

1 The Attorney General's Immigration Courts

Maybe you've seen those signs people would sometimes carry at rallies and protest marches aimed at President Trump's immigration policies, signs that say, "This is what 'Never Again' looks like." I first saw one in January 2018, in a photo in the *New York Times* that accompanied a story about the DACA program. In the photo, you can see about a dozen people standing close together, most of them holding up a photo—of themselves or possibly a loved one—printed over a Twitter hashtag like "#HereToStay" or "#DreamActNow." You can tell it's a chilly day because the people are dressed in light coats, scarves, and (for some reason) matching lime green gloves that punctuate the image throughout. Off to the right, one woman holds up a red sign with white lettering, bearing the slogan that Jews have long invoked to recall the Holocaust and stand against the persecution of any people.¹ Those signs, produced by a rabbinical human rights organization called T'ruah, cropped up with particular frequency after Representative Alexandria Ocasio-Cortez controversially referred to ICE detention facilities as "concentration camps," and now they seem to be pointing the finger primarily at U.S. government treatment of people in detention.²

When I first saw the sign in January 2018, though, the controversial family separation policy had not yet been announced, and the comparison

I felt challenged to was a different one: Do the conflicts now devastating Central America and Mexico amount to persecution and destruction of an entire people on a mass scale—a holocaust? Framing the question this way doesn't let U.S. immigration policy off the hook, either. Jewish leaders, historians, and others have criticized U.S. immigration policy of the 1930s and early 1940s for turning away large numbers of Jewish refugees from Europe.³ If what's going on in Central America and Mexico today is mass persecution and the people fleeing it are like the Jews of yesterday, the sign suggested, then U.S. immigration policy deserves renewed scrutiny to avoid repeating the terrible mistakes of the past.

But what does “persecution” really mean? That question underlies some of the biggest debates in immigration law today, because that term is an essential element of any claim for asylum. When President Trump said that the asylum process is rife with abuse, he may have been conflating two separate issues.⁴ The first is the need to shut down businesses that unabashedly seek to provide customers with entirely fictitious asylum petitions, which violate anyone's understanding of the asylum laws. Such operations have been prosecuted under Presidents Obama and Trump, though the Trump administration's proposal to deport potentially thousands of such operations' clients generated controversy.⁵ The second, and more complex, issue that President Trump may have been raising is the fundamental question of what types of *truthful* claims should be considered “persecution,” qualifying a person for asylum under U.S. statutes and treaty obligations.

A struggle for control over immigration law has broken out since the beginning of the Trump administration. The scope of the definition of “persecution” in asylum law is one of several hot-button issues over which the battle has been waged. While a few cases will end up before the U.S. Court of Appeals or, rarely, the Supreme Court, most litigants and their lawyers argue their cases before a different institution: the immigration courts. And it will be an immigration court that tells an individual whether her case fits within the constellation of fact situations that have been defined as persecution in the past. Unless the noncitizen has a lawyer—and most don't—the immigration court's word will usually be the last.⁶ Even in those rare cases that are reviewed by the U.S. Court of Appeals, the appellate court will apply a high standard to overturn the decision below, gener-

ally accepting the immigration judge's view of the facts and deferring to reasonable interpretations of ambiguous legal terms. In other words, what happens in the immigration courts matters.

Actually, the immigration courts are not really "courts" at all, at least not in the sense we usually use the word. They're not part of the federal judiciary like the U.S. Supreme Court, the U.S. Courts of Appeals, or the U.S. District Courts, created under Article III of the Constitution. And they're not one of the court systems that Congress created to hear claims on certain specialized statutory issues, like the U.S. Tax Court or the U.S. Court of Appeals for the Armed Forces. Those are called Article I courts, since they are under the control of Congress, the branch of government defined by Article I of the Constitution.

Instead, the immigration courts are an arm of the attorney general, who heads the Department of Justice (DOJ). DOJ is part of the executive branch, defined by Article II of the Constitution, and the attorney general is a political appointee who answers directly to the president. Since 1940, the attorney general has had the responsibility of deciding whether a noncitizen was legally permitted to enter the country or is legally entitled to stay. Since that would be a lot of work for one person who has other important duties like prosecuting federal crimes, DOJ employees called "immigration judges" are tasked with hearing those removal cases. The immigration judges are now organized under an office of DOJ called the Executive Office for Immigration Review (EOIR). EOIR also includes the Board of Immigration Appeals (BIA), which hears appeals from decisions of the immigration judges. Collectively, the hearings and appeals directed by EOIR are often referred to in common parlance as "the immigration courts."

Since their function is to assist the attorney general in deciding removal cases, the immigration courts make decisions subject to his supervision and control. They're not Article III judges, so they don't have life tenure to make them independent of the political process. EOIR sets their performance standards and retention policies (though their salaries are set by Congress).⁷ Because they are intended to function as an arm of the attorney general, he is free to disagree with them and overrule them at any time, in any case. In short, immigration judges and members of the BIA do not have—and are not intended to have—the independence that Article III or even Article I judges have. They are closely connected to political

officers, and their decision-making authority is directly influenced by political goals.

