



6-2023

A Lack of Uniformity, Compounded, in Immigration Law

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Recommended Citation

Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 Notre Dame L. Rev. 2115 ().
Available at: <https://scholarship.law.nd.edu/ndlr/vol98/iss5/8>

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A LACK OF UNIFORMITY, COMPOUNDED, IN IMMIGRATION LAW

*Jill E. Family**

The Administrative Procedure Act (APA) is known for bringing standardization to federal agency behavior. The APA's framework for adjudication, however, is lax and incomplete. It provides standards, but only meaningfully for formal adjudication, and Congress rarely requires agencies to follow the APA's formal adjudication procedures. The APA, therefore, expressly allows for nonuniform adjudication in that it requires little of the informal adjudication category that makes up the lion's share of agency adjudication.

This lack of uniformity in adjudication is prominent in immigration law. When federal agencies adjudicate whether to remove (deport) an individual from the United States, those agencies act pursuant to the Immigration and Nationality Act (INA) and not the APA. The INA establishes removal adjudication before an immigration judge. The lack of uniformity is compounded in immigration law, however, because most removals are achieved not through the INA's immigration judge procedures but rather through various diversions from immigration court. These diversions provide fewer procedural protections and deviate from the supposed standard of a hearing before an immigration judge. In practice, there are no centralized, uniform procedures for removal adjudication. The INA theoretically provides a substitute North Star in place of the APA, but in practice the INA's immigration court procedures only apply to a minority of cases.

This phenomenon in immigration law raises questions about the strength of the APA and the value of uniformity in administrative law. If the APA's aim was to improve adjudication, it has failed in immigration law. The removal adjudication system is extremely dysfunctional. Removal adjudication does not have the constitutional-like, uniform standards it desperately needs.

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* Professor of Law and Faculty Advisor, Law and Government Institute, Widener Law Commonwealth. Thank you to the *Notre Dame Law Review* for the invitation to participate in its Symposium, "History of the Administrative Procedure Act and Judicial Review." I especially appreciate the efforts of Nicholas D'Andrea, Joseph Graziano, Courtney Klaus, Jensen Rehn, and Professor Emily Bremer in executing a wonderful Symposium. I thank all the Symposium participants for their insights and interest in my contribution.

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INTRODUCTION

The Administrative Procedure Act (APA), as currently interpreted, approaches adjudication with a split personality.¹ If Congress requires an agency to use the APA’s formal adjudication procedures, then a robust, standard, and uniform set of procedures applies.² If Congress fails to trigger formal adjudication and instead allows an agency to follow the APA’s informal adjudication procedures, then a weak gathering of only a few basic features applies.³ Congress, through statutes separate from the APA, may require more than the APA’s informal adjudication procedures by supplying alternative procedures that are different from the APA’s formal adjudication requirements.⁴

1 Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021) (arguing that informal and formal adjudication were intended to be stages of adjudication rather than modes).

2 5 U.S.C. §§ 554, 556, 557 (2018).

3 5 U.S.C. § 555 (2018); see also Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1382, 1401.

4 See MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 4 (2019). Professor Asimow comprehensively categorized the agency adjudication that takes place pursuant to bespoke direction outside of the APA. His study reveals that removal adjudication is not unique in that its direction does not come from the APA. Under Professor Asimow’s categorization, removal hearings in immigration court belong to a category of agency adjudication he labels “Type B.” *Id.* at 15–21, 151. As immigration court adjudication has developed, Congress has given it more formal characteristics, despite that it falls under the APA’s *informal* adjudication category. *Infra* subsection II.A.2. This Article argues that even the more formalistic immigration court proceedings that have developed under the INA are not enough for immigration law. *Infra* Part IV. Neither are the formal adjudication provisions of the APA. *Infra* Part IV. Also, the more formalistic immigration court proceedings in fact only make up a small minority of removal hearings. *Infra* Section II.B. Removal adjudication outside of immigration court falls under Professor Asimow’s “Type C” proceedings. ASIMOW, *supra*, at 151 n.714.

When Congress veers from formal adjudication, the APA provides only a limited guide because the APA only provides detailed procedures for formal adjudication.⁵ Therefore, when Congress creates custom procedures, the only benchmark the APA provides are the formal adjudication requirements. The APA fails to provide a robust norm for informal adjudication.⁶ This makes it harder to argue that any agency adjudication system is deviant, at least from a subconstitutional perspective. Because of the disunity in adjudication, Professor Emily Bremer has concluded it is an oversimplification to say that the APA provides uniform standards across the administrative law landscape.⁷

Immigration law provides a major example of the APA's lack of uniformity in adjudication. The APA's formal adjudication requirements do not apply to immigration removal adjudication because Congress has taken advantage of the APA's opt-out feature. Soon after the APA was enacted, Congress made clear that it wanted removal proceedings to follow independent, custom-made procedures.⁸ Today, immigration removal procedures still are governed by the Immigration and Nationality Act (INA) and not the APA.⁹

The exemption of immigration law from the APA is not surprising, given that immigration regulation was not top of mind when Congress created the APA.¹⁰ The APA was a political compromise to end a battle over the expansion of federal agency power tied to the New Deal. The APA was designed to address concerns over economic regulation. The unique concerns presented by the regulation of humans through immigration law were not top of mind.

Immigration removal adjudication reflects the limits of the APA to direct congressional action related to agencies. While the idea of the APA as quasi constitutional and providing at least the influence of standardized procedures is widespread,¹¹ the experience of removal adjudication suggests otherwise. From soon after the enactment of the APA, the APA has not governed removal adjudication. Instead, Congress has supplied alternative procedures. Removal adjudication has not fared well under the APA's sphere of influence.¹² In fact, the removal adjudication system fails to satisfy basic administrative design

5 Bremer, *supra* note 3, at 1353–54.

6 *Id.* at 1401.

7 See Bremer, *supra* note 3, at 1353–54.

8 See *infra* subsection II.A.1.

9 See *infra* subsection II.A.2.

10 Jill E. Family, *Regulated Immigrants: An Administrative Law Failure*, 66 HOW. L.J. (forthcoming 2023).

11 William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking* 98 NOTRE DAME L. REV. 1893, 1894 (2023); Bremer, *supra* note 3, at 1352, 1357–61.

12 See *infra* subsection II.A.2 and Section III.B.

process values.¹³ No aspect of the APA has forced Congress' hand to fix removal adjudication, nor does the APA provide a clear alternative path for removal adjudication.

Congress has avoided uniformity in removal adjudication in two major ways. First, Congress has avoided the application of any centralized and uniform procedures in removal adjudication because there are not any for informal adjudication and Congress has not triggered the APA's formal adjudication requirements. Instead, it has created bespoke procedures for removal adjudication in the INA.¹⁴ Second, Congress has created diversions from the custom immigration judge procedures it established in the INA as the supposed norm for immigration adjudication.¹⁵ Thus, the INA does not demand uniform procedures either. The reality of immigration removal adjudication is that it mostly takes place before frontline border officers with few procedural protections, rather than before an immigration judge in immigration court (the INA norm) or before an Administrative Law Judge (the APA formal adjudication norm).

This compounded lack of uniformity shows how the APA has failed to provide subconstitutional guardrails in removal adjudication. This is disappointing. The need for centralized administrative law principles is especially strong in immigration law because constitutional protections are often limited.¹⁶ The absence of norms for informal adjudication in the APA hits immigration law hard because there is little to measure Congress' choices against when the Constitution is weak and administrative law principles are minimal. The situation is intensified by the lack of uniformity even under the INA's procedures. If uniformity matters, there is little of it in removal adjudication.

