EMPOWERING IMMIGRATION JUDGES TO SANCTION ATTORNEYS ABUSING THE POWERLESS

Abraham Estuardo Bran*

I. WOULD YOU FEEL PROTECTED?

Imagine you are an immigration judge, and you are just assigned a case. The respondent is a foreign national from Honduras, and this is her first hearing. She speaks Spanish, so you have to use an interpreter—not a problem; you are used to this. Included in the advisal you give pro se respondents, you tell her that she can hire an attorney at no cost to the government. She asks for time to hire an attorney. Understandingly, you give her a list of approved pro bono agencies the court staff prepared and a new hearing date in a few months.

At her next hearing, she tells you that she has called all of the numbers on the list, but no one will return her calls. She has not prepared any applications, nor does she know what, if any, forms of relief from removal she qualifies for. You are irritated because it has been several months with little progress on this case. Nevertheless, you are having a good day and tell her that she has one more chance to come back with an attorney. You warn her that you will proceed next time whether or not she has representation.

A few months later, she returns with an attorney she hired. Well, she comes in with his associate. The associate tells your clerk that he has two

* J.D. Candidate 2021, M.B.A. Candidate 2022, and Special Projects Editor of *The Southwestern Law Review* 2020-2021. I would like to thank the many people who inspired and helped me in writing this Note. I especially want to thank Professors Beth Caldwell and Andrew Knapp who grounded me in this passion project and Professors Mark Cammack and Emily Rehm for helping me find my voice. Thank you to my mentors at Joyce & Associates and at 606 for teaching me what strong advocacy and high-quality work look like. Thank you to my friends Gina Pech, Jennefer Canales-Pelaez, Cecilia Antonio Lucas, Brenda Navarro, Dani Gies, Ana Mastache, Grabiela Franco, and the many other immigration warriors who pour their hearts and souls into their work to ensure that we have a fighting chance. And lastly, thank you to my mother and father, Maria Ines and John Paul Bran, who dared to dream of a future in a country where I could be afforded these opportunities.

other cases with different judges on different floors and asks to be called next. He reaches down and picks up three blank carbon-copy pleadings forms he is to submit when his client's name is called. He takes a seat in your very crowded gallery and begins to fill out the forms. After being called and entering his appearance, he waives a formal reading of the Notice to Appear. He states that he will explain the charges of removability to his client later and concedes them. He also asks for "attorney prep time," as he does not have any applications for relief prepared for today's hearing. Frustrated that this case has made little progress, you begrudgingly agree to a short continuance.

The next few hearings are like pulling teeth. You learn that the respondent intends to seek asylum based on the harm she experienced in Honduras. You remind counsel that, apart from an application form, he must submit his client's written statement, criminal background checks, and corroborating evidence.

Compliance with these requests seems simple, and yet the record remains incomplete. At the next hearing, the associate will tell you that the fingerprinting was requested a few days before the hearing and an appointment has not been scheduled. The next time, the respondent's written statement is provided in Spanish but has not been translated for you. Excuses come in all shapes and colors: *we have moved offices; the other associate didn't write it down; the client didn't go*. Eventually, you have just enough in your file to schedule a hearing to hear the merits of the asylum claim.

At this hearing, you finally see the partner represent his client. You start by asking if there are any amendments to the documents submitted. He says no. You proceed to review the application form with the respondent on the record. *Current address.* Mistake. *Last entry to the United States.* Mistake. *Prior Entries in the United States.* Mistake. *Number of Children.* Mistake. You go off the record and ask counsel to review the form with his client.

When you are back on the record, you proceed to testimony. Counsel does not need to do much here because the respondent is ready to tell you her story. She tells you about the physical and sexual abuse she experienced at the hands of local gang members in her home village. She gives you the parts of her story that impacted her most and led her to flee Honduras. She is crying by the end of it and is pleading for help. Counsel ends his questioning.

Because you understand asylum law, you know there is very specific testimony required here, and you ask the respondent some questions yourself. You ask the respondent why she thinks she was being abused.[1] You ask her

1. In order to qualify for asylum, an applicant must establish that the persecution occurred on account of his or her membership in a particular social group. In other words, the applicant must

if she reported the abuse to the police.[2] You ask what she thinks will happen to her if she returned to Honduras.[3]

Once the testimony is taken, you ask the attorney again if all of the documentation for this case is submitted. He says yes. You flip through the record and note that only a statement from the respondent, the application form, and some internet printouts regarding general violence in Honduras are submitted. You ask for a closing statement. He answers that he is submitting on the record. You ask him to articulate the protected ground.[4] He says, "Women who have suffered gang violence." You instantly experience an overwhelming feeling—"Are you kidding me?" You know this cannot work. You know that case law prohibits this articulation, and you must deny her application.[5] You know that if counsel had articulated something better, this respondent might have a fighting chance.

The experiences of this hypothetical judge are not uncommon. In many instances, immigration attorneys rely on their years of experience and practice to allow them to coast through cases.[6] Immigrants are denied relief because attorneys fail to provide adequate representation.[7] While it is true that immigration lawyers have a hard job, particularly during and in the aftermath of the Trump Administration,[8] and all denials in immigration cases cannot be chalked up to "bad lawyering,"[9] some immigration lawyers are out

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show that the membership to a protected group was "one central reason" for the persecution. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

2. The asylum applicant must also show that the "government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." A-B-, 27 I. & N. Dec. 316, 337 (Att'y Gen. 2018).

3. If the applicant is unable to evidence past persecution, he or she may be eligible for asylum if he or she can establish a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(2)(B) (2020).

4. Current case law also asks applicants to specifically delineate the ***exact*** group of membership for which they are seeking protection. W-Y-C-, 27 I. & N. Dec. 189, 191 (B.I.A. 2018).

5. *See* A-B-, 27 I. & N. Dec. at 334 (reiterating that the protected ground for which the applicant has suffered persecution *must exist independently* from the harm).

6. Benjamin Edwards & Brian L. Frye, *It's Hard Out There for an Immigrant; Lemon Lawyers Make It Harder*, THE HILL (Jan. 19, 2018, 10:15 AM), https://thehill.com/opinion/immigration/369702-its-hard-out-there-for-an-immigrant-lemon-lawyers-make-it-harder ("The managing partner would file baseless asylum claims and then task his young associate with defending them in immigration court. It forced a hard choice on a young lawyer: his ethics or his income.").

7. *See* Banks Miller et al., *Leveling the Odds: The Effects of Quality Legal Representation in Cases of Asymmetrical Capacity*, 49 L. & SOC'Y REV. 209, 210 (2015).

8. *See, e.g.*, Laura Murray-Tjan, *What It's like to Be an Immigration Lawyer in the Trump Era*, WBUR (Oct. 24, 2018), https://www.wbur.org/cognoscenti/2018/10/24/immigration-law-trump-administration-laura-murray-tjan.

9. *See* Jennifer Minear, *When Law Professors Attack: Four False Assumptions in the WSJ Op-Ed*, THINK IMMIGR. (Dec. 1, 2017), https://thinkimmigration.org/blog/2017/12/01/when-law-

there taking advantage of—and money from—unfortunate immigrants who do not know better.

What is worse is that the hypothetical judge is unable to sanction this attorney for his failure to advocate for his client. This attorney can now go on and provide the same kind of inadequate representation to the next person and the one after. In order to protect some of the most vulnerable individuals in our country, we must vest a power of contempt in immigration judges to hold underperforming attorneys accountable and prevent future generations of immigrants from suffering the same fate as our hypothetical respondent.

