Article

The Fourth Amendment Implications of "U.S. Imitation Judges"

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INTRODUCTION

John Oliver, in a recent episode entitled "Immigration Courts," shone a spotlight on the numerous problems with how U.S. immigration courts operate.[1] He refuted a general misunderstanding that immigration courts sit in the judicial branch of government, rendering critical adjudicative decisions about deportation, and explained that they actually are Executive Branch employees.[2] The boss of immigration judges is the attorney general of the United States, who works for the president.[3] The prosecutor who argues to detain and deport the noncitizen also works for the president, as an employee of the Department of Homeland Security (DHS).[4] The person who jailed the detainee in the first place is yet another DHS employee.[5]

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1. *Immigration Courts: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 1, 2018), https://www.youtube.com/watch?v=9fB0GBwJ2QA [https://perma.cc/L3W8-EFHF].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

Scholars, immigration judges, attorneys, and congressional committees have been calling for a truly independent immigration adjudication system for decades,[6] critiquing a system in

6. *See, e.g.*, *Hearing on Strengthening and Reforming America's Immigration Court System Before the Subcomm. on Border Sec. & Immigration of the S. Judiciary Comm.*, 115th Cong. (Statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges) (2018) [hereinafter Statement], https://www.judiciary.senate.gov/imo/media/doc04-18-18%20Tabaddor%20Testimony.pdf [https://perma.cc/RF4H-JZKF] (discussing the inconsistencies of having a judicial court in a law enforcement department); *Immigration Reform and the Reorganization of Homeland Defense: Hearing before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 72–73, 85 (2002) (statement of Dana Marks Keener, President, National Association of Immigration Judges), https://govinfo.gov/content/pkg/CHRG-107shrg86931/pdf/CHRG-107shrg86931.pdf [https://perma.cc/MRS7-5U66] (recommending the adoption of a 1997 proposal to fix the problems of immigration courts); U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY (1997), https://files.eric.ed.gov/fulltext/ED424310.pdf [https://perma.cc/GUS7-YAVL] (making recommendations to Congress on how to reform the immigration system); SEC'Y OF LABOR'S COMM. ON ADMIN. PROCEDURE, THE IMMIGRATION AND NATURALIZATION SERVICE 81–82 (mimeo. 1940); AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf [https://perma.cc/6E3P-QX4H] (proposing solutions to the problems with immigration courts); APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 35 (2009), https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly_line_injustice-_blueprint_to_reform_americas_immigration_courts.pdf [https://perma.cc/VT6K-TT4E] (advocating for impartial immigration judges); JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 12–16 (2011) (outlining the structure of immigration courts); Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 439 (1983) (describing 1981 report of the Select Commission on Immigration and Refugee Policy, appointed in 1978, which proposed creation of an Article I immigration court); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372–75 (2006) [hereinafter Legomsky, *War on Independence*] (discussing the history of immigration judges); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1644–51 (2010) [Legomsky, *Restructuring Immigration Adjudication*] (detailing the criticisms of immigration courts); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3–4, 10–11 (2008) [hereinafter Leigh Marks, *An Urgent Priority*] (explaining that many problems remain unsolved with respect to immigration courts); Dana Leigh Marks, *Still a Legal Cinderella? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, 59 FED. LAW. 25, 29 (2012) [hereinafter Leigh Marks, *Still a Legal Cinderella*] (showing how immigration courts are important for all lawyers to understand); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 644–45

which some judges describe themselves as "U.S. imitation judges."[7] This Article examines the lack of truly independent immigration judges (IJs) through the lens of the Fourth Amendment, which applies when a noncitizen is arrested for deportation.[8] In 1975, the Supreme Court held in *Gerstein v. Pugh*[9] that to continue detention after an initial arrest in the criminal context, the detached judgment of a neutral judge is necessary; a prosecutor's finding of probable cause is insufficient to protect the important Fourth Amendment rights to be free from an unreasonable seizure.[10] In contrast, in the immigration detention context, no such neutral judge has any role in the process. Every person who authorizes a noncitizen's arrest and detention works for a law enforcement agency, causing one to wonder *who* exactly is exercising independent judgment over decisions concerning noncitizens' physical freedom.

(1981) (explaining the inefficiencies with dependence on the Immigration and Naturalization Service); Will Maslow, *Recasting Our Deportation Laws: Proposals for Reform*, 56 COLUM. L. REV. 309, 309 (1956) (arguing that the procedures of justified deportation warrant scrutiny); M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1562 (1997) (proposing an Article I court for immigration law); Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 63 FED. LAW. 67, 68 (2016) (explaining how a growing caseload, coupled with inconsistent obligations, affects immigration courts); Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785, 1787 (2011) (demonstrating the complexities of immigration courts); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 7 (1980) (examining the expanded role of the Immigration and Naturalization Service); Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 151 (1958) ("[W]here the consul denies, or refuses to issue, a visa, he is a law unto himself, and his action is final and cannot be reviewed by any other administrative authority."); Note, *The Special Inquiry Officer in Deportation Proceedings*, 42 VA. L. REV. 803, 818–25 (1956) (describing the process of discretionary relief); Press Release, Am. Immigration Lawyers Ass'n, AILA Renews Call for an Independent Immigration Court (May 27, 2003) ("AILA urges the creation of an independent immigration court system . . . .").

7. Slavin & Harbeck, *supra* note 6, at 70 ("As one of our colleagues put it, we often feel that we are 'U.S. imitation judges.'").

8. *See infra* Part II.

9. 420 U.S. 103 (1975).

10. *Id.* at 114.

This Article builds off of prior scholarship examining the Fourth Amendment's application in the immigration context, introducing a further problem: immigration adjudicators' lack of independence. Christopher Lasch exposed the Fourth Amendment violations inherent in Immigration and Customs Enforcement (ICE) detainer practices,[11] which spurred successful Fourth Amendment litigation when local governments attempted to hold persons without probable cause pursuant to ICE detainers.[12] Following the successful detainer litigation, Michael Kagan described the practice of warrantless arrests for deportation without a prompt probable cause hearing by a neutral decision-maker as "[i]mmigration [l]aw's [l]ooming Fourth Amendment [p]roblem."[13] Kagan assumed the neutrality of immigration judges in his article, focusing instead on the length of time before noncitizens receive such review of DHS's detention decisions.[14] In a separate article, I have critiqued the detentions pursuant to the "shadow" procedures of expedited and administrative removal as a further Fourth Amendment violation, as only DHS officers sign off on detention as part of these procedures.[15] Because the decision-makers in shadow deportations are DHS actors, not immigration judges, in that piece I do not

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11. Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 186–93 (2008) (outlining procedural avenues to change ICE issues); Christopher N. Lasch, *Litigating Immigration Detainer Issues*, *in* IMMIGRATION LAW FOR THE COLORADO PRACTITIONER 34-1 (1st ed., 2011) (pointing out how varying interpretations and use of Form I-247 could implicate constitutional safeguards such as probably cause); Christopher N. Lasch, *The Faulty Legal Arguments Behind Immigration Detainers*, AM. IMMIGR. COUNCIL, IMMIGR. POL'Y CTR.: PERSPECTIVES SERIES, Dec. 2013, at 2, https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch_on_detainers.pdf [https://perma.cc/J27N-EH5G] (encouraging jurisdictions to adopt different detainer policies).

12. *See infra* Part II.

13. Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 126 (2015).

14. *Id.* In a recent article, I also propose prompt probable cause hearings before immigration judges, but only for post-entry social control deportations. *See* Mary Holper, *Promptly Proving the Need To Detain for Post-Entry Social Control Deportation*, 52 VAL. U. L. REV. 231, 238 (2018). In this article I only briefly question immigration judges' neutrality without fully exploring the Fourth Amendment implications of their lack of neutrality. *Id.*

15. Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 932–37 (2018).

fully explore the immigration adjudication system's lack of a truly neutral judge.[16]

In this Article, I propose that federal magistrate judges make such a probable cause finding in order to continue pretrial detention for deportation.[17] This proposal resolves the Fourth Amendment violations that occur when the only supposedly "neutral" judge who authorizes the jailing of a human being is regularly critiqued as not so "neutral."[18] While others have effectively argued that the entire immigration adjudication system needs a judge who is untethered from a law enforcement agency,[19] in this Article, I focus only on the initial decision to continue pretrial detention, as this is where, in the criminal pretrial context, the Fourth Amendment's probable cause hearing requirement attaches.

The need for a neutral decision-maker in immigration detention decisions has never been more important. The Trump administration has promoted an unabashedly anti-immigrant agenda, resolving to detain and deport as many immigration violators as possible[20] and promising to end the "catch and release" program that candidate Trump referred to as a "massive amnesty."[21] The administration has kept its promises, going so far as announcing a "zero tolerance" policy of taking children away from asylum-seekers who illegally cross the U.S. border to deter

16. *See id.* at 940–43.

17. *See infra* Part I.A.1.

18. *See infra* Part II.

19. *See, e.g.*, APPLESEED, *supra* note 6, at 7; Legomsky, *War on Independence*, *supra* note 6, at 385.

20. *See, e.g.*, Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter Border Security Executive Order], https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements [https://perma.cc/8KCB-UGTK] (increasing detention powers); Memorandum from John Kelly, Sec'y of Homeland Sec., Implementing President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017) [hereinafter Border Security Implementation Memo], https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies [https://perma.cc/W7RQ-N5DJ] (putting the executive order into practice).

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

future border-crossers.[22] Only after massive national and international outcry did President Trump reverse the policy.[23] In fiscal year 2017, the ICE agency within DHS jailed a daily average of nearly 40,500 people.[24] By May 2019, reports show a staggering 52,000 people in ICE detention.[25] The ICE Enforcement and Removal Operations made a total of 143,470 arrests in FY 2017, a thirty percent rise from FY 2016.[26] In FY 2018 ICE increased that arrest number by eleven percent, arresting 158,581 people.[27]

Then-Attorney General Jeff Sessions in 2017 announced that the administration "will secure this border and bring the full weight of both the immigration courts and federal criminal enforcement to combat this attack on our national security and

22. *See* Eli Rosenberg, *Senator Asks FBI for Perjury Investigation of Kirstjen Nielson over Family Separation Statements*, WASH. POST (Jan. 18, 2019), https://www.washingtonpost.com/politics/2019/01/18/senator-asks-fbi-perjury-investigation-kirstjen-nielsen-over-family-separation-statements/?noredirect=on&utm_term=.03495885e6a0 [https://perma.cc/D4SB-QAB5] (discussing recently leaked DHS Memo regarding family separation policy with link to memo).

23. *See* John Wagner et al., *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, WASH. POST (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html?noredirect=on&utm_term=.ddaaebcc4d25 [https://perma.cc/GW97-UDCC] (referring to the "[i]nternational condemnation of the Trump administration policy" as one source of the change in policy).

24. NAT'L IMMIGRANT JUSTICE CTR. & DET. WATCH NETWORK, ICE LIES: PUBLIC DECEPTION, PRIVATE PROFIT 2 (2018), http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IcLies_DWN_NIJC_Feb2018.pdf [https://perma.cc/KP5T-FFR9].

25. Hamed Aleaziz, *More than 52,000 People Are Now Being Detained by ICE, an Apparent All-Time High*, BUZZFEED NEWS (May 20, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border [https://perma.cc/9Z9Q-5RCM].

26. Kristen Bialik, *ICE Arrests Went Up in 2017, with Biggest Increases in Florida, Northern Texas, Oklahoma*, PEW RES. CTR. (Feb. 8, 2018), http://www.pewresearch.org/fact-tank/2018/02/08/ice-arrests-went-up-in-2017-with-biggest-increases-in-florida-northern-texas-oklahoma/ [https://perma.cc/W576-5SJ4].

27. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS 2 (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/22EJ-2UET].

sovereignty."[28] As part of this agenda, Sessions made key decisions to undermine judges' independence,[29] causing one administrative law scholar to note that "[p]residential administration has finally penetrated agency adjudications."[30] Acting Attorney General Matthew Whitaker continued where Sessions left off, publicly criticizing Central American asylum-seekers as "lawbreakers" with "meritless claims" who "take advantage of loopholes that lead to their release into the United States."[31] Attorney General William Barr also has suffered criticism for penalizing asylum-seekers with mandatory detention, taking away discretion from immigration judges.[32] Former Chairman of the Board of Immigration Appeals, Paul Wickham Schmidt, has denounced a "concerted politically-based attack on migrants and the independence of the Immigration Court system orchestrated by restrictionist groups outside of government who use unscrupulous and willing senior officials like Barr, and Sessions before him, as operatives."[33] One is correct to question how much pres-

28. Jeff Sessions, U.S. Attorney Gen., Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal [https://perma.cc/42CV-NUXY].

29. *See infra* Part II.B.

30. Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 34 (2018). Kim discusses both the legal and cultural constraints that have kept the president from interfering with the adjudicative activities of executive branch agencies, which, she writes, have ended in the Trump administration. *Id.* at 12–16, 37.

31. Matthew Whitaker, Acting U.S. Attorney Gen., Remarks on the Importance of a Lawful Immigration System (Dec. 11, 2018), https://www.justice.gov/opa/speech/acting-attorney-general-matthew-whitaker-delivers-remarks-importance-lawful-immigration [https://perma.cc/N26D-YKPU].

32. *See, e.g.*, Letter from Robert M. Carlson, President, Am. Bar Ass'n, to William Barr, U.S. Attorney Gen. (Apr. 23, 2019), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ABALettertoAGBarrreMatterofM-S-4-23-19.pdf [https://perma.cc/V4JP-8HPS] (critiquing Attorney General opinion in M-S-, 27 I. & N. Dec. 590 (A.G. 2019), which removed immigration judges' discretion in deciding bond for recently-arrived asylum-seekers, and stating, "[w]e are also concerned that this decision is one more step in a series of recent actions by the Department of Justice to remove discretion and restrict the authority of immigration judges.").

33. Paul Wickham Schmidt, *Barr Continues Restrictionist Assault on Immigration Courts: Intends To Reverse BIA Precedents Giving "Full Faith & Credit" to State Court Sentence Modifications — Another Disingenuous Request*

sure the "neutral" judges experience to execute the Trump administration's anti-immigrant policies.[34] We find ourselves in an age where top-level Executive Branch actors have a stated goal of detaining as many noncitizens as possible for deportation,[35] and correspondingly pose an increasing threat to immigration adjudicators' independence. This Article explores the intersection of the two important topics of immigration adjudicators' independence and detention.

The Article proceeds as follows: Part I provides an overview of the relevant Fourth Amendment law, which requires a neutral judge to review a law enforcement officer's warrantless arrest in order to continue detention and demonstrates why the Fourth Amendment applies to immigration arrests, although nominally "civil." Thus, the lack of a truly neutral judge available to review DHS arrest decisions exposes the entire immigration detention system to a Fourth Amendment challenge. Part I also answers doctrinal challenges to importing the Fourth Amendment's requirement of neutral judge review into the immigration detention system. In Part II, the Article explains why the current immigration system lacks a truly neutral judge. Initially, the structural lack of neutrality was a function of the historical blending of immigration law's prosecutorial and adjudicative functions. Even once the functions were officially in separate agencies as a result of the Homeland Security Act of 2002, the adjudicators still worked for the nation's top law enforcement official. At that time, the Attorney General and Department of Justice (DOJ) also began what has been called a "war on independence" on the adjudicators. Part II offers two examples of

For "Amicus Briefing!," IMMIGRATIONCOURTSIDE.COM (May 30, 2019), https://immigrationcourtside.com/2019/05/30/barr-continues-restrictionist-assault-on-immigration-courts-intends-to-reverse-bia-precedents-giving-full-faith-credit-to-state-court-sentence-modifications-another-disi/ [https://perma.cc/HUV9-LNQV].

34. Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump [https://perma.cc/HNJ2-NRZZ]; Bruce J. Einhorn, *Jeff Sessions Wants To Bribe Judges To Do His Bidding*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html [https://perma.cc/P4BK-V6ME].

35. *See, e.g.*, Border Security Executive Order, *supra* note 20; Border Security Implementation Memo, *supra* note 20.

how immigration judges' independence has been further undermined by statutes and regulations that allow DHS prosecutors to override immigration judges' bond decisions. Part III provides a proposal to remedy these systemic violations, which includes federal magistrate judge review of any immigration arrest in order to continue detention.

I. THE FOURTH AMENDMENT AND IMMIGRATION ARRESTS

This Part discusses the Fourth Amendment's applicability to the immigration enforcement context, thus laying the foundation for why the lack of a truly neutral judge implicates the Fourth Amendment rights of all who suffer immigration detention during removal proceedings.

