Written Testimony
Charles D. Stimson
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"Preserving Due Process and the Rule of Law: Examining the Status of Our Nation's Immigration Courts"
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Chairman Padilla, Ranking Member Cornyn, and Members of the Subcommittee, thank you for the honor of testifying today. My name is Charles D. Stimson. I am Deputy Director of the Edwin Meese III Center for Legal Judicial Studies, Manager of the National Security Law Program, and Senior Legal Fellow at The Heritage Foundation.[1]

I have written that, unlike all federal and most state court judges, immigration judges cannot dismiss a case for failure to state a claim, nor can they render judgment on the pleadings, even in patently frivolous cases.[2] I have also written about the need for immigration judges to be given contempt authority.[3] My written and oral testimony today will focus on this scholarship and the need for immigration judges to have these common judicial tools to manage their crushing caseloads.

This is not and should not be a partisan issue. This is a good-governance issue, pure and simple.

Introduction

Immigration policy has been, more or less, a challenge for every United States President in the modern era.[4] Congress has legislated on the issue at least 238 times in the 20th century,[5] passing sweeping reforms of our nation's immigration laws in 1952, 1965, 1986, 1996 and 2012.[6]

In the past few decades, since the Simpson–Mazzoli Act of 1986,[7] major immigration policy issues have included how best to secure the border,[8] whether to grant amnesty for illegal aliens living in the United States,[9] birthright citizenship,[10] whether to keep the visa lottery and what to do about visa overstays,[11] chain migration,[12] the economic impact of lawful and illegal immigration,[13] whether the states and businesses have a role in enforcing federal immigration law,[14] the impact of illegal immigration on crime,[15] the degree to which local law enforcement can or should cooperate with federal immigration authorities,[16] the benefits to which illegal immigrants should be entitled,[17] and more.[18]

Some states have allowed illegal immigrants to have state driver's licenses.[19] They defend those laws by arguing that since illegal immigrants will drive with or without a license, allowing them to have driver's licenses enhances public safety and increases state and federal revenue.[20] Despite a federal law that prohibits state colleges and universities from giving in-state tuition to illegal aliens (unless they offer in-state tuition to everyone), some states have defied federal law and offer in-state tuition to illegal immigrants.[21]

More than 170 cities and counties across the United States have passed sanctuary laws that protect illegal immigrants from U.S. Immigration and Customs Enforcement (ICE).[22] California and seven other states are now sanctuary states, meaning that they prohibit local law enforcement from cooperating with ICE.[23] Some cities in those sanctuary states have pushed back, vowing to defy state law and cooperate with federal immigration authorities as they (and their states) had for decades.

Yet as our national immigration debate rages on, we remain an immigrant-friendly country, giving legal status to more foreigners every year than is given by any other country.[24] The United States offers lawful permanent residency (LPR) to over a million people a year, even as the estimated number of illegal aliens in this country has climbed from 2 million in 1984[25] to 12 million in 2015.[26] The number of asylum claims jumped from 48,321 in 2012 to 65,218 in 2018.[27] Today, the number of pending asylum claims at DHS's Citizenship and Immigration Services is over 920,000.

Overseeing the adjudication of asylum and other immigration-related cases are the federal immigration judges. Appointed by the Attorney General of the United States, immigration judges serve within the executive branch and, unlike Article III federal judges, do not require Senate confirmation. Like state and federal judges, immigration judges sit in courtrooms, handle cases, rule on motions, and render judgments. They also are required to follow U.S. Supreme Court and federal Circuit Court precedent.

But immigration judges lack many of the tools that all federal and most state judges have that enable them to manage their dockets efficiently and effectively. Immigration judges don't have contempt authority, cannot dismiss a case for failure to state a claim, and cannot render a judgment on the pleadings.

As a result, the immigration court caseload has exploded in size, from no cases in 1984, to 260,000 in 2011, to 876,552 in 2019, to 2.6 million today. Cases with merit, which deserve the court's time and attention, are lumped in with meritless cases, creating a chaotic and unmanageable docket. This inures to the benefit of those whose cases lack merit but drag on for years and delays justice for those whose cases have merit.

It is time for immigration judges to get contempt authority. Furthermore, giving immigration law judges the ability to dismiss a case for failure to state a claim and the ability to render judgments on the pleadings—as their robed brothers and sisters have in other courts—would arm the immigration judiciary with the ability to manage their dockets effectively and efficiently, help eliminate the backlog of cases, and prune the docket.

August 2023 saw a record number of new deportation cases arrive at the Immigration Court. A total of 180,065 new Notices to Appear (NTAs) were issued during August.[28] This was a jump of 19 percent in just one month; July filings had reached a previous high of 151,910.[29] While the growth rate of 19 percent is large, it was moderate compared to the 28 percent jump from June to July.

Thus far, more than 1,230,000 new deportation cases have been added to the Immigration Court's docket during fiscal year (FY) 2023.[30] All these immigrants received NTAs issued by Department of Homeland Security (DHS) officials requiring them to appear in Immigration Court and defend themselves against the government's efforts to deport them. For many, these individuals will need to establish that they should be granted asylum or an alternative form of relief from removal if they are to be allowed to stay in the country.

Based on discussions I have had with seasoned immigration judges, if they had the ability to dismiss a case for failure to state a claim and the ability to render judgments on the pleadings, they believe that their caseloads would shrink by up to 75 percent.

Overview of the Immigration Courts

The immigration courts are part of the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR).[31] As such, they are part of the executive branch and do not fall under Article III of the Constitution. The EOIR oversees the immigration courts through the Office of the Chief Immigration Judge.[32] The EOIR also oversees the Board of Immigration Appeals (BIA), which hears appeals from the immigration courts.[33] Appeals of BIA decisions are taken up by the Federal Circuit Courts of Appeals, and appeals of their opinions can be made to the United States Supreme Court.[34]

The immigration courts have jurisdiction to make determinations about removal and deportation, adjudicate asylum applications, adjust status, review credible fear determinations made by the Department of Homeland Security, and conduct removal proceedings initiated by the Office of Special Investigation, among other related activities.[35]

Unlike the federal courts, the immigration courts do not have a flexible set of procedural rules designed to "secure the just, speedy, and inexpensive determination of every action and proceeding."[36] The Immigration Court Practice Manual is the closest analog, but it does little more than provide a set of standardized practices for a procedure that is strictly governed by regulations. Unlike the Federal Rules of Civil Procedure, the Practice Manual gives the immigration judges almost no authority to manage a case independently.[37]

Crippled by the Numbers

The immigration courts are inundated with more cases than they can handle effectively. In 1984, they had no case backlog. By 2011, their backlog exceeded 260,000 cases. [38] In 2019, they were drowning under 876,552 pending cases.[39] Today, that number is over 2.6 million cases. Meanwhile, the average length of time that a migrant spends waiting for a final decision has exploded: 324 days in 1998 to 726 days in 2019.[40] Today, the wait time is over three years.