This Note will explain how to vest a power of contempt in immigration judges in order to sanction inadequate practitioners. Section II will elaborate on the impressions judges have of some immigration lawyers and why these are starkly different from the immigration heroes typically portrayed in the media. Section III will present the current case law and procedural recourses immigrants and immigration judges can turn to when encountering ineffective counsel as well as the deficiencies of those options. Section IV will propose legislation and immigration reform necessary to create this power of contempt. Finally, Section V will conclude and emphasize the necessity for reform. The practice of immigration law needs to be reevaluated so as to ensure that all immigration practitioners provide quality services and permit presiding immigration judges to hold them accountable when they do not.

II. DISPARATE IMPRESSIONS OF IMMIGRATION ATTORNEYS AND AN UNDERPERFORMING PRIVATE BAR

Immigrants obtain counsel because they know they need help. But what if the attorney you trust to help you is not like the ones you hear about in the news? What if he or she fails to submit evidence to support your case or employs questionable legal strategies? This section elaborates on the difference of opinion judges and laypeople have when it comes to the work that immigration lawyers perform. We postulate whether the representations made before the courts could have led to this disparity. We close on the necessity to hold immigration attorneys to a higher standard in order to protect some of the most vulnerable respondents.

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professors-attack-four-false-assumptions-in-the-wsj-op-ed/ (explaining that demographics play a large role in the success of a case and that the Immigration Bar is not unique for having some practitioners perform "below acceptable standards").

i. Diverging Impressions of Immigration Lawyers

It is no secret that having an immigration lawyer will substantially increase an immigrant's likelihood of success before an immigration court.[10] Immigration lawyers work hard to decipher complicated immigration law[11] and, most notably, had to quickly adapt to policy changes under the Trump administration.[12]

In these trying times for immigrants in the United States, it is common to hear about the great warriors at the American Civil Liberties Union and similar organizations. These attorneys rush to file injunctions against travel bans,[13] prohibitions placed on entries from the southern border,[14] and changes to the Deferred Action for Childhood Arrivals program (DACA),[15] to name

10. *See* Andrew I. Schoenholtz et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340, 376 (2007) (In 2005, "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 66-67 (2015) (discussing the increased number of applications filed in non-represented cases likely due to the uncertainty of the relief they may qualify for).

11. *See* Monica Campbell, *Under Trump, Immigrants Face Increasingly Long and Complicated Road to Citizenship*, THE WORLD (Dec. 6, 2019, 12:45 PM), https://www.pri.org/stories/2019-12-06/under-trump-immigrants-face-increasingly-long-and-complicated-road-citizenship.

12. *Compare* Alison Frankel, *Jeff Sessions' 'Unprecedented' Legacy in Immigration Court*, REUTERS (Nov. 8, 2018, 1:54 PM), https://www.reuters.com/article/us-otc-sessions/jeff-sessions-unprecedented-legacy-in-immigration-court-idUSKCN1ND35C ("[F]ormer AG Sessions took over at least seven cases from immigration courts in the 21 months he held office."), *with The AG's Certifying of BIA Decisions*, JEFFREY S. CHASE: OPS./ANALYSIS ON IMMIGR. L. (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://www.jeffreyschase.com/archive] ("In her eight years as Attorney General during the Clinton Administration, Janet Reno decided a total of three cases pursuant to certification. Under the Obama administration, AGs Eric Holder and Loretta Lynch decided a comparable number of cases (four).").

13. *See Timeline of the Muslim Ban*, ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban (last visited Dec. 27, 2020).

14. *See* Chris Mills Rodrigo, *Judge Reinstates Block on Trump's Asylum Ban for Migrants at Southern Border*, THE HILL (Sept. 9, 2019, 12:13 PM), https://thehill.com/regulation/court-battles/460527-federal-judge-reinstates-block-on-trumps-asylum-ban-for-migrants-at.

15. *See DACA Litigation Timeline*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/issues/daca/daca-litigation-timeline/ (May 8, 2020); *see also* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (holding, among other things, that the Trump Administration terminated the Obama-aged DACA program in a manner that was "arbitrary and capricious" in violation of the Administrative Procedure Act). The Supreme Court decision restored the DACA program to its original 2012 form. *But see* U.S. DEP'T OF HOMELAND SEC., RECONSIDERATION OF THE JUNE 15, 2012 MEMORANDUM ENTITLED "EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN" (2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf

a few issues. Many of these suits require experts to drop their assignments and prepare filings moments after policy guidelines by the Department of Justice (DOJ) and the Department of Homeland Security (DHS) are issued.[16] They do this to ensure that people's fundamental rights are not being violated.[17]

These amazing lawyers do exist, but they are not representative of the average immigration lawyer.[18] The typical immigration attorney, or a "direct service" immigration attorney, has a caseload of clients with affirmative applications before the United States Citizenship and Immigration Service (USCIS) or removal defense applications before the Executive Office of Immigration Review (EOIR). Many of them took on large caseloads to accommodate the high demand for immigration counsel in Trump's America.[19]

Judges are not so quick to call these immigration attorneys heroes.[20] In a Stanford Law Review empirical study of almost 700 state and federal judges, an overwhelming majority voted that immigration lawyers provided the lowest quality representation.[21] Compared to civil practice areas such as civil rights, family law, intellectual property, personal injury, malpractice, tax, trusts, and estates, immigration lawyers received the lowest scores by judges ranking them from "fair" to "inadequate."[22] Interestingly, the worst rankings came from federal appellate judges[23] who review more immigration

(limiting the classes of people who can apply for DACA protections under an "initial request" and for advanced parole to travel outside of the United States).

16. *See supra* notes 13-15.

17. In their brief against the limitations placed on entries at the southern border, which gave rise to the Trump-age "Remain in Mexico" policy, four human rights organizations argued that the July 2019 Policy Memorandum violated the Administrative Procedures Act and that the Trump Administration acted arbitrarily and capriciously when creating rules mounted by unsupported assumptions. *See* Planitiffs' Memorandum in Support of Motion for Temporary Restraining Order, E. Bay Sanctuary Covenant v. Barr, 391 F. Supp. 3d 974 (N.D. Cal. 2019) (No. 4:19-cv-04073-JST).

18. *See* Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457, 1505 (2017) ("The study broke attorneys into three categories by win rates: (i) poor attorneys in the bottom 10th percentile with less than 4% win rates; (ii) average attorneys at the 50th percentile winning about 24% before a particular judge; and (iii) good attorneys at the 90th percentile that won 60% or better before a particular judge.").

19. For a comprehensive overview of historical immigration policies including the 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the "current deportation wave," see BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO (2019).

20. *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011).

21. *Id.*

22. *Id.* at 331.