I. THE APA'S NONUNIFORMITY FEATURE IN ADJUDICATION

The APA contains uniform procedures for formal adjudication, but formal adjudication is rarely required.¹⁷ Formal adjudication has eleven requirements, including a hearing before an Administrative Law Judge who has job protections not afforded to other administrative adjudicators.¹⁸ Formal adjudication is required only if Congress

13 See *infra* subsection II.A.2.

14 See *infra* subsection II.A.2.

15 See *infra* Section II.B.

16 See *infra* Part III.

17 Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 141 (2019).

18 5 U.S.C. §§ 554, 556, 557 (2018). The eleven requirements of formal adjudication are: (1) "Notice of Legal Authority and Matters of Fact and Law Asserted"; (2) "Oral Evidentiary Hearing Before the Agency or ALJ Who Must Be Impartial"; (3) "Limitations on Adjudicator's Ex Parte Communications with Parties and Within Agency"; (4) "Availability

uses precise language that triggers it.¹⁹ Because of this tough trigger, most agency adjudication under the APA is subject only to the APA's informal adjudication procedures. The APA contains only limited requirements for informal adjudication,²⁰ including the right to be represented by counsel (at private expense), the right to the conclusion of the adjudication within a reasonable time, and the right to prompt notice of a decision with a brief explanation of reasons.²¹ That is the extent of the uniform rules for informal adjudication.²²

The upshot is that the APA itself does not require much of agencies engaged in adjudication if formal adjudication is not triggered. For adjudication, the lack of APA-based requirements for informal adjudication and the high bar to trigger formal adjudication results in a *de facto* “exceptionalism norm” in agency adjudication.²³ As Professor Bremer has described, because the APA provides little uniformity for informal adjudication and because so much adjudication *is* informal adjudication under the APA, adjudication governed by principles from outside the APA is the norm.²⁴ The APA is not providing central principles.²⁵ In this context, the APA is not providing uniformity, but rather is promoting variation. This calls into question the mythos of the APA as a standardizing force.²⁶ Not only is it easy for Congress to avoid the APA's formal adjudication norms, but the APA contains virtually no norms for informal adjudication, which means there is no uniform standard to measure congressional design against.²⁷

of Legal or Other Authorized Representation”; (5) “Burden of Proof on Order’s Proponent”; (6) “Party Entitled to Present Oral or Documentary Evidence”; (7) “Party Entitled to Cross-Examine Witnesses if Required for Full Disclosure of Facts”; (8) “Decision Limited to Bases Included in Hearing Record”; (9) “Party Entitled to Transcript of Evidence from Exclusive Record for Decision”; (10) “Decision Includes Reasons for All Material Findings and Conclusions”; (11) “Agency Head Final Decision-Making Authority and De Novo Review of ALJ Decisions.” Walker & Wasserman, *supra* note 17, at 149 tbl.1.

19 See, e.g., *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006).

20 5 U.S.C. § 555 (2018); see also Bremer, *supra* note 3, at 1401.

21 5 U.S.C. § 555. Other provisions applicable to informal adjudication include the right to use agency subpoena power, the right of interested persons to appear if orderly public business permits, and the right to obtain copies of documents submitted to the agency. *Id.*

22 Bremer, *supra* note 3, at 1400–01. For rulemaking, the APA provides for more uniformity in that the APA provides more robust procedures for informal rulemaking than it does for informal adjudication. *Id.* at 1368. Congress is always free, however, to supply different rulemaking requirements through a statute other than the APA.

23 *Id.* at 1358, 1410–11.

24 See *id.* For further discussion of the variety of adjudication structures outside of the APA, see ASIMOW, *supra* note 4.

25 Eskridge & Ferejohn, *supra* note 11, at 1901; see also Bremer, *supra* note 3, at 1411.

26 Bremer, *supra* note 3, at 1356, 1411.

27 See *id.* at 1353–54.

The lack of uniformity in adjudication under the APA is the result of political compromise. The APA was enacted in 1946, but that enactment followed legislative efforts that began in the late 1920s and early 1930s.²⁸ The legislative efforts sought to restrict the growing power of federal agencies. The fight that resulted in the APA has been described as a “pitched political battle for the life of the New Deal.”²⁹ Upset by the New Deal’s shift of power to the government to regulate business, advocates pushed for procedural protections.³⁰ Some advocates saw procedure as a mechanism to control policies that they otherwise could not control.³¹ The New Deal was meant to be an engine for social change, and some sought to stop it by gumming up the works of certain administrative agencies.³²

President Roosevelt in 1940 vetoed one of those pre-APA legislative reform efforts, the Walter-Logan bill.³³ The Walter-Logan bill would have judicialized agency action by demanding trial-like hearings before agency action.³⁴ This reform would have severely restricted agency action. After President Roosevelt’s veto of the Walter-Logan bill, he tasked the Department of Justice to study federal agencies and to recommend reforms.³⁵ The Department of Justice ultimately issued a report, but that report did not lead to immediate legislative action due to the onset of World War II.³⁶

After the war, administrative law reform returned to the legislative agenda. Policymakers continued to tussle over how much agency power should be restrained (both by Congress and by court review) and whether all agencies should be subject to uniform principles.³⁷ The APA emerged as a compromise. For example, notice and

28 Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219–224 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1566 (1996).

29 Shepherd, *supra* note 28, at 1560.

30 See *id.* at 1570. The American Bar Association established a Special Committee on Administrative Law in May 1933 that focused on procedure to control President Roosevelt’s New Deal programs. *Id.* at 1569–71; see also Joanna Grisinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. POL’Y HIST. 379, 384–85 (2008).

31 Shepherd, *supra* note 28, at 1568; DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 132 (2014).

32 Gellhorn, *supra* note 28, at 222; Shepherd, *supra* note 28, at 1601, 1626–27; Paul R. Verkuil, Walter Gellhorn & Kenneth Culp Davis, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 516 (1986); Grisinger, *supra* note 30, at 380. Reform efforts often exempted certain agencies and seemed aimed at specific New Deal agencies. Shepherd, *supra* note 28, at 1601, 1618–19.

33 See Shepherd, *supra* note 28, at 1628.

34 Verkuil et al., *supra* note 32, at 512, 515.

35 Shepherd, *supra* note 28, at 1632.

36 *Id.* at 1632, 1641.

37 *Id.* at 1662–67.

comment rulemaking arrived as a concession between those who wanted full hearings for every rulemaking and those who did not.³⁸ Much of the APA's language is ambiguous due to an inability to reach consensus on every issue,³⁹ and the fight over its interpretation began almost immediately.⁴⁰ The APA was an acceptable compromise; neither side was thrilled.⁴¹ Federal agency power remained strong, but some restrictions were implemented.

The compromise inherent in the APA is evident in how it deals with questions of uniformity. The APA does provide some uniform principles and procedures, but the APA makes it easy for Congress to abandon the APA's procedures and to promote variation among agencies instead. For adjudication, the APA only provides uniform, detailed procedures for formal adjudication.⁴² If Congress does not activate formal adjudication, agencies retain the flexibility to establish their own informal procedures, unless Congress supplies requirements through another statute.⁴³ This treatment of uniformity was not just the result of political compromise, but also a practical realization that administrative agencies are diverse and that a one-size-fits-all approach is not always desirable.⁴⁴

Removal cases exemplify the APA's high tolerance for nonuniform procedures. Congress has not triggered formal adjudication for immigration removal cases. Instead, Congress divorced removal adjudication from the APA soon after the APA's creation. Through the INA, Congress provided substitute procedures for removal adjudication. The next Part discusses the adjudication system Congress created through the INA and how diversions from the INA system compound the lack of uniformity in immigration law.

II. COMPOUNDED NONUNIFORMITY IN IMMIGRATION LAW

A. *Non-APA Removal Adjudication*

1. Congress Removed Removal Adjudication from the APA

At the time of the APA's enactment, removal cases were divided into two types of administrative hearings: deportation or exclusion. Deportation hearings were for those who had reached U.S. soil, and

38 *Id.* at 1650–51.

39 *Id.* at 1665.