Despite the immigration courts' limited subject matter, their caseload far surpasses the caseload of most, if not all, of the nation's federal district courts. In 2019, there were 424 immigration judges managing 876,552 pending immigration cases.[41] Today, there are 734 immigration judges spread across 69 courts and three adjudication centers managing more than 2,620,591 cases. Some immigration judges, like those in Miami, have a caseload of 10,000 cases each.

By comparison, in 2019, there were 677 federal district judges who managed 458,988 cases.[42] As of June 30 this year, that same number of judges was managing 692,219 cases. Put another way, the average immigration judge has 3,570 pending cases, while the average federal district court judge (who also benefits from a staff of several full-time law clerks) has 1,022, up from 678 in 2019.

The majority of claims or defenses raised by migrants in their immigration cases are not meritorious. In the second quarter of 2019, 68 percent of removal and deportation cases resulted in removal orders.[43] Notably, on a small percentage of asylum claims, applications are granted.[44] In FY 2022, EOIR granted only 14 percent of asylum claims.

Unfortunately, there is little that immigration judges can do to eliminate meritless cases early in the process. Immigration judges are limited to two rulings for most cases—relief or removal—and these decisions are made only at the end of proceedings.[45] With few exceptions, an immigration judge cannot dispose of a meritless or improperly prosecuted case.[46]

This allows immigration judges no room to meet special circumstances with flexibility as federal judges can. Additionally, the Department of Justice has never issued regulations under the Immigration and Nationality Act that would give immigration judges control of a disorderly courtroom. Simply put, immigration judges have no mechanism for enforcing their judgments. Nor do they have a mechanism to dismiss meritless cases or summarily grant judgement to the government as other courts can. Immigration judges must hear cases from start to finish, even if it is obvious from the outset that a case lacks legal merit. Predictably, the docket is clogged with meritless cases.

These failures are widespread and harmful to aliens and citizens alike. Aliens are not afforded a speedy trial in any reasonable sense of the word given the exorbitant number of pending cases in the docket. Another concern involves the large percentage of aliens who file for relief but support their application with meritless victimhood claims. Immigrants whose claims are clearly meritless end up effectively denying timely relief to aliens who have legitimate claims. If the DOJ's goal is to incentivize illegal immigration, it is succeeding.

Grant Immigration Courts Two Tools Common to the State and Federal Courts

It is a bedrock principle of civil litigation in both federal[47] and state courts that a plaintiff must plead a viable legal claim.[48] Not so in immigration court.[49] Whereas all state and federal courts have tools they can use to dispose of meritless cases at the early stages of litigation, the immigration courts—the sole exception being those rare instances where an alien admits that he or she is subject to removal[50]—do not.

Federal and state court judges have two important tools that allow them to dismiss meritless cases soon after they are filed: dismissal for failure to state a claim and judgment on the pleadings. These tools ensure that legally deficient cases do not waste scarce judicial resources. These tools are not, however, available to immigration judges who must manage thousands of meritless cases from filing to final judgment.[51]

By contrast, federal judges are empowered by Federal Rule of Civil Procedure 12(b)(6) to dismiss claims that are inadequately pleaded or legally baseless.[52] The courts of all 50 states also have this authority.[53] To determine whether a claim is legally baseless, the court assumes that the facts alleged are true.[54] The court then considers whether those facts satisfy the elements of a viable claim. If the facts as pleaded do not give rise to a viable claim, then the court can dismiss the case.[55] Courts need not wait for a motion to dismiss a meritless claim, but in most cases, they must give the party whose claims are dismissed an opportunity to be heard.

The federal courts and all but three of the states' courts have another tool they can use to eliminate meritless cases early in the judicial process: judgment on the pleadings.[56] Federal Rule of Civil Procedure 12(c) gives federal district courts the power to grant judgment to a party based solely on the pleadings. Typically, this tool is used when the parties agree on the underlying facts of a case but disagree about their legal effect.[57] Alternatively, as with a dismissal under 12(b)(6), a court may assume that the facts alleged are true and consider whether they give rise to a viable claim.[58] The court then applies the law to those facts to determine whether a party is entitled to early judgment. Typically, a party must move for judgment on the pleadings before a court can enter an early judgment, but one Circuit Court of Appeals permits district courts to grant judgment on the pleadings without a motion if one party is plainly assured of victory as a matter of law.[59]

Immigration judges lack both of these tools. This means that when a plainly meritless case comes before them, they have no choice but to retain it, manage it, hold hearings in it, and only after the judicial process is exhausted enter the inevitable judgment. The result is judicial gridlock. Meritorious cases stall behind a backlog of baseless ones.

Giving immigration courts these two tools would help to alleviate the gridlock. Asylum petitions provide a clear example. The law sets out the elements of a valid claim to asylum in precise language.[60] An applicant for asylum must demonstrate that he is unwilling to return to his home country because he is likely to face persecution, or fear of persecution, on account of race, religion, nationality, membership in a particular social group, political opinion, or other special circumstances as the President may specify.[61] Nothing else provides a basis for asylum. Thus, if an applicant appears before an immigration judge and applies for asylum on the grounds that he fears gang violence in his home country, he is ineligible for asylum. Nevertheless, the immigration judge cannot dismiss the case or grant judgment in the government's favor until the applicant has filled out the appropriate forms and had a hearing. The time and effort the judge must spend on that plainly meritless case is time the judge cannot spend on a potentially meritorious one.

The federal courts have long recognized that "judicial resources better spent on meritorious claims [are] wasted on frivolous ones."[62] It is time to give immigration courts the powers employed by the federal and state courts to prioritize meritorious cases and quickly dispose of meritless ones.

The Legislative Solution

To effect this change, the regulations should be amended to grant immigration judges the ability to dispose of petitions that do not rise to the pleading standards required by Federal Rule 12(b)(6).

The proposed changes are set forth below; additions are underlined and removals are stricken through.

First, 8 C.F.R. § 1240.11(c)(1) should be amended as follows:

> (1) If the alien expresses fear of persecution or harm <u>on account of a protected statutory basis under section 208 of the Act</u> upon return to any of the countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:
>
> (i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;
>
> (ii) Make available the appropriate application forms; and
>
> (iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

Additionally, 8 C.F.R § 1240.11(c)(3) should be amended as follows:

> (3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute <u>unless the factual matter is accepted as true</u>. An evidentiary hearing extending beyond issues related to the basis for a ~~mandatory~~ denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

Furthermore, 8 C.F.R. § 1208.14 should be amended as follows:

> (a) By an immigration judge. Unless otherwise prohibited in § 1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations. <u>An immigration judge may deny any application for relief if it lacks sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.</u>
> ~~(d) Applicability of § 103.2(b) of this chapter. No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter.~~

Finally, 8 C.F.R. § 1240.12(b) should be amended as follows:

(b) Summary decision. Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal. An immigration judge may deny any application for relief if it lacks sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Immigration Judges Need Contempt Authority

Twenty-six years ago, the United States Congress passed a law giving immigration judges civil contempt authority, but it delegated to the U.S. Attorney General the duty to draft the implementing regulations. Five U.S. Presidents and several U.S. Attorneys General later, immigration judges still don't have contempt power. Why? Because, in defiance of a congressional statute, the Justice Department has failed to issue an implementing regulation.