23. *Id.*

cases than the polled federal district, state appellate, or state trial judges.[24] On the other hand, these federal appellate judges stated that DHS lawyers, charged with the prosecution of the immigrant, were overwhelmingly of better quality than the immigrant's counsel.[25] These judges emphasized "intellectual ability" as the most important characteristic of a lawyer.[26]

Judges are not the only ones to take note of the subpar representation in the field. Law professors have published opinion pieces stating that immigration lawyers frequently fail to adhere to the Rules of Professional Responsibility.[27] Some immigration lawyers even try to rectify the mistakes that their colleagues make.[28]

To understand why these inconsistent views of immigration attorneys exist, we must consider that immigration judges see what the attorneys do in their courtrooms—not just the impact litigation reported in the media.

ii. Subpar Performance by Immigrants' Counsel Before Immigration Courts

Statistically speaking, immigration attorneys are not winning many cases. To model the experience, we will use the rates at which immigration judges granted asylum applications. In 2018, 110,469 asylum applications were filed defensively before the immigration courts.[29] About fifty-six percent of these applications were adjudicated,[30] and of those, only sixty-four

24. *See* 8 U.S.C. § 1252(a)(5) (providing that federal appellate courts are the exclusive means for judicial review for most immigration decisions). A federal district court is limited in the types of issues it can see in a habeas suit. *See Background on Judicial Review of Immigration Decisions*, AM. IMMIGR. COUNCIL (Jun. 1, 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/background_on_judicial_review_of_immigration_decisions.pdf. State judges would likely only see immigration lawyers in their courtroom when they are litigating family or criminal law cases that have an impact on their client's immigration status. *See Immigration Issues in the State Courts*, STATE JUSTICE INSTITUTE, http://www.sji.gov/grants/strategic-initiatives-grants/immigration-issues-in-the-state-courts/ (last visited Jan. 7, 2021).

25. Seventy four percent of the federal appellate polled judges believed so. *See* Posner & Yoon, *supra* note 20, at 333.

26. *Id.* at 334.

27. *See, e.g.*, Benjamin Edwards, *Immigrants Need Better Protection From Their Lawyers*, WALL ST. J. (Nov. 26, 2017, 4:07 PM), https://www.wsj.com/articles/immigrants-need-better-protectionfrom-their-lawyers-1511730450.

28. *See, e.g.*, Nomaan Mechant, *This Lawyer Goes After Other Lawyers Who Take Advantage of Immigrants Who Could Practice for Years Without Being Stopped*, BUS. INSIDER (Aug. 22, 2017, 9:22 AM), https://www.businessinsider.com/bad-immigration-lawyers-2017-8.

29. STATISTICS YEARBOOK FISCAL YEAR 2018, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV. 24 fig.18 (2018), https://www.justice.gov/eoir/file/1198896/download.

30. *Id.* at 24 fig.19.

percent of respondents had legal representation.[31] Despite the overall increase in adjudication rates,[32] asylum and withholding of removal grant rates have decreased by thirty-three percent over the last five years.[33] The Board of Immigration Appeals (BIA) is also facing unprecedented appeal rates from denied cases.[34]

There are several possible explanations for why these denial rates are so high—some of which are outside of the attorney's control.[35] Given the increased number of applicants, it is possible that immigration lawyers are taking on more cases than they can feasibly handle.[36] That makes it more difficult for private attorneys to represent detained individuals, causing them to appear pro se.[37]

On the other hand, these denial rates may be high because attorneys frequently fail to competently represent their clients by permitting underdeveloped cases reach their final stages, depriving immigrants of the possibility of success.[38] For example, to qualify for asylum an intending immigrant must show that he or she has suffered from severe persecution[39] on account of a protected ground.[40] One of these protected grounds requires that an immigrant show that they belong to a particular social group (PSG)

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31. ADJUDICATION STATISTICS: CURRENT REPRESENTATION RATES, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV. (2020), https://www.justice.gov/eoir/page/file/1062991/download.

32. The number of cases has more than doubled since 2014. *See* STATISTICS YEARBOOK, *supra* note 29, at 24 fig.18.

33. *Id.* at 27 fig.23.

34. *See id.* at 36 tbl. 20.

35. In many circumstances, it is apparent that immigrants and their counsel have the cards stacked against them in the courtroom. *See* CALDWELL, *supra* note 19, at 32-42 (explaining that immigration judges lack the judicial discretion to review certain cases or mitigating circumstances that could explain on equity, why an immigrant should be allowed to stay in the country).

36. *See* Nick Miroff & Maria Sacchetti, *Burgeoning Court Backlog of More than 850,000 Cases Undercuts Trump Immigration Agenda*, WASH. POST (May 1, 2019, 3:17 PM), https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5_story.html.

37. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 247 (2012) ("This problem is significantly worse for immigrants in detention. The cost of legal representation rises for immigrants in detention because of the logistical difficulties (including client communication, document preparation, and confusing and ever-changing jail visitation procedures) and travel time required to visit detention facilities. For those who cannot afford representation, the situation is worsened by the fact that detention facilities are often located far from urban areas that might have robust networks of pro bono attorneys.").

38. *See* Edwards, *supra* note 27.

39. 8 C.F.R. § 1208.13(b) (2020).

40. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

whose members share a common characteristic that is immutable,[41] socially visible,[42] and particularly defined.[43] Some frequently used PSGs are gender, sexual orientation, age, and familial ties.[44] Once a cognizable social group is articulated, the immigrant must then show the nexus linking the persecution to the membership in the PSG.[45] Unfortunately, many immigrants cannot get to the second step of the analysis because they have not satisfied the standards to establish a cognizable group.[46] This is something a competent immigration lawyer should do[47] and frequently fails to do.[48]

Some of these cases end up before an immigration judge, where the only evidence is the immigrant's testimony.[49] In these instances, the immigrant's testimony is crucial, and attorneys must actively guide their clients' delivery and address any inconsistencies with previously submitted statements.[50] Even with so much on the line, attorneys fail to adequately prepare their clients for hearings and fail to address discrepancies that arise during the adversarial hearing.[51] This makes it difficult for a judge to be able to find a respondent credible and grant the application.

The inconsistent and often subpar[52] performances place a large burden on immigration judges to ensure that immigrants receive adequate due

41. This is a characteristic that you cannot change or should not have to change. W-G-R-, 26 I. & N. Dec. 208, 213 (B.I.A. 2014).

42. This group is recognized by the foreign countries' government or their society. *Id.* at 214.

43. One should be able to distinguish who is a member of the group and who is not. *Id.* at 217.

44. *But see* L-E-A-, 27 I. & N. Dec. 581, 586 (Att'y Gen. 2019) ("In the ordinary case, a family group will not meet this standard because it will not have the kind of identifying characteristics that render the family socially distinct within the society in question.").

45. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158 (b)(1)(B)(i).

46. "How the attorney performs can be fateful. If, for example, the attorney fails to create a complete record including submitting documents that are essential to the case, the immigrant may lose, *no matter how authentic his claim for asylum may be* or how dire the consequences of deportation." Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 624 (2009) (emphasis added).

47. *See id.* at 624.

48. Banks Miller et al., *supra* note 7, at 232 ("We find that high quality advocacy is an important predicter of whether asylum applicants . . . have a decent chance at securing relief.")

49. *See* Brennan, *supra* note 46, at 625.

50. *Id.*

51. *See id.*

52. Judge Noel Brennan of the New York Immigration Court says:

Some lawyers simply lack legal expertise. But there is also a kind of ennui that is widespread among lawyers who appear before me. Case theory is not developed. Necessary documents are not produced, nor are immigrants prepared to present reasonable explanations for why such documents are absent. Applicants and witnesses are often unprepared for the cross-examination by experienced DHS attorneys. At a master calendar hearing, issues may be identified that need to be addressed and documents singled out that the respondent can reasonably be expected to produce in a case. Capable, prepared, and effective counsel are on top of issues that require attention and will file supporting witness affidavits, corroborating documents, and/or memos of law on issues in dispute. It is not that

process.[53] Immigration judges have to ensure that they are not separating families or sending people to countries where they face torture using the underdeveloped records presented to them.[54] Some of these cases drag on for years without a clear end in sight.[55]

Similarly, some immigration attorneys have crafted legal strategies and disregard their duties of candor to the courts and other ethical responsibilities in the practice of law. For example, in *Andrade Jaso*, the BIA gave the immigration judges the discretion to terminate removal proceedings when attorneys present "meritless" asylum applicants in order to place their clients in removal proceedings.[56] Immigration attorneys would file meritless asylum applications with USCIS, which are subsequently denied and referred to an immigration court for deportation processing.[57] When in immigration court, respondents defensively apply for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.[58] This practice disregards the discretionary difficulties on obtaining protection from deportation under Cancellation of Removal[59] and places immigrant clients at an unreasonable gamble of deportation.[60]

I mind counsel choosing not to produce documentary evidence or certain witnesses to advance their client's claim. Rather, I've grown concerned that many attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it.