A. THE FOURTH AMENDMENT'S REQUIREMENT OF A NEUTRAL JUDGE

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[36] In 1975, in *Gerstein v. Pugh*,[37] the Supreme Court required a *neutral* judge to review a police officer's decision to arrest a person without probable cause.[38] A prosecutor's decision to bring criminal charges was insufficient to determine probable cause because the Court did not think that "prosecutorial judgment standing alone [met] the requirements of the Fourth Amendment."[39] The Court wrote:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[40]

Thus, to continue detention after initial arrest, the detached judgment of a magistrate judge is necessary; the prosecutor's

36. U.S. CONST. amend. IV.
37. 420 U.S. 103 (1975).
38. *Id.* at 114–19.
39. *Id.* at 117.
40. *Id.* at 112–13 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

finding of probable cause is insufficient to protect Fourth Amendment rights.[41] This Fourth Amendment rule applies to "*any* significant pretrial restraint of liberty."[42]

As compared to these strictures of the criminal justice system, immigration officers have the authority to arrest noncitizens without a warrant.[43] If they obtain a warrant, it is an administrative arrest warrant, which was signed by an immigration officer—the equivalent of the police.[44]

A warrantless arrest requires only that immigration officers promptly bring the noncitizen before a different DHS officer to be questioned regarding their right to be in the United States.[45] Only later does an immigration judge become involved in the process,[46] and at no point in the process do the statute or regulations mandate automatic review by a neutral and detached magistrate.[47]

1. The Applicability of the Fourth Amendment to Immigration Arrests

The Supreme Court has never squarely decided the right to have an immigration arrest reviewed for probable cause by a neutral judge to continue pretrial detention. There is some commentary on this issue in dicta from the 1960 case *United States v. Abel*.[48] In *Abel*, the Court considered whether an arrest pursuant to an administrative warrant issued by immigration authorities, which did not require judicial involvement, should lead

41. *See id.*

42. *Id.* at 125 (emphasis added).

43. *See* 8 U.S.C. § 1357(a) (2018); 8 C.F.R. § 287.5 (2019); *see also* Holper, *supra* note 15, at 963 (describing "regular" removal proceedings).

44. *See* 8 C.F.R. § 236.1(b).

45. *See id.* § 287.3(a); *see also id.* § 287.3(d) (requiring a decision on whether to charge and detain to be made within forty-eight hours unless there are "emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time").

46. *See* 8 U.S.C. § 1229; *see also infra* Part II (demonstrating the immigration judge's role in authorizing detention).

47. Federal circuit courts of appeals may review questions of law or constitutional questions on appeal from the Board of Immigration Appeals of an order of removal. *See* 8 U.S.C. § 1252. Detention challenges may be raised in a habeas corpus petition before the federal district court, although the court may not review discretionary decisions regarding custody. *See id.* § 1226(e); Demore v. Kim, 538 U.S. 510, 517 (2003).

48. 362 U.S. 217 (1960).

to suppression of the evidence under the Fourth Amendment.[49] Declining to suppress the evidence, the Court stated, "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time."[50] Yet, the Court acknowledged that no litigant had raised that challenge to arrest for deportation prior to the *Abel* case.[51] The Court repeatedly stated that the petitioner had waived the issue by not raising it in prior stages of the litigation, thus rendering its commentary on administrative arrests dicta.[52] Also, at that time the Court had not yet clarified that the Fourth Amendment *applied* to civil and administrative searches.[53] Nor had the Court decided subsequent cases applying the Fourth Amendment to border patrol's enforcement actions.[54]

In a 1993 case, *Reno v. Flores*, children in immigration custody raised the right to a probable cause hearing, framing the issue as a Due Process protection, yet the Court's holding does not extend to adult detention.[55] In *Reno* the Supreme Court re-

49. *Id.* at 230.

50. *Id.*

51. *See id.* at 233 ("The constitutional validity of this long-standing administrative arrest procedure in deportation cases has never been directly challenged in reported litigation. . . . This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants. It has frequently, however, upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such warrants.").

52. *See id.* at 230 ("The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for 'warrants' under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed."); *id.* (stating that the petition "did not challenge the exercise of [the warrant] authority below, but expressly acknowledged its validity"); *id.* at 231 ("At no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or unconstitutional. Such challenges were, to repeat, disclaimed."); *id.* at 232 ("Affirmative acceptance of what is now sought to be questioned could not be plainer.").

53. *See* Kagan, *supra* note 13, at 134 (discussing *Camara v. Municipal Court*, 386 U.S. 523, 532 (1967), in which the Court held in 1967 that the Fourth Amendment applies to civil and administrative searches).

54. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973); *see also* Holper, *supra* note 15, at 944 (discussing Fourth Amendment's applicability in border patrol cases).

55. Reno v. Flores, 507 U.S. 292 (1993).

versed the Ninth Circuit's mandate that juveniles in Immigration and Naturalization Services (INS) custody receive *Gerstein* probable cause hearings.[56] A Ninth Circuit panel concluded that *Gerstein* did not apply to deportation proceedings and that the *Gerstein* Court itself stressed that its holding was not readily transferrable to civil proceedings.[57] The panel also followed the dicta in *Abel*, writing that although "[it was] professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment's requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner's claim."[58] An en banc panel of the Ninth Circuit disagreed, finding that the children's fundamental liberty interest required that "the decision to detain be made only in conjunction with a neutral and detached determination of necessity."[59] The Supreme Court held that there was no fundamental liberty interest at stake, since the case dealt with INS custody of children, who are "always in some form of custody."[60] Thus, "shackles, chains, or barred cells" were not at issue, as would be the case in adult immigration detention.[61] The Court dedicated very little of its decision to the procedural due process claim that the children should have their detention promptly reviewed for probable cause by a neutral judge. Rather, the Court held that the juveniles were given ample procedures under the regulations.[62] Nowhere in the majority opinion is *Gerstein* even mentioned.[63] Because the *Flores* Court took great pains to ensure

56. *Id.*

57. Flores *ex rel.* Galvez-Maldonado v. Meese (*Flores I*), 913 F.2d 1315, 1335–37 (9th Cir. 1990) (citing Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975)). The Court remanded to the district court to determine whether such a hearing was appropriate under the *Mathews v. Eldridge* balancing test. *See id.* at 1337 (citing Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976)).

58. *Id.* at 1337 (citing Abel v. United States, 362 U.S. 217, 233 (1960)).

59. Flores *ex rel.* Galvez-Maldonado v. Meese (*Flores II*), 942 F.2d 1352, 1364–65 (9th Cir. 1991) (en banc).

60. *Id.* at 1383 (Wallace, J., dissenting).

61. Flores, 507 U.S. at 302.

62. *Id.* at 307–08.

63. This is unlike the panel decision and the en banc decisions, which, between the majority opinions and the concurring and dissenting opinions, yielded much discussion about the applicability of *Gerstein* or whether a prompt probable cause hearing should be afforded to the juveniles under the *Mathews v. Eldridge* test. *See Flores II*, 942 F.2d at 1364–65 (en banc opinion addressing *Gerstein* issue); *Flores I*, 913 F.2d at 1335–37 (panel opinion discussion of applicability of *Gerstein*).

that it was *not* deciding about "shackles, chains, or barred cells," the issue of whether adults in immigration detention can seek a *Gerstein*-style hearing was not resolved.[64]

Starting in the 1970s, when the Fourth Amendment challenges involved issues other than the right to have one's arrest reviewed for probable cause, the Court repeatedly applied the Fourth Amendment to immigration officers' enforcement actions.[65] To be sure, the Court's holdings have suffered critique for watering down the strictures of the Fourth Amendment in the context of immigration enforcement, for example, that they've permitted racial profiling and set a low bar for noncitizens to "consent" to searches.[66] Yet, this critique does not change

64. *See* Kagan, *supra* note 13, at 151–52. Other courts have not recognized a Fourth Amendment right to a neutral detached magistrate to review detention for probable cause in the immigration context. *See, e.g.*, Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) (finding warrantless arrest legal pursuant to statute and thus subsequent statement taken following arrest should not be suppressed); *cf.* United States v. Encarnacion, 239 F.3d 395, 399–400 (1st Cir. 2001) (holding that Federal Rule of Criminal Procedure 5(a), which requires a prompt probable cause hearing, does not protect detainees arrested for deportation under 8 U.S.C. § 1357(a)(2)). Some have followed the dicta in *Abel*. *See, e.g.*, Spinella v. Esperdy, 188 F. Supp. 535, 540–41 (S.D.N.Y. 1960) ("While the Supreme Court declined to pass upon a similar argument in *Abel*, . . . some pertinent observations there were nonetheless made . . . the court did refer to its frequent upholding of administrative deportation proceedings shown to have commenced by arrests made pursuant to such warrants."). Others have assumed, without much analysis, that an immigration officer's review of the charges is the equivalent to prompt review of detention by a magistrate judge. *See, e.g.*, Arias v. Rogers, 676 F.2d 1139, 1142 (7th Cir. 1982) (mistakenly reasoning that a "special inquiry officer" signed off on the arrest warrant and that "[s]pecial inquiry officers have judicial authority . . . and therefore correspond to the committing magistrate in a criminal proceeding"); Tejeda-Mata v. Immigration & Naturalization Serv., 626 F.2d 721, 725 (9th Cir. 1980) ("The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause."); Min-Shey Hung v. United States, 617 F.2d 201, 202 (10th Cir. 1980); United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975), *cert. denied*, 423 U.S. 1035 (1975); Au Yi Lau v. Immigr. & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971).

65. *See, e.g.*, United States. v. Brignoni-Ponce, 422 U.S. 873, 878, 884 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973).

66. *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1549 (2011); Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010); Kevin R. Johnson, *How Racial Profiling Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1024–25 (2010).

the simple fact that the Fourth Amendment does apply.[67] The applicability of the Fourth Amendment when an ICE officer arrests a noncitizen for deportation is one of the few positive outcomes of the 1984 decision in *INS v. Lopez-Mendoza*,[68] where the Court refused to apply the exclusionary rule, except when immigration officers committed egregious violations of the noncitizen's Fourth Amendment rights.[69] Because the *Lopez-Mendoza* decision dealt only with the remedy of evidentiary exclusion, it implicitly recognized that the Fourth Amendment applies to such an arrest,[70] as subsequent courts have clarified.[71] However, the *Lopez-Mendoza* Court's refusal to apply one of the most recognized remedies to Fourth Amendment violations to deportation cases left immigration scholars and advocates losing faith in the Fourth Amendment.[72]

In 1990, the Court gave immigration law scholars and advocates more reason to lose faith in the Fourth Amendment.[73] In *United States v. Verdugo-Urquidez*,[74] the Court held that a Mexican citizen could not claim suppression as a remedy for a Fourth Amendment violation when U.S. federal agents searched his properties in Mexico after he had been arrested in Mexico and

67. *See Brignoni-Ponce*, 422 U.S. at 878 ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.").

68. 468 U.S. 1032 (1984). The Court also suggested it might entertain Fourth Amendment challenges should the violations become "widespread." *Id.* at 1050.

69. *Id.* at 1050–51.

70. *See* Kagan, *supra* note 13, at 147–48; M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word "Citizen,"* 11 HARV. LATINO L. REV. 189, 196 (2008) ("The *Lopez-Mendoza* opinion accepted without question the principle that the Fourth Amendment applied to undocumented persons in a criminal proceeding.").

71. *See, e.g.*, Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015) ("To hold otherwise would give no effect to the language used by the Supreme Court in *Lopez-Mendoza* expressing concern over fundamentally unfair methods of obtaining evidence and would ignore the fact that eight justices in *Lopez-Mendoza* seem to have agreed that the exclusionary rule applies in removal proceedings in some form."); Oliva-Ramos v. Attorney Gen. of the U.S., 694 F.3d 259, 271–72 (3d Cir. 2012); Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

72. *See, e.g.*, Victor C. Romero, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights after* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. CAL. L. REV. 999 (1992).

73. *See id.*

74. 494 U.S. 259 (1990).

extradited to the United States for prosecution.[75] The Court examined the history of the Fourth Amendment's reference to "the people" and found that unlike other amendments (such as the Fifth Amendment that applies to "persons" and the Sixth Amendment that applies to the "accused"), the Fourth Amendment only applies to U.S. citizens or those with voluntary substantial connections to the political community of the U.S.[76] Because he had not established voluntary "substantial connections" to the U.S., Mr. Verdugo-Urquidez could not claim Fourth Amendment rights.[77] In dicta, the Court wrote that the Fourth Amendment should apply to noncitizens who are illegally in the U.S.[78] This dicta suggests that the thousands of noncitizens who are lawfully in the U.S., either as permanent residents or holders of less permanent immigration statuses, and yet are deportable, have a voluntary substantial connection to the political community of the U.S. such that they can claim Fourth Amendment protections. Even those who have never been admitted but

75. *Id.* at 274–75.

76. *Id.* at 265–67.

77. *Id.* at 271, 274–75.

78. *Id.* at 272–73 (reasoning that "[t]he illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations," which distinguished their cases from that of Mr. Verdugo-Urquidez, who "had no voluntary connections with this country that might place him among 'the people' of the United States."). Courts have disagreed about whether the plurality opinion's discussion with respect to whether the Fourth Amendment applies to "illegal aliens" is dicta or binding precedent, since Justice Kennedy, in a concurring opinion, wrote "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply." *Id.* at 278 (Kennedy, J., concurring); *see also* Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 WL 388589, at *5 (W.D. Tex. Feb. 2, 2005) (finding that a border crossing-card holder had Fourth Amendment rights and stating that "[t]he definition of 'the people' advanced in *Verdugo-Urquidez* is therefore considered as persuasive authority to the extent it applies to resolution of the present motion for summary judgment."), *aff'd and remanded*, 459 F.3d 618 (5th Cir. 2006); United States v. Guttierez, 983 F. Supp. 905, 915 (N.D. Cal. 1998) ("It is also noteworthy that a majority of the justices did *not* subscribe to Chief Justice Rehnquist's [*Verdugo-Urquidez*] opinion, particularly with respect to his discussion and analysis regarding the scope of the Fourth Amendment as it applies to illegal aliens") *rev'd on other grounds by* United States v. Guttierez, 203 F.3d 833 (9th Cir. 1999). *But see* United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1261 (D. Utah 2003) ("This court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion.").

who have developed community ties to the U.S. should be protected under this analysis.[79]

In 2012, litigation challenging ICE detainers shed new light on the applicability of the Fourth Amendment to immigration arrests.[80] The ICE detainer is a request to state or local authorities to "[m]aintain custody" of a person for an additional forty-eight hours, plus weekends and holidays, "beyond the time when the subject would have otherwise been released" from the state or local custody.[81] When local jails honored ICE's request and refused to release a person until ICE could take custody, those held under detainers sued the state authorities, and in some cases federal immigration authorities, for damages, arguing that

79. In *Osorio-Martinez v. Attorney General of the United States of America*, the Third Circuit in 2018 reasoned that petitioners, who had entered the U.S. unlawfully, satisfied the eligibility criteria for special immigrant juvenile status, but were awaiting availability of visas, developed the "substantial connections with this country," such that precluding their challenge to expedited removal via habeas corpus violated the Suspension Clause. 893 F.3d 153 (3d Cir. 2018) (quoting *Verdugo-Urquidez*, 494 U.S. at 271). The court reasoned: "This is not to suggest that aliens must be accorded a formal statutory designation and attendant benefits to lay claim to 'substantial connections' to invoke the Suspension Clause . . . . We need not address here what minimum requirements aliens must meet to lay claim to constitutional protections." *Id.* at 170 n.13. Victor Romero argues, post-*Verdugo-Urquidez*, that the Fourth Amendment "*should be* about creating a floor of rights, beneath which the United States government may not fall." Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Gutierrez *and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 62 (2000). He advocates for the application of tort reform, in which a property owner owes the same duty of care regardless of whether the person injured is an invitee, a licensee, or a trespasser; in the same way, the U.S. government owes a duty to not unreasonably seize a lawful permanent resident, visa holder, or undocumented noncitizen. *Id.* at 79–82. Carolina Nuñez, discussing courts' broad application of *Verdugo-Urquidez*, argues that courts should be evaluating membership and the ensuing Fourth Amendment rights guaranteed to members of the U.S. community by looking not at proxies such as status, but at a more complex theory of membership, such as community ties and mutuality of obligation. *See* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 137 (2011).

80. *See, e.g.*, Kagan, *supra* note 13; *see also* Holper, *supra* note 15.