There is, to be sure, ample criticism of the immigration court system and of immigration judges in particular.[63] In 2019, the American Bar Association (ABA) wrote in a comprehensive study that the "immigration courts are facing an existential crisis" and are "irredeemably dysfunctional."[64] The state of those courts has grown much worse since the ABA study a mere four years ago.

Calls for wholesale structural realignment of the immigration court system are not uncommon and include recommendations to place the court under Article I, like the U.S. Tax Court,[65] or to eliminate the "trappings" of courts and replace them with less adversarial bureaucratic processes like those used by the Social Security Administration.[66] Others question the independence of immigration judges themselves, since they are part of the U.S. Department of Justice;[67] are hired by the Executive Office for Immigration Review, which is accountable to the Attorney General;[68] and don't enjoy the protections afforded to federal judges. [69] One organization even suggested that the immigration courts are designed to fail.[70]

Some of the constructive criticism of the immigration court, its structure, and the roles and responsibilities of immigration judges merit further study, debate, congressional scrutiny, and possible thoughtful reform. But this type of effort would require a concerted effort by congressional leaders from both parties, thoughtful dialogue, and an open mind without political maneuvering—an effort that, for the time being, seems out of reach.

In the meantime, as noted above, immigration judges are swamped by a crushing caseload, are burdened by a backlog of over two million cases, and lack the tools to dismiss a case for failure to state a claim and to render a judgment on the pleadings.[71] Immigration judges also lack contempt authority, even though Congress recognized this deficiency more than two decades ago and passed a statute giving them that power. As a result, litigants before the immigration courts, government attorneys and private counsel alike, can't be held accountable to the judge with respect to matters such as timelines, docketing dates, or even court orders. Counsel, who often carry other cases

before other (non-immigration judge) courts, put a priority on cases where the court has actual power to enforce its own orders with either civil or criminal contempt. Counsel who appear before immigration judges know that those judges can wag their fingers and raise their voices if counsel defies a court order—but nothing more.

As a result, immigration court judges are treated as second-class judges, taking a back seat to all other judges who have the contempt power over parties and lawyers who knowingly violate court orders. Moreover, immigration dockets, which are already overburdened with cases, continue to expand because of the inability of judges to manage their dockets (or even the counsel before them) effectively.

Immigration judges needed contempt authority 26 years ago when Congress passed the statute, and they need it more today than ever before. The Department of Justice can fix this issue quickly, but if it is unwilling to do so, Congress ought to step in once and for all to give immigration judges commonsense tools to manage their dockets and the counsel before them as all other judges do.

Contempt Power Matters

The contempt power is the power to deter and punish contempt for the court's authority. It is a critical tool in the judicial toolkit. Contempt is any act of disobedience or disrespect toward a judicial body.[72] To put it another way, contempt power is the power of a judicial body to coerce compliance or summarily punish (with monetary fines or imprisonment) noncompliance with the court's orders or standards of acceptable behavior.[73] This power is "inherent in all courts."[74]

The contempt power is ancient. In fact, the power is "as ancient as the laws themselves."[75] Historical examples of courts wielding their inherent contempt powers abound.[76] Sir William Blackstone explained that courts must have the power to punish contempt because "without a competent authority to secure their administration from disobedience and contempt, [laws] would be vain and nugatory."[77]

Mirroring Blackstone, the Supreme Court has held that "[i]f a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."[78] Accordingly, courts have "no more important duty" than to enforce their orders and punish disobedience.[79] Without a contempt power, courts of law devolve into "boards of arbitration whose judgments and decrees would be only advisory."[80]

In 1948, Congress enacted 18 U.S.C. § 401, which sets the outer bounds of the federal courts' contempt power.[81] It provides:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Federal Rules of Civil Procedure also provide for the use of the contempt power in specific situations. The federal courts can, for example, use the contempt power to punish a party or attorney for failure to obey a scheduling order,[82] a discovery order,[83] a subpoena,[84] or a judgment.[85]

Related to but separate from the contempt power, federal courts also retain a rule-based authority to sanction misleading, vexatious, harassing, or unsupported factual representations and legal arguments.[86] They also retain a narrow inherent authority to impose monetary sanctions on lawyers even in the absence of contempt.[87]

Contempt may be either civil or criminal.[88] The same punishments (fines and imprisonment) apply to both.[89] Whether contempt is civil or criminal depends on the purpose of the sanction—civil is remedial; criminal is punitive.[90] Put another way, a contempt proceeding is civil if its purpose is to coerce compliance but criminal if its purpose is to punish the wrongdoer.[91]

The contempt power is not, however, unlimited.[92] The federal courts are obligated to use "the least possible power adequate to the end proposed."[93] Moreover, that power is limited by the First Amendment's protection of free speech,[94] the Fifth Amendment's Due Process Clause,[95] the protection against double jeopardy,[96] the protection against self-incrimination,[97] and the Eighth Amendment's protection against cruel and unusual punishments.[98] The Supreme Court has also said, in *dicta*, that the Sixth Amendment's guarantees of speedy trial and compulsory process apply to the contempt power.[99]

Whatever its limits, the contempt power is an essential tool for any court. Without it, the courts would be powerless to fulfill their duties of administering public justice and enforcing the rights of litigants.[100]

Congress Authorized the Contempt Power for Immigration Judges

It is no surprise that Congress saw fit to give immigration judges the contempt power. At the end of 1996, Congress passed the Omnibus Consolidated Appropriations Act for 1997 by wide bipartisan majorities in both chambers.[101] That act included an amendment to the Immigration and Nationality Act of 1952, which reads:

> The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (*under regulations prescribed by the Attorney General*) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.[102]

At first glance, this statute appears to give immigration judges the ability to punish contempt. In fact, the statute is conditional. It gives immigration judges permission to wield whatever contempt

power the Attorney General determines they should have, but as written, the statute gives them no authority to punish contempt *until* the Attorney General publishes regulations giving them that authority.

It has been 26 years since Congress enacted §1229a(b)(1), and no Attorney General has ever finalized implementing regulations. As a result, immigration judges still lack contempt authority, §1229a(b)(1) is toothless, and the DOJ has thwarted Congress's intent to correct a long-standing problem.