40 *Id.* at 1662–66.

41 *Id.* at 1674.

42 5 U.S.C. § 554 (2018).

43 *See* Shepherd, *supra* note 28, at 1651.

44 *See* Grisinger, *supra* note 30, at 405.

exclusion hearings were for those who were at the border applying for admission.⁴⁵ After the enactment of the APA, the question arose whether the APA supplanted the existing removal procedures. Soon after the enactment of the APA, the Department of Justice published an influential manual to guide its implementation.⁴⁶ Immigration law is only briefly mentioned in the manual and the manual does not opine thoroughly on the application of the APA to immigration law.⁴⁷ The immigration agency itself considered whether the APA applied to removal cases and determined it did not.⁴⁸ The immigration agency concluded that neither type of removal hearing was subject to the new APA.

The Supreme Court, however, held in 1950 that deportation hearings were subject to the formal adjudication procedures of the APA in *Wong Yang Sung v. McGrath*.⁴⁹ The agency proceedings in *Wong Yang Sung* resulted in a deportation order.⁵⁰ The deportation order was challenged because the agency proceedings were not conducted under the APA's formal adjudication procedures.⁵¹ The government argued

45 T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 895 (8th ed. 2016); Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 *INTERPRETER RELEASES* 453, 454–55 (1988). At the time of the enactment of the APA, the agency adjudication of exclusion cases followed different procedures than the adjudication of deportation cases. *Id.* For exclusion cases, immigrant inspectors referred applicants for admission to a Board of Special Inquiry assigned to the port of entry. *Id.* at 455. These three-member boards further examined the applicant for entry. *Id.* at 455–56. There was an agency appeal available to the INS Central Office, and then to the Board of Immigration Appeals. *Id.* Deportation cases were heard by an immigrant inspector who presented the government's case and adjudicated the outcome. *Id.* at 454. In more complicated cases, an examining officer was assigned to present the government's case. *Id.* There was an agency appeal process that culminated in review by the Board of Immigration Appeals. *Id.* at 456. The functions of prosecutor and judge were combined, and the immigrant inspectors also investigated cases (although not the cases they adjudicated). *Id.* at 454–55.

46 U.S. DEP'T OF JUST., *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* (1947).

47 There is a brief mention that habeas corpus review still will be used in immigration law. *Id.* at 97.

48 In 1947, the INS expressed its opinion that entry and deportation proceedings were not subject to the new APA. Ugo Carusi, *The Federal Administrative Procedure Act and the Immigration and Naturalization Service*, in *THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES: PROCEEDINGS OF AN INSTITUTE CONDUCTED BY THE NEW YORK UNIVERSITY SCHOOL OF LAW ON FEBRUARY 1–8, 1947*, at 278, 278, 291, 297 (George Warren ed., 1947).

49 *Wong Yang Sung v. McGrath*, 339 U.S. 33, 53 (1950). The Immigration Act of 1917 was the governing immigration statute at the time, and judicial review of deportation decisions occurred through habeas corpus proceedings. *Id.* at 48; Rawitz, *supra* note 45, at 453–54.

50 *Wong Yang Sung*, 339 U.S. at 35.

51 *Id.*

that the APA's formal adjudication provisions did not apply to deportation adjudication.⁵²

In *Wong Yang Sung*, the Supreme Court explained that concern about the combination of functions within agencies—the idea that one person would investigate, prosecute, and adjudicate—was a major concern addressed through the APA's formal adjudication provisions.⁵³ At the time, the immigration agencies employed inspectors who investigated and adjudicated deportation cases.⁵⁴ The same inspector would not investigate and decide in the same case, but the position required investigation and adjudication.⁵⁵ Inspector X would adjudicate cases investigated by Inspector Y, and Inspector Y would adjudicate the cases investigated by Inspector X.⁵⁶ Also, an inspecting officer, when acting as an adjudicator, usually presented the case for removal and adjudicated it.⁵⁷ The Supreme Court held that this adjudication framework violated the APA. The Court explained:

[T]hat the safeguards [the APA] did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt. And this commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceeding, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused.⁵⁸

The Court held that Congress did not exempt immigration adjudication from the formal adjudication requirements of the APA.⁵⁹ It also held that allowing the position of immigration inspector to investigate and adjudicate violated those requirements, even if one inspector did not investigate and adjudicate the same case.⁶⁰

Six months after the Supreme Court's decision, Congress passed an appropriations bill that included a provision exempting

52 *Id.* at 36.

53 *Id.* at 38, 41–45.

54 *Id.* at 45–46.

55 *Id.*

56 *Id.*

57 Rawitz, *supra* note 45, at 454–55.

58 *Wong Yang Sung*, 339 U.S. at 46.

59 *Id.* at 53.

60 *Id.* The Court concluded that the APA's formal adjudication provisions governed deportation hearings because deportation hearings were "required by statute" under the APA even though deportation hearings were not, in fact, required by statute but rather were required by the Court's interpretation of the Constitution. *Id.* at 50–51 (quoting Administrative Procedure Act, ch. 324, § 5, 60 Stat. 237, 239–40 (1946)).

deportation and exclusion cases from the APA.⁶¹ The Immigration and Naturalization Service requested from Congress almost \$4 million for 1951 (about \$46 million in 2022 dollars)⁶² to comply with the Supreme Court's opinion in *Wong Yang Sung*.⁶³ Instead of appropriating the funds, Congress exempted deportation and exclusion cases from the APA.

In 1952, Congress passed a new comprehensive immigration law, the Immigration and Nationality Act (INA).⁶⁴ In *Marcello v. Bonds*, the Court held that Congress continued to displace the APA with respect to deportation procedures through the 1952 INA.⁶⁵ Marcello argued that the congressional design of a deportation proceeding overseen by a "special inquiry officer" who was supervised by those engaged in investigation and prosecution violated the APA.⁶⁶ The Court held that Congress, through the INA, expressly set up a parallel system for immigration hearings and that Congress meant for the system to be exempted from the APA.⁶⁷ Congress's 1952 immigration adjudication system did not require a separation of prosecutorial and adjudicatory functions within the agency (as the APA's formal adjudication rules would have required, as discussed in *Wong Yang Sung*).⁶⁸ Additionally, the Court held that because the Constitution did not require separation of functions in immigration law, the congressional desire for no separation of functions would stand.⁶⁹

While the Supreme Court held that Congress *did* express a clear intent to create parallel, non-APA deportation procedures through the 1952 INA, in 1955, the Supreme Court held that Congress *did not*

61 Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044, 1048; Rawitz, *supra* note 45, at 456.

62 Ian Webster, *The U.S. Dollar Has Lost 91% of Its Value Since 1951*, ALIOTH (Feb. 14, 2022) <https://www.in2013dollars.com/us/inflation/1951> [<https://perma.cc/3PZG-8JT9>].

63 *Supplemental Appropriations for 1951: Hearings Before the S. Comm. on Appropriations*, 81st Cong. 751–52 (1950) (statements of A.R. Mackey, Acting Commissioner, INS). The agency estimated that future costs could rise to \$25–30 million per year. *Id.* at 753 (statement of Paul Winings, General Counsel, INS). The Association of Immigration and Nationality Lawyers and the American Bar Association objected to the exemption. *See id.* at 754–55 (statement of Jack Wasserman, Legislative Representative, Association of Immigration and Nationality Lawyers). The American Bar Association labelled the agency's estimates a "gross exaggeration." *Revision of Immigration, Naturalization, and Nationality Laws, Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comm. on the Judiciary*, 82d Cong. 526–27, 534–35 (1951) (Statement of Jack Wasserman, Representative, American Bar Association).

64 Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952).

65 *Marcello v. Bonds*, 349 U.S. 302 (1955).

66 *See id.* at 305.

67 *Id.* at 308–10.

68 *Id.* at 305; *see Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950).