81. U.S. DEP'T OF HOMELAND SEC., I-247 IMMIGRATION DETAINER FORM (2019), https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf [https://perma.cc/Y8XP-F8LY]; *see also* 8 C.F.R. § 287.7(d) (2019) (describing the length of time that ICE can detain a person who is not otherwise detained by a criminal justice agency).

this continued custody was a new "seizure" for Fourth Amendment purposes, and lacked probable cause.[82] Because noncitizens enjoy the same rights as citizens when charged or held for a crime,[83] several courts responded to the unlawful seizure of a noncitizen pursuant to an ICE detainer by analyzing their cases under traditional Fourth Amendment principles.[84]

In fact, the First Circuit Court of Appeals found that the applicability of the Fourth Amendment to arrests pursuant to ICE detainers was so obvious that "existing precedent . . . placed the statutory or constitutional question beyond debate."[85]

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82. *See, e.g.*, Roy v. Cty. of L.A., No. CV 12-09012-AB (FFMx), 2018 U.S. Dist. LEXIS 27268, at *68–70 (C.D. Cal. Feb. 7, 2018) (finding that Los Angeles Sheriff's Department's practice of holding inmates beyond their release dates on the basis of immigration detainers "constitutes a new arrest under the Fourth Amendment" and therefore violated detainees' Fourth Amendment rights because there was no judicial finding of probable cause); Parada v. Anoka Cty., 332 F. Supp. 3d 1229, 1243 (D. Minn. 2018) (finding local county honoring ICE detainer violated detainee's Fourth Amendment rights); Orellana v. Nobles Cty., 230 F. Supp. 3d 934, 945 (D. Minn. 2017) (immigration detainee's continued confinement after he would have been released on state charges of driving under the influence, pursuant to ICE detainer, violated his rights under the Fourth Amendment); Moreno v. Napolitano, 213 F. Supp. 3d 999, 1001, 1004–09 (N.D. Ill. 2016) (granting summary judgment to class of individuals targeted by ICE detainers on their claim that ICE's practice of issuing detainers without obtaining an arrest warrant was prohibited by the INA and finding that the warrantless arrest power of § 1357(a)(2) did not defeat their claim because "immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained"); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014); *see also ICE Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?*, AM. CIV. LIBERTIES UNION (Nov. 13, 2014), https://www.aclu.org/sites/default/files/assets/2014_11_13_-_ice_detainers_4th_am_limits.pdf [https://perma.cc/52NB-QQWS] [hereinafter *ICE Detainers*] (collecting cases where holding a noncitizen under ICE detainer was found to be a new arrest for Fourth Amendment purposes); *Recent ICE Detainer Damages Cases*, AM. CIV. LIBERTIES UNION (Apr. 3, 2018), https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases-2018) [https://perma.cc/32WJ-QCMQ] [hereinafter *Recent ICE Detainer Damages*].

83. *See* Dunaway v. New York, 442 U.S. 200, 216 (1979) ("[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

84. *See Recent ICE Detainer Damages*, *supra* note 82; *ICE Detainers*, *supra* note 82, at 3–4.

85. Morales v. Chadbourne, 793 F.3d 208, 214 (1st Cir. 2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). The court made this finding in response to ICE officials claiming qualified immunity, which would allow them to

In addition to the detainer litigation, in 2012 the Supreme Court in *Arizona v. United States*[86] reiterated, albeit in dicta, that the Fourth Amendment applies to arrests for immigration enforcement purposes.[87] The detainer cases and this most recent language on the applicability of the Fourth Amendment to immigration arrests thus have left the door open to the application of a different Fourth Amendment right; namely, the right to review of detention by a neutral judge for probable cause, and release should that review not occur.[88] It is thus time to reevaluate the waived arguments from the 1960 *Abel* case or see how they apply to the detention of adults, not children (as in the 1993 *Flores* case). Scholars and advocates could again find faith in the Fourth Amendment.

Following the successful detainer litigation, Michael Kagan has argued that "immigration law's looming Fourth Amendment problem" is the lack of a prompt probable cause hearing.[89] Kagan

avoid liability for damages if they did not know that the Fourth Amendment applied in this context. *Id.*; *see also Parada*, 332 F. Supp. 3d 1229, 1239 (same); Galarza v. Szalczyk, 2012 WL 1080020, at *14 (E.D. Pa. Mar. 30, 2012) (denying the ICE officer qualified immunity), *rev'd on other grounds*, 745 F.3d 634 (3d Cir. 2014).

86. 567 U.S. 387 (2012).

87. The Court considered section 2(B) of the law, which required Arizona officers to make a "reasonable attempt . . . to determine the immigration status" of any person they stop, detain, or arrest on some other legitimate basis if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States." *Id.* at 411 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2012)). The law also provided that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." *Id.* (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2012)). While the Court found that other provisions of Arizona's law were preempted by federal law, section 2(B) was not, because nothing in federal law prohibited states from sharing information with ICE. *Id.* at 411–12. When challengers suggested that Arizona officials would delay the release of individuals pending information from ICE, the Court stated, citing Fourth Amendment cases, that such holds would be illegal. *Id.* at 413 (citing Arizona v. Johnson, 555 U.S. 323, 333 (2009); Illinois v. Caballes, 543 U.S. 405, 407 (2005)). The Court also stated: "[it] is not a crime for a removable alien to remain present in the United States . . . if the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *Id.* at 407.

88. *See* Kagan, *supra* note 13, at 158–61; *see also* Holper, *supra* note 15, at 955–62 (proposing a probable cause hearing in front of an immigration judge); Holper, *supra* note 14, at 267–87 (proposing a similar solution).

89. *See generally* Kagan, *supra* note 13 (explaining why immigration detentions are looking more and more like criminal detentions, and thus need probable cause).

examines immigration law's lack of such a hearing, which presents an overlap between Fourth and Fifth Amendment Due Process rights, since guaranteeing such a hearing "is, in effect, a requirement for a certain kind of process."[90] He proposes that courts interpret the statute and regulations to provide a prompt probable cause hearing before an immigration judge, in order to avoid finding them unconstitutional.[91] Drawing on the Supreme Court cases examining immigration detention under a Due Process analysis, Kagan argues that, while most of those cases examined immigration detention at the "back end," his proposal would require courts to examine such detention at the "front end."[92] In this Article, I diverge from Kagan in that I do not presume the neutrality of the immigration judge to satisfy the *Gerstein* requirement of neutrality.[93]

I believe that such a challenge to immigration detention can be made by examining the problem exclusively through the lens of the Fourth Amendment, instead of through the Due Process Clause. Due process is flexible,[94] and can vary depending on issues such as the detainee's status, length of time in the U.S., and the length of detention.[95] The Fourth Amendment has its own

90. *Id.* at 129.

91. *Id.* at 129–30 (writing that "in *Zadvydas*, the Court opened the door to 'constitutional limitations,' not only due process claims" (quoting Zadvydas v. Davis, 533 U.S. 678, 695 (2001))). Kagan wrote his article before the Supreme Court's 2018 *Jennings* decision, in which the Court struck down the Ninth Circuit's use of the constitutional avoidance doctrine to mandate periodic bond hearings with the burden of proof on the government. Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018). Holding that the Ninth Circuit's reading was not a plausible reading of the statutes authorizing detention, the Court remanded the case back to the Ninth Circuit to decide whether prolonged detention under the statutes violated the detainees' due process rights. *Id.* at 851.

92. Kagan, *supra* note 13, at 128.

93. *See infra* Part II; *see also* Kagan, *supra* note 13, at 169 (recognizing that "the reliance on immigration judges would not create a mechanism for a 'judicial determination of probable cause,'" yet reasoning that "immigration judges could provide a significant measure of detachment from the ICE officers who arrest people for immigration violations" (quoting Gerstein v. Pugh, 420 U.S. 103, 114 (1975))).

94. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

95. *Compare* Landon v. Plasencia, 459 U.S. 21, 36 (1982) (due process requires hearing for lawful permanent resident stopped at the border who seeks to come back to the U.S.), *with* United States *ex rel.* Knauff v. Shaughnessy, 338

limitations that require a certain level of balancing as well,[96] but a Fourth Amendment inquiry focuses on the reasonableness of the seizure, not the status of the person harmed by the seizure or whether the proceedings that follow are punishment.[97] It also does not factor in the financial cost of the added procedures, as the Due Process balancing test of *Mathews v. Eldridge* does.[98] In this way, the Fourth Amendment provides one lens through which to view an immigration system where individuals who are detained for a variety of reasons, with a variety of statuses, and with differing ties to the U.S. all suffer the same constitutional harm—detention without review by a neutral judge.[99] It can be a forgotten Amendment when the question is preventive (as opposed to punitive) detention, as immigration detention is.[100]

It is also true that providing a *Gerstein* hearing before a truly neutral judge is no panacea of rights for an immigration detainee. Scholars have critiqued *Gerstein*'s lack of procedures to protect against an erroneous finding of probable cause,[101]

U.S. 537, 544 (1950) (considering the due process claim of applicant for admission to the U.S. and stating, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned").

96. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interests of the individual, a process evident in our previous cases dealing with Border Patrol traffic-checking operations." (citations omitted)).

97. *See* Holper, *supra* note 15, at 930–32. Of course, the remedies available for Fourth Amendment violations depend on the nature of the proceedings. *See id.* at 955–69 (discussing various remedies for Fourth Amendment violations occurring in expedited and administrative removal).

98. *Id.* at 960 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

99. *See* Peter H. Schuck, *INS Detention and Removal: A "White Paper*,*"* 11 GEO. IMMIGR. L.J. 667, 706 (1997) (describing diverse population of "detainable aliens" and recommending that INS, as a federal agency, use uniform procedures).

100. Beyond the scope of this Article is an examination of how courts came to examine preventive detention schemes primarily through the lens of the Due Process Clause of the Fifth Amendment instead of the Fourth Amendment's prohibition on unreasonable seizures. David Cole has briefly discussed the application of the Fourth Amendment to preventive detention such as immigration detention. *See* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 712 (2009) ("[W]hile preventive detention has most often been analyzed through the lens of due process, the Fourth Amendment also imposes limits on the practice.").

101. *See, e.g.*, Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 27–28 (2006); George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 421–23 (1986).

since the *Gerstein* hearing is satisfied without the presence of the detainee and the "full panoply of adversarial safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses."[102] The probable cause hearing may provide only a "speed bump" in the criminal justice process, yet it requires prosecutors to ensure that there is sufficient evidence to proceed.[103] Also, providing a truly neutral decision-maker to justify a detainee's continued pretrial detention, which often can last years, provides the requisite neutral check on the thousands of DHS detention decisions that are made each year. As scholars document a growing number of wrongful deportations,[104] including deportations of U.S. citizens,[105] this probable cause "speed bump" provides a critical procedural protection against wrongful detentions.

a. Potential Limits on Applying a Gerstein Hearing to Immigration Detention

There will certainly be critics that argue against a wholesale importation of the *Gerstein* neutral judge review mandate into the immigration context. Here, I address these doctrinal concerns.[106]

First, the plenary power of the political branches over immigration law would cause a court to balk at second-guessing Congress's choice of procedures when it comes to enforcing immigration law. The Supreme Court has found detention to be a valid

102. Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

103. Telephone Interview with Timothy Watkins, former federal defender, now Dir.'s Leadership Program Resident, Admin. Office of the U.S. Courts (Sept. 7, 2018).

104. *See* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 777–79 (2015) (explaining how detention of U.S. citizens, terminations of removal, and summary removal errors are common); Fatma Marouf et al., *Justice on the Fly: The Dangers of Errant Deportations*, 75 OHIO ST. L.J. 337, 384–87 (2014) (outlining the ratio between stays of removal and successful cases); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 146–53 (2010) (explaining that a surge in enforcement has likely made wrongful deportations more frequent).

105. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 608 (2011).

106. I recognize that there also will be practical, logistical concerns; these are discussed in Part III.

part of the deportation process,[107] so, the argument goes, with the plenary power to deport or exclude comes the plenary power to detain during that process. In the foundational case for this assertion, *Wong Wing v. United States*,[108] the Court assumed that the procedures would involve "temporary confinement" to last just "while arrangements were being made for their deportation."[109] In fact, "the government could have deported Wong Wing from Detroit to Canada in thirty minutes."[110] Notably, detention for thirty minutes would not violate the Fourth Amendment rights of a person held for criminal trial today.[111]

In *Wong Wing*, the Chinese national was not being held for deportation when he filed his case, but was confined to hard labor in the Detroit House of Correction;[112] the Court held that this confinement at hard labor was punishment, which could not be imposed without a criminal trial.[113] The Court justified detention as part of the deportation process by likening it to detention as part of the criminal process:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case

107. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 524 (2003) ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" (quoting Wong Wing v. United States, 163 U.S. 228, 235 (1896))); Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

108. *Wong Wing*, 163 U.S. 228.

109. *Id.* at 235.

110. Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 36 (2005).

111. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 55–56 (1991) (interpreting prompt probable cause hearing mandated under the Fourth Amendment to occur within forty-eight hours).

112. Neuman, *supra* note 110, at 35–36. While his case was on appeal to the Supreme Court, the circuit court had admitted Wong Wing to bail pending appeal. *Id.* at 35.

113. *Wong Wing*, 163 U.S. at 237.

> of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.[114]

If an arrest on a criminal charge necessarily involves detention,[115] and subsequent case law mandated such detention to be reviewed by a neutral judge for probable cause,[116] then shouldn't *Wong Wing* stand for this same proposition in the immigration arrest context? Notably, in subsequent Supreme Court decisions citing to *Wong Wing* for the assertion that detention is necessarily part of the deportation process, no litigants raised a Fourth Amendment challenge.[117] And, the *Wong Wing* Court confirmed that the Constitution applies to those who are undocumented, notwithstanding the Court's prior affirmations of Congress's plenary power over immigration law.[118] The Court's later

114. *Id.* at 235.

115. *See id.*

116. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("When the stakes are this high, the detached judgment of a neutral magistrate is essential.").

117. *See* Demore v. Kim, 538 U.S. 510, 523 (2003) (finding no Fifth Amendment due process claim for mandatory detention pending removal proceedings); Carlson v. Landon, 342 U.S. 524, 555–56 (1952) (finding no merit to Fifth and Eighth Amendment challenges). In the 2003 *Demore v. Kim* case, nobody challenged the neutrality of the judge; indeed, Mr. Kim would have welcomed any hearing before an immigration judge, since he had no hearing to review his detention. *Demore*, 538 U.S. at 514; *see also* Kagan, *supra* note 13, at 154 ("*Demore* . . . stand[s] for the rule that Congress may designate a particular class of people for mandatory detention while their cases are pending based on a presumption of flight risk or dangerousness. But this does not address the procedural safeguards required to determine whether a person actually belongs in this disfavored class."). When the Court decided *Carlson* in 1952, the right to a probable cause hearing by a neutral judge after a warrantless arrest had yet to be established in the criminal justice context, much less applied to pretrial detention during the deportation process. *See Gerstein*, 420 U.S. at 114 (establishing Fourth Amendment right to neutral judge review of probable cause to continue detention after arrest in 1975). Also, at that time the Court had not yet clarified that the Fourth Amendment applies to administrative arrests. *See* Kagan, *supra* note 13, at 134 (discussing *Camara v. Municipal Court*, in which the Court held in 1967 that the Fourth Amendment applies to civil and administrative searches).

118. *See* Neuman, *supra* note 110, at 41 (describing *Wong Wing* as "a series of firsts . . . the first Supreme Court decision invalidating a federal immigration statute, the first Supreme Court holding that the Bill of Rights protects aliens against the federal government, and the first Supreme Court confirmation of the constitutional rights of illegal aliens"); *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L. J. 1003, 1016 (2002) ("[A]t the very height of deference to plenary immigration power, the Court in *Wong Wing* applied to immigration detention the same principle that

decisions also confirmed that the plenary power does not diminish all Fourth Amendment rights.[119] Moreover, immigration detention pending removal proceedings today frequently lasts well beyond the thirty minutes it took for Wong Wing to be deported: for a class of detainees challenging their prolonged detention, detention lengths averaged between 346 to 427 days, with some lasting up to 1,585 days.[120]

The plenary power relates to the political branches' power to exclude[121] and deport;[122] it should not extend to the power to detain. As David Cole has noted, the defenders of unchecked detention as part of the deportation process "have confused the power to deport with the power to detain,"[123] and thus have unnecessarily extended the political branches' plenary power over decisions to expel and deport to detention decisions during those processes.[124] Also, as stated by the Supreme Court in the 2001

it has subsequently applied in other civil detention cases: an absolute prohibition on the use of civil detention for punitive ends." (citing *Wong Wing*, 163 U.S. at 235)).

119. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973). *But cf.* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (describing federal government's authority to conduct routine, suspicionless searches at the border as "plenary" (citing United States v. Ramsey, 431 U.S. 606, 616–17 (1977))).

120. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1079–80 (9th Cir. 2015), *rev'd*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018). The *Rodriguez* class was subdivided into three subclasses. For those subject to mandatory detention pursuant to 8 U.S.C.§ 1226(c), the average length of detention was 427 days, with the longest-detained class member confined for 1,585 days (and counting). *Id.* The 8 U.S.C. § 1225(b) subclass members had been detained for as long as 831 days, and for an average of 346 days each. *Id.* at 1081. At the time petitioners generated their report, one 8 U.S.C. § 1226(a) subclass member had been detained for 1,234 days with no definite end in sight. *Id.* at 1085.

121. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

122. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (applying plenary power to deportation decisions).

123. Cole, *supra* note 118, at 1038.

124. *Id.* at 1016; *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 28 (1984) ("[T]he detention authority is more than a programmatic resource, ancillary to the power to exclude and deport. Detention is also an awesome power in its own right.").

case of *Zadvydas v. Davis*,[125] "[the plenary power] is subject to important constitutional limitations."[126]

Second, the Court in *Gerstein* limited its holding to the criminal justice system; it was never intended to apply outside of that context.[127] But in another civil detention system in which juveniles are arrested for delinquency, the Court in *Schall v. Martin*[128] used *Gerstein* as a benchmark in a procedural Due Process analysis.[129] The Court determined that the procedures afforded to juveniles by the state, which included a probable cause hearing before a Family Court judge within three days, would be constitutionally adequate under *Gerstein*.[130] As noted by the Ninth Circuit, however, the juvenile procedures in place under the state law were more protective than *Gerstein* hearings as they existed at the time, and thus the Court never reached whether

125. 533 U.S. 678 (2001).