Id. at 626.

53. *Id.*

54. *See id.*

55. *See* Eagly & Shafer, supra note 10, at 63 n.205 ("[T]he average total case duration of detained cases was 44 days (SD = 184), compared to 545 days (SD = 562) for released cases and 493 days (SD = 607) for never-detained cases.").

56. 27 I. & N. Dec. 557, 558 (2019).

57. NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS, IMMIGRANT LEGAL RES. CTR. 1 (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf. *But see The BIA and Selective Dismissal*, JEFFREY CHASE: OPS./ANALYSIS ON IMMIGR. L. (June 7, 2019) https://www.jeffreyschase.com/blog/2019/6/7/the-bia-and-selective-dismissal (questioning the validity of *Andrade Jaso* in light of BIA precedent).

58. This application is only available defensively before the immigration court. *See* NON-LPR CANCELLATION OF REMOVAL, *supra* note 57.

59. In order to qualify for cancellation of removal, an applicant must show that their removal would cause "extreme and exceptionally unusual hardship to their qualifying relatives." While the BIA has offered some factors a court should consider when making this determination, there lacks any bright-line guidance to allow practitioners to determine whether an applicant definitely qualifies for the relief. *See* Monreal-Aguinaga, 23 I. & N. Dec. 56, 58-64 (B.I.A. 2001); Andazola-Rivas, 23 I. & N. Dec. 319, 320-23 (B.I.A. 2002); Gonzales Recinas, 23 I. & N. Dec. 467, 468-73 (B.I.A. 2002); *see also* Carl Shusterman, *BIA Defines Hardship Standard for Cancellation of Removal*, ILW (Jun. 14, 2001), https://www.ilw.com/articles/2001,0614-Shusterman.shtm#.

60. "It is very difficult proving that someone will suffer exceptional and extremely unusual hardship. The law recognizes that anyone who is deported will suffer hardship. But this is not enough to win cancellation of removal." *Obtaining Legal Residence through Cancelation of*

These are just some of the issues judges face when working with private bar immigration attorneys.[61] It is important to address these issues of low quality representation because immigrants face increasing challenges to protection in the United States, and there no indication that there is a brighter tomorrow.[62]

iii. An Uncertain Future for Asylees and Refugees

Cases continue to be denied at extremely high rates. In 2018, only about thirteen percent of immigrants were granted relief in an immigration court.[63] The remaining eighty-seven percent were removed from the United States,[64] granted voluntary departure,[65] or had their cases terminated.[66] This low rate of granting relief was pervasive under the Trump administration[67] despite a significant increase in the number of cases heard and decided.[68] In 2019, more cases were adjudicated per month than any other year in the past twenty years.[69]

Compared to any other place in the world, immigrants seeking asylum in the United States face some unique challenges. They are placed in detention centers under inhumane conditions while their cases pend.[70] At the

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Removal, ILS, https://www.indianalegalservices.org/node/391/obtaining-legal-residence-through-cancellation-removal (May 10, 2012).

61. *See* Brennan, *supra* note 46.

62. While the Biden Administration is making some efforts in reigning in the over policing Immigration and Customs Enforcement officers of the Trump Era by reinstituting some of the Obama enforcement priorities, they have no clear intention of abolishing the agency. Charles Reed, *Biden Administration Reverts to Targeted Immigration Enforcement*, NBC NEWS (Feb. 19, 2021, 5:08 AM), https://www.nbcnews.com/politics/immigration/biden-administration-reverts-targeted-immigration-enforcement-n1258318.

63. STATISTICS YEARBOOK, *supra* note 29, at 13 fig.7.

64. About 116,508 cases resulted in an order of removal by an Immigration Judge in 2018. *Id.*

65. In 22,189 cases, the immigrant was granted voluntary departure from the United States. *Id.* Under this grant, the immigrant must leave the United States at their own expense by a date designated by the immigration judge, not to exceed sixty days from the date of decision. INA § 240B(b)(1)-(2), 8 U.S.C. § 1229c(b)(1)-(2).

66. 19,530 cases were terminated in 2018. STATISTICS YEARBOOK, *supra* note 29, at 13 fig. 7. Termination usually occurs when a case has been deemed moot because the immigrant was either incorrectly placed in removal proceedings or they are no longer removable because of a grant of immigration relief outside of open court.

67. About thirteen percent of all cases were granted in 2015, 2016, and 2017, and 15.94% were granted in 2014. *Id.*

68. The number of cases being heard increased by over 50,000 individuals from 2015 to 2018. *Id.*

69. NEW CASES AND TOTAL COMPLETIONS, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV. (2020), https://www.justice.gov/eoir/page/file/1060841/download.

70. Canadian Council for Refugees v. Can. (Immigr., Refugees & Citizenship), [2020] F.C. 770, paras. 136, 138 (Can.) (striking down the Safe Third Country Act because it posed a "grossly

flip of the switch, the Trump Administration attempted to end programs that long protected immigrants from deportations[71] and results in sending these individuals to countries they might not consider home.[72] In many instances, this has led to detrimental social and emotional effects for people displaced from their cultures.[73]

Access to quality representation should not be yet another obstacle to obtaining protection. The immigrants that enter the United States typically do not have access to information about the attorneys they hire and have to rely on what they are told in initial consultations.[74] The adequacy of immigration attorneys should not be so disparate that immigrants play Russian roulette when blindly trusting their lawyers. Immigrants are deported and the reputations of the underperforming attorneys frequently go unscathed.[75] Although EOIR does publish records of the attorneys it disciplines, it only publishes when an attorney has been suspended or disbarred.[76] These immigrants already face many obstacles when maneuvering the immigration court system, such as language barriers, cultural barriers, and educational barriers;[77] access to quality counsel should not be another.

Immigrants should not have to rely on the assistance of the overworked pro bono sector, in order to ensure that they are receiving competent legal representation. According to the Stanford Law Review empirical study, federal appellate judges primarily recommended increasing public financing for indigent litigants to improve the issue of inadequacy.[78] This might be because the pro bono sector generally receives better feedback than the

disproportionate" risk that an individual would be subjected to human rights violations if returned to the United States as contemplated under the Act).

71. *See supra* notes 10-17 and accompanying text.

72. *See* CALDWELL, *supra* note 19 (telling the stories of deported individuals that view themselves as American).

73. *Id.* at 69 ("Some days, she says, she understands why her former roommate—also a deportee who has grown up in the U.S.—tried to kill herself.").

74. *See* Edwards, *supra* note 18, at 1506 ("In the market for immigration lawyers, a significant information asymmetry exists—the lowest quality immigration lawyers know that they do not win their cases but their clients do not.").

75. *Id.* ("When a client loses a case because of low-quality lawyering, the client does not remain in the community to spread word about the attorney's behavior.").