Several Attorneys General have at least paid lip-service to drafting a contempt regulation, but none has ever done so. For example, in 2006, Attorney General Alberto Gonzales issued a memorandum instructing the Director of EOIR and others within the DOJ to "draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority."[103] No such rule was implemented.

Every year from 2006 through 2016, the DOJ said in its Semiannual Agendas that it intended by the following year to draft a regulation giving immigration judges contempt authority.[104] No such regulation was implemented, and the proposed contempt rule disappeared from the agenda in 2017.[105] Since then, the DOJ has given no indication that it intends to draft an implementing regulation.

The DOJ has not explained why it has refused to promulgate a contempt regulation, but commentators suppose that it is because the DOJ does not want its trial lawyers to be subject to discipline by its immigration judges.[106]

When I discussed this matter with senior officials in the previous Administration, they indicated that DHS did not want their immigration attorneys held in contempt for not complying with judicial orders. When I asked why DHS immigration attorneys should be treated with kid gloves compared to other federal government attorneys like Assistant United States Attorneys, they could not answer my question.

It is my understanding that DHS still holds the same opinion: They do not want DOJ immigration judges to be able to hold DHS immigration attorneys in contempt.

Immigration judges put orders on DHS attorneys routinely asking for the criminal history ("rap sheet") of a particular alien, but those attorneys refuse to do so. Since DHS attorneys don't have the burden of proof in hearings, many immigration judges I have spoken to note that DHS attorneys have become lazy. The respondent has the burden of proof. All DHS attorneys do is cross examine people to see whether they can catch them in a lie. These same immigration judges told me that many DHS attorneys don't know how to put a case together.

DHS attorneys engage in charge sheet review. They review the "Notice to Appear" to make sure that it's factually sufficient and legally correct. That's not actively working a case.

One of the biggest problems immigration judges are having now is getting DHS attorneys to actually show up in the courtroom. They want to show up by WebEx or phone it in. It has become so bad that recently, a DHS attorney assigned to a hearing appeared via WebEx in a hoodie and sweatpants and laying down in his bed. I'm told he was admonished by his superiors for this unprofessional behavior.

Contempt power is like a nuclear weapon: Once you have it, you don't want to use it, but it deters others from bad behavior. If the Congress gave contempt authority to immigration judges, those judges would likely use it sparingly once counsel for the government or respondent's counsel realized that they could be subject to being held in contempt. That's what happens in federal and state courts, and there is no reason to think it would play out any differently in immigration courts.

Immigration Judges Need Contempt Authority

The lack of contempt authority hinders the immigration courts' ability to manage their ever-increasing caseloads. Without it, judges have no ability to cajole or punish attorneys and litigants who refuse to comply with orders, deadlines, or rules of decorum. As a result, immigration courts are powerless to combat incompetence and gamesmanship that delay speedy resolution of their cases, which happens quite frequently. As the ABA noted in its 2019 report, "absent such authority, immigration judges are again rendered powerless to control their own courtrooms and enforce compliance with potential time saving programs."[107]

In 2018, Judge Ashley Tabaddor, an immigration judge and President of the National Association of Immigration Judges, summed up the problem to the Senate Border Security and Immigration Subcommittee:

> One of the most egregious and long-standing examples of the structural flaw of the Courts' placement in the DOJ is that Immigration Judges have never been able to exercise the congressionally mandated contempt authority statutorily authorized by Congress in 1996. This is because the DOJ has never issued implementing regulations in an effort to protect DHS attorneys (who it considers to be fellow federal law enforcement employees). However, as Congress recognized in passing contempt authority, misconduct by both DHS and private attorneys has long been one of the great hindrances to adjudicating cases efficiently and fairly. For example, it is not uncommon for cases to be continued due to private counsel's failure to appear or be prepared for a hearing, or DHS' failure to follow the Court's orders, such as to conduct pre-trial conferences to narrow issues or file timely documents and briefs. Just a couple of months ago, when I confronted an attorney for his failure to appear at a previous hearing, he candidly stated that he had a conflict with a state court hearing, and fearing the state court judge's sanction authority, chose to appear at that hearing over the immigration hearing in my court. Similarly, when I asked a DHS attorney why she had failed to engage in the Court mandated pre-trial conference or file the government's position brief in advance of the hearing, she defiantly responded that she felt that she had too many other work obligations to prioritize the Court's order. These examples represent just a small fraction of the problems faced by Immigration Courts, due to the failure of the DOJ, in over 20 years, to implement the Congress approved even-handed contempt authority.[108]

In short, immigration judges are not masters of their own courtrooms. They, their caseloads, and (most importantly) the hundreds of thousands of immigrants whose cases they decide are held captive by the uncheckable behavior of a few misbehaving or incompetent lawyers and litigants.

In the press release accompanying his memorandum of Immigration Court reforms, Attorney General Gonzales recognized that "[b]y better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past."[109] It's past time to take that statement seriously.

Language of the Regulation

There are two ways to fix this problem and finally give immigration judges the contempt power that Congress authorized 26 years ago: the easy way and the harder way.

The easy way is for the DOJ to finally draft a regulation. The harder way is for Congress to amend §1229a(b)(1) to include an explicit contempt power and thereby deprive the DOJ of any discretion in the matter. Regardless of which approach is taken, immigration judges' contempt authority should substantially mirror federal judges' contempt authority.

The regulation could be codified at 8 C.F.R. §1003.112 (presently nonexistent) and read:

> 8 C.F.R. 1003.112 *Contempt proceedings in Immigration Court.*
> (a) *Contempt.* Pursuant to 8 U.S.C. § 1229a(b)(1), an immigration judge may punish by fine such contempt of its authority, and none other, as—
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful process, order, rule, decree, or command.
> (b) *Method of disposition.*
> (1) *Summary disposition.* When conduct constituting contempt is directly witnessed by the immigration judge, the conduct may be punished summarily.
> (2) *Disposition upon notice and hearing.* When the conduct apparently constituting contempt is not directly witnessed by the immigration judge, the alleged offender shall be brought before the court and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.
> (c) *Procedure.* The immigration judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The immigration judge shall also determine when the contempt proceedings shall be conducted. The immigration judge may punish summarily under subsection (b)(1) only if the immigration judge recites the facts for the record and states that they were directly witnessed by the

immigration judge in the actual presence of the court participants. Otherwise, the provisions of subsection (b)(2) shall apply.

(d) *Record; review.* A record of the contempt proceedings shall be part of the record of the proceedings during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and filed with the Board of Immigration Appeals for review within seven (7) days of the contempt proceedings. The Board of Immigration Appeals may approve or disapprove all or part of the sentence.