126. *Id.* at 695. For example, federal courts have not found the Court's 1953 decision in *Shaughnessy v. U.S. ex rel. Mezei* to stand for the sweeping proposition that persons seeking admission have no constitutional rights when making claims related to their detention. 345 U.S. 206, 216 (1953); *see also* Rosales-Garcia v. Holland, 322 F.3d 386, 414 (6th Cir. 2003) (reasoning that to the extent that *Mezei* stands for the proposition that arriving aliens have no constitutional rights, cases in which "the contours of constitutionally permissible civil detention are rigorously delineated" is a "substantial jurisprudential development from the time that *Mezei* was decided" (citing Kansas v. Hendricks, 521 U.S. 346 (1997); Foucha v. Louisiana, 504 U.S. 71 (1997); United States v. Salerno, 481 U.S. 739 (1987); Jackson v. Indiana, 406 U.S. 715 (1987))); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999) ("The case before us does not question the validity of the procedures used to admit or exclude petitioner, but it is against that backdrop that we consider whether the indeterminable nature of his detention pending ultimate deportation rises to a constitutional violation. Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process.").

127. *See* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial."); Flores I, 913 F.2d 1335, 1336 (9th Cir. 1990); *see also* Project Release v. Provost, 722 F.2d 960, 975 (2d Cir. 1983) (declining to extend *Gerstein* to civil commitment statutes and finding no due process violation when the state statute provides for a judicial hearing within five days of demand by patient, relative, or friend, as well as habeas corpus relief).

128. 467 U.S. 253 (1984).

129. *Id.* at 274–75.

130. *Id.* at 274–77.

less process would be constitutionally adequate.[131] Also, the Supreme Court has described juvenile delinquency proceedings as "functionally akin to a criminal trial,"[132] and thus deserving of near-identical procedures to those used in the criminal justice process.[133] Yet many have made that same argument about deportation proceedings—that although civil, "deportation is different,"[134] and thus deserving of heightened procedural protections akin to those seen in the juvenile delinquency system.[135]

This is especially so after the Supreme Court's 2010 decision in *Padilla v. Kentucky*,[136] where the Court recognized a Sixth Amendment right to advice regarding immigration consequences,[137] a watershed decision that caused many to question whether the Court now sees deportation as deserving of more procedures than are available in other civil contexts.[138] Peter

131. *Flores I*, 913 F.2d at 1336.

132. Gagnon v. Scarpelli, 411 U.S. 778, 789 n.12 (1967).

133. *See In re* Winship, 397 U.S. 358, 368 (1970) (holding that due process requires that the burden of proof in juvenile delinquency proceedings be beyond reasonable doubt); *In re* Gault, 387 U.S. 1, 31–56 (1967) (explaining that due process requires right to appropriate notice, counsel, confrontation and cross-examination, and privilege against self-incrimination in juvenile delinquency proceedings); Kent v. United States, 383 U.S. 541, 557 (1966) (explaining that due process requires the right to a hearing, that counsel be given access to records, and a statement of reasons before a case is transferred from juvenile court to adult court). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that the right to trial by jury in juvenile delinquency proceedings is not required under the due process clause).

134. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

135. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1931–32 (2000) (arguing that juvenile delinquency proceedings can provide an example of proceedings that are civil in name but many of the protections of a criminal trial attach); Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 49–57 (2011) (discussing how juvenile delinquency proceedings can provide a helpful analogy to how procedural protections should apply in deportation proceedings); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 316–17 (2000) (discussing juvenile delinquency proceedings as a "quasi-criminal" proceeding where some of the constitutional protections of a criminal trial are available even though the proceeding is nominally civil).

136. 559 U.S. 356 (2010).

137. *Id.* at 374.

138. *See, e.g.*, Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right*

Markowitz has described the *Padilla* decision as one more example of where the Court has allowed "a uniquely criminal law doctrine [to] creep[]…into the 'civil' deportation realm."[139] He explains that the Court's watered-down application of the Fourth Amendment exclusionary rule in *Lopez-Mendoza* is another example of the Court allowing "the criminal square peg [to] fit in the civil round holes,"[140] notwithstanding the Court's early labeling of deportation as "civil."[141] Thus, there is every reason to apply *Gerstein* out of its original criminal context when the issue is pre-trial detention for deportation.

In other civil detention contexts, the statutes authorizing such detention frequently had a judge overseeing the detention decision, so when challenged under the Due Process Clause, the neutrality of the decision-maker is rarely discussed.[142] In the context of deciding the procedures necessary for parole revocation, in *Morrissey v. Brewer*[143] the Court held that due process required an independent decision-maker, but that need not be a

to Deportation Counsel: Watershed or Work-in-Progress?, 45 NEW ENG. L. REV. 305, 319 (2011); Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011); Maddali, *supra* note 135; Markowitz, *supra* note 134.

139. Markowitz, *supra* note 134, at 1324.

140. *Id.* at 1318.

141. *Id.* at 1311–12 (citing Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

142. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 750 (1987) (pretrial detention based on dangerousness is decided in full adversarial hearing presided over by a neutral judge); Addington v. Texas, 441 U.S. 418 (1979) (civil detention for mental illness and danger to self or others authorized by a judge). In *Parham v. J.R.*, the Court found that a treating psychiatrist was neutral enough to commit a minor to a mental hospital. 442 U.S. 584 (1979). However, the Court did not believe that such decisions required a full adversarial hearing; nor did the Court describe the institution's psychiatrists who made the decisions as acting in any sort of a zealous manner pursuant to some law enforcement purpose, the way that ICE officers act. *Compare id.* at 615–16 (quoting district court's findings that it was "impressed by the conscientious, dedicated state employed psychiatrists who, with the help of equally conscientious, dedicated state employed psychologists and social workers, faithfully care for the plaintiff children" (quoting J.L. v. Parham, 412 F. Supp. 112, 138 (M.D. Ga. 1976))), *with Enforcement and Removal Operations*, ICE (Aug. 15, 2019), https://www.ice.gov/about [https://perma.cc/5ZBU-EW7R] (describing ICE Enforcement and Removal operations as "identif[ying] and apprehend[ing] removable aliens, detain[ing] these individuals when necessary and remov[ing] illegal aliens from the United States").

143. Morrissey v. Brewer, 408 U.S. 471 (1972).

judicial officer, so long as it was an "independent decisionmaker."[144] *Morrissey* was a due process case, not a Fourth Amendment case, so the Court was not examining the procedures through the *Gerstein* lens (nor had *Gerstein* yet been decided).[145] It is also instructive to examine the subsequent developments around parole revocation in the federal system; four years after *Morrissey* was decided, Congress created the U.S. Parole Commission as an independent agency within the DOJ.[146] One of the reasons to create such an independent agency was to separate parole decision-making from the prosecutors in the DOJ.[147]

Third, the thousands of immigration arrests happening each year, although not reviewed by a neutral judge, are "reasonable" seizures within the meaning of the Fourth Amendment[148] because their purpose is not primarily to investigate crime, but to enforce a civil regulatory scheme.[149] In the 1967 case *Camara v.*

144. *Id.* at 486.

145. Justice Douglas, in his dissent, highlighted that this supposedly "independent" decision-maker is not truly independent. *See id.* at 497–98 (Douglas, J., dissenting) ("The hearing should not be before the parole officer, as he is the one who is making the charge and 'there is inherent danger in combining the functions of judge and advocate.'").

146. *See* 18 U.S.C. § 4203(b) (2012). The House Conference Report creating the Parole Commission stated that the law was necessary in order to create a less disparate and more predictable process that both prisoners and the public would more readably understand and accept. *See* H.R. REP. NO. 94-838, at 20 (1976) (Conf. Rep.).

147. *See* H.R. REP. NO. 94-838, at 20; *see also* S. REP. NO. 94-369, at 20 (1975) (noting that even though the Commission would be part of the Department of Justice, having a decision-making process that was independent from the Department would guard against influence in cases).

148. *See* Robert M. Bloom, *Border Searches in the Age of Terrorism*, 78 MISS. L. J. 295, 299 (2008) (describing reasonableness as "touchstone" for Fourth Amendment rights); Chacón, *supra* note 66, at 134 ("[T]he test for Fourth Amendment 'reasonableness' turns on the balance between the government's interest and the individual's right to privacy.").

149. *Cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (declining to suspend usual requirement of individualized suspicion where the police set up a non-border checkpoint "primarily for the ordinary enterprise of investigating crimes"); *see also* Carbado & Harris, *supra* note 66, at 1608–13 (explaining that one reason why Fourth Amendment Supreme Court cases involving racial profiling of Latinos do not "occupy significant space in the literature on racial profiling" is because these cases are not centrally about the enforcement of criminal law and thus are seen by criminal law scholars as part of the Court's "'special needs'/regulatory/administrative search and seizure jurisprudence").

Municipal Court,[150] the Supreme Court permitted health inspectors to search houses without individualized suspicion of a violation.[151] The Court, however, still required an "area warrant" issued by a judge so as to limit the discretion of each inspector.[152] In the immigration detention context, the intrusion is significantly more—the taking away of physical liberty, not the search of one's house.[153] Nor does it seem plausible that the thousands of noncitizens subject to immigration detention should have a reduced expectation of privacy that would justify being put in a jail, as would the owner of a "closely regulated" industry whose business property may be subject to warrantless inspection.[154]

Fourth, "[s]pecial needs"[155] such as border control justify immigration arrests and detention without the approval of a neutral judge.[156] This would likely be the most-favored response of

150. 387 U.S. 523 (1967).

151. *Id.* at 536–37.

152. *Id.*

153. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 555–56 (1985) (Souter, J., dissenting) ("Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect 'the plumbing, heating, ventilation, gas, and electrical systems' in a person's home, . . . or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing." (alteration in original)); *cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (noting that privacy expectations are less in a car than in one's private dwelling).

154. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–03 (1987); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973) ("A central difference between [the business regulation] cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petition here was not engaged in any regulated or licensed business.").

155. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (setting forth three-part test for reasonableness of warrantless inspections of commercial properties); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 81–83 (2001) (explaining that a hospital's sharing of diagnostic tests for pregnant women with police not justified by special need even if the ultimate purpose is to protect the health of the mother and child); Michigan Dep't. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that a sobriety checkpoint is a special law enforcement concern that justifies highway stop without any individualized suspicion).

156. *See* United States v. Ramsey, 431 U.S. 606, 616 (1977) ("That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border,

the Trump administration, which sees detention as one of the only ways to deter illegal border crossers,[157] who, in the view of many within the administration, are taking advantage of procedural rights built into U.S. immigration law to stay in the U.S. while fighting against deportation.[158] It is quite possible that detaining noncitizens who present themselves at the border or port-of-entry for no more than forty-eight hours in order to issue an expedited removal order would pass a reasonableness test under the Fourth Amendment.[159] However, seizing and jailing thousands of people suspected of immigration violations who are found anywhere within the interior of the U.S. is a far cry from the brief stops of vehicles or persons, which are justified when they occur at a checkpoint near the border or port-of-entry.[160]

That may be true, but many have argued that the border has extended further inside of the perimeter of the U.S.[161] In

should, by now, require no extended demonstration."); *Martinez-Fuerte*, 428 U.S. at 552–53, 557 (finding that stops of motorists at permanent checkpoints near the border are justified by the important law enforcement concern of policing a southern border that is 2,000 miles long); Chacón, *supra* note 66, at 133; Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1190–91 (2008) ("The 'border exception' sits at the intersection of two established and much criticized areas of constitutional doctrine: the 'plenary power' doctrine and the various exceptions to ordinary Fourth Amendment requirements for primarily administrative, noncriminal searches and seizures. Both areas are highly deferential to government actions, and many of the criticisms of the deference extended in those areas apply with comparable force to the deference afforded the government under the border exception.").

157. *See, e.g.*, Border Security Executive Order, *supra* note 20; Border Security Implementation Memo, *supra* note 20.

158. *See* Philip Rucker & David Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/powerpost/trump-advocates-depriving-undocumented-immigrants-of-due-process-rights/2018/06/24/dfa45d36-77bd-11e8-93cc-6d3beccdd7a3_story.html?noredirect=on&utm_term=.05c119748f4a [https://perma.cc/R9K3-TLDC].

159. *See* United States v. Montoya de Hernandez, 473 U.S. 531 541–43 (1985) (permitting detention for sixteen hours at an international border based on reasonable suspicion by customs agents that she was smuggling contraband in her alimentary canal); Holper, *supra* note 15, at 938–39 (describing expedited removal procedures).

160. *See* United States v. Flores-Montano, 541 U.S. 149, 152 (2004); *Montoya de Hernandez*, 473 U.S. at 533, 538; *Martinez-Fuerte*, 428 U.S. at 557.

161. *See Martinez-Fuerte*, 428 U.S. at 556 ("Our previous cases have recognized that maintenance of a traffic-checking program in the interior is neces-

fact, Daniel Kanstroom has categorized an entire class of deportation cases as "extended border control" deportations.[162] "Extended border control" deportations happen when the noncitizen has not been admitted to the U.S. or has been admitted but violates the rules that govern his temporary residence.[163] In contrast, "post-entry social control" deportations involve noncitizens who have been admitted to the U.S., under a permanent or temporary status, and are deportable because of criminal or political conduct—conduct that arose after they were admitted.[164] If, at least in "extended border control" deportations, the government can cite to the "special need" of border control to justify immigration arrests and detention without the approval of a neutral judge,[165] then a significant number of immigration arrests without the involvement of a neutral judge would comply with the Fourth Amendment. The problem with this rationale is that it takes a Fourth Amendment doctrine that was intended to tip the balance of interests in favor of the government where governmental power is at its "zenith"—at the international border[166]—and applies it when the governmental power has dwindled—within the interior of the U.S.[167] Even one of the first cases in which the Supreme Court affirmed the "border exception" to the

sary because the flow of illegal aliens cannot be controlled effectively at the border."); Chacón, *supra* note 66, at 145 n.99 (citing to circuit court cases expanding the border search doctrine to searches occurring near the border and reasoning that although "quite modest, they demonstrate the malleability of the concept" (citing United States v. Yang, 286 F.3d 940, 949 (7th Cir. 2002); United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994))); *see also* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 174 (2007) (describing how expedited removal has allowed the border to become "detached from its traditional location at the perimeter of the country's edges . . . by relying on the legal fiction of removing unwanted migrants 'at the border' when they are already firmly within its perimeter").

162. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 5 (2007).

163. *Id.* at 5.

164. *Id.* at 6.

165. *See Montoya de Hernandez*, 473 U.S. at 541–43; *Martinez-Fuerte*, 428 U.S. at 557.

166. United States v. Flores-Montano, 541 U.S. 149, 152 (2004) ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.").

167. *See Montoya de Hernandez*, 473 U.S. at 538 ("[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."); United States v. Ramsey, 431 U.S. 606, 617–18 (1977).

Fourth Amendment's warrant requirement, *Almeida-Sanchez v. United States*,[168] limited the geographic scope of the border.[169] In this sense, ICE agents who arrest and detain noncitizens for deportation are no different than police arresting persons upon suspicion of illegal conduct, and the decisions of these "zealous officers" must be checked by a "neutral and detached magistrate instead of being judged by the officer engaged in [enforcement]."[170] And, as the Court stated in *Almeida-Sanchez*, "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."[171]

Thus, the reasonableness of the seizures and subsequent detentions for deportation should be made on a case-by-case basis[172] and by a neutral judge. If the current immigration system lacks such truly neutral judges,[173] as I argue in the next section, then the entire immigration detention system is regularly violating the Fourth Amendment rights of those caught in its increasingly broad net.

II. THE NOT-SO-NEUTRAL IMMIGRATION JUDGE

This Part demonstrates why the current immigration judges cannot systemically provide the "neutral judge" review required to authorize continued detention under the Fourth Amendment. While I recognize that there are many fair, impartial immigration judges, including before whom I have practiced, this anecdotal evidence cannot change the underlying structural issues that cause judges to rely on the DOJ for their professional livelihoods, or the statutes and regulations in place that allow their

168. 413 U.S. 266 (1973).

169. *See id.* at 268 (holding that stop and search of automobiles without a warrant or probable cause violates Fourth Amendment when occurring twenty-five miles from the border); Chacón, *supra* note 66, at 137 ("*Almeida-Sanchez* therefore can be read as an affirmation of the breadth of border search authority and a limitation on the geographic scope of this border exceptionalism.").

170. *See* Gerstein v. Pugh, 420 U.S. 103, 112–13 (1975) (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).

171. *Almeida-Sanchez*, 413 U.S. at 273.

172. *Cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 564–66 (1976) (permitting border checkpoint without issuance of an "area" warrant by a judge).

173. *See infra* Part II.

supposedly neutral detention decisions to be overridden by a DHS prosecutor.