This arrangement is an anomaly in the federal government. There are other federal agencies that adjudicate cases, but those adjudications arise under the statutes those agencies administer. For example, the Department of Labor (DOL) may sanction an employer for violating the Fair Labor Standards Act, and in adjudication before DOL's Wage and Hour Division an employer may contest the agency's reading of the statute or regulation upon which the agency action was based. As the agency that interprets and enforces the labor laws, it arguably makes sense for parties to be able to first challenge DOL's interpretation with DOL before seeking review of the agency's sanction by a court.

The immigration courts in DOJ are different. DOJ is a law enforcement agency that represents the United States. According to its mission statement, its job is

[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.⁸

According to Black's Law Dictionary (the classic source for legal terminology), "law enforcement" means "[t]he detection and punishment of violations of the law." All of DOJ's other functions—prosecuting federal crimes, enforcing federal civil laws, running the Bureau of Prisons—fit within this definition. Deciding immigration cases does not—especially where the cases being decided were brought by DOJ's "client," the United States, against an individual.

In addition, DOJ does not have special expertise in immigration law, apart from supervising the immigration courts themselves. DOJ, despite its law enforcement mission, doesn't enforce the immigration laws; that's done by the Department of Homeland Security (DHS). When you see on the news that Immigration and Customs Enforcement (ICE) is conducting raids or that Customs and Border Protection (CBP) is detaining people at airports, that's DHS, not DOJ or the immigration courts. Between 1940 and 2002, both the enforcement and the adjudication functions under the

immigration laws were done by DOJ, but the Homeland Security Act of 2002 (HSA) recognized that this violated a basic tenet of due process: It is patently unfair to have the same party investigating, prosecuting, and deciding the case against you. The HSA formalized an important separation of functions by moving investigation and prosecution into the newly created DHS. Curiously, however, the HSA left the adjudication function within an agency whose purpose is law enforcement.

As long as the immigration courts remain under the authority of the attorney general, the administration of immigration justice will remain a game of political football—with people's lives on the line. While the aggressive actions of the attorneys general in the Trump administration exposed the political volatility of the system, the system itself invites political manipulation and a whiplash approach to the administration of immigration law that varies with the views of whoever happens to be in the White House.

THE ATTORNEY GENERAL'S SELF-REFERRAL POWER

The tension between law enforcement and removal adjudication has existed for over a century. So why is it only now becoming a concern?

It isn't. As early as 1931, a commission established by President Herbert Hoover studied exclusion and deportation procedures, then under the Department of Labor, and recommended that Congress replace them with an independent immigration court system like the U.S. Tax Court. The Wickersham Commission (better known for its separate report on Prohibition) cited many "objectionable features" of the process then, including the "despotic powers" of the immigration officers. "There seems to be no good reason," the Commission concluded, "why we should not proceed at least as far in the establishment of a satisfactory system with respect to the important personal rights involved in deportation as we have with respect to the property rights involved in taxation."⁹

The call for immigration court reform has been repeated over the decades, giving rise to some needed changes but never removing the immigration courts from the political control of law enforcement officers.¹⁰ The issue has attracted renewed attention since 2017 because of the

aggressive intervention by the attorneys general in the Trump administration into the day-to-day work of immigration judges. That intervention has affected both the substantive and the procedural operation of the law before the immigration courts in ways that have created chaos for immigrants and immigration judges.

The problem will not end with the Trump administration. The immigration courts' location within the Department of Justice will remain subject to abuse no matter who occupies the White House. Even if a new administration were to reverse some of the more controversial moves of recent attorneys general, the precedent set during the Trump administration could be followed by any administration at any time to achieve its political goals—restrictive or permissive—around immigration. While we expect shifts in policy from a new president, other tools—such as legislation, rulemaking, or executive orders on matters committed to presidential discretion—are available for that purpose. Those tools were designed to require participation by the public and deliberation by the executive branch over controversial issues. Adjudication, by contrast, is a blunt tool for changing policy—especially when people's lives are on the line. Individuals appearing before the immigration courts deserve some predictability about the standards that will be used to decide their cases. A system that allows politically appointed officers to suddenly change settled legal principles being used to decide pending cases—effectively moving the goalposts midway through a game with life-or-death consequences—impugns notions of fundamental fairness in adjudication.

The attorney general's power to rehear immigration court cases comes from a Department of Justice regulation, 8 C.F.R. § 1003.1, which prescribes rules for the organization, jurisdiction, and power of the BIA. That regulation provides

(h) Referral of cases to the Attorney General.

(1) The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.¹¹

Section 1003.1(h)(1)(i) allows the attorney general to exercise plenary authority over the immigration courts, deciding on his own motion to “self-refer” cases from the BIA and redecide them himself. Through this