(e) *Punishment.* A fine does not become effective until ordered executed by the Board of Immigration Appeals no more than thirty (30) days after a disposition is entered and filed by the immigration judge. The immigration judge may delay announcing the punishment after a finding of contempt to permit the person involved to continue to participate in the proceedings.

(f) *Informing person held in contempt.* The person held in contempt shall be informed by the Board of Immigration Appeals in writing of the holding and punishment, if any, of the immigration judge and of the final action of the Board of Immigration Appeals after its own review.

If Congress decides that after 26 years it is time to take the matter out of the DOJ's hands, then its job is simple: Congress should amend §1229a(b)(1) to give immigration judges the same contempt authority it permits federal courts in 18 U.S.C. § 401. The amended §1229a(b)(1) would read as follows (deletions are struck though and additions underlined):

> The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority ~~(under regulations prescribed by the Attorney General)~~ to sanction by civil money penalty <u>such contempt of its authority as may a court of the United States sanction pursuant to 18 U.S.C. § 401</u>.

If Congress enacted that amendment, the immigration courts would have a functional contempt power even if the DOJ promulgated no further regulations. Regardless of whether the DOJ implements a contempt regulation or Congress amends §1229a(b)(1) to do so itself, it is high time to add this tool to the immigration courts' toolbox.

Giving immigration judges the authority to punish contempt is not partisan: Congress voted overwhelmingly to give them that authority 26 years ago. The ABA has called for the implementation of contempt authority as well. Neither is it a panacea; it is simply one small tool that immigration judges need to manage their enormous caseloads efficiently.

For 26 years, immigration judges have been waiting for this authority. But for 26 years, the DOJ has refused to give it to them in both Republican and Democratic Administrations. Either the DOJ should immediately implement a regulation like the one proposed here, or Congress should take the question out of the DOJ's hands. As long as we have our current immigration court system, it should work as well as it is able to work. That means ending regulatory self-capture and giving immigration judges the authority to hold lawyers and litigants in contempt when appropriate.

Conclusion

Giving immigration law judges these tools is not a partisan or political act; it is a matter of fairness and common sense. If they had these common judicial management tools, they would be able to trim their dockets, focus on cases of merit, and dispose of meritless cases.

These proposals are also not unique: Every federal district court judge in the country has these tools, as does almost every single state and local judge across the land.

The issue of how best to solve immigration policy in the United States is complex. Regardless of whether you endorse comprehensive immigration reform or a commonsense, step-by-step approach, this proposal makes sense. Furthermore, it can be put into place immediately if Congress decides to put aside partisan differences and focus on commonsense, apolitical solutions to at least one aspect of immigration reform.

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[2] *See* Charles Stimson and GianCarlo Canaparo, *Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 247, Jul. 18, 2019, https://www.heritage.org/immigration/report/expanding-the-toolkit-giving-immigration-judges-authority-summarily-dispose.

[3] *See* Charles Stimson and GianCarlo Canaparo, *Authority Delayed Is Authority Denied: Giving Immigration Judges Contempt Authority*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 249, Aug. 8, 2019, https://www.heritage.org/immigration/report/authority-delayed-authority-denied-giving-immigration-judges-contempt-authority.

[4] For Franklin Delano Roosevelt, the issue was the internment of Japanese Americans. With Executive Order 9066, he gave the Secretary of War power to intern anyone he deemed a potential espionage threat. Exec. Order 9066, 7 Fed. Reg. 1,407 (February 25, 1942). The Supreme Court upheld the order in *Korematsu v. United States*, 323 U.S. 214 (1944), but that opinion was repudiated in *dicta* in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018). Presidents Truman through Reagan contended with mounting domestic concern that illegal immigration was a threat to the U.S. job market. As a result, Congress passed a number of bills starting with the Immigration and Nationality Act of 1952 (called the McCarran–Walter Act), which established a system of preferences based on professional skills and family ties, and culminating in the Immigration Reform and Control Act of 1986 (also called the Simpson–Mazzoli Act), which imposed penalties on American businesses for employing illegal immigrants. *See* USCIS History Office and Library, *Overview of INS History*, 2012, https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf. George H.W. Bush signed the Immigration Act of 1990 that, among other things, increased immigration quotas, provided family-based immigration visas, and created categories of occupation-based visas. *See* Warren R. Leiden *et al*., *Highlights of the U.S. Immigration Act of 1990*, 14 Fordham Int'l L.J. 328 (1990). Bill Clinton dealt with the fallout of the Mariel Boatlift and came to an agreement with the Cuban government that

would come to be known as the "wet foot, dry foot policy." Justin Wm. Moyer, *The forgotten story of how refugees almost ended Bill Clinton's Career*, WASH. POST, Nov. 17, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/11/17/the-forgotten-story-of-how-refugees-almost-ended-bill-clintons-career; U.S. Department of State, Archive: Cuba, *Migration*, March 16, 2000, https://1997-2001.state.gov/regions/wha/cuba/migration.html. George W. Bush attempted but failed to secure passage of the Comprehensive Immigration Reform Act of 2007. Donna Smith, *Senate kills Bush immigration reform bill*, Reuters, June 28, 2007, https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629. Finally, Barack Obama implemented a policy of deferred action for childhood arrivals (DACA) and deferred action for parents of Americans (DAPA), although the latter was enjoined by the courts. *See* Adam Liptak *et al*., *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES, June 23, 2016, https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html.

[5] *See* U.S. Citizenship and Immigration Services, Legislation from 1901–1940, https://www.nps.gov/elis/learn/education/upload/Legislation-1901-1940.pdf; U.S. Citizenship and Immigration Services, Legislation from 1941–1960, https://www.nps.gov/elis/learn/education/upload/Legislation-1941-1960.pdf; U.S. Citizenship and Immigration Services, Legislation from 1961–1980, https://www.nps.gov/elis/learn/education/upload/Legislation-1961-1980.pdf; U.S. Citizenship and Immigration Services, Legislation from 1981–1996, https://www.nps.gov/elis/learn/education/upload/Legislation-1981-1996.pdf.

[6] These are just the major federal acts passed since 1900. There have been scores of amendments to each of these laws, notably including the 1990 Immigration Act, the INA Amendments, and the Immigration Reform and Control Act of 1986.

[7] 8 U.S.C. 1101, the Immigration Reform and Control Act of 1986. *See also* Edwin Meese III, *I Recall the 1986 Immigration Act Rather Differently*, THE HERITAGE FOUNDATION, June 13, 2013, https://www.heritage.org/immigration/commentary/i-recall-the-1986-immigration-act-rather-differently.

[8] See THE HERITAGE FOUNDATION, *Solutions 2018, The Policy Briefing Book: Border Security*, https://solutions.heritage.org/providing-for-a-strong-defense/border-security.