A. A BRIEF HISTORY OF THE COMMINGLED PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS

Administrative agencies, the "fourth branch of government,"[174] have had increasing broad power to carry out important functions of government, such as setting forth law, adjudicating cases, and prosecuting cases.[175] Concern about agencies' serious impacts on private rights with limited restraints, created a call for a uniform structure to agency decision-making.[176] In the 1930s, the American Bar Association saw the undermining of the judicial branch by the creation of agencies.[177] Advocates for reform had a choice between "bringing the resolution of controversies back to the court system and bringing court rules to the administrative system";[178] and since the benefits of administrative adjudication were well-recognized at this point, "[t]he effort later turned from bringing administrative proceedings into a federal court system to bringing court standards into the administrative proceedings."[179]

President Roosevelt created a Committee on Administrative Management, which reported its findings in 1937; the President also assigned the Attorney General to name a similar committee in 1939.[180] After legislative hearings, at which all existing administrative agencies were invited to submit their views,[181] the

174. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (describing the place of administrative agencies within the constitutional framework).

175. *See id.* at 578–59 (noting the acceptance of agencies who exercise judicial, legislative, and executive functions but fall outside the three branches).

176. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 36–38 (1950) (discussing the growing concerns about agency power and the call to implement safeguards), *superseded by statute*, Supplemental Appropriation Act of 1951, Pub. L. No. 81-843, 64 Stat. 1044; *see also* Ardestani v. INS, 502 U.S. 129 (1991).

177. Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 691 (2012).

178. *Id.*

179. *Id.* (quoting William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y. L. SCH. L. REV. 829, 843–44 (2004)).

180. *Wong Yang Sung*, 339 U.S. at 38.

181. *Id.* at 40.

Administrative Procedure Act (APA) was signed into law by President Truman in 1946.[182]

Among other requirements, the APA provides for the separation of the adjudicative and prosecutorial functions.[183] Specifically, the APA requires that an adjudicatory officer shall not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for any agency."[184] Also, "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."[185]

Justifying the separation of functions, the President's Committee on Administrative Management noted concerns when "[t]he discretionary work of the administrator is merged with that of the judge"[186] because "[p]ressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights."[187] The Committee also found that having one person serve as both prosecutor and judge "undermines judicial fairness" and "weakens public confidence in that fairness."[188] Similarly, the Attorney General's Committee on Administrative Procedure found that "commingling of functions of investigation or advocacy with the function of deciding are . . . plainly undesirable" and thus recommended the creation

182. *Id.* at 40 (citing 92 CONG. REC. 6706 (1946)).

183. 5 U.S.C. § 554(d)(2) (2012).

184. *Wong Yang Sung*, 339 U.S. at 40.

185. *Id.* The APA language regarding separation of functions is largely the same as when the APA first was enacted in 1946. *See id.* at 35 n.1 (quoting 5 U.S.C. § 5 (1946)).

186. *Id.* at 41–42 (quoting PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36–37 (1937)).

187. *Id.* at 42.

188. *Id.*; *see also* Legomsky, *War on Independence*, *supra* note 6, at 390 ("[T]he more a governmental function resembles legislation or other policymaking, the more a representative democracy values political accountability over decisional independence. For that reason, it is only in the adjudication context—not in the legislative or implementation contexts—that I claim a normative link between decisional independence and the rule of law.").

of independent hearing commissioners "insulated from all phases of a case other than hearing and deciding . . . ."[189]

After the passage of the APA, the issue of whether deportation hearings complied with the APA's required separation of adjudicatory and prosecutorial roles reached the Supreme Court in the 1950 case *Wong Yang Sung v. McGrath*.[190] Mr. Sung had been ordered to be deported by a "presiding inspector," who played the part of both prosecutor and judge.[191] The Court wrote, "while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today."[192] Deciding that the provisions of the APA applied to deportation cases, the Court held that having the special inquiry officer serve both the role of prosecutor and judge violated the APA's provisions.[193] Following "[t]he torpedo delivered by the 1950 *Sung* decision,"[194] the INS made temporary appointments of APA Hearing Examiners, giving incumbent presiding inspectors such appointments.[195]

Wong Yang Sung's effect in immigration law was short-lived.[196] The INS and the DOJ requested an exemption from APA

189. *Wong Yang Sung*, 339 U.S. at 44 (quoting S. DOC. NO. 77-8, at 56 (1941), ATT'Y GEN. COMM. ADMIN. PROCEDURE, REPORT 56 (1941)).

190. 339 U.S. 33. In 1940, there had been a study of the immigration procedures by a committee named by the Secretary of Labor, who then had jurisdiction over immigration matters; this study recommended that presiding inspectors be relieved of their prosecutorial duties. *See Wong Yang Sung*, 339 U.S. at 42–44 (quoting SEC'Y OF LABOR'S COMM. ON ADMIN. PROCEDURE, THE IMMIGRATION AND NATURALIZATION SERVICE 77 (mimeo. 1940)); *see also id.* at 44 ("A genuinely impartial hearing, conducted with critical detachment, is psychologically improbable if not impossible, when the presiding officer has at once the responsibility of appraising the strength of the case and of seeking to make it as strong as possible." (citation omitted)).

191. *Id.* at 45. The regulations at the time prohibited the presiding inspector from being the one who investigated the case, unless the noncitizen consented. *Id.* (citing 8 C.F.R. § 150.6(b) (1949)).

192. *Id.*

193. *Id.* at 45–48.

194. Sidney B. Rawitz, *From* Wong Yang Sung *to Black Robes*, 65 INTERPRETER RELEASE 453, 456 (1988).

195. *Id.*

196. *Id.*

coverage, and Congress quickly delivered in a 1950 appropriations bill.[197] Two years later, Congress passed the 1952 McCarran-Walter Immigration and Nationality Act (INA), which specifically exempted deportation proceedings from the APA's requirements.[198] The Court recognized this exemption in the 1954 case of *Marcello v. Bonds*,[199] reasoning that Congress had deliberately legislated deportation proceedings out of the APA's hearing requirements.[200] Mr. Marcello had received what was then termed a "two-man" hearing (unlike *Sung*'s "one-man hearing"),[201] in which a special inquiry officer presided over his case, but a different immigration officer presented the evidence.[202] The presiding officer was subject to the supervision and control of officials within the prosecuting agency, however.[203] The Court held that this arrangement did not violate his due process rights, "when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters."[204]

With the 1952 INA, Congress buried the term "presiding inspector" and replaced it with "special inquiry officers."[205] The hiring process for special inquiry officers also changed in later years to give preference to holders of college and law degrees (instead of those with border patrol experience, which was previously rewarded in hiring for INS officers).[206] The DOJ continued to make small steps toward adjudicators' independence, remov-

197. *Id.* at 456–57; *see also* Supplemental Appropriations Act of 1951, ch. 1052, 64 Stat. 1044, 1048 (1950).

198. Immigration and Nationality Act of 1952, ch. 477, sec. 403, § (a)(47), 66 Stat. 163, 280.

199. 349 U.S. 302, 310 (1955).

200. *Id.* at 308–09.

201. *See* Rawitz, *supra* note 194, at 454 (discussing the differences between two-man hearings and one-man hearings).

202. *Marcello*, 349 U.S. at 306.

203. *Id.* at 311.

204. *Id.*

205. Rawitz, *supra* note 194, at 456–57.

206. Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, *in* IMMIGRATION STORIES 113, 128 (David A. Martin & Peter H. Schuck eds. 2005); Rawitz, *supra* note 194, at 457.

ing special inquiry officers from INS District Director supervision and creating the position of Chief Special Inquiry Officer in 1956.[207] In every case where deportability was contested, it was required that there be a separate prosecutor and special inquiry officer, who would have his own file, in order to insulate the special inquiry officer from the prejudicial contents of the prosecution's file.[208]

All immigration adjudicators continued to answer to the Attorney General, although the Supreme Court interpreted regulations enacted to accompany the 1952 INA as requiring the Board of Immigration Appeals (Board) to exercise independent judgment.[209] In the 1954 case *Accardi v. Shaughnessy*, a noncitizen had been denied discretionary relief because he was on a list of "unsavory characters" issued by the Attorney General.[210] The Court held that the Board failed to exercise its own independent discretion, pursuant to its regulation, and remanded the case.[211] On remand, however, the Board reached the same conclusion, which the Court found was free of undue influence by the Attorney General.[212] In Mr. Marcello's case, the Attorney General publicly stated that Mr. Marcello was "undesirable" and "that the proceedings were specially designed to deport" him, and that his name was on a list that the Attorney General desired to deport.[213] Yet, the Supreme Court found that there was no specific evidence that the Board prejudged his claim and thus the Board had in fact engaged in the exercise of independent judgment.[214] So, while this "independent judgement" regulation has existed on paper, enforcing some internal version of separating adjudicators from policymakers,[215] as demonstrated by these two Supreme Court cases, it is not very meaningful in practice.

207. Rawitz, *supra* note 194, at 458.

208. Kanstroom, *supra* note 206, at 128; Rawitz, *supra* note 194, at 458.

209. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

210. *Id.* at 264.

211. *Id.* at 267–68.

212. Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280, 282–83 (1955).

213. Marcello v. Bonds, 349 U.S. 302, 312 (1955).

214. *Id.* at 312–14.

215. *See* Kim, *supra* note 30, at 42 ("[T]he [*Accardi*] holding can be understood as promoting a version of internal separation of powers."); *see also id.* at 10–12 (describing different functions of an agency, which including adjudicative or quasi-adjudicative, legislative or quasi-legislative, and purely ministerial).

In 1983, the adjudicators were officially moved out of the INS, with the creation of the Executive Office for Immigration Review (EOIR).[216] The new EOIR housed the Board and the now-titled "immigration judges," a title that began in 1973, with the practice of wearing robes in the courtroom.[217] However, the Attorney General was still the boss of both the immigration judges and the Board.[218] Also, the Supreme Court in 1991 affirmed that *Marcello* holding, notwithstanding the creation of the EOIR, and held that deportation proceedings were still not "adversary adjudications" under the APA.[219]

There also arose separate procedures within immigration law for sanctioning employers, which came about in the late 1980's. The introduction of employer penalties into immigration law with the 1986 Immigration Reform and Control Act[220] saw a new model of adjudication, now that the questions were no longer concerning the rights of "aliens" but also U.S. citizen employers were subject to sanctions for illegally hiring undocumented workers.[221] There has been little criticism of this disjointed system of administrative procedures within the INA,

216. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056 (Feb. 25, 1983) (to be codified at 28 C.F.R. pt. 0).

217. Rawitz, *supra* note 194, at 458.

218. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. at 8056.

219. In the 1991 case of *Ardestani v. INS*, the Court affirmed the *Marcello* holding that deportation proceedings were exempted from the APA, holding that there could be no award of attorneys' fees under the Equal Access to Justice Act for prevailing in a deportation hearing, because such a hearing was not technically an "adversary adjudication" under the APA. 502 U.S. 129, 133–34, 139 (1991). The Court in *Ardestani* made such a holding notwithstanding the promulgation of the 1983 regulations that created the EOIR, which the Court described as "conform[ing] deportation hearings more closely to the procedures required for formal adjudication under the APA." *Id.* at 134.

220. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. For a summary of the legislative history leading up to the employer sanctions provisions of IRCA, see Michael Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007).

221. Immigration Reform and Control Act § 274A(e)(1)(A)(4). The employer sanction provisions of IRCA led to the creation of the Office of Chief Hearing Administrative Hearing Officer (OCAHO) within the EOIR, which employs ALJs appointed pursuant to the APA. *See* 8 C.F.R. § 1003.0 (2019); 28 C.F.R. §§ 44.100, 68.26 ("Hearings shall be held before an Administrative Law Judge appointed under 5 U.S.C. § 3105 and assigned to the Department of Justice.").

where the business owner gets a hearing before a "real" administrative law judge[222] and the noncitizen gets an "imitation judge."[223] This would seem to be one more example of where, as Jack Chin has noted, "administrative procedure tends to offer greater protection to businesses than to individuals."[224] Administrative law scholar Paul Verkuil, defending this disparate treatment, stated,

> The decider independence issue is especially sensitive in the context of employer sanctions. Whereas there is little doubt that the immigration judge structure satisfies the due process standards of independence for decisions about aliens, the structure must be examined more closely when those normally outside the reach of the system are to be brought within it.[225]

B. THE "WAR ON INDEPENDENCE" IN THE POST-9/11 ERA

In response to the terrorist attacks of September 11, 2001, Congress in 2002 created the DHS, which would house all functions of the former INS, including prosecutorial functions.[226] As a result of this legislation, which went into effect in 2003, immigration prosecutors no longer worked within the same agency as the adjudicators.[227] Yet, scholars and the National Association of

OCAHO judges are authorized to sanction employers who have engaged in unfair immigration-related employment practices and illegally hired workers; they also can issue civil penalties for document fraud. *See* 8 C.F.R. §§ 270.1–.3 (defining document fraud and describing procedures to enforce civil sanctions); 8 C.F.R. § 274A.9 (defining procedures for administrative sanctions against employers who knowingly illegally hire undocumented workers); 28 C.F.R. § 44.200 (defining unfair immigration-related employment practices).

222. *See* William Funk, *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 883 (2006) (describing the *Wong Yang Sung* Court's concern with the "embodiment in one person or agency the duties of prosecutor and judge," which was remedied by the APA's creation of ALJs, then called hearing examiners, as well as providing for the separation of functions in 5 U.S.C. § 554(d)).

223. *See* Slavin & Harbeck, *supra* note 6, at 70.

224. Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 4 (2002).

225. Paul Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1195 (1984).

226. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2136.

227. The explanatory notes to the implementing regulations state, "[t]his rule is also a step in the process of separating DHS enforcement and services functions from Department of Justice adjudication functions as envisioned by the Act." Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10,922, 10,922 (Mar. 6, 2003).

Immigration Judges noted that such changes did not fully eviscerate a fundamental truth: that judges are housed within the DOJ, "an agency that is closely aligned with the DHS and shares its primary mission of law enforcement rather than objective adjudication."[228] As Gerald Neuman has observed, "[t]he Attorney General . . . and other political appointees in the Justice Department are politically accountable for their success in creating the reality or appearance of border control, in general or in well-publicized cases."[229] The simultaneous "war on terror" caused the DOJ to step up enforcement efforts within immigration law.[230]

At the same time that Congress officially separated the immigration prosecutors from adjudicators with the Homeland Security Act, the Attorney General began what Stephen Legomsky has called a "war on independence" of the EOIR adjudicators.[231] He outlines three types of constraints that executive or legislative actors can impose on the authority of the adjudicator: the substitution of a general rule for individualized adjudication or judgment; a decision by an executive or administrative official to intervene in a pending case; and a threat of personal consequences to adjudicators, including reassignment to a less desirable position, nonrenewal of appointment, or loss of compensation, if they do not reach a certain type of outcome. In his article, he focuses on the third type of decisional independence.[232]

In 2002, not long after the National Association of Immigration Judges had issued a proposal for an independent court, the Attorney General published a final rule that reduced the size of

228. Leigh Marks, *Still a Legal Cinderella*, *supra* note 6, at 29.

229. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1024 (1998).

230. *See* Stella Burch Elias, "*Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1135 (2008) (noting how the "war on terror" led to the radical changes in immigration enforcement); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1571–73 (2010) (discussing how federal immigration enforcement is expanding).

231. *See* Legomsky, *War on Independence*, *supra* note 6, at 370 ("As hyperbolic as the title of this Article might sound, I submit it is accurate to depict the sum of these various measures as an all-out war on the very notion of decisional independence in the adjudication of immigration cases.").

232. *Id.* at 387–88. The automatic stay described in Part II.C is an example Legomsky cites of a substitution of a general rule for an individualized determination, which undermines judges' independence. *Id.*

the Board.[233] This caused Board members who had ruled most frequently in favor of immigrants to be reassigned to non-adjudicative positions within the Department;[234] data also showed that in the one-year period following this announcement but before the reassignments, Board members began to rule less frequently against the government.[235] Another study showed that after the reassignments, outcomes in Board cases were significantly less favorable to immigrants.[236] In response to concerns that the reassignments were punishment for ruling against the government, the DOJ responded:

> Each Board member is a Department of Justice Attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission.[237]

The DOJ provided no real explanation for the study's findings, thus confirming fears that an adjudicator can be re-assigned to a non-adjudicative position as a form of reprimand.[238] These reassignments marked the first time in the Board's history that an Attorney General had removed a member.[239]

The 2002 final DOJ rule also identified a different degree of independence by the Board.[240] Until 2002, a regulation stated that "Board Members shall exercise their independent judgment

233. *Id.* at 373–74. *See also infra* note 340 (discussing various proposals that have been suggested).

234. Legomsky, *War on Independence*, *supra* note 6, at 376 ("Data compiled by Peter Levinson, a long-time member of the legal staff of the House Judiciary Committee, show that the axe fell entirely on the most 'liberal' members of the BIA, as measured by the percentages of their rulings in favor of noncitizens." (citing Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1164 (2004))).

235. *Id.* at 377 (citing Levinson, *supra* note 234, at 1159–60).

236. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1670 (citing DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION' COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 24 (2003), http://files.dorsey.com/files/Upload/DorseyStudyABA.pdf).

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

238. *See* Legomsky, *War on Independence*, *supra* note 6, at 374–75 (discussing how the changes have further heightened apprehensions).

239. *Id.* at 379.

240. *Id.*; Levinson, *supra* note 234, at 1161.

and discretion in cases coming before the Board."[241] The new rule rearranged the priorities, stating that "Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them";[242] only later does a "diluted version" of the decision independence language appear.[243] Stephen Legomsky noted that although the reassignments impacted only Board members, "the reference to '[a]ll attorneys' makes clear that the attorney general intended the quoted language to apply to immigration judges as well."[244] In the current administration, former Attorney General Sessions reminded immigration judges of their subservient role in carrying out the Trump administration's priorities of having "zero illegal immigration in this country."[245]

In 2006, Attorney General Gonzales announced a system of performance evaluations for each immigration judge and Board member.[246] Regulations went into effect in 2007 which made explicit the legal authority to establish such a performance evaluation system, without any input or public disclosure of the procedures or criteria for determining what constitutes good

241. Legomsky, *War on Independence*, *supra* note 6, at 379 (quoting 8 C.F.R. § 3.1(a)(1) (2002)).

242. *Id.* (quoting 8 C.F.R. § 3.1(a)(1), (d)(1)(ii) (2003)).

243. *Id. See* 8 C.F.R. § 1003.1(d)(1)(ii) (2019) ("Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board . . . .").

244. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1670.

245. As Catherine Kim writes, in remarks during the EOIR's Legal Training Program, Sessions 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 must "conduct designated proceedings 'subject to such supervision and shall perform such duties as the Attorney General shall prescribe.'" Kim, *supra* note 30, at 22 (quoting Jefferson Sessions, U.S. Attorney Gen., Remarks to the Executive Office for Immigration Review Legal Training Program in Washington, D.C. (June 11, 2018)).

246. *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 496 (2007) (citing Press Release, U.S. Dep't. of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html [https://perma.cc/EBU4-HZ85]).

"performance."[247] Legomsky writes that the combined effect of the reassignments of Board members, adjusted "independence" regulations, and performance evaluations "remind surviving and future BIA members and immigration judges that they hold their jobs at the discretion of one of the opposing parties in the cases that come before them."[248] Regardless of how much faith one might have in a current Attorney General to not malevolently use reassignments and bad performance evaluations against an individual adjudicator, he writes, "adjudicators can never again feel confident ruling against the government in close, controversial, or high-visibility cases."[249]

Another affront to immigration judges' decisional independence came with "case completion goals," which the DOJ formally implemented in 2002.[250] Although the scheduling of a case does not, at first glance, appear to seriously constrain a judge's independence, time limits tend to favor the government[251] because it can take time to both become eligible for relief from removal (since a petition can be pending with a different agency such as the U.S. Citizenship and Immigration Services) and develop positive discretionary factors.[252] For detainees, the set case completion goal of ninety days[253] can present a roadblock to getting an attorney, obtaining corroborating documents, and providing expert testimony, all of which are key to helping the detainee

247. *Id.* (citing Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,675 (Sept. 20, 2007) (to be codified at 8 C.F.R. pts. 1003, 1240)).

248. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1671.

249. *Id.* at 1677.

250. As a result of requirements imposed by the Government Performance and Results Act of 1993, the Department of Justice had to quantify achievements and accountability. The DOJ chose to establish "adjudication priorities" for the Immigration Court and elected to measure its success by evaluating whether courts met these case-completion goals. Slavin & Marks, *supra* note 6, at 1787 n.13 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 20–21 (Aug. 2006)).

251. *See* Kim, *supra* note 30, at 32.

252. *See id.*

253. Memorandum from Michael J. Creppy, Chief Immigration Judge, EOIR, to all Immigration Judges et al., Case Completion Goals (Apr. 26, 2002), http://www.aila.org/infonet/ocij-describes-case-completion-goals [https://perma.cc/B3JD-TQ3E].

win.[254] Many have critiqued the DOJ's management of judges' caseloads as an example of DOJ's undue influence over judges.[255] Case completion goals were implemented by court and at first were not imposed on individual judges,[256] yet evidence demonstrated that individual judges felt the impact of these goals, citing them in decisions that denied continuances to noncitizens.[257] Although the EOIR publicly stated that case completion goals would not impact individual judges for failure to comply,[258] a 2008 study concerning immigration judge burnout revealed a common perception that these case goals were mandatory.[259] Immigration judges reported that the goals created a work environment where they are unable to adjudicate cases fairly and independently.[260]

Today, early critics of case completion goals have seen their fears play out. Former Attorney General Sessions referred to himself a case involving the authority to grant continuances, requiring judges to factor in both "administrative efficiency" (case completion goals) and DHS objections when deciding whether to grant continuances to noncitizens whose applications for relief are pending before different agencies.[261] In announcing this policy, he reversed portions of the Board's 2009 decision in *Matter of Hashmi* that specifically prohibited judges from citing to case

254. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 6–10 (2015) (presenting statistics from an empirical study that demonstrated that detainees were five times less likely to obtain representation than nondetained respondents, and without representation, were more likely to lose their cases and be deported).

255. *See, e.g.*, APPLESEED, *supra* note 6, at 1 ("The sharp increase in the number of cases in Immigration Courts over the past decade, without a corresponding increase in resources, lies at the root of many of these problems.").

256. *See* Slavin & Marks, *supra* note 6, at 1787.

257. *See id.* at 1788.

258. *See* Statement, *supra* note 6, at 7.

259. *See* Slavin & Marks, *supra* note 6, at 1787–88; *see also* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64–65 (2008) (quoting one immigration judge, who stated, "[w]hat is required to meet the case completions is quantity over quality").

260. Lustig et al., *supra* note 259, at 64–65; *see also* Slavin & Marks, *supra* note 6, at 1787 ("In the Immigration Court System, these 'goals' have become an undue and sometimes unseen pressure on an immigration judge's ability to render a thorough, well-reasoned decision.").

261. *See In re* L-A-B-R-, 27 I. & N. 405, 415–17 (A.G. 2018).

completion goals when deciding whether to continue a case,[262] which the Board decided after a reprimand from the Third Circuit Court of Appeals.[263] In a similar effort to speed up deportations without regard to pending applications for relief, Sessions directed immigration judges to no longer use the tool of administrative closure to take a case off a judge's docket while an application was pending before a different agency.[264]

More controversially, Sessions proposed individual production quotas on immigration judges, which would impact judges' performance evaluations if a judge failed to comply.[265] Under this metric, immigration judges would be required to complete 700 cases a year, have a remand rate by the Board or circuit court of under 15%, and meet at least half of a list of performance benchmarks related to completing certain types of cases within strict deadlines.[266] According to a statement of the President of the National Association of Immigration Judges before Congress in April 2018, this "unprecedented move . . . violates every tenet of an independent court and judges . . . ."[267] With these changes,

262. *Id.*

263. *See In re* Hashmi, 24 I. & N. 785, 793–94 (A.G. 2009) ("Compliance with an Immigration Judge's case completion goals . . . is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances."). The Immigration Judge in *Hashmi* had denied a motion to continue to a noncitizen who had an application pending before the U.S. Citizenship and Immigration Services. *Id.* at 786–87. When the Board originally upheld that denial, the Third Circuit, on appeal, held that the decision was "impermissibly arbitrary" because it relied on case completion goals, which the court stated "should not be read as an end in themselves but as a means to prompt and fair dispositions, giving due regard to the unique facts and circumstances of the case." Hashmi v. Att'y Gen., 531 F.3d 256, 261 (3d Cir. 2008).

264. *In re* Castro-Tum, 27 I. & N. 271, 281 (A.G. 2018), *abrogated by* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).

265. Memorandum from Jefferson B. Sessions, III, U.S. Attorney Gen., to Adjudicative Employees, EOIR Performance Plan (Mar. 30, 2018), http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf [https://perma.cc/6ACV-DPVU]. This memorandum was sent to immigration judges on March 30, 2018. *See* Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN POLITICS (Apr. 2, 2018, 8:55 PM), https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html [https://perma.cc/WHV6-9SRM].

266. *See* Sessions, *supra* note 265.

267. Statement, *supra* note 6, at 7; *see also* Betsy Woodruff, *New Quotas for Immigration Judges Are "Incredibly Concerning," Critics Warn*, DAILY BEAST (Apr. 2, 2018, 6:58 PM), https://www.thedailybeast.com/new-quotas-for

Sessions fulfilled one of the Trump administration's stated concerns of deterring illegal immigration to the U.S., since the DOJ publicly stated that the backlog in immigration proceedings is attributed to discretionary grants of removal, which "have slowed down the adjudication . . . and incentivized further illegal immigration . . . ."[268]

In 2008, concern over the political hiring of immigration judges caused a Congressional committee to examine these claims.[269] DOJ former liaison to the White House, Monica Goodling, testified before the U.S. House Judiciary Committee that, from 2004–2006 the DOJ and White House had appointed immigration judges based on their Republican Party affiliations or conservative political views, bypassing the usual procedures.[270] While these concerns righted themselves in response to this Congressional inquiry,[271] the concerns appear to have reemerged in the DOJ's recent hiring of immigration judges to clear up the 714,000 case backlog.[272] In this process, there have been allegations that candidates' applications were either stalled or rejected "based on their perceived political or ideological views."[273] The

-immigration-judges-are-a-recipe-for-disaster-critics-warn?ref=scroll [https://perma.cc/6UUQ-LQS3] ("Critics of the move say it will result in speedier deportations of asylum-seekers, robbing them of due process.").

268. Press Release, U.S. Dep't of Justice, Backgrounder on EOIR Strategic Caseload Reduction Plan (Dec. 6, 2017), https://www.justice.gov/opa/press-release/file/1016066/download [https://perma.cc/3HEA-F4A9].

269. *See* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) [hereinafter GOODLING POLITICIZED HIRING], https://oig.justice.gov/special/s0807/final.pdf [https://perma.cc/F9J3-QXE7].

270. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1665–66 (citing GOODLING POLITICIZED HIRING, *supra* note 269, at 70–71).

271. *See id.* at 1666 (discussing the Attorney General's 2007 new immigration judge appointment process in which EOIR would again play a dominant role).

272. Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, THE GUARDIAN (June 16, 2018, 6:59 PM), https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges [https://perma.cc/BX4L-QCCY].

273. *Id.*; *see also* Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her over Politics*, CNN POLITICS (June 21, 2018, 10:40 AM), https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html [https://perma.cc/Q3ZV-QTZV]; Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1689 ("The tawdry hiring practices that so badly tarnished

renewed allegations of political bias in hiring immigration judges has caused congressional Democrats to request more information from the DOJ.[274]

C. THE UNDERMINING OF IMMIGRATION JUDGE INDEPENDENCE IN BOND DECISIONS

This Section illustrates two examples of how the immigration bond system does not ensure a fair and neutral hearing, again undermining judges' independence. Thus, even though immigration judges often make individualized decisions about flight risk and dangerousness,[275] potentially releasing an immigration detainee for the remainder of removal proceedings, that decision can be unilaterally undone by a DHS prosecutor. As background, it is important to note that INS officials had long expressed disdain for immigration judges,[276] viewing them "as pushy intruders whose demands in the name of due process only obstruct the Service mission."[277] Not long after the EOIR's creation, the INS publicly expressed the desire to take bond decisions away from EOIR adjudicators.[278] The INS had become increasingly frustrated by judges reducing their bonds, and thus INS General Counsel announced at a conference for immigration lawyers that he desired to eliminate all immigration judge and

EOIR and other components of the Department of Justice have since been corrected, but without congressional action, nothing prevents future Justice Departments and White House officials from lapsing.").

274. *See* Letter from Elijah E. Cummings et al., Members of Cong., to Jeff Sessions, U.S. Attorney Gen., U.S. Dep't of Justice (Apr. 17, 2018).

275. By statutes and regulation, the following detainees have no right to a bond hearing: those removable for several types of crimes or terrorism; detainees who have arrived at a port of entry and have not been admitted; and detainees who already have been ordered removed. *See* 8 U.S.C. §§ 1225(b), 1226(c), 1231(a) (2012); 8 C.F.R. § 1003.19 (2019).

276. The district directors of INS delivered testimony before the Select Commission on Immigration and Refugee Policy, which proposed an Article I immigration court in its 1981 report. Fuchs, *supra* note 6, at 438–43 . In the opinion of a consultant to the Commission, the INS "view[ed] the present role of immigration judges negatively," asserting that immigration judges made "simple" hearings needlessly complex, and even referred to their robes as "the black nightgowns they frequently wear when conducting hearings." Levinson, *supra* note 6, at 646 & n.17 (citing Memorandum, Assoc. of Immigration Dirs.' Conference with Comm'r Castillo (Dec. 14, 1977)).

277. Roberts, *supra* note 6, at 8–9.

278. Janet Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347, 395 (1987).

Board review of INS bond decisions.[279] In a white paper to the INS regarding its detention strategies in 1997, Peter Schuck noted these disparities between INS and immigration judge bonds, and recommended that the Deputy Attorney "adopt . . . policies designed to better coordinate bonding decisions and to impose departmental priorities and policies on EOIR as well as the INS."[280]

A 2001 interim regulation expanded the DHS's authority to unilaterally override an immigration judge's release order by filing a piece of paper indicating the intent to appeal such decision.[281] First adopted in 1998, the "automatic stay" was created as an override to an immigration judge's release of a noncitizen who was subject to laws that required either presumptive or mandatory detention because they were deportable for certain criminal convictions.[282] Attorney General John Ashcroft expanded this authority in 2001 in an interim regulation, which he passed quickly without comment in the wake of the September 11, 2001 terrorist attacks.[283] The INS trial attorney could invoke this authority in any case where the INS in its original custody determination set no bond or a minimum bond of $10,000.[284] No longer was the authority limited to those who, because of a criminal conviction, were deemed presumptively dangerous by the agency.[285] Thus the INS could essentially determine the outcome of a bond hearing before an immigration judge by setting an initial bond of at least $10,000 or no bond, allowing its prosecutors to later invoke the automatic stay and hold someone in detention regardless of the IJ's ruling.[286]

279. *See id.*

280. Schuck, *supra* note 99, at 683–84.

281. 8 C.F.R. §§ 1003.6(c), .19(i)(2), (2019).

282. Procedures for the Detention and Release of Criminal Aliens and for Custody Redeterminations, 63 Fed. Reg. 27,441 (May 19, 1998) (to be codified at 8 C.F.R. pts. 3, 236). For a comprehensive review of the history of the mandatory detention statutes, see Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES (David A. Martin & Peter H. Schuck, eds., 2005).

283. Review of Custody Determinations, 66 Fed. Reg. 54,909 (Oct. 31, 2001) (to be codified at 8 C.F.R. pt. 3).

284. *Id.* at 54,910.

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

286. *See* Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122, at *1–2 (N.D. Cal. June 17, 2005) (holding that the regulation "impermissibly merges

The final rule was issued in 2006 after a notice-and-comment period, in which modest changes were made to the final rule, none of which addressed concerns over IJ independence.[287] Responding to comments that the automatic stay undermined

the functions of adjudicator and prosecutor" and that it is "*ultra vires*" as it "eliminates the discretionary authority of immigration judges to determine whether an individual may be released, thereby exceeding the authority bestowed"); Ashley v. Ridge, 288 F. Supp. 2d 662, 671 (D.N.J. 2003) (quoting Cole, *supra* note 118, at 1031 (reasoning that the automatic stay "produces a patently unfair situation by tak[ing] the stay decision out of the hands of the judges altogether and giv[ing] it to the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified")). Some habeas courts found most problematic the creation of a new class of mandatory detention by allowing such an override of the judge's discretionary release decision. *See, e.g.*, Zavala v. Ridge, 310 F. Supp. 2d 1071, 1079 (N.D. Cal. 2004) ("The regulation . . . has the effect of mandatory detention of a new class of aliens, although Congress has specified that such individuals are not subject to mandatory detention."); Almonte-Vargas v. Elwood, No. CIV.A. 02-CV-2666, 2002 WL 1471555, at *4 (E.D. Pa. June 28, 2002) (describing the automatic stay as "accomplishing Petitioner's mandatory detention" by allowing the trial attorney to override the judge's release order). One court found the regulations to be unlawful because there was no time limitation on the length of detention pursuant to the stay authority. *See* Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 450 (D. Conn. 2003).