69 *Marcello*, 349 U.S. at 311.

expressly remove deportation proceedings from the APA's *judicial review* provisions. In *Shaughnessy v. Pedreiro*, the Court held that Congress did not expressly exempt immigration deportation hearings from the judicial review provisions of the APA with the language of the INA.⁷⁰ Given the APA's goal of increasing judicial review, the Court held that Congress would need to use explicit language to preempt the APA's judicial review scheme and to provide other instructions.⁷¹

In 1961, Congress enacted legislation that provided the clearer statement the Court sought in *Shaughnessy v. Pedreiro*. Congress expressed its clear intent to move judicial review of both deportation and exclusion proceedings out from under the APA and into a scheme supplied by the organic statute.⁷² The 1961 statute was intended to pull back on the possibilities for judicial review opened up by the Supreme Court's recognition of judicial review under the APA.⁷³ For example, the 1961 statute eliminated the role of the federal district courts in reviewing deportation orders.⁷⁴ Congress directed all those seeking judicial review of a deportation order to file a petition for review directly with a U.S. Court of Appeals.⁷⁵ Also, the 1961 legislation added a six-month time limit on when judicial review could be sought and a requirement to exhaust administrative remedies.⁷⁶

Congress next enacted major changes and restrictions on judicial review in 1996.⁷⁷ In 1996, Congress tightened its non-APA statutory

70 *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). In the 1952 act, Congress stated that agency deportation orders are "final." The Court held that the "final" language was ambiguous. *Id.* at 51. The Court said that it would be "more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word 'final' in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part." *Id.* The Court reached the same conclusion as to exclusion hearings in 1956. *Brownell v. Tom We Shung*, 352 U.S. 180, 181 (1956).

71 *Shaughnessy*, 349 U.S. at 51.

72 Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651.

73 ALENIKOFF ET AL., *supra* note 45, at 1029; § 5(a), 75 Stat. at 651; H.R. REP. NO. 87-1086, at 22 (1961) ("The purpose of section 5 is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section 106 to the Immigration and Nationality Act.").

74 ALENIKOFF ET AL., *supra* note 45, at 1029. Habeas corpus review remained available for exclusion orders. *Id.*

75 See § 5(a), 75 Stat. at 651-53.

76 *Id.*

77 In 1988, Congress shortened the time limit for filing a petition for review from six months to sixty days for those whose removal orders were based on an aggravated felony conviction. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347(b), 102 Stat. 4181, 4472. This time limit was shortened to thirty days in 1990. Immigration Act of 1990, Pub. L. No. 101-649, § 502(a), 104 Stat. 4978, 5048. There were other restrictions aimed at individuals with aggravated felony convictions enacted before 1996, but 1996 marked the next

regime by narrowing the ability of the courts of appeals to review both deportation and exclusion decisions. Congress enacted restrictions that affect the timing and form of challenges,⁷⁸ as well as restrictions on review based on the substance of the case.⁷⁹ The substantive restrictions include provisions that eliminate review over many executive discretionary decisions in removal cases and that limit review for those whose removal orders are based on the commission of a variety of criminal acts.⁸⁰

Additionally in 1996, Congress stopped providing for two tracks of hearings at the agency level (exclusion and deportation) and instead created one removal hearing that could be based on a charge of either deportability or removability.⁸¹ The procedure for the singular hearing type continued to be supplied by the INA.

The post-APA litigation of the 1950s and 1960s, and the congressional reaction to it, established that both agency adjudication of removal and judicial review of removal agency adjudication would be governed by an organic statute, the Immigration and Nationality Act, and not the APA. The next subsection explains the substitute scheme.

2. Removal Adjudication Under the INA

Congress now supplies one type of administrative hearing no matter if the removal charge is based on inadmissibility or deportability.⁸² Congress has divided the work of removal adjudication among two federal agencies: the Department of Justice and the Department of Homeland Security (DHS). This division of labor has separated some functions within the executive branch, but these functions are still combined within the executive branch.

The Department of Justice, through its Executive Office for Immigration Review, runs the immigration courts.⁸³ Attorney employees of the Department of Justice called immigration judges conduct hearings

major restructuring of immigration judicial review. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004(b), 108 Stat. 1796, 2027.

78 Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 306, 110 Stat. 3009, 3009-608 to 3009-612 (1996) (codified as amended at 8 U.S.C. § 1252(b), (f), (g) (2018)).

79 *Id.* § 306, 110 Stat. at 3009-607 to 3009-608 (codified as amended at 8 U.S.C. § 1252(a)(2)).

80 *Id.*

81 *Id.* § 306 (codified as amended at 8 U.S.C. § 1252).

82 The inadmissibility grounds apply when a person is seeking legal entry and the deportability grounds apply after a person is admitted. *See supra* note 81 and accompanying text.

83 *Executive Office for Immigration Review*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir> [<https://perma.cc/TSQ9-3DDH>].

to determine whether an individual is removable from the United States.⁸⁴ At these hearings, individuals appear either in person or virtually before an immigration judge.⁸⁵ There is live questioning of witnesses, including by the immigration judge.⁸⁶ Through an administrative appeals process, members of the Board of Immigration Appeals (BIA), also a part of the Department of Justice, review the work of immigration judges.⁸⁷ The BIA's work is mostly paper based; oral argument is extremely rare.⁸⁸ The Attorney General has agency head review over the system through the power to certify any matter to himself for decision.⁸⁹ The federal courts of appeals have only limited judicial review over the agency adjudication system via the bespoke judicial review system Congress created.⁹⁰

DHS plays two important roles in the removal adjudication system. First, DHS is the agency that initiates removal proceedings. DHS holds the discretion to decide when an individual will be charged with removal and what removal charges to file.⁹¹ DHS thus holds great power in terms of prosecutorial discretion as it is the gatekeeper for the stream of individuals who need to appear in immigration court. Second, the attorneys who appear in immigration court on behalf of the government work for DHS.⁹² These attorneys work for Immigration and Customs Enforcement (ICE), which is a part of DHS.⁹³ ICE attorneys prosecute the charges of removal initiated by their agency.⁹⁴ During removal proceedings, these attorneys wield the discretion to decide whether to continue to pursue removal and whether the agency believes that the individual is entitled to any relief from removal.

The individuals subject to a charge of removability, the respondents, may be represented during a removal hearing.⁹⁵ However, there is no statutory right to government-funded counsel. Also, the Supreme

84 Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 599 (2009).

85 *Form of the Proceedings*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/6> [<https://perma.cc/HE4L-VS4K>].

86 *Individual Calendar Hearing*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/16> [<https://perma.cc/YC3Z-7XL9>].

87 Family, *supra* note 84, at 599.

88 EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 107 (2022).

89 8 C.F.R. § 1003.1(h)(1) (2022).

90 8 U.S.C. § 1252 (2018).

91 *See Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about-ice/ero> [<https://perma.cc/4K3N-MUM9>].

92 *Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/about-ice/opla> [<https://perma.cc/UA3J-779D>].

93 *Id.*

94 *See id.*

95 8 U.S.C. § 1362 (2018).

Court has not recognized a constitutional right to government-funded counsel in removal proceedings.