76. *See List of Currently Disciplined Practitioners*, U.S. DEP'T OF JUST EXEC. OFF. OF IMMIGR. REV., https://www.justice.gov/eoir/list-of-currently-disciplined-practitioners (Dec. 31, 2020).

77. *See* Brennan, *supra* note 46, at 624.

78. Posner & Yoon, *supra* note 20, at 320.

private bar,[79] and organizations like Human Rights First have high success rates.[80] However, there is just not enough of a pool of high performing pro bono immigration attorneys to support the large amount of indigent immigrant respondents.[81]

Accordingly, we must address the ineffectiveness of the immigration lawyers in the private bar. In order to do so, we must implement stronger accountability standards and stricter professional review. It is important that we provide the best possible representation to these vulnerable individuals because in many cases it will be the difference between life and death.

III. RECOURSES AVAILABLE TO COMPLAIN ABOUT THE INADEQUATE PERFORMANCES OF IMMIGRATION ATTORNEYS TODAY

When faced with underperforming counsel, there are different recourses for immigrants, judges, and other practitioners to bring about a claim against the attorney. Before the immigration courts, immigrant respondents can request to reopen removal proceedings due to ineffective assistance of counsel following the procedures set forth in the BIA's decision in *Lozada*.[82] They are also free to bring a complaint to the corresponding state bar if the conduct violates a rule of professional conduct. Judges, on the other hand, may only refer the complaints to internal administrative officials who then discipline attorneys when they feel compelled to do so.[83] None of these current solutions provide immigrants with a strong sense of corrective justice nor do they address the innate generational problem of these issues.

i. Ineffective Assistance of Counsel Under Lozada

In *Lozada*, the BIA held that responding immigrants could request that immigration judges reopen and reconsider the merits of their cases when

79. Kirk Semple, *In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants*, N.Y TIMES (Dec. 18, 2011), https://www.nytimes.com/2011/12/19/nyregion/judges-give-low-marks-to-lawyers-in-immigration-cases.html.

80. *See* Schoenholtz et al., *supra* note 10, at 341; Banks Miller et al., *supra* note 7, at 233 ("This analysis also highlights the positive impact of NGOs on the likelihood of receiving a grant, which suggests that reform efforts to increase representation are more likely to succeed if they are coordinated with (or modeled on) existing asylum related NGOs and pro-bono programs.").

81. *See* Brennan, *supra* note 46, at 626.

82. 19 I. & N. Dec. 637, 639-40 (1988).

83. *See* EOIR ATTORNEY DISCIPLINE PROGRAM AND PROFESSIONAL CONDUCT RULES FOR IMMIGRATION ATTORNEYS AND REPRESENTATIVES, U.S. DEP'T OF JUST. EXEC. OFF. OF IMMIGR. REV. 4 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/23/EOIRsDisciplineProgramFactSheet.pdf.

there is a clear case of ineffective assistance of counsel.[84] As a due process safeguard, respondents may reopen a case based on ineffective assistance of counsel if they satisfy threshold procedural and substantive requirements.[85] Procedurally, respondents must submit an affidavit explaining the relevant facts, inform former counsel of the allegations thereby giving counsel the opportunity to respond, and file a complaint with an appropriate disciplinary board if they believe the handling of the case to be in violation of the attorney's ethical or legal duties.[86] Substantively, respondents must show that the attorney's mishandling "affected the proceedings" and was detrimental in the case.[87] Theoretically, under *Lozada*, disciplinary boards will be informed whenever attorneys are mishandling cases and causing legitimate and substantial harm. However, in practice, disciplinary boards are not always told when there are cases being mishandled by inadequate attorneys.[88]

Under Ninth Circuit case law, the *Lozada* requirements do not need to be adhered to rigidly, and failure to comply with any one of its requirements is not dispositive when the "purpose is fully served by other means."[89] The Ninth Circuit has explained that the purpose of the requirement to notify the disciplinary board is not to punish the practicing attorneys but rather to ensure that the immigrant is not colluding with the attorney.[90] The court is only to ensure that the immigrant is not working with his attorney to unnecessarily delay the case or buy time.[91] If an affidavit sufficiently explains that the attorney mishandling the case was not colluding with the immigrant, then there is no need to notify the disciplinary board.[92] As long

84. 19 I. & N. Dec. at 638-39.

85. *See id.*; *see also* Reyes v. Ashcroft, 358 F.3d 592, 596 (9th Cir. 2004) ("Although the Sixth Amendment's effective counsel right does not attach to deportation proceedings, [the respondent] enjoys, in deportation proceedings, a Fifth Amendment due process right to effective assistance of the counsel he retained. In the deportation context, 'ineffective assistance of counsel . . . results in a denial of due process under the Fifth Amendment only when the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting her case.'" (citations omitted) (quoting Iturribarria v. INS, 321 F.3d 889, 899 (9th Cir. 2003))).

86. *Lozada*, 19 I. & N. Dec. at 639.

87. Maravilla v. Ashcroft, 381 F.3d 855, 858-59 (9th Cir. 2004); *see also* Castillo-Perez v. INS, 212 F.3d 518, 526 (9th Cir. 2000) ("Lozada is intended to ensure both that an adequate factual basis exists in the record for an ineffectiveness complaint and that the complaint is a legitimate and substantial one.").

88. *See Reyes*, 358 F.3d at 597.

89. *Id.*

90. Lo v. Ashcroft, 341 F.3d 934, 938 (2003).

91. *See id.*

92. *Id.*

as a respondent "substantially complies" with the requirements of *Lozada*, he or she will have a second chance in court.[93]

Lozada and its loosened requirements might not be as helpful to the immigrant population in the long run. While it can be helpful for the individual immigrant who was wronged, loosening the reporting requirement means that a disciplinary board will not always reprimand an attorney – or even know when to intervene.[94] The attorney can turn around and provide the same level of apathy to another unsuspecting immigrant.[95] This falls in line with the right being derived from a due process perspective and not a constitutional right to adequate counsel.[96]

ii. Violation of the Rules of Professional Conduct

The Rules of Professional Conduct were envisioned to be a self-contained system, giving clients grounds to complain against attorneys who fail to provide competent and diligent representation. The Rules also give attorneys the right and the duty to notify a state bar when they have knowledge that the conduct of other practitioners falls below the standard of care in the profession.[97] However, in the immigration context this form of review seems to be nothing more than a vision.

In a perfect world, an immigrant would be able to bring a case for malpractice against an underperforming attorney for a violation of his ethical rules of competence. However, this makes three fundamental assumptions. First, the Rules assume that the immigrant understands that they can bring a case against an attorney for malpractice. Second, the Rules assume that the immigrant has the means to hire new counsel to bring a malpractice claim against the alleged ineffective counsel. Third, the Rules assume that the immigrant was not deported at the conclusion of their immigration proceeding. These assumptions are all incorrect to make in the context of immigration proceedings.

First, the average layperson likely does not have a solid understanding of the ethical rules that govern the practice of law. This is likely even more difficult for a person unaware of United States law and culture. An immigrant may not readily recognize that something was wrong in his or her

93. *See Reyes*, 358 F.3d at 597.

94. *See id.* at 597.

95. *See* Edwards, *supra* note 27 ("When only winners remain, immigrants never hear about the lost cases. State bars also struggle to police this behavior. It's difficult to file a bar complaint after you've been deported.").

96. *See Reyes*, 358 F.3d at 596.

97. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020).

case. It may take the work of an attorney carefully reviewing a case to explain how a claim for malpractice exists.