287. The final rule set a time limit on the duration of the automatic stay, providing that it would expire in ninety days if the Board did not decide the appeal of the bond decision. Review of Custody Determinations, 71 Fed. Reg. 57,873, 57,874 (Oct. 2, 2006) (to be codified at 8 C.F.R. pts. 1003.6(c), .19(i)(2)). However, as Raha Jorjani has observed, the "'90-day limit' of the new regulations can be dangerously deceptive," as DHS can then seek a discretionary stay (a procedure that is less one-sided in that the detainee has had the opportunity to argue in support of release), continuing detention for up to thirty days, and the stay can remain in effect for an additional five and up to fifteen days should DHS seek Attorney General review (plus tolling of the time limits should the noncitizen need more time for briefing). Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 106–07 (2010). The final rule also requires that a supervisory DHS officer sign off on the automatic stay filing, and that DHS certify that there is factual and legal support for its position. Review of Custody Determinations, 71 Fed. Reg. at 57,874; *see also* Jorjani, *supra*, at 104–05 (arguing that the final rule did not adequately address early courts' rulings, such as in *Zabadi*, 2005 WL 1514122, at *2, and *Zavala*, 310 F. Supp. at 1078, because "the regulations are tantamount to permitting DHS to adjudicate the identical legal issue that it is prosecuting before an independent authority" because "the regulations require only that DHS approve its own legal strategy"); *id.* at 106 (noting that in order for there to be factual and legal support, the regulation permits DHS to rely on legal arguments that are contrary to binding precedent, which "permits DHS to detain immigrants without bond by relying on principles that have been previously rejected by courts").

the IJ's independence, the EOIR characterizes immigration judges and immigration prosecutors (who at that point were housed within DHS) as all acting together, carrying out the Attorney General's "broad authority" to detain and release a noncitizen on bond pending a decision to deport.[288] And, as a reminder of the history of comingled functions, the EOIR cited to the Supreme Court's holding in *Marcello v. Bonds* that permitted the combination of adjudicative and investigative roles in the former INS.[289]

288. Review of Custody Determinations, 71 Fed. Reg. at 57,877 ("Under longstanding provisions of the Immigration and Nationality Act, the Attorney General has had broad detention authority . . . . Now, after enactment of the HAS, the Secretary of Homeland Security exercises that discretion in carrying out the detention and enforcement authority formerly administered by the INS, and the Attorney General and his delegates (the Board and the immigration judges) exercise that discretion in the review of the custody decisions initially made by DHS."); *see also id*. at 57,879 ("[T]he INA places no restrictions on the Attorney General's or the Secretary [of DHS]'s discretion to prescribe procedures for the adjudication of bond requests by aliens during removal proceedings, and agencies are generally afforded great latitude in organizing themselves internally and in developing procedures for carrying out their responsibilities.").

289. *Id.* at 57,880 (citing Marcello v. Bonds, 349 U.S. 301, 311 (1955)). Once the final regulation went into effect, which set a time limit of ninety days on the duration of detention under the automatic stay, many habeas courts were not able to reach a decision on the legal challenge because the Board had already exercised its discretionary stay authority. *See, e.g.*, Altayar v. Lynch, No. CV1602479PHXGMSJZB, 2016 WL 7383340, at *4–6 (D. Ariz. Nov. 23, 2016) (holding that the automatic stay had converted to discretionary stay by the time of decision, and discretionary stay authority did not violate due process because of opportunity for each party to brief issues). Of those courts that reached the issue, however, the views of the respective role of judges and prosecutors in bond hearings differed from the views held by earlier courts. For example, a federal district court in the Eastern District of Wisconsin critiqued other courts' holdings that the automatic stay provision was unconstitutional, characterizing such courts' decisions as "based on a misunderstanding of the relationship between DHS, the IJs, and the BIA, and their respective roles in exercising the authority of the Attorney General to make custody determinations in cases involving the removal of aliens." Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1032 (E.D. Wis. 2007). On appeal to the Seventh Circuit, the issue concerning the constitutionality of the alien's detention had become moot. Hussain v. Mukasey, 510 F.3d 739, 742–43 (7th Cir. 2007); *see also Altayar*, 2016 WL 7383340, at *4 (reasoning in dicta that the automatic stay did not violate due process, and reasoning that "a stay of some length is afforded precisely because it allows the Government an opportunity to appeal before a detainee might flee").

Scholars have critiqued the automatic stay as an attack on immigration judges' independence.[290] Immigration Judge Dana Leigh Marks describes the automatic stay regulation as "th[e] improper ability by one party virtually to guarantee its desired outcome in bond proceedings," which is part of a larger "trend favoring enforcement priorities."[291] As Judge Marks notes, "With one party retaining such a great legal advantage, it is understandable that the public finds the current arrangement to be mere window-dressing and doubts the impartiality of the Immigration Courts."[292]

A second affront to immigration judges' independence in bond decisions is the statutory authority that DHS has to rearrest a noncitizen, even after a prior release by an immigration judge, without justifying the rearrest to an immigration judge.[293] The statute and implementing regulation do not, on their face, require DHS to prove any changed circumstances prior to a rearrest.[294] The breadth of the language suggests that as soon as a noncitizen has won a bond hearing and been released, DHS may detain that person for any reason whatsoever, thus undermining the bond hearing before the supposedly neutral immigration judge. What is more, DHS need not even go through the steps of filing the automatic stay in the requisite time period, or seeking a discretionary stay, or writing an appeal to the Board. The authority certainly rewards the DHS attorney who has missed a deadline, either the one business-day deadline for the automatic

290. *See* Cole, *supra* note 118, at 1031 ("[T]he regulation takes the stay decision out of the hands of the judges altogether . . . ."); Jorjani, *supra* note 287, at 100 (noting, for instance, that "a release order cannot be executed until the BIA has made a final decision on the custody appeal, despite an individualized determination by the Immigration Judge . . . .").

291. Leigh Marks, *An Urgent Priority*, *supra* note 6, at 12.

292. *Id.*

293. *See* 8 U.S.C. § 1226(b) (2012) ("The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.").

294. *Id.*; 8 C.F.R. § 236.1(c)(9) (2019) ("When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.").

stay or the thirty-day deadline for a typical appeal,[295] or who does not feel like writing a brief to the Board arguing against the IJ's release decision.[296]

The earliest example of the rearrest authority appears to be for those whose orders of deportation could not be effectuated because, due to World War I, borders had shifted, rendering many people stateless.[297] The statute required their deportation on the vessels that brought them.[298] Recognizing that is was unrealistic to effectuate all deportations pursuant to the statute, the implementing rules permitted release if "prompt deportation cannot be accomplished because of war or other conditions."[299] Upon receiving permission from the immigration agency, a deportable noncitizen could be released and permitted to accept self-supporting employment under conditions set forth in the rules.[300] The rules required employers to set out a scheme of work for the detainee and to pay a portion of the wages to the immigration service as security against absconding.[301] The detainee could be taken back into custody if the work finished and there was no more, if he violated conditions of release, misbehaved, or failed to obey the laws, whether federal or state.[302] According to Daniel Wilshire, who has chronicled the history of U.S. immigration detention,

> They were subject to extraordinary controls and powers of re-arrest not linked to the possibility of deportation or criminal charges. They were "reauthorized" [having become "unauthorized" by virtue of their deportation orders], but remained virtually at the mercy of the executive in ways that would be unconstitutional if applied to lawful residents or citizens.[303]

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295. *See* 8 C.F.R. § 1003.19(i).

296. *Id.*

297. DANIEL WILSHIRE, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 32 (2012).

298. The Immigration Act of 1917 stated that, "all aliens brought to this country in violation of the law shall be immediately sent back . . . to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Secretary of Labor immediate deportation is not practicable or proper." *Id.* at 32 (citing Immigration Act of 1917, Pub. L. No. 64-301, § 18, 39 Stat. 874, 887–89 (repealed 1952)).

299. *Id.* (citing Immigration Laws (Act of February 9, 1917) – Rules of May 1, 1917, Rule 17A(1)).

300. *Id.*

301. *Id.*

302. *Id.* (citing Rules 17A(2)–(3), (5)).

303. *Id.*

The rearrest authority later appeared in the statute governing detention pending deportation proceedings, where the detainee's right to be in the U.S. had not yet been extinguished.[304] Since the earliest challenges, courts have found that such rearrest must pass review for abuse of discretion, suggesting that immigration officials can only rearrest based on new evidence.[305] Yet, Congress subsequently took away federal courts' jurisdiction to review the exercise of discretion in bond decisions,[306] leaving even that limitation on the rearrest authority open to abuse without oversight by the judiciary. The Board also examined the rearrest authority in the 1981 case *Matter of Sugay*.[307] There the original bond amount of $50,000 was reduced by the IJ to

304. *See, e.g.*, Immigration and Nationality Act of 1952, Pub. L. 82-414, § 242(a), 66 Stat. 163, 209 ("But such bond or parole, whether heretofore or hereafter authorized, may be resolved at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.").

305. For example, in *Carlson v. Landon*, one of the noncitizens arrested for deportation argued that his rearrest pursuant to the new Internal Security Act of 1950, after his previous release under bond on the same warrant, with no proof of changed circumstances, was an abuse of the Attorney General's discretion. 342 U.S. 524, 534 (1952). The Court held that "[a]lthough in a civil proceeding for deportation the same branch of government issues and executes the warrant, we think the better practice is to require in those cases also a new warrant." *Id.* at 546. The Ninth Circuit, interpreting *Carlson*, permitted the rearrest of a noncitizen under the 1952 statutory authority to not be an abuse of the Attorney General's discretion when the noncitizen engaged in "continued and undenied" communist activity in the period before he was retaken into custody. Ocon v. Landon, 218 F.2d 320, 326 (9th Cir. 1954). Similarly, the D.C. Circuit prohibited a noncitizen's rearrest unless there were "adequate reasons for making the arrest"; the court reasoned that "[n]either appellant's criminal record nor his unpopularity justifies imprisoning him." Rubinstein v. Brownell, 206 F.2d 449, 456 (D.C. Cir. 1953). The Second Circuit interpreted the rearrest authority and held, "[W]e cannot construe the statute to give the Attorney General unbridled license to exercise his discretion as to detention in whatever arbitrary or capricious way he might see fit, provided only that he act with reasonable dispatch to obtain a decision as to the alien's deportability." United States *ex rel.* Yaris v. Esperdy, 202 F.2d 109, 111–12 (2d Cir. 1953).

306. 8 U.S.C. § 1226(e) (2012).

307. Sugay, 17 I. & N. 637, 639 (BIA 1981) (quoting 8 C.F.R. § 242.2(c) (1980)) ("When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director . . . , in which event the alien may be taken into physical custody and detained.").

$20,000; after the noncitizen's applications for relief were denied, the INS District Director elected to revoke the IJ's $20,000 bond and set a $30,000 bond. Responding to a challenge that the regulation "undermine[d] the impartial and independent decision of the immigration judge,"[308] the Board responded that the noncitizen always has recourse to appeal the new custody decision by INS to the immigration judge, and then to the Board.[309] Also, the Board directed that "no change should be made by a District Director absent a change of circumstances."[310]

Although *Matter of Sugay* is a restraint on DHS's otherwise extremely broad authority to rearrest,[311] it does not go far enough to protect immigration judges' independence in deciding bond. There is no requirement that DHS must promptly prove the changed circumstances to a judge; thus, a noncitizen could suffer a significant amount of detention until the government must justify the change in circumstances to override the prior release order. Currently, a district court order protects the nation-wide class of unaccompanied minors who are rearrested by mandating that DHS prove changed circumstances within seven days of rearrest;[312] however, there is no comparable case extending that requirement to immigration detainees who are over the age of eighteen.[313] What is more, the regulations governing bond hearings require that if a *detainee* loses a bond hearing and then

308. *Id.* at 639.

309. *Id.* at 639–40.

310. *Id.* at 640. In the case, the Board found that there was a sufficient change of circumstances, namely: (1) new evidence, which included a certified conviction record for murder in the Philippines (at the first bond hearing, the government had presented this fact, but their records were not certified or authenticated); and (2) that the noncitizen had been denied relief and ordered deported by the IJ. *Id.* at 638.

311. *Id.*

312. Saravia v. Sessions, 280 F. Supp. 3d, 1168, 1195–96 (N.D. Cal. 2017) (ordering government to prove changed circumstances for unaccompanied minors who were released from the custody of the Office of Refugee Resettlement to sponsors and then later, upon DHS' belief that the minors were gang-involved, were placed back into government custody based on a finding of dangerousness, without justifying such redetention to a judge), *aff'd*, 905 F.3d 1137 (9th Cir. 2018).

313. Anyone over the age of eighteen is subject to adult detention, governed by 8 U.S.C. § 1226 (2012) (unlike the detention of unaccompanied minors, which is governed by 8 U.S.C. § 1232). *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074–82.

seeks another bond hearing because of changed circumstances, he must file a request in writing; this regulation also requires that the detainee show a "material" change in circumstances.[314] Advocates representing noncitizens in bond hearings might wonder why they do not have similar authority as DHS, allowing them to unilaterally release their clients if they can prove to themselves that there is a change in circumstances. Such a suggestion seems absurd, and yet it is just the flipside of the authority that DHS has to unilaterally overrule a supposedly "neutral" immigration judge decision.

D. IMMIGRATION DETENTION AS "DIFFERENT" FROM OTHER ADMINISTRATIVE LAW

In the wake of the 2002 Homeland Security Act, Former INS General Counsel David Martin defended the Attorney General's supervision of immigration adjudicators.[315] He argued that immigration "may implicate particularly sensitive foreign policy dealings or law enforcement decisions," so that "immigration policy may have to adapt quickly in response to events. . . . For these reasons, . . . all relevant decisions where law is interpreted and policy set, including adjudications, should ultimately be under the authority of a Cabinet official, who has wider horizons and more immediate political accountability than the usual independent tribunal."[316] From a management perspective, he hypothesizes a situation where a massive influx of migrants come to the border; in this situation the Attorney General could deploy not only enforcement officers but also immigration judges.[317]

Martin's concern for foreign policy is an example of what Peter Schuck calls "classical immigration law,"[318] which "sanctioned a system of adjudication in which the hierarchy of legitimate legal succession is completely reversed. Here, where sovereignty confronts strangers, the Constitution can be subor-

314. 8 C.F.R. § 1003.19(e) (2019).

315. David A. Martin, *Immigration Policy and the Homeland Security Reauthorization Act: An Early Agenda for Practical Improvements*, INSIGHT Apr. 2003, at 18.

316. *Id.*

317. *Id.*

318. Schuck, *supra* note 124, at 5–34.

dinated to a congressional statute, indeed, to mere administrative practice."[319] Martin's defense of the current immigration adjudication structure views immigration decisions as only implicating foreign policy concerns when, in fact, immigration enforcement involves the lives of individual people who have individual rights under the Constitution, especially when the government takes away their physical liberty.[320] Questions of physical liberty have historically been viewed by common law courts as deserving of special concern, and separate from national security questions.[321]

Martin's defense of the current structure also does not account for the ways in which courts have failed to treat questions of physical liberty in the immigration context as run-of-the-mill administrative law decisions, which normally would deserve deference under the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[322] Alina Das and Michael Kagan both note various examples where courts have applied this "liberty" exception to *Chevron* deference, albeit without courts explicitly acknowledging the creation of such an exception.[323] The "physical liberty" exception is one of a growing number of "immigration" exceptions to *Chevron* deference for which scholars are advocating.[324]

319. *Id.* at 33–34.

320. *See supra* Part I.

321. *See* Daniel Wilsher, *Whither the Presumption of Liberty? Constitutional Law and Immigration Detention*, *in* CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS 66, 72–78 (Michael J. Flynn & Matthew B. Flynn eds., 2017).

322. 467 U.S. 837 (1984).

323. *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 154–58, 177–80, 188–99 (2015); Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 533–35 (2019).

324. *See, e.g.*, Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 330 (2017) (arguing that *Chevron* deference should not apply when the statutory interpretation question involves deportation for a criminal conviction); Michael Kagan, Chevron*'s Immigration Exception, Revisited*, YALE J. ON REG.: NOTICE & COMMENT (June 10, 2016), http://yalejreg.com/nc/chevron-s-immigration-exception-revisited-by-michael-kagan/ [https://perma.cc/4PXC-8TW5]; Michael Kagan, *Does* Chevron *Have an Immigration Exception?*, YALE J. ON REG: NOTICE & COMMENT (May 19, 2016), http://yalejreg.com/nc/does-chevron-have-an-immigration-exception-by-michael-kagan/ [https://perma.cc/454C-QSHU]; *see also* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond*

As this Part has explained, the immigration system has long lacked a truly neutral judge; even when an immigration judge decides to release a detainee during removal proceedings, that judge does not exercise complete independence. The Trump administration has made every effort to undermine immigration judges' independence, leading some judges to retire in protest.[325] The system thus regularly violates noncitizens' Fourth Amendment rights because there is no neutral judge authorizing their detention during removal proceedings.

III. PROPOSED SOLUTION

In this Article, I propose that a federal magistrate judge promptly review all immigration arrests by ensuring that there is probable cause to remove the person in order to continue pretrial detention. Parts I and II have outlined why immigration detainees possess such rights and why immigration judge review does not suffice to protect these important Fourth Amendment rights. This Part considers several additional questions about whether such a proposal is truly warranted, realistic, and sufficient to address the identified legal problems.

First, does the system already provide for Article III judge review, in that a detainee can bring a habeas corpus petition in federal district court?[326] Vindicating the widespread Fourth Amendment violations described in this Article through individual habeas corpus petitions is a near-impossible task. To begin, it may be strategically unwise for an immigration detainee to raise the immigration judge's lack of neutrality before the federal court since the detainee risks offending the judge who may later be deciding discretionary relief in immigration court. Also, an individual habeas corpus petition is time-consuming, and de-

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Chevron, 60 DUKE L.J. 1059 (2011) (questioning the role of *Chevron* deference in asylum cases, where legal standards are governed by international treaty obligations).