[9] *See* David Inserra, *"Amnesty First" Breaks Faith with the American People*, THE HERITAGE FOUNDATION, May 24, 2018, https://www.heritage.org/immigration/commentary/amnesty-first-breaks-faith-the-american-people.

[10] *See* Hans A. von Spakovsky, *Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment*, THE HERITAGE FOUNDATION, Oct. 30, 2018, https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment.

[11] *See* Diem Nguyen *et al*., *Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 2358, Jan. 25, 2010, https://www.heritage.org/homeland-security/report/biometric-exit-programs-show-need-new-strategy-reduce-visa-overstays.

[12] *See* James Jay Carafano, *The Border Is in Disarray, but Change May Be Coming*, THE HERITAGE FOUNDATION, April 11, 2019, https://www.heritage.org/immigration/commentary/the-border-disarray-change-may-be-coming.

[13] *See* Robert Rector *et al*., *The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer*, THE HERITAGE FOUNDATION SPECIAL REPORT NO. 133, May 6, 2013, https://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer.

[14] *See* Chamber of Commerce v. Whiting, 563 U.S. 582 (2011). *See also* Charles Stimson, *States Get A License to Enforce Immigration Laws*, THE HERITAGE FOUNDATION WEBMEMO No. 3342, Aug. 22, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/wm3342.pdf.

[15] *See* Hans A. von Spakovsky, *Crimes by Illegal Aliens, Not Legal Immigrants, Are the Real Problem*, THE HERITAGE FOUNDATION, June 4, 2017, https://www.heritage.org/immigration/commentary/crimes-illegal-aliens-not-legal-immigrants-are-the-real-problem.

[16] *See* James Carafano, *Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement*, THE HERITAGE FOUNDATION WEBMEMO NO. 1212, Sep. 14, 2006, https://www.heritage.org/immigration/report/build-section-287g-the-immigration-and-nationality-act-boost-state-and-local.

[17] *See* Rector *et al*., *supra* note 14.

[18] *See*, Kay Cole James, *et al., An Agenda for American Immigration Reform*, Heritage Foundation Special Report No. 210 (Feb. 20, 2019), *available* at https://www.heritage.org/sites/default/files/2019-02/SR210_0.pdf; see also Olivia Enos *et al*., *The U.S. Refugee Admissions Program: A Roadmap for Reform*, THE HERITAGE FOUNDATION BACKGROUNDER NO. 3212, July 5, 2017, https://www.heritage.org/sites/default/files/2017-07/BG3212.pdf; Charles Stimson *et al*., *States Are Violating Federal Law to Benefit Illegals*, THE HERITAGE FOUNDATION, Nov. 30, 2011, https://www.heritage.org/immigration/commentary/states-are-violating-federal-law-benefit-illegals.

[19] *See* Gilberto Mendoza, *States Offering Driver's Licenses to Immigrants*, NATIONAL CONFERENCE OF STATE LEGISLATURES, November 30, 2016, http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx (noting that 12 states and the District of Columbia allow illegal immigrants to obtain a driver's license); AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *ACLU Supports Drivers Licenses for Immigrants, Urges Vigilance*, Oct. 3, 2013, https://www.aclunc.org/news/aclu-supports-drivers-licenses-immigrants-urges-vigilance.

[20] After California passed a bill permitting illegal immigrants to obtain driver's licenses, Governor Edmund G. ("Jerry") Brown Jr. said, "[t]his bill will enable millions of people to get to work safely and legally. Hopefully, it will send a message to Washington that immigration reform is long past due." Press Release, Office of Governor Edmund G. Brown Jr., *Governor Brown Issues Statement Following Passage of AB 60* (Sep. 12, 2013), https://www.ca.gov/archive/gov39/2013/09/12/news18203/index.html.

[21] *See* Hans A. von Spakovsky *et al*., *Providing In-State College Tuition for Illegal Aliens: A Violation of Federal Law*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 74, Nov. 22, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/lm_0074.pdf.

[22] *See* Center for Immigration Studies, Maps: Sanctuary Cities, Counties, and States by Bryan Griffith and Jessica M. Vaughan, Apr. 16, 2019, https://cis.org/Map-Sanctuary-Cities-Counties-and-States.

[23] *See* Center for Immigration Studies, Sanctuary Cities, November 7, 2018, https://cis.org/Fact-Sheet/Sanctuary-Cities.

[24] See Department of Homeland Security, Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2015 to 2017, https://www.dhs.gov/immigration-statistics/yearbook/2017/table6 (last accessed June 10, 2019).

[25] *See* ProCon.org, US Undocumented Immigrant Population Estimates, 1969–2016, https://immigration.procon.org/view.resource.php?resourceID=000844#1983.

[26] *See* Department of Homeland Security Office of Immigration Statistics, Population Estimates, December 2018, https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.

[27] See U.S. Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Technology's Immigration Courts Report: Asylum Statistics FY 2012–2016, https://www.justice.gov/eoir/file/asylum-statistics/download.

[28] *See* Transactional Records Access Clearinghouse (TRAC) Immigration Report, *Record Number of New Immigration Court Cases Arrive in August; Destinations for Asylum Seekers Shifting*, Sep. 20, 2023, https://trac.syr.edu/reports/729/.

[29] *Id.*

[30] *Id.*

[31] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL (2018), https://www.justice.gov/eoir/page/file/1084851/download.

[32] *Id.*

[33] *Id*.

[34] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (2018), https://www.justice.gov/eoir/page/file/1103051/download.

[35] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

[36] *See Fed. R. Civ. P. 1.*

[37] *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

[38] *See* TRACIMMIGRATION REPORT 242, *AS FY 2010 ENDS, IMMIGRATION CASE BACKLOG STILL GROWING* (Oct. 21, 2010), https://trac.syr.edu/immigration/reports/242/. Although the baffling growth in the case backlog can be credited primarily to the ineffective court system, prior to 2017, the Executive Office for Immigration Review (EOIR) unlawfully closed over 300,000 cases, which the Trump Administration added back in to the backlog queue. TRACIMMIGRATION REPORT 536, *IMMIGRATION COURT BACKLOG SURPASSES ONE MILLION CASES* (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/.

[39] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: PENDING CASES (Apr. 23, 2019), https://www.justice.gov/eoir/page/file/1060836/download.

[40] TRACIMMIGRATION, IMMIGRATION COURT BACKLOG TOOL (Apr., 2019), https://trac.syr.edu/phptools/immigration/court_backlog/.

[41] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: IMMIGRATION JUDGE HIRING (Apr., 2019), https://www.justice.gov/eoir/page/file/1104846/download.

[42] UNITED STATES COURTS, CASELOAD STATISTICS DATA TABLES: U.S. DISTRICT COURTS–COMBINED CIVIL AND CRIMINAL FEDERAL COURT MANAGEMENT STATISTICS (Mar. 31, 2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2019.pdf.