Second, an immigrant may not have the means to hire a new attorney to bring a case against their old one.[98] If an immigrant was unable to secure pro bono representation at the immigration court stage, it is unlikely that they would be able to secure representation in an appeal or in a collateral civil suit.[99] Assuming that immigrants do have the means to hire a second lawyer, they then have to make a critical decision: do they hire counsel to appeal their denial for immigration relief—potentially by arguing ineffective assistance under *Lozada*—or do they spend the money to take their first attorney to civil court? Given the potential for deportation if their immigration case is not appealed, it is reasonable to assume that these immigrants would invest in the former and not the latter.

Third, and possibly the most critical assumption here, if an immigrant loses an immigration case, and that case is not moved forward into an appeal, that immigrant respondent is issued a removal order and becomes an ICE enforcement priority.[100] The average immigrant does not have the means to bring suit against former counsel from abroad.

While a State's Rules of Professional Conduct may provide a form of collateral ethical and competency review in most civil and criminal contexts, they do not provide safeguards for immigrant respondents in removal proceedings.

iii. The "Power" of Immigration Judges and of the Attorney Discipline Counsel

Immigration judges on the other hand are given different instructions when dealing with ineffective counsel. Immigration judges must internally report instances of professional misconduct to an EOIR Disciplinary Council, which ultimately can reprimand attorneys.[101] This Council reviews the complaint and decides whether the complaint is severe enough to review in

98. It also operates under the assumption that an immigrant who has been defrauded is willing to put his or her trust into yet another person to remedy his or her case. *See* Mechant, *supra* note 28.

99. In earlier years, immigrants experience high levels of poverty, but they seem to fall in line with the national average as time goes on. *See* Steven Raphael & Eugene Smolensky, *Immigration and Poverty in the United States*, 26 FOCUS (U. Wis.-Madison Inst. for Rsch. on Poverty, Madison, Wis.), no. 2, 2009, at 27, 31.

100. See 8 C.F.R. §§ 1003.2(f), 1003.23(b)(1)(v), (b)(4)(ii), (b)(4)(iii)(C) (2020).

101. *See* EOIR ATTORNEY DISCIPLINE PROGRAM, *supra* note 83, at 4. This reporting method is technically not limited to just Immigration Judges. Immigrants and other practitioners can also report to the EOIR Attorney Disciplinary Counsel. However, it is the only available form of reprimanding for immigration judges to pursue.

an adversarial hearing before an Adjudicating Official.[102] At this hearing, the Official will make a recommendation as to disciplinary action deemed necessary under the circumstances.[103] Any reprimanded attorney then has the option to appeal a negative finding to the BIA.[104] Once a final decision on the case is reached, EOIR issues a final order delineating the punishment against the attorney, which can include publication on the EOIR List of Currently Disciplined Practitioners.[105] Should the matter lead to suspension from practice before the immigration courts, the attorney could later seek subsequent review and reinstatement.[106]

This multistep system theoretically would provide a safeguard for future respondents from receiving the same inadequate representation. But as we saw before, there are severe fundamental limitations that undercut the effectiveness of the tool.[107]

First, the alleged misconduct goes through layers of discretionary review.[108] Immigration judges are *not required* to report misconduct to the Disciplinary Council.[109] They must make the initial decision to report the

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102. *See Form EOIR-44: Immigration Practitioner/Organization Complaint Form*, U.S. DEP'T OF JUST. EXEC. OFF. OF IMMIGR. REV. 3 (Jan. 2017), https://www.justice.gov/eoir/file/eoir44/download.

103. Relevant grounds for disciplining attorneys include:

> 1. Charging a grossly excessive fee; . . .
> 3. Knowingly or with reckless disregard making a false statement or willfully misleading, misinforming, threatening, or deceiving any person; . . .
> 6. Knowingly or with reckless disregard making a false or misleading communication about qualifications or services (e.g., practitioners must be recognized as certified specialists in immigration law in order to refer to themselves as such);
> 7. Engaging in rude or insulting, or obnoxious conduct that would constitute contempt of court; . . .
> 9. Knowingly or with reckless disregard falsely certifying a copy of a document as being true and complete;
> 10. Engaging in frivolous behavior;
> 11. Engaging in conduct that constitutes ineffective assistance of counsel as found by an immigration judge, the BIA, or a federal court;
> 12. Repeatedly failing to appear for scheduled pre-hearing conferences or hearings in a timely manner without good cause; . . .
> 14. Engaging in conduct that is prejudicial to the administration of justice;
> 15. Failing to provide competent representation to a client; . . .
> 17. Failing to act with reasonable diligence and promptness;
> 18. Failing to maintain communication with a client; and . . .
> 21. Repeatedly filing notices, motions, or briefs that contain boilerplate language that evidences a failure to competently and diligently represent the client.

EOIR ATTORNEY DISCIPLINE PROGRAM, *supra* note 83, at 1-3.

104. *Id.* at 5.

105. *Id.*; *List of Currently Disciplined Practitioners*, *supra* note 76.

106. EOIR ATTORNEY DISCIPLINE PROGRAM, *supra* note 83, at 6.

107. *Id.* at 3-5.

108. *Id.*

109. *Id.* at 3.

inadequacy of the attorney to the Council.[110] The Council, headquartered in Virginia, must then sort through all of the complaints received from every immigration court in the country to determine which of them require investigatory hearings.[111] The Adjudicating Official at those hearings, who in many cases is a different immigration judge, must take time out of his or her large docket to decide what appropriate action to recommend.[112] Ultimately, the review of alleged misconduct is handled, if at all, two degrees removed from the original judge who witnessed the behavior.[113]

Second, there is some confusion as to what kind of conduct supports reporting to the Disciplinary Council or finding that disciplinary action is necessary. The regulations state that disciplinary action is available against an attorney "engaged in criminal, unethical, or unprofessional conduct, or in a frivolous behavior."[114] One of the grounds simply states that the attorney must provide competent representation to a client.[115] While competent representation is defined, [116] many attorneys fail to provide it. Given the appearances before the immigration courts, it is clear that many have not engaged in the "preparation reasonably necessary for the representation."[117]

Last, the sanctions available are limited to the attorney's practice within the immigration court.[118] The immigration court system has its own licensing scheme.[119] The BIA permits only attorneys and duly (internally) licensed non-attorneys to appear before the immigration courts.[120] If an attorney were to be disciplined for providing inadequate representation, that disciplinary action is limited to his or her appearance capacity before the immigration courts.[121] The BIA's final decision has no bearing on the attorney's state

110. *Id.*

111. *Id.*

112. *Id.* at 4-5.

113. *Id.* at 3-5.

114. 8 C.F.R. § 1003.101 (2020).

115. *See id.* § 1003.102, .102(o) ("A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she: . . . Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").

116. *See id.* § 1003.102(o) ("Competent handing of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

117. *Id.*

118. *See* EOIR ATTORNEY DISCIPLINE PROGRAM, *supra* note 83, at 3.

119. *See* 8 C.F.R. § 1292.1(f) (2020).

120. *Id.* § 1292.1; *see also* Daniel M. Kowalski, *EOIR Launches Online Registration for Immigration Practitioners*, LEXISNEXIS (May 14, 2013), https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/eoir-launches-online-registration-for-immigration-practitioners.

121. *See* EOIR ATTORNEY DISCIPLINE PROGRAM, *supra* note 83, at 3.

license.[122] This permits attorneys to continue practicing before state and other federal courts despite having been found culpable of mishandling legal cases.