325. *See* Aleaziz, *supra* note 34 ("The timing of my retirement was a direct result of the draconian policies of the Administration, the relegation of [judges] to the status of 'action officers' who deport as many people as possible as soon as possible with only token due process . . . ." (alteration in original) (quoting former immigration judge John Richardson)).

326. *See* 28 U.S.C. § 2241 (2012). In such situations, all parties can consent to a magistrate conducting the proceeding, which is a civil proceeding. *See* 28 U.S.C. § 636(c)(1).

tainees rarely have court-appointed counsel for such a legal battle.[327] For those who are fortunate enough to have counsel in the deportation case, that attorney may choose not to spend time litigating the habeas challenge when the client now faces an expedited hearing on the merits of the deportation case.[328] Hours spent preparing a habeas petition are frequently wasted, as federal district courts may not reach a decision on the merits of the detention while the detainee is still fighting the deportation case.[329] An amicus curiae brief filed in a habeas appeal[330] presented statistics from the District of Massachusetts that showed an average of 130 days to resolve a habeas petition with some averaging 408 days; this length of time operates to moot many petitions.[331]

327. *See* Holper, *supra* note 15, at 969.

328. *See id.* at 965–69.

329. *E.g.*, Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007). For example, several habeas corpus cases challenging the automatic stay regulation have been dismissed as moot, because the authority for the detention transferred before the habeas court could reach resolution of the issue. *See supra* Part II.C. Some cases are dismissed because an appeal challenging the detainee's custody is still before the Board, which has jurisdiction to consider statutory challenges and discretionary decisions regarding bond in an interlocutory appeal. 8 C.F.R. § 1003.19(f) (2019). Although exhaustion of administrative remedies is not statutorily required, habeas courts cite the doctrine of prudential exhaustion to dismiss habeas petitions where legal challenges to detention are before the Board. *See, e.g.*, Maldonado-Velasquez v. Moniz, Case No. 1:16-cv-11890-RGS (D. Mass. Nov. 8, 2016). *But see* Figueroa v. McDonald, No. 18-10097-PBS, 2018 WL 2209217, at *3 (D. Mass. May 14, 2018) (holding that appeal to the BIA of improper burden allocation would be futile because the Board already had decided the issue in a published case and that the Board does not have jurisdiction to decide constitutional issues and therefore any constitutional claims need not be exhausted).

330. Brief of Amicus Curiae Am. Immigration Lawyers Ass'n in Support of Appellant & Reversal, Maldonado-Velasquez v. Moniz, No. 17-1918 (1st Cir. Mar. 22, 2018). In a case challenging the unlawful burden allocation that a detainee must bear in his immigration bond hearing, the American Immigration Lawyers Association submitted an amicus brief to encourage the court to reach the burden allocation argument, *id.* at 15, even though the District Court had not reached the issue because it decided the detainee was not prejudiced by the burden allocation. *Maldonado-Velasquez*, No. 17-1918, at 1.

331. *See Maldonado-Velasquez*, No. 17-1918, at 1–2 (dismissing a detention challenge because it became moot by virtue of the detainee receiving a final order of removal from the Board of Immigration Appeals).

Challenging unlawful immigration detention practices through class actions presents its own set of challenges.[332] Although litigating on behalf of a class can address the mootness concerns, Congress in 1996 sought to severely limit the use of immigration class actions.[333] When class action litigators presented convincing arguments to bypass such perceived bars to class action litigation,[334] the Supreme Court in 2018 asked the lower court to decide whether a class was the best way to decide a due process challenge to prolonged detention during deportation proceedings.[335]

Second, there is a practical concern that with the number of immigration arrests increasingly growing (158,581 in fiscal year 2018),[336] magistrate judges will not be able to keep up with the demand. Magistrate judges' time is already taken up by the prioritization of criminal cases, which must be given priority because of the time requirements of the Speedy Trial Act.[337] Yet, this is a question of funding for the judicial branch of government; should more magistrate judges be required, more funding

332. *See, e.g.*, Chacón, *supra* note 230, at 1631 (discussing court ruling barring class actions of patterns or practices of due process violations, which "threaten[s] one of the most effective means noncitizens have to challenge illegalities in immigration law and procedures" (citing Aguilar v. ICE, 510 F.3d 1 (1st Cir. 2007))).

333. 8 U.S.C. § 1252(f)(1) (1996) ("Regardless of the nature of the action or the claim or the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–31], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.").

334. *See, e.g.*, Rodriguez v. Hayes, 591 F.3d 1105, 1119–20 (9th Cir. 2010). The Ninth Circuit in *Rodriguez* reasoned that 8 U.S.C. § 1252(f)(1) did not bar class-wide relief because: (1) this statutory provision only barred temporary injunctions, not permanent injunctions or declaratory relief; and (2) "1252(f) prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes." *Id.* (quoting 8 U.S.C. § 1252(f)).

335. Jennings v. Rodriguez, 138 S. Ct. 830, 851–52 (2018).

336. U.S. IMMIGRATIONS & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/RVR4-75PE].

337. *See* Peter G. McCabe, *A Guide to the Federal Magistrate System*, FED. BAR ASS'N 43–45 (Aug. 2014), http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System [https://perma.cc/55HG-E7H4] (last updated Oct. 2016).

can be appropriated for that purpose.[338] Also, the concern of overburdening federal magistrates with authorizing needless detentions may be a reason for ICE to more carefully choose which persons it chooses to detain for removal proceedings, instead of assuming that all noncitizens are presumptively flight risks or dangerous.[339] Placing a "Fourth Amendment logjam" on ICE's detention machine does not, after all, interfere with ICE's ability to investigate and deport persons they believe to be in violation of the immigration laws.[340] To the extent that ICE believes a "Fourth Amendment logjam" will cause many persons who have "no right to be here" to be free within the United States, that very question—whether someone has the right to be in the United States—is precisely the question that should be determined by a neutral judge before extended pretrial detention can occur.

Third, is magistrate judge review for probable cause sufficient, as they are not Article III judges? In the federal criminal system, magistrate judges regularly review whether there is probable cause to continue pretrial detention when police have arrested someone without probable cause; they also regularly issue arrest warrants.[341] Magistrate judges are assigned duties by Article III district court judges; the jurisdiction they exercise is that of the District Court itself, as they are not an administrative agency or separate Article I court.[342] Indeed, the Supreme Court in *Gerstein* anticipated review for probable cause by a "neutral

338. *See id.* at 14 (noting the "slow but steady increase in the number of full-time [magistrate judge] positions over the years" was "partly the result of increased district court caseloads, but due also to the increasing delegation of a broad range of additional judicial duties by the district courts"). *But see id.* (discussing the perilous "financial state of the federal judiciary – resulting from several years of inadequate appropriations and the damaging effects of Congressional sequesters").

339. *See* Mark Noferi, *Mandatory Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, *in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS 215, 227–32 (Maria João Guia et al. eds., 2016).

340. *See, e.g.*, Morales v. Chadbourne, 793 F.3d 208, 218 (1st Cir. 2015) (reasoning that ICE officials can go about their work determining whether someone has violated the immigration laws; they must, however, let the person out of jail while they undertake such investigation if they have not proven probable cause to detain).

341. *See* McCabe, *supra* note 337, at 23, 26–27.

342. *See id.* at 2.

and detached magistrate"[343] to fulfill a criminal defendant's Fourth Amendment rights.

Fourth, one could argue that questions of removability are best left to the expert immigration judges, not federal magistrate judges. Yet, a closer look reveals that federal magistrate judges do in fact handle questions of removability. As prosecutions for illegal entry and reentry have become increasingly more common,[344] federal judges no doubt are familiar with immigration law and what constitutes presence in violation of the law.[345] Magistrate judges, although not trying cases of reentry, which is a felony,[346] regularly issue arrest warrants based on probable cause[347] that a person who has been ordered removed is found in the U.S. or authorizing continued detention.[348]

Magistrate judges certainly have more expertise in what is "probable cause," because that term does not exist in the immigration statute and regulations. Although certain immigration-specific terms like "reason to believe"[349] have been interpreted to be the rough equivalent of probable cause,[350] it is not a typical immigration term of art. In contrast, a federal magistrate who reviews warrants would be very familiar with the concept of probable cause.[351]

As for questions that arise from removability based on criminal convictions, it should be noted that the same analysis for removability based on a criminal conviction applies when a federal court applies a variety of sentencing provisions that rely on

343. Gerstein v. Pugh, 420 U.S. 103, 112–13 (1975).

344. *Immigration Prosecutions for February 2018*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Mar. 26, 2018), https://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb18/fil/ [https://perma.cc/66QQ-ANDH].

345. *See* 8 U.S.C. § 1325(a) (2012) (prohibiting unlawful entry to the U.S.); *id.* § 1326(a) (prohibiting unlawful reentry to the U.S. or be found in the U.S. after having been deported, ordered removed, or denied admission).

346. *See* McCabe, *supra* note 337, at 59.

347. *See id.* at 23; *see also* FED. R. CRIM. P. 4(a), 5.

348. *See* 8 U.S.C. § 1326(a).

349. *E.g.*, 8 U.S.C. § 1182(a)(2)(C) (prohibiting an alien who is inadmissible because the consular officer or the Attorney General has "reason to believe" is a drug trafficker from obtaining a visa or eligibility to be admitted to the U.S.).

350. Alexa C. McDonnell, *Reason To Believe: Satisfying the Standard of Proof of Section 212(a)(2)(C)(i)*, IMMIGR. L. ADVISOR, May–June 2011, at 6, 10, https://www.justice.gov/sites/default/files/eoir/legacy/2011/07/06/vol5no5.pdf [https://perma.cc/W7LW-ACKR].

351. *See* McCabe, *supra* note 337, at 23.

prior convictions for certain categories of offenses.[352] Although district courts, not magistrate judges, apply this analysis in felony sentencing,[353] many magistrate judges later become district court judges.[354] Thus, magistrate judges could benefit from the practice of applying the categorical approach when the issue to be determined is whether there is probable cause that someone is removable for a criminal conviction. Magistrate judges also may assess the strength of a particular detainee's arguments against removal in the context of deciding an immigration habeas corpus petition.[355]

Fifth, there are proposals that could provide the requisite neutrality of immigration adjudicators without involving federal magistrate judges. For example, others have proposed an Article I court, or an independent agency within the DOJ, staffed by Administrative Law Judges (ALJ).[356] As other scholars have noted,

352. *See, e.g.*, Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 269 (2012).

353. *See* McCabe, *supra* note 337, at 29.

354. *Id.* at 16 ("[M]any magistrate judges have been rewarded by eventual promotion to an Article III judgeship.").

355. *See, e.g.*, Muse v. Sessions, No. 18-CV-0054 (PJS/LIB), 2018 WL 4466052, at *3–6 (D. Minn. Sept. 18, 2018) (applying multi-factor test for whether mandatory detention without bond hearing violates due process and, as part of the test, assessing the likelihood that the removal proceedings will result in a final order of removal); Sajous v. Decker, No. 18-CV-2446 (AJN), 2018 WL 2357266, at *10–11 (S.D.N.Y. May 23, 2018) (applying multi-factor test for whether mandatory detention without a bond hearing violates due process and, as part of the test, assessing any arguments detainee has made against removal).

356. *See supra* note 6 and accompanying text. Following the INA, congressional committees, scholars, the private bar, and immigration judges have called for more independence in the immigration adjudication system. *See supra* note 6 and accompanying text. In 1981, a Select Commission on Immigration and Refugee Policy wrote a report with 100 recommendations for President Reagan; one of the changes recommended was the creation of an Article I Immigration Court to "upgrade the entire process of adjudication in exclusion and deportation cases." Fuchs, *supra* note 6, at 438, 443. The National Association of Immigration Judges also has called for Congress to create an Article I court, citing the Tax Court as a successful example of impartial adjudication. *See, e.g.*, Leigh Marks, *An Urgent Priority*, *supra* note 6, at 15. Immigration scholar and former Chief Counsel to the U.S. Citizenship and Immigration Services Stephen Legomsky proposed the conversion of immigration judges into administrative law judges (ALJs), and moving them from the Department of Justice to a new, independent executive branch tribunal; he explained the contours of this system

however, neither ALJ review nor the creation of Article I courts has provided the anticipated decisional independence of the adjudicators.[357] Also, an independent executive branch agency would need to jockey for funds from Congress each year; this is easier when their decisions involve politically popular causes

as well as its advantages and disadvantages in a 2010 article. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 6, at 1710–14, 1721. The American Bar Association (ABA) in 2010 completed a lengthy report on the immigration adjudication system, reviewing extensive literature on the topic and interviewing scholars, judges, and practitioners. *See* AM. BAR ASS'N, *supra* note 6. The ABA considered three possible models: an Article I court, an independent agency within the Executive Branch, and a hybrid model. *Id.* at 6–9. The ABA recommended an Article I court as the preferred option among the three because it would be a wholly judicial body, likely "to engender the greatest level of confidence in its results, [could] use its greater prestige to attract the best candidates for judgeships, and offers the best balance between independence and accountability to the political branches." *Id.* at 6–35. As a second choice, the ABA recommended the independent agency model, which "would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President." *Id.* at 6–36.

357. *E.g.*, Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 29 U. KAN. L. REV. 541, 549–50, 550 n.54 (2011); Taylor, *supra* note 246, at 485. Jill Family critiques the Article I model for reforming the immigration system, citing the congressional decision to create an independent Article I court for the adjudication of veterans' benefits, which did not provide the anticipated panacea of decisional independence. Family, *supra* at 549–50. She also cites several law review articles that critique the pro-government bias by the Tax Court, which is another example of an agency created as an independent tribunal, to illustrate that creating an independent tribunal does not always create completely independent adjudicators. *Id.* at 550 n.54. Similarly, Margaret Taylor, recognizing the many calls for an independent immigration agency, responded with the example of the social security disability benefits system, which saw a similar transformation that did not provide the full decisional independence hoped for by reformers. Taylor, *supra* note 246, at 485–90. She notes that "ALJ independence all but extinguishes an agency's authority over hiring, firing, and supervision of its ALJs, but gives an agency control—according to whatever administrative appeal or quality assurance procedures the agency might establish—over ALJ decisions." *Id.* at 485.

like veterans' benefits; a politically unpopular cause such as immigration adjudication would fare much worse.[358] Further, in response to a recent Supreme Court ruling,[359] a July 2018 Executive Order has changed the appointment process for ALJs, whose appointment processes will now be controlled by agency heads instead of the less political Office of Personnel Management.[360] Critics have raised concerns that this will lead to more political hiring of ALJs,[361] reflecting the same concerns over political hiring for immigration judges.[362] Thus, even ALJs are not completely free from the political process—not enough to ensure a truly neutral judge for Fourth Amendment purposes.

Finally, despite years of scholars, judges, and congressional committees calling for an overhaul to the immigration adjudication system,[363] none has been forthcoming—if history is any guide, these changes are unlikely to occur anytime soon. Magistrate judges, however, already exist and regularly decide whether there is probable cause to detain. This proposal asks that they step in to protect immigration detainees' Fourth Amendment rights.

358. Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1854 (2010); *see also* AM. BAR ASS'N, *supra* note 6, at 6–7 ("A new court or agency would face stiff competition for resources. However, the budget for the immigration judiciary would not have to compete for funding with other priorities within the same department, as it does now in DOJ."). Yet, as the ABA noted, "the main thrust of most criticisms or doubts expressed about an independent court or agency seems to be that it will not necessarily solve *all* of the current problems with the existing system. That, however, does not diminish the case for attacking problems that *can* be addressed by creating an independent immigration judiciary." AM. BAR ASS'N, *supra* note 6, at 6–7 (emphasis in original).

359. Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that administrative law judges of the Securities and Exchange Commission are "officers of the United States" within the meaning of the Constitution's Appointments Clause).

360. Exec. Order No. 13843, 83 Fed. Reg. 32,755 (July 10, 2018).

361. Eric Yoder, *Trump Moves To Shield Administrative Law Judge Decisions in Wake of High Court Ruling*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/ [https://perma.cc/78F6-7UNP].

362. *See* Legomsky, *War on Independence*, *supra* note 6, at 372–74.

363. *See generally supra* note 6 and accompanying text.

CONCLUSION

The U.S. immigration detention system lacks truly neutral judges to authorize months or years of executive detention for thousands of people each year. This is precisely the type of legal wrong that the Fourth Amendment was designed to prevent. As the Court stated in *Terry v. Ohio*:[364]

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[365]

Today, courts have breathed new life into Fourth Amendment protections for immigration detainees through the ICE detainer litigation. The next round of Fourth Amendment litigation in immigration law should resolve a problem that has concerned scholars, Congressional committees, lawyers and judges for decades—the lack of a truly neutral judge.

364. Terry v. Ohio, 392 U.S. 1 (1968).
365. *Id.* at 21.