[43] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: FY 2019 SECOND QUARTER DECISION OUTCOMES (Apr. 23, 2019), https://www.justice.gov/eoir/page/file/1105111/download.

[44] *Id.*

[45] IMMIGRATION COURT PRACTICE MANUAL, *supra* note 32.

[46] *See*, *e.g.*, *id.* Chapter 3.1(d)(ii) (providing that if an application for relief is untimely, the alien's interest in that relief is deemed waived or abandoned).

[47] Where this paper mentions "federal courts" and "federal judges," it refers exclusively to those courts established under Article III of the Constitution.

[48] *See* Fed. R. Civ. P. 8.

[49] *See Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) ("In the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, **without first having to establish prima facie eligibility for the requested relief**.") (emphasis added).

[50] *See* 8 C.F.R. §§ 1240.12(b), 1240.10(c). It should be noted that there is an apparent drafting error in § 1240.12(b) in that it cross-references to § 1240.10(b) when it plainly is intended to cross reference to § 1240.10(c).

[51] *See*, *e.g.*, 8 C.F.R. § 1240.11(c)(1) (providing that if an alien expresses any fear of harm upon returning to the country to which he or she might be removed, the immigration judge must provide the alien with an application for relief, grant a continuance on that application, hold a hearing on the merits, and issue a decision); *see also Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (although the immigration judge found that the alien was not entitled to asylum based on a general fear of the violence in Guatemala, the BIA ruled that the judge should have granted the alien a continuance to find a lawyer and then apply for relief from removal).

[52] *See generally* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1356, 1357 (3d ed. 2019) [hereinafter FEDERAL PRACTICE AND PROCEDURE].

[53] AL ST RCP RULE 12; ALASKA R. CIV. P. 12 ARIZ. R. CIV. P. 12; AR R RCP RULE 12; CA CIV PRO § 430.50; CO ST RCP RULE 12; CT ST § 52-91; DE R SUPER CT RCP RULE 12; FL ST RCP RULE 1.110; GA ST § 9-11-12; HI R RCP RULE 12; ID R RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1.421; KS ST 60-212; KY ST RCP RULE 12.02; LA C.C.P. ART. 927; ME R RCP RULE 12; MD R RCP CIR CT RULE 2-322; MA ST RCP RULE 12; MI R RCP MCR 2.116; MN ST RCP RULE 12.02; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NH R SUPER CT CIV RULE 9; NJ R SUPER TAX SURR CTS CIV R.

4:6-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3211; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OK ST T. 12 § 2012; OR R RCP ORCP 21; PA ST RCP RULE 1032; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(b); TN R RCP RULE 12.02; TX R RCP RULE 91a; UT R RCP RULE 12; VT R RCP RULE 12; VA ST § 8.01-273; WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.

[54] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[55] *See*, *e.g.*, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1365 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 F. App'x 769 (Fed. Cir. 2014); White v. Monohan, 326 Fed. Appx. 385, 386 (7th Cir. 2009); Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008); Insomnia Inc. v. City of Memphis, Tennessee, 278 Fed. Appx. 609 (6th Cir. 2008); MM&S Financial, Inc. v. National Ass'n of Securities Dealers, Inc., 364 F.3d 908 (8th Cir. 2004).

[56] FEDERAL PRACTICE AND PROCEDURE, *supra* note 53, § 1367; *See also* AL ST RCP RULE 12; ALASKA R. CIV. P. 12; ARIZ. R. CIV. P. 12; AR R RCP RULE 12; CA CIV PRO § 439; CO ST RCP RULE 12; DelVecchio v. DelVecchio, 146 Conn. 188, 148 A.2d 554 (Conn. 1959) (recognizing a motion for judgment on the pleadings even though Connecticut's rules do not provide for it); DE R SUPER CT RCP RULE 12; FL ST RCP RULE 1.140; GA ST § 9-11-12; HI R RCP RULE 12; ID R RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1.954; KS ST 60-212; KY ST RCP RULE 12.03; LA C.C.P. ART. 965; ME R RCP RULE 12; MA ST RCP RULE 12; MI R RCP MCR 2.116; MN ST RCP RULE 12.03; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NJ R SUPER TAX SURR CTS CIV R. 4:6-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3212; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OR R RCP ORCP 21; PA ST RCP RULE 1034; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(c); TN R RCP RULE 12.03; Pat H. Stanford, Inc. v. Franklin, 312 S.W.2d 703 (Tex. Civ. App. 1958) (recognizing a motion for judgment on the pleadings as a creation of the common law); UT R RCP RULE 12; VT R RCP RULE 12; Kelly v. Carrico, 256 Va. 282, 287, 504 S.E.2d 368, 371 (Va. 1998) (permitting a motion for judgment on the pleadings even though Virginia's rules do not provide for it where the opposing party did not object); WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.

[57] Id.

[58] Id.

[59] *See* Flora v. Home Fed. Sav. & Loan Ass'n, 685 F.2d 209 (7th Cir. 1982).

[60] 8 U.S.C. § 1158(b)(1)(A) (limiting asylum to those who qualify as "refugees"); 8 U.S.C. § 1101 (defining "refugee").

[61] 8 U.S.C. § 1101.

[62] Smith v. State of S.C., 882 F.2d 895, 898 (4th Cir. 1989).

[63] *See, e.g.*, Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261 (2019); Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315, 333-36 (2015); Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 706-16 (2012); Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 317-20 (2011); Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1569-78 (2011); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 546-89 (2011); David L. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 794-805 (2011); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1685-1720 (2010); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 403-08 (2006); *see also* Elizabeth J. Stevens, *Making Our 'Immigration Courts' Courts*, *in* FED. LAWYER 17, 18 (Mar. 2018); Am. Immigration Lawyers Ass'n (AILA) Board of Governors, *Resolution on Immigration Court Reform* 1-2 (Jan. 29, 2018), https://www.naij-usa.org/images/uploads/publications/AILA_Resolution_Passed_2.3_.2018_.pdf.

[64] Am. Bar Ass'n, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, at UD 2-3 (2019),

https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [hereinafter Am. Bar. Proposals].

[65] *See,* e.g., Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 15-21 (2008); Stevens, *supra* note 1 at 17–18; Nat'l Ass'n of Immigration Judges, *NAIJ Blueprint for Immigration Court Reform 2013* 2, https://www.naij-usa.org/images/uploads/publications/NAIJ-BLUEPRINT-FOR-REFORM-Revised_4-13-13-1_2.pdf; Am. Bar Proposals, *supra* note 2 at ES 44

[66] *See*, Jain, *supra* note 1 at 320–22 (not explicitly endorsing the idea but exploring the relative pros and cons).

[67] *See, e.g.*, Am. Bar Proposals, *supra* note 64 at 6-34; Am. Immigration Lawyers Ass'n, Issue Paper: The Importance of Independence and Accountability in Our Immigration Courts (2006), http://www.aila.org/content/default.aspx?docid=8382.