This route does not provide sufficient punitive measures against attorneys who are abusing their positions when representing immigrants, and as such, they are effectively getting away with it. The immigration judges with the front row seats are unable to unilaterally decide to suspend or take away poorly performing attorneys' licenses in a meaningful way. This inability to eradicate the problem poses a risk to future generations of immigrants coming to the United States—with legitimate and heart-wrenching cases—from receiving adequate representation in court. In order to protect their right to due process, we must vest a power of contempt in the immigration judges hearing these respondents' cases and empower these judges to take action.

IV. THE ELUSIVE POWER OF CONTEMPT: HOW TO CREATE IT

Reforming the immigration court system is hardly a nuanced topic. Many have proposed that drastic changes in the system are necessary in order to create a stronger and better immigration process.[123] These potential reformation plans range in radicality, and some are better suited to creating a power of contempt in immigration courts.[124] The following section explores structural changes in the immigration court system that could vest a power of contempt in the immigration judges.

i. Loosening the Executive Hold on Immigration Law

Before diving into the subject of immigration reform, we should address the constitutional elephant in the room: the executive has broad discretion on all matters concerning immigration.[125] Legislative intervention requires

122. *See id.* at 4.

123. *See, e.g.*, *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, http://www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx (last visited Jan. 1, 2021).

124. *See, e.g.*, Letter from Am. Bar Ass'n et al. on Congress Should Establish an Independent Immigration Court to Members of Cong. (July 11, 2019), https://www.naij-usa.org/images/uploads/publications/ABA_-_Congress_Should_Establish_an_Independent_Innigration_Court.pdf.

125. *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018); *see also* Adam Liptak, *The President Has Much Power Over Immigration, But How Much?*, N.Y. TIMES (Feb. 5, 2017), https://www.nytimes.com/2017/02/05/us/politics/trump-immigration-law.html.

intrusion into areas traditionally considered to fall squarely into the powers of the executive.[126]

In *Trump v. Hawaii*, this breadth was reiterated as the United States Supreme Court applied only a rational basis standard to the executive orders banning entry to the United States for non-citizens who traveled from or through a Muslim country.[127]

Before meaningful legislative reform takes place, there has to be a serious reconsideration of the deference given to the executive branch in areas of immigration. Proponents have discussed effectively limiting the executive power and restoring equilibrium in the branches of government by amending the INA.[128] By repealing and rewriting parts of the Congressional delegation of the INA, Congress could limit the scope in which the executive can implicate wide sweeping immigration change by its orders.[129] This would ensure that the following proposals are not considered reaching into powers otherwise broadly delegated to the executive by the judiciary.

ii. Reforming Immigration Courts as Article I Courts

Turning back to the issue of vesting a power of contempt, it is important to note that immigration courts are not Article III federal courts.[130] Immigration courts are trial-level adjudicatory courts that conduct hearings on respondents' removability and relief, among other immigration issues.[131] DHS, acting as the prosecutor in the case, and the respondent alike can file appeals of unfavorable decisions with the BIA.[132] Both the immigration

126. *See Trump*, 138 S. Ct. at 2407-08; Liptak, *supra* note 125.

127. *See* 138 S. Ct. at 2420-21; *see also* Cristina Rodriguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, AM. CONST. SOC'Y, https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/ (last visited Jan. 1, 2021) (referring to the Supreme Court's decision as "Roberts Court's *Korematsu v. United States*—the reviled decision by a previous generation to accept the government's national security justifications for interning Japanese Americans during World War II.").

128. Dalen Porter, Trump v. Hawaii*: Bringing the Political Branches' Power Back into Equilibrium Over Immigration*, 97 DENV. L. REV. F. 128, 150-54 (2019), https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5d55f919dd5db90001c684c0/1565915419027/Porter_DLR_Final.pdf.

129. For a brief interview on a proposed change to INA § 212(f), see Stuart Anderson, *How to Limit a President's Power Over Immigration*, FORBES (June 8, 2020, 12:07 AM), https://www.forbes.com/sites/stuartanderson/2020/06/08/how-to-limit-a-presidents-power-over-immigration/#62c7dd9d2531.

130. *See* RESOLUTION ON IMMIGRATION COURT REFORM, AM. IMMIGR. LAWS. ASS'N BD. OF GOVERNORS 3 (2018), https://www.aila.org/File/DownloadEmbeddedFile/74919.

131. *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts/.

132. *Id.*

courts and the BIA are vested under the DOJ.[133] In limited circumstances, DHS and the respondent can appeal once more to the federal circuit courts.[134] Only then would the case enter a traditional federal system.[135]

Many scholars have considered a variety of issues that would be resolved by restructuring the immigration courts as Article I legislative judiciaries.[136] For example, Judge A. Ashley Tabaddor, Former President of the National Association of Immigration Judges,[137] explains that an immigration judge wears two hats: one of an impartial decision maker and one as an agent of the DOJ's law enforcement mission.[138] These naturally conflicting principles do not permit judges to act in the traditionally politically insolated fashion.[139] The Attorney General can appoint politically leaning judges using his discretion that would inevitably polarize the immigration court system.[140]

Creating Article I immigration courts would not only liberate immigration judges from the enforcement missions of the DOJ, but it would also empower them with the impartial duty of supervising the quality of lawyering provided by respondent and government attorneys.[141] Requiring

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. On January 25, 2021, President Biden appointed A. Ashley Tabaddor as the USCIS Chief Counsel, and she left her positions as Immigration Judge and President of the NAIJ. *A. Ashley Tabaddor, Chief Counsel, Office of Chief Counsel*, U.S. CITIZENSHIP & IMMGR. SRVCS., https://www.uscis.gov/about-us/organization/leadership/a-ashley-tabaddor-chief-counsel-office-of-chief-counsel (Feb. 1, 2021); Daniel Wiessner, *Immigration Judge Who Criticized Trump Admin. Tapped for USCIS Post*, REUTERS (Jan. 26, 2011), https://www.reuters.com/article/immigration-uscis/immigration-judge-who-criticized-trump-admin-tapped-for-uscis-post-idUSL1N2K12Y5. As an avid proponent for judicial independence, *see infra* note 138, I sincerely hope that she uses her newfound proximity to the President to continue advocating for introduction of legislation instituting immigration reform and Article I judiciaries.

138. *Strengthening and Reforming America's Immigration Court System: Hearing Before the S. Judiciary Comm., Border Security and Immigr. Subcomm.*, 115th Cong. 2-3 (2018) (statement of J. Tabaddor, President, National Association of Immigration Judges), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf.

139. *See* ATT'Y GEN., MEMORANDUM FOR THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: RENEWING OUR COMMITMENT TO THE TIMELY AND EFFICIENT ADJUDICATION OF IMMIGRATION CASES TO SERVE THE NATIONAL INTEREST 1-2 (Dec. 5, 2017), https://www.justice.gov/opa/pressrelease/file/1015996/download; Press Release, Dep't of Just., Backgrounder on EOIR Strategic Caseload Reduction Plan, https://www.justice.gov/opa/press-release/file/1016066/download_(last visited Jan. 1, 2021); C. J. KELLER, MEMORANDUM ON OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-01: CONTINUANCES, at 1-6 (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download.

140. Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 29–30 (2013).