This adjudication system is severely troubled. It fails to satisfy the basic requirements of administrative process design of efficiency, acceptability (fairness) and accuracy.⁹⁶ First, the system is extremely inefficient. The current backlog of cases in immigration court is over two million.⁹⁷ The average time to complete a case is 775 days.⁹⁸ The backlog has grown from under 200,000 cases in Fiscal Year 2008 to over 500,000 in Fiscal Year 2016 to crossing one million in Fiscal Year 2019.⁹⁹ Since Fiscal Year 2019, the backlog has doubled.¹⁰⁰

Second, the system is not fair. The lack of government-funded counsel and the system's reliance on detention in remote locations contribute to a system that undermines fairness. One study concluded that only thirty-seven percent of individuals in removal proceedings are represented.¹⁰¹ The lack of a lawyer affects a noncitizen's ability to succeed in immigration court. Representation means "dramatically more successful case outcomes" for noncitizens.¹⁰² Detention also affects fairness. The INA mandates the detention of many immigrants as a part of removal adjudication.¹⁰³ As Anil Kalhan has described, "[f]or many noncitizens, detention now represents a deprivation as severe as removal itself."¹⁰⁴ Immigration detention includes the confinement of children and families.¹⁰⁵ As of September 25, 2022, ICE was holding over 25,000 individuals.¹⁰⁶ Sixty-six percent of these detainees had no criminal record, yet even those with no criminal record are held in conditions that do not meaningfully differ from those of convicted

96 Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964) (describing the criteria of administrative process design).

97 *Immigration Court Backlog Tool*, TRACIMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/9U9Z-ZJDL>].

98 *Immigration Court Backlog Tool*, TRACIMMIGRATION, https://trac.syr.edu/phptools/immigration/court_backlog/ [<https://perma.cc/629C-B7FJ>].

99 *Immigration Court Backlog Tool*, *supra* note 97.

100 *Id.*

101 Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7, 16 (2015).

102 *Id.* at 57.

103 8 U.S.C. § 1226(c) (2018).

104 Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010).

105 *Family Detention*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/family-detention> [<https://perma.cc/UQP6-CVWT>].

106 *ICE Detainees*, TRACIMMIGRATION https://trac.syr.edu/immigration/detentionstats/pop Agen_table.html [<https://perma.cc/2CGC-VXY6>].

criminals.¹⁰⁷ This civil detention equates to criminal imprisonment without the procedural protections of the criminal justice system. Also, detention makes it more difficult for individuals to obtain legal representation.

Another fairness concern arises from the lack of adequate decisional independence for both immigration judges and BIA members. Immigration judges and BIA members lack the job protections of Administrative Law Judges.¹⁰⁸ The members of the BIA and immigration judges are attorney employees of the Department of Justice.¹⁰⁹ Immigration adjudicators must decide cases worried about what the Attorney General, the country's top law enforcement official, thinks of their decision-making record.¹¹⁰ Additionally, the Attorney General has the power to certify removal cases to himself if he does not like the work product of the immigration adjudication system. Therefore, even if independent decisionmaking occurs, the Attorney General may easily overrule it.

The system is also inconsistent. The outcome in an individual case not only depends on whether the noncitizen can afford counsel, but also depends on which immigration judge is assigned to preside over the removal hearing. There are wide disparities in asylum grant rates, for example, from immigration judge to immigration judge.¹¹¹ Implicit bias plays a role as well.¹¹²

The flexibility of the APA allows Congress to develop custom processes to improve agency adjudication at the expense of uniformity. In removal adjudication, however, improvement is elusive. As the next Section shows, as troubled as the immigration court system is, it disguises a network of agency adjudication that takes place without even

107 *Id.*; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1370, 1383–88 (2014); Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1442, 1444–45 (2010); AM. BAR ASS'N, CIVIL IMMIGRATION DETENTION STANDARDS (2012).

108 Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 U. PA. J. CONST. L. 1025, 1029 (2019).

109 *Id.* at 1028.

110 *Id.* at 1029–30. The Trump Administration imposed case completion quotas, took away docket management tools, and removed at least one immigration judge from a case to signal its lack of emphasis on accurate decisionmaking. *Id.* at 1040, 1042–43.

111 Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); *Asylum Decisions Vary Widely Across Judges and Courts—Latest Results*, TRACIMMIGRATION (Jan. 13, 2020), <https://trac.syr.edu/immigration/reports/590/> [<https://perma.cc/RF5D-F9W5>]; see also Rikha Sharma Rani, *Trapped at the Border? Hope For a Female Judge*, POLITICO (June 15, 2018), <https://www.politico.com/magazine/story/2018/06/15/immigration-court-judge-women-218824/> [<https://perma.cc/KWL8-YM2R>].

112 See Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).

the procedural protections of the INA's immigration court system. By considering those diversions, a true sense of the lack of uniformity in removal adjudication emerges.

B. *Diversions from Removal Adjudication Procedures*

Most removal adjudication does not take place in immigration court.¹¹³ Through various diversions, opportunities for a hearing before an immigration judge are limited for those facing removal.¹¹⁴ Some of the diversions are based in the INA. Expedited removal, waivers of a hearing, and the loss of a right to a hearing due to criminal history are all based in the INA. Other diversions come from the executive branch. Through metering systems, public health justifications, and programs that force applicants to wait in Mexico for a hearing, the executive branch effectively eliminates immigration judge hearings.

Congress created the expedited removal program to divert foreign nationals from immigration court. In fiscal year 2019, forty-six percent of all removals were expedited removals.¹¹⁵ The expedited removal program provides less process than the immigration court system. It gives unreviewable power to the executive agency to allow removal decisions by low level agency officers. Judicial review is extremely limited to only the basic question of whether the individual is a foreign national.¹¹⁶ The Supreme Court has determined the lack of judicial review of the expedited removal system is constitutional. It does not violate the Habeas Corpus or Due Process Clauses.¹¹⁷

Under expedited removal, those arriving at a United States border who the border officer believes to be inadmissible under the misrepresentation or lack of proper documentation grounds of admissibility shall be removed summarily without any hearing.¹¹⁸ An individual removed from the United States under expedited removal is barred from entering the United States for five years.¹¹⁹ The decision of the front-line border officer stands, with only supervisory review by a superior border patrol officer.¹²⁰ Through expedited removal, the separation

113 Family, *supra*, note 84, at 597; *see also* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014).

114 Family, *supra* note 84 at 597–98; 609–32.

115 MIKE GUO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 10 (2020).

116 8 U.S.C. § 1252(e)(2) (2018).

117 Dept't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020).

118 8 U.S.C. § 1225(b)(1)(A)(i) (2018).

119 *Id.* § 1182(a)(9)(A)(i).

120 8 C.F.R. § 253.3(b)(7) (2022).

of functions between the Department of Justice and the Department of Homeland Security is abandoned, and decision-making authority is granted to a low-level officer.

The command to expedite removal of arriving foreign nationals expands beyond ports of entry. Congress has delegated discretion to apply expedited removal in the interior.¹²¹ The Trump administration expanded the use of expedited removal to the fullest extent allowed under the INA, applying it to all foreign nationals who had not been admitted and who had been in the United States for less than two years.¹²² The Biden administration pulled back the use of expedited removal to its posture before the Trump administration.¹²³ Now, foreign nationals who are apprehended within fourteen days of entry and within a hundred miles of a U.S. border are subject to expedited removal.¹²⁴

Even those applying for asylum are affected. Those who express at the border an intention to apply for asylum or a fear of persecution are referred to a “credible fear” interview before an asylum officer.¹²⁵ If the foreign national passes this “credible fear” interview, he or she is detained pending a hearing before an immigration judge.¹²⁶ If the foreign national fails this “credible fear” interview, he or she is removed without further hearing.¹²⁷ There is an opportunity for an immigration judge to review the results of the “credible fear” test, but there is very limited judicial review.¹²⁸ Therefore, for those deemed to be inadmissible under the misrepresentation or improper-documentation grounds, the only path toward immigration-judge adjudication lies with an asylum claim, and even that access is limited. Additionally, the Biden administration is in the process of reforming the executive branch’s processing of asylum claims. With the goal of making the asylum process more efficient, the administration is seeking to give asylum officers, as opposed to immigration judges, more power to decide asylum claims that arise from a positive “credible fear” finding.¹²⁹ This

121 See 8 U.S.C. § 1225(b)(1)(A)(iii).

122 HILLEL R. SMITH, CONG. RSCH. SERV., IF11357, EXPEDITED REMOVAL OF ALIENS: AN INTRODUCTION (2022).

123 See Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16,022, 16,024 (Mar. 21, 2022).

124 See *id.* at 16,022.

125 See 8 U.S.C. § 1225(b)(1)(A)(ii), (B)(i)–(ii).

126 See *id.* § 1225(b)(1)(B)(ii).

127 See *id.* § 1225(b)(1)(B)(iii)(I).

128 See *id.* §§ 1225(b)(1)(B)(iii)(III), 1252(a)(2)(A).

129 See Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078, 18,079–80 (Mar. 29, 2022) (to be codified at 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240).

may be an improvement,¹³⁰ but it is another example of a divergence from the immigration court “norm” in the INA.