[68] Board of Immigration Appeals, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. §§ 1, 3, 100).

[69] *See* Am. Bar. Proposals, *supra* note 64 at 2-24–2-26. When this paper mentions "federal courts" or "federal judges" it refers exclusively to those courts and judges that derive their authority from Article III of the Constitution. In so doing, it specifically exempts immigration judges and administrative law judges.

[70] *See* Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, CENTER FOR IMMIGRATION STUDIES REPORT (Oct. 2011), https://cis.org/sites/cis.org/files/articles/2011/built-to-fail-full.pdf.

[71] *See* Charles Stimson and GianCarlo Canaparo, *Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases*, The Heritage Foundation Legal Memo No. 247, Jul. 18, 2019, https://www.heritage.org/immigration/report/expanding-the-toolkit-giving-immigration-judges-authority-summarily-dispose.

[72] Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. Q. 1, 1 (1961) [hereinafter *History of Contempt*]; *see also* Ronald K. Ingoe, *Civil Contempt in Federal Courts*, 24 WASH. & LEE L. REV. 119 (1967).

[73] *History of Contempt*, *supra* note 72.

[74] *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1873).

[75] 4 WILLIAM BLACKSTONE, COMMENTARIES *282; *see also History of Contempt*, at 6, *supra* note 10 ("The power of courts to punish contempts is one which wends historically back to the early days of England the crown.").

[76] For a thorough examination of the history of the contempt power, see *History of Contempt*, at 4–5, *supra* note 72 (citing, *inter alia*, 1 Campbell, *The Lives of the Chief Justices of England* 125–42 (1894)) and Sir John Fox, *The Nature of Contempt of Court*, 37 LQ. REV. 191 (1921) (tracing the contempt power in England back to the 10th century). The earliest example that Goldfarb provides occurred in the late 14th century. Prince Hal of England (who would later become King Henry IV) was held in contempt by Chief Justice Gascoigne when he repeatedly flew into a rage during the criminal trial of one of his servants. The judge reminded the prince that the court kept the king's peace, and even the prince owed allegiance to the king. When the prince continued to make a scene (some sources say he struck the judge) the judge sentenced him for contempt and ordered him imprisoned. Incidentally, the king was pleased that Justice Gascoigne was bold enough to hold the prince to account.

In the United States, in 1814, Major General Andrew Jackson was famously held in contempt and fined $1,000 after he used his declaration of martial law in New Orleans to have a journalist, a federal district judge, and the United States Attorney thrown in prison. He threw the journalist in prison after he wrote an article critical of Jackson. He threw the judge in prison after he granted the journalist's petition of habeas corpus. And he threw the U.S. Attorney in prison when he brought habeas corpus proceedings on behalf of the judge.

[77] *Id*.

[78] Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911).

[79] *Id*.

[80] *Id*.

[81] *See* 3A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 702 (3d ed. 2019) [hereinafter FEDERAL PRACTICE AND PROCEDURE]. To be clear, this statute is not the source of the federal courts' contempt power. As both Blackstone and the Supreme Court have recognized, the contempt power is inherent in the courts. *See Ex parte* Robinson, 86 U.S. at 510. One court has even held that any statute that seeks to limit the courts' inherent contempt power is not binding. *See* Bradley v. State, 36 S.E. 630 (Ga. 1900).

[82] Fed. R. Civ. P. 16(f).

[83] FED. R. CIV. P. 37(b).

[84] FED. R. CIV. P. 45(g).

[85] Fed. R. Civ. P. 70(e).

[86] Fed. R. Civ. P. 11(c).

[87] *See*, *e.g.*, Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764 (1980) (recognizing the "well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices.") (internal quotations omitted); Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1447 (11th Cir. 1985); Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985); In re Cordova Gonzalez, 726 F.2d 16 (1st Cir. 1984); Matter of Baker, 744 F.2d 1438 (10th Cir. 1984); Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982); Flaksa v. Little River Marine Const. Co., 389 F.2d 885 (5th Cir. 1968).

[88] FEDERAL PRACTICE AND PROCEDURE § 703, *supra* note 82; *see also* United States v. United Mine Workers of Am., 330 U.S. 258, 303, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947).

[89] *Id*.

[90] United Mine Workers of Am., 330 U.S. at 303; McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949).

[91] FEDERAL PRACTICE AND PROCEDURE § 703, *supra* note 82.

[92] The precise contours of the limits addressed here are beyond the scope of the immigration courts.

[93] Spallone v. U.S., 493 U.S. 265, 276 (1990) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

[94] *See*, *e.g.*, Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[95] *See*, *e.g.*, Roadway Express, 447 U.S. at 767; Blackmer v. United States, 284 U.S. 421 (1932); Hovey v. Elliott, 167 U.S. 409 (1898).

[96] *See* In re Bradley, 318 U.S. 50 (1943).

[97] *See* Gompers, 221 U.S. at 444.

[98] *See* United Mine Workers of Am., 330 U.S. at 364 n. 30.

[99] *Id*.

[100] *See*, *e.g.*, Gompers, 221 U.S. at 451; Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904).

[101] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of the U.S.C.).

[102] 8 U.S.C. §1229a(b)(1) (emphasis added).

[103] Memorandum from the Attorney General to the Deputy Attorney General, Assistant Attorney General for Legal Policy, Director of the Executive Office for Immigration Review, and Acting Chief Immigration Judge (Aug. 9, 2006), https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf.

[104] 83 NO. 48 Interpreter Releases 2716 (Dec. 18, 2006); 84 NO. 26 Interpreter Releases 1552 (July 9, 2007); 85 NO. 20 Interpreter Releases 1382 (May 12, 2008); 86 NO. 21 Interpreter Releases 1509 (May 22, 2009); 87 NO. 19 Interpreter Releases 975 (May 10, 2010); 88 NO. 3 Interpreter Releases 231 (Jan. 17, 2011); 89 NO. 5 Interpreter Releases 274 (Jan. 30, 2012); 90 NO. 28 Interpreter Releases 1555 (July 29, 2013); 91 NO. 22 Interpreter Releases

971 (June 9, 2014); 92 NO. 48 Interpreter Releases 2281 (Dec. 21, 2015); 93 No. 24 Interpreter Releases Art. 16 (June 20, 2016).

[105] 94 No. 30 Interpreter Releases Art. 19 (Aug. 7, 2017).

[106] *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1674 (2010); Marks, *supra* note 63 at 10.

[107] *See* Am. Bar Proposals, *supra* note 66, at UD 2-17.

[108] *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Boprder Security and Immigration of the S. Judiciary Comm.*, 115 Cong. (2018) (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges).

[109] *See*, *e.g.*, Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Reviews (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html.