141. "[T]he Supreme Court has stressed the importance of federal judicial review of Article I courts' decision." Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV.

federal appellate review of internal cases would allow the federal circuits to review the due process violations in immigration proceedings beyond satisfaction of the broadened *Lozada* requirements.[142]

In order to reformulate immigration courts as Article I courts, legislators could follow the model of the bankruptcy courts of the United States.[143] Congress has the constitutional authority to establish lower legislative tribunals.[144] These tribunals could have separate trial and appellate courts requiring specialized review given the complexity of immigration law.[145]

However, this would require the new Article I immigration courts to depart from the bankruptcy court's case law regarding the delegable power to non-Article III judges.[146] The Bankruptcy Reform Act of 1978 unconstitutionally delegated to bankruptcy judges too much judicial authority.[147] There would have to be a finding that the benefits of the judicial authority outweighs the reach into a different branch of government.[148] While this solution is problematic, it is possible that immigration courts could do what the bankruptcy courts did given the high rates of inadequate representation immigrants receive.[149]

However, despite its benefits, Congress has already rejected Article I restructuring for immigration courts several times.[150]

iii. Legislating a Power of Contempt

A less radical proposal would be for an immigration judge to have a power of contempt that operates similar to their subpoena power. Presently,

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997, 1016 (2018) (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 592 (1985) and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986)).

142. *See id.* at 1016-17.

143. For a thorough explanation of the process to reformulate the Immigration Courts as Article I courts by analyzing the process of the Bankruptcy Courts, see *id.* at 1010-11.

144. U.S. CONST. art. I, § 8, cl. 9.

145. Baibak, *supra* note 141, at 1013-15.

146. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-63 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015).

147. Tisha Morris, *The Establishment of Bankruptcy Appellate Panels Under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 U. MEM. L. REV. 1501, 1503-04 (1996).

148. *See* Porter, *supra* note 128, at 146-47, 149-50.

149. *See* AM. BAR ASS'N, COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 4-9 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

150. Birdsong, *supra* note 140, at 44.

immigration judges are able to, sua sponte or upon the request of the parties, issue a subpoena and request the production of documents or witnesses for a hearing.[151] These subpoenas include the names of the witnesses and the documents requested at a specified hearing date.[152] There are even accommodations given by regulation for witnesses that live more than 100 miles away.[153]

Despite all of this, whenever the immigration judge's subpoena is neglected or refused by the designated witness or party, the immigration judge is powerless to authorize federal officials to hold the wrongdoer in contempt of the court.[154] Instead, the immigration judge must request that a federal district judge issue a similar subpoena order requesting the documentation or participation of the witness.[155] Only when the federal judge's subpoena is disobeyed may the wrongdoer be held liable by the federal courts.[156] This makes it such that the immigration judge's subpoena is powerless without the federal court certification.[157]

An immigration judge should be given a similar power to request, under the certification of a federal judge in the district, that an attorney be reprimanded for their behavior in an immigration court. While immigration courts may not be considered Article III judiciaries, the attorney-client relationship exists as it would in any other court. Such a relationship triggers traditional ethical responsibilities and require counsel to put their best foot forward in the courtroom. When a duty of care and competence is violated by the attorney, the attorney should be held liable as they would in any other courtroom.

While this proposal seems easy enough, Congress seems reluctant to legislate any judicial powers to the immigration judges. There is presently a

151. 8 C.F.R. § 1003.35(b)(1) (2020).

152. *Id.* § 1003.35(b)(3).

153. *Id.* § 1003.35(b)(4) ("If the witness is at a distance of more than 100 miles from the place of the proceeding, the subpoena shall provide for the witness' appearance at the Immigration Court nearest to the witness to respond to oral or written interrogatories, unless there is no objection by any party to the witness' appearance at the proceeding.")

154. *Id.* § 1003.35(b)(6).

155. *Id.*

156. *See* 43 U.S.C. § 104 ("Any person willfully neglecting or refusing obedience to such subpoena, or neglecting or refusing to appear and testify when subpoenaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of district courts of the United States. The punishment for such offense, upon conviction, shall be a fine of not more than $200, or imprisonment not to exceed ninety days, or both, at the discretion of the court: *Provided*, That if such witness has been prevented from obeying such subpoena without fault upon his part he shall not be punished under the provisions of this section.").

157. *See* 8 C.F.R. § 1003.35(b)(6).

bill called the Immigration Court Improvement Act of 2019, proposing that immigration judges be insulated from the political process.[158] The purpose of this bill is to prevent immigration judges from being removed from the bench for failing to adhere to case completion numerical quotes.[159] This bill has similar judicial empowerment undertones as vesting a power of contempt in immigration judges,[160] but unfortunately is not receiving much support from legislators.[161]

Legislating an authority for immigration judges to request review and sanctions issued by federal judges should differ and receive more Congressional support than the Immigration Court Improvement Act of 2019 because it is modeled after already existing regulation.[162] Further, holding attorneys accountable for the representations in court should not be considered as controversial as requiring judges to process cases at certain rates and appraise their performances on their incapacity to adhere to quotas.

V. CONCLUSION

There are many problems for immigrants in the United States. The Trump Administration targeted different areas of immigration law and limited protections available under DACA, Asylum, and Temporary Protected Status, among others.[163] Many passionate attorneys continue to fight back to ensure that fundamental constitutional rights are protected and seek to build a more humane approach to immigration law. At least that is what we know about the appellate level.

On the ground level, immigrants are not necessarily always provided the same caliber of lawyering. Immigration judges can speak to the many unprepared attorneys that appear in their courtrooms and the underdeveloped cases they are forced to rule on. Unfortunately, the immigration private bar contains many attorneys providing subpar representation and are effectively

158. S. 663, 116th Cong. (2019).

159. *Id.* § 3(b)(2).

160. *Id.* § 2(b) ("It is the sense of Congress that—(1) immigration judges—(A) should be fair and impartial; and (B) should have decisional independence that is free from political pressure or influence; and (2) in order to promote even-handed, non-biased, decision making that is representative of the public at large, immigration judges should be selected from a broad pool of candidates with a variety of legal experience, such as law professors, private practitioners, representatives of pro bono service and other nongovernmental organizations, military officers, and government employees.").

161. *See Cosponsors: S.663 116th Congress (2019-2020)*, U.S. CONG., https://www.congress.gov/bill/116th-congress/senate-bill/663/cosponsors?searchResultViewType=expanded (last visited Jan. 1, 2021).

162. *See* 8 C.F.R. § 1003.35(b)(6).

163. Rodriguez, *supra* note 127.

"getting away with it" because the immigration judges supervising these attorneys are unable to sanction them for their inadequacies. Future generations of immigrants suffer the consequences of this.

Now I recognize that some generalizations are being made. Not every private bar immigration attorney is abusing the system and exploiting immigrants. There are many passionate advocates who bury their heart and souls into their direct service immigration cases despite being slapped time and time again by a harsh administration devoted to promoting a racist and elitist immigration agenda. This call for reform is not directed at or motivated by them.

Nonetheless, this call for reform of the rules governing attorney competence and diligence by providing more punitive options to immigration judges arises due to an unfortunate sect of the private bar getting away with providing low quality service to immigrants. The quality of lawyering should not be so disparate that immigrants are essentially playing Russian Roulette when hiring a lawyer. The present safeguards are insufficient.

Stronger safeguards are necessary. Whether immigration courts are restructured as Article I courts, or Congress authorizes immigration judges to seek federal judges to certify sanctions, immigration judges must be enabled to separate the good lawyers from the bad ones. Immigration judges sit in the first row and watch cases, like that of our hypothetical Honduran respondent, be mishandled by unscrupulous attorneys. Immigration judges need to be able to sanction these inadequate attorneys to restore the integrity of the immigration system for future generations of immigrations who will need our help.