Individuals waive rights to a hearing before an immigration judge both explicitly and implicitly. An example of an explicit waiver is a waiver extracted in exchange for access to the Visa Waiver Program. To obtain the benefit of travelling to the United States without first having to obtain a visa from a U.S. consulate abroad, the Visa Waiver Program demands a waiver of rights to adjudication in return. The INA requires the individual to waive “any right” to review of the border officer’s determination as to whether the individual is admissible into the United States, unless the person is applying for asylum.¹³¹ Through the Visa Waiver Program, nationals of certain countries are allowed to skip the step of applying for a formal visa, but these individuals are not immune to removal at the border. The encountering border officer makes the ultimate decision whether to admit the individual. Under the Visa Waiver Program, anyone who uses the program agrees in advance to waive the right to challenge the border officer’s determination, unless the person is applying for asylum. In fiscal year 2019, almost 23,000,000 admissions took place under the Visa Waiver Program.¹³² That equates to 23,000,000 waivers of rights to immigration court adjudication.

One implicit waiver comes from the INA’s grant of authority to the Department of Homeland Security to allow an applicant for admission to withdraw their application.¹³³ During fiscal year 2019, there were over 50,000 withdrawals.¹³⁴ If it does not appear that the individual will be allowed to legally enter, the border officer has the discretion to allow the applicant to withdraw their application. There are strong incentives to withdraw rather than risk detention and/or a bar from

130 Philip G. Schrag, Jaya Ramji-Nogales & Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOW. L.J. (forthcoming 2023) (manuscript at 37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233655 [<https://perma.cc/U5U7-37VN>].

131 8 U.S.C. § 1187(b), (g) (2018); *see also* 8 C.F.R. § 217.4(a) (1) (2022) (“Such refusal and removal shall be made at the level of the port director or officer-in-charge, or an officer acting in that capacity, and shall be effected without referral of the alien to an immigration judge for further inquiry, examination, or hearing, except that an alien who presents himself or herself as an applicant for admission under section 217 of the Act and applies for asylum in the United States must be issued a Form I-863, Notice of Referral to Immigration Judge, for a proceeding in accordance with 8 CFR 208.2(c) (1) and (c) (2).”).

132 OFF. OF IMMIGR. STAT., U.S. DEP’T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 65–66 tbl.25 (2020). Admissions do not equal the number of people using the Visa Waiver Program, as an individual may be admitted more than once in a year under the program.

133 *See* 8 U.S.C. § 1225(a) (4); *see also* 8 C.F.R. § 235.4 (2022) (providing discretion to the government to allow withdrawal of an application instead of removal proceedings).

134 GUO, *supra* note 115, at 12 tbl.9.

returning to the United States if formally removed. Withdrawing, however, waives access to immigration-court adjudication. If the government encourages those with potentially valid claims to admission to withdraw, then the withdrawal incentive would be used to discourage the exercise of a right to immigration court adjudication. The government has flexed this type of pressure before.¹³⁵

For some foreign nationals, their criminal history affects their rights to a hearing in immigration court. The conviction of certain crimes can render a person subject to administrative removal, which avoids a hearing before an immigration judge. If a person is not a lawful permanent resident (green-card holder), and the person is convicted of an aggravated felony as defined by the immigration statute, then the person is subject to administrative removal.¹³⁶ Administrative removal is a form-based, written process.¹³⁷ There is no live hearing; instead, a low-level officer determines whether removal is appropriate.¹³⁸ The term “aggravated felony” in immigration law is at times a misnomer since a crime need not be aggravated or a felony to classify as an “aggravated felony.”¹³⁹ Individuals subject to administrative removal are permitted to seek judicial review.¹⁴⁰

For others, an encounter with the criminal justice system may involve the waiver of rights to removal adjudication. Under 8 U.S.C. § 1228(c)(5), an order of removal can be an appropriate term of a criminal plea bargain.¹⁴¹ The statute grants to the government the authority to “enter into a plea agreement which calls for the alien, who is deportable . . . , to waive the right to notice and a hearing . . . and stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement.”¹⁴² In this criminal plea context, foreign nationals are abdicating rights to participate in immigration court.

Reinstatement of removal is another process that avoids immigration court. The INA allows for the summary removal of individuals with prior removal orders who return to the United States without

135 See *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494–97 (C.D. Cal. 1988), *aff’d sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990); *Perez-Funez v. Dist. Dir.*, 619 F. Supp. 656, 657–58 (C.D. Cal. 1985); *Perez-Funez v. Dist. Dir.*, 611 F. Supp. 990, 992–93 (C.D. Cal. 1984).

136 See 8 U.S.C. § 1228(b) (2018).

137 See SEJAL ZOTA, DAN KESSELBRENNER & ANDREW WACHTENHEIM, NAT’L IMMIGR. PROJECT OF THE NAT’L LAWS. GUILD & IMMIGRANT DEF. PROJECT, ADMINISTRATIVE REMOVAL UNDER 238(B): QUESTIONS AND ANSWERS 1–3 (2017).

138 See *id.*

139 See AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 1 (2021).

140 8 U.S.C. § 1228(b)(3).

141 *Id.* § 1228(c)(5).

142 *Id.*

permission.¹⁴³ DHS issues reinstatement orders after a reinstatement proceeding. During the proceeding, a DHS officer determines whether there is a prior removal order, whether the individual entered unlawfully, and whether any exceptions apply.¹⁴⁴ There is judicial review over a reinstatement order.¹⁴⁵

The Trump administration developed even more methods of diverting individuals from immigration court within the executive branch.¹⁴⁶ The Trump administration implemented a metering system at the U.S.-Mexico border.¹⁴⁷ This policy artificially limited the number of asylum applicants who could approach the border per day.¹⁴⁸ This policy blocked access to immigration court because approaching the border is the first step toward immigration court. The Biden administration ended this policy.¹⁴⁹ The Trump administration also implemented the “Remain in Mexico” program, which forced asylum applicants, after they finally were able to approach the border, to wait in Mexico for a hearing before an immigration judge.¹⁵⁰ About 70,000 individuals were forced to remain in Mexico before the Biden administration attempted to end the program.¹⁵¹ The dangerous conditions in Mexico discouraged some from pursuing their claims, thus depressing access to immigration court.¹⁵² The Biden administration eventually ended Remain in Mexico after court challenges to its efforts to end it.¹⁵³ Additionally, after the onset of the COVID-19 pandemic in March 2020, the Trump administration invoked an additional reason to close the border to asylum seekers—public health.¹⁵⁴ President Biden attempted to end this policy in April 2022, but his efforts to end the policy are subject to litigation.¹⁵⁵ Almost 2,000,000 expulsions under this

143 8 U.S.C. § 1231(a)(5) (2018).

144 See 8 C.F.R. § 241.8 (2022).

145 AM. IMMIGR. COUNCIL & NAT’L IMMIGR. PROJECT OF THE NAT’L LAWS. GUILD, REINSTATEMENT OF REMOVAL 9 (2019).

146 Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 55–70 (2020).

147 *Id.* at 51.

148 Family, *supra* note 108, at 1044–45.

149 Rafael Bernal, *Biden Administration Formally Ends ‘Metering’ Policy at US-Mexico Border*, THE HILL (Nov. 3, 2021, 2:37 PM), <https://thehill.com/latino/579889-biden-administration-formally-ends-metering-policy-at-us-mexico-border/> [https://perma.cc/27JX-56BS].

150 See Family, *supra* note 108, at 1045.

151 AM. IMMIGR. COUNCIL, THE “MIGRANT PROTECTION PROTOCOLS” 1 (2022).

152 See *id.* at 4–5.

153 See Adam Liptak, Miriam Jordan & Eileen Sullivan, *Supreme Court Sides with Biden’s Efforts to End ‘Remain in Mexico’ Program*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/06/30/us/politics/biden-remain-in-mexico-scotus.html> [https://perma.cc/QYH2-YEV3].

154 AM. IMMIGR. COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER 1 (2022).

155 See, e.g., *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (mem.).

public health policy had been carried out by May 2022.¹⁵⁶ All of these policies ration access to the immigration court system, and the decisions how to ration access were made in the executive branch and implemented by frontline border officers.

All these diversions have rationed access to the immigration court system for millions. Expedited removal made up 46% of all removals, while reinstatement of removal made up 39% in fiscal year 2019.¹⁵⁷ Of the remaining 15% of removals, some of those are administrative removals.¹⁵⁸ The metering policy means that some who would have accessed an immigration court hearing were at least delayed in accessing it. The public health bar also leads to artificially limited access to immigration court. At best, less than 15% of removals occur after a hearing before an immigration judge. These diversions vastly outnumber immigration court adjudications. Therefore, these diversions deserve significant attention. Part of that attention is an understanding how the APA has allowed these diversions to develop.

III. APA NONUNIFORMITY AND IMMIGRATION REMOVAL ADJUDICATION

It is understandable that Congress baked flexibility into the APA. Even in the first half of the twentieth century, there was great variety in federal agencies and their tasks. The APA has been described as the result of canonizing the best practices of various agencies at the time.¹⁵⁹ It makes sense that one agency's best practice might not be the best fit for every other agency.¹⁶⁰

The lax approach to centralized, uniform adjudication procedures, however, doomed the removal adjudication system. Congress jumped on its ability to quarantine immigration removal adjudication from the APA. Congressional action following the APA made clear that Congress wanted to supply its own standards for removal adjudication.¹⁶¹ The flexibility of the APA made it easy for Congress to do this, and the lack of any uniform standards in the APA for informal adjudication left little guidance for Congress in crafting the standards for removal adjudication. The absence of preferred informal

156 AM. IMMIGR. COUNCIL, *supra* note 151, at 1.

157 GUO, *supra* note 115, at 8.

158 The government does not publish the number of administrative removals per year. Through a FOIA request, Professor Shoba Wadhia determined that the government completed 9,217 administrative removals in 2013. Wadhia, *supra* note 113, at 3.

159 Grisinger, *supra* note 30, at 381–82; Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1876 (2023).

160 See Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. MICH. J.L. REFORM 1 (2013).

161 See *supra* subsection II.A.1.

adjudication practices in the APA made it easy for Congress to implement whatever it wanted in removal adjudication. The APA does not provide a comparison; this absence makes it harder to argue that the custom standards are abnormal.¹⁶²

In the absence of robust APA-based standards for informal adjudication, Congress created the immigration court system. Immigration court adjudication, warts and all, is not the true representation of removal adjudication. The true representation of removal adjudication is a procedure that does not take place in immigration court and is not subject to even the limited protections that the immigration court system provides. The APA, therefore, has allowed removal adjudication to develop into a seriously disturbing process. This failure of the APA is even more concerning because the Constitution provides little, if any, centralized principles. That leaves a scenario where Congress is mostly left to its own devices. There is no centralized statutory guidance based in generalized administrative law principles and the Constitution demands little.

The effectiveness of administrative law in immigration law is especially important because immigrants often are denied constitutional protections, both procedural and substantive.¹⁶³ Congress's chosen procedures for removal adjudication *are* subject to the Due Process Clause for those who have effected an entry into the United States, but those procedures *are not* subject to the Due Process Clause for those at the border seeking entry or for those apprehended close to the border.¹⁶⁴ For all immigrants, the substance of immigration policy is mostly beyond constitutional challenge. The political branches have plenary power to determine the substance of immigration policy.¹⁶⁵ The exercise of this plenary power is at best subject to a search for a

162 See *supra* Part I.

163 See *supra* subsection II.A.2.

164 *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963–64, 1981–83 (2020) (holding the Due Process Clause does not apply to an individual apprehended on U.S. territory twenty-five yards from the border); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”). Certain returning lawful permanent residents are not treated as seeking entry. See 8 U.S.C. § 1101(a)(13)(C) (2018).

165 Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 112–14 (2014). The plenary power doctrine is steeped in ancient notions of sovereignty that reason that the political branches need special power over immigration law to protect the nation and to allow the nation to exist. *Id.*

facially legitimate reason, even if other, illegitimate reasons are present.¹⁶⁶

The lack of procedural due process protection for some immigrants gives Congress extremely wide latitude in fashioning bespoke procedures for removal adjudication. Expedited removal is one example. Unless individuals express a fear of returning home, the only process provided occurs within the executive branch, carried out by front-line border officers with supervisory review only.¹⁶⁷ For these Constitution-free procedural zones, neither the APA nor the Constitution is a limiting force. The APA is not a limiting force because the APA does not insist on any uniform principles, nor does it supply any robust model informal adjudication procedures that might persuade Congress to adopt more robust procedures for removal adjudication.

When procedural due process protection does apply (for example, for those individuals in a removal proceeding based on a charge of deportability), the strength of the constitutional protection is dependent on a court's balancing of the government's interests, the individual's interests, and the risk of an error if the government's chosen procedures are followed.¹⁶⁸ The APA does not provide any subconstitutional uniform standards. Also, even when the Due Process Clause does apply to cabin Congress's procedural choices, the weak constitutional review of immigration's policy choices still detrimentally affects removal adjudication. Immigrants in removal proceedings only may make weak constitutional challenges against the substance of the policy that led them into removal proceedings in the first place. Even when an immigrant gets a hearing in immigration court, there is little opportunity to constitutionally challenge the policy choice that makes the individual removable.

The APA does not counteract this substantive constitutional void, either. Here is a moment in removal adjudication when a uniform, APA-based administrative law doctrine does apply. The APA prohibits arbitrary and capricious government action.¹⁶⁹ This prohibition does apply to an agency's implementation of Congress' removal grounds.¹⁷⁰ That challenge, however, focuses on the way the agency thought about

166 *Fiallo v. Bell*, 430 U.S. 787, 794–95 (1977). In reviewing the Trump administration's immigration ban aimed at Muslims, the Supreme Court expressed that as long as there was a facially legitimate reason for the ban, it would ignore evidence of illegitimate motivations. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–23 (2018).

167 See 8 C.F.R. § 253.3(b)(7) (2022).

168 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

169 5 U.S.C. § 706(2)(A) (2018).

170 See, e.g., *Judulang v. Holder*, 565 U.S. 42 (2011) (holding the Board of Immigration Appeal's interpretation of a deportation statute to be arbitrary and capricious).

a problem rather than the merits of the actual policy.¹⁷¹ This means that even if the executive branch's interpretation of immigration law is subject to arbitrary and capricious review, that review is limited to errors in how the agency approached the problem. The agency may be free to adopt the exact same policy using a more careful, or perhaps more calculated, rationale.¹⁷²

In this constitutional void, Congress could choose to create statutes that demand more of removal adjudication. For example, Congress could create an Article I Immigration Court to inject more decisional independence and to diminish political control over removal adjudication.¹⁷³ Also, Congress could eliminate its own diversions from immigration court and could prohibit the executive branch practices that have led to additional diversions. Instead, Congress has viewed the lack of a demand from the APA as an opportunity to provide little process and to shrug its shoulders at the constitutional void. Thus far, the dysfunctionality of removal adjudication has not motivated Congress to act. There is nothing in the APA that incentivizes or forces Congress to fix the system, let alone to depart upward to provide greater rights.

The immigration court system itself is problematic, but the diversions make the whole endeavor even worse. Congress has created an alternative statutory adjudication system as sanctioned under the APA. That system is severely troubled by unimaginable backlogs, a lack of decisional independence, a lack of consistency in decisionmaking, an

171 *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

172 *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (explaining that arbitrary and capricious review does not address the wisdom of policy but rather whether the agency has provided a "reasoned explanation" for the policy).

173 COMM'N ON IMMIGR., AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, pt. 6, at 3 (2019) (recommending the creation of an Article I immigration court); AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS I (2018) ("In order protect [sic] and advance America's core values of fairness and equality, the immigration court must be restructured outside of the control of DOJ, in the form of an independent Article I court."); *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, <http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx> [<https://perma.cc/AX5L-KT26>] ("Since 2013 the Federal Bar Association has urged Congress to establish an Article I 'United States Immigration Court' . . ."); Email from A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. Judges, to Elizabeth Stevens, President, Fed. Bar Ass'n, Immigr. L. Section (Mar. 15, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf [<https://perma.cc/E5QP-JW2M>] (endorsing "the Federal Bar Association's proposed legislation in support of an independent Immigration Court").

unjust system of detention, and insufficient legal representation. As problematic as the immigration court system is, perhaps its worst feature is that it deflects attention from the diversions. The immigration court system detracts attention from adjudication that operates with even fewer guardrails for fairness.

The diversions mean that the lack of uniformity in immigration removal adjudication is compounded. Immigration court is governed by bespoke statutory procedures, as allowed by the APA. Most removal adjudication, it turns out, does not take place through those statutory bespoke procedures, but rather through diversions from that system. Some of those diversions come from the statute itself. Some come from executive branch policies. Either way, immigrants in removal proceedings find themselves far from the idea of uniform procedures of administrative law. Perhaps most importantly, immigrants find themselves in an extremely flawed system, no matter if they can access a hearing in immigration court or are subject to a diversion.

IV. DOES UNIFORMITY MATTER?

The APA allowed the phenomenon of compounded nonuniformity in immigration removal adjudication to take root. While the APA's flexibility is understandable both in terms of political compromise and in terms of practicality, this feature has allowed Congress to design the current dysfunctional removal adjudication system. The APA did not provide sufficient guardrails or norms for Congress to follow in crafting removal adjudication. This is surprising, given that a major role attributed to the APA is its ability to craft quasi-constitutional, uniform norms for agency behavior.¹⁷⁴

This APA failure, however, also is *not* surprising, given that the APA was not designed to address the kind of regulation that immigration law embodies. The APA was the product of concern about economic regulation. It was not designed to address government power in the context of the regulation of people. The APA is focused on other things and was never designed to address immigration law. Therefore, even if the APA contained uniform rules for informal adjudication, it is questionable whether those rules would have adequately addressed the needs of immigration adjudication. Even the APA's formal adjudication requirements would not be enough for immigration law.¹⁷⁵ Additionally, even if the APA contained uniform standards for informal adjudication, Congress still would be able to create a parallel

174 Eskridge & Ferejohn, *supra* note 11, at 1894, 1926–27; Bremer, *supra* note 3, at 1351, 1361–71, 1411–13.

175 Family, *supra* note 10.

regime for removal adjudication. The APA is, after all, just a statute, even if we think of it as something more.

The APA's loose approach to uniformity in adjudication does affect administrative law's potential as a source of constitutional-like protections for individuals in removal proceedings. The APA is not performing a constitutional-like force in informal adjudication,¹⁷⁶ including in removal adjudication. Professor Bremer argues that the lack of uniformity in informal adjudication leads to a poorer system which allows Congress to deemphasize broader procedural values in favor of substantive policy goals.¹⁷⁷ The lack of uniform APA-based procedures also prevents a clear understanding of what regulated parties should expect out of informal adjudication. Without a default norm, Congress has more space to implement procedural practices that may seem objectionable if compared to a uniform standard.¹⁷⁸ The lack of a uniform standard clouds the atmosphere, leaves us without a norm against which to judge congressional choices, and prevents the development of durable norms.¹⁷⁹

If the APA contained stronger, uniform rules for informal adjudication, however, it may have improved the trajectory of removal adjudication in that it would have set a transparent standard for what informal adjudication should look like. Perhaps the diversions would seem even more shocking if there were stricter norms contained in the APA. On the other hand, it is questionable whether more robust uniform APA informal adjudication procedures would be adequate to meet the needs of immigration regulation. The chances may be low that more robust APA informal adjudication procedures would demand the level of independent adjudication that immigration law needs, would be able to integrate concerns about detention, or would guarantee a right to government funded counsel.

Another alternative reality would have had the APA swap its default from informal adjudication to formal. Under that regime, the APA's formal adjudication principles would be the default and Congress would have had to expressly exempt to allow informal adjudication. This would have set a higher bar for what is expected of all agencies when adjudicating. Congress always could have diverged from that standard, but perhaps the higher starting point would have influenced those organic statutes, or at least made departures more transparent. The APA's formal adjudication procedures would improve removal adjudication but would not solve all of its problems. There is still agency head review in formal adjudication. While an Administrative Law

176 Bremer, *supra* note 3, at 1413.

177 *Id.*

178 *Id.* at 1415.

179 *Id.* at 1413–16.

Judge presides over a formal administrative hearing,¹⁸⁰ they are still employed by the agency (albeit with more job protections). Additionally, the future independence of administrative law judges is now in doubt.¹⁸¹

It could be that a lack of uniformity in the APA did not affect the trajectory of removal adjudication. Even if the APA would have required more uniform procedures, it is possible that Congress always would have established problematic procedures for immigrants. Immigrants themselves lack direct political agency due to their inability to vote, and sometimes also lack political influence. Also, the lack of constitutional protections exists independently of the APA and may be the true influence on Congress' design choices, including the implementation of the diversions.

Uniformity does matter in that the APA is missing important adjudication norms. The absence of norms may have worked to removal adjudication's detriment. The APA was not designed to address immigration regulation, however, and therefore even if it contained uniform standards for adjudication, those standards probably would not have been designed with immigration regulation in mind. Congress's rush to exempt removal adjudication from the APA shows that Congress has wanted to apply different controls to removal adjudication since the beginning of the APA. Those separate controls possibly would have been influenced by the existence of APA-based informal adjudication norms, but we will never know. What we do know is that the APA has failed to demand a functional immigration removal adjudication system. The lack of uniformity in the APA allowed Congress to establish a separate regime for removal adjudication. The APA's weak sphere of influence also allowed Congress to create disconcerting diversions from its separate regime.

CONCLUSION

Congress has created customized procedures for removal adjudication, as sanctioned by the APA. The APA allowed Congress to opt out of the APA's formal adjudication procedures and instead to supply procedures through the Immigration and Nationality Act. It turns out that the INA's immigration court procedures, however, apply only to a small minority of removal cases. Instead, most removal cases are subject to diversions from immigration court. Most removal cases are an opt out of the opt out.

Congress' bespoke system for removal adjudication is a failure when measured by administrative process design principles. The lack

180 See *supra* note 18 and accompanying text.

181 See *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

of uniformity in APA informal adjudication—the lack of an APA model of what informal adjudication should look like—has left us without a standard to judge Congress’ customized design. Also, the lack of uniformity means that the APA is not operating as a “super statute” in this context. This is magnified by weak or nonexistent constitutional protections. Removal adjudication mostly is left to congressional and executive prerogative. This is antithetical to the principles ascribed to the APA and represents the APA’s failure to improve this corner of administrative law.