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The Immigration Court System: Unconstitutionality at the Hands of the Executive to Push Nativism

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The Immigration Court System: Unconstitutionally at the Hands of the Executive to Push Nativism

By Chloe Wigul

ABSTRACT

The United States' immigration court system is located within the U.S. Department of Justice's Executive Office for Immigration Review and operated under the power of the attorney general. Consequently, the attorney general can review and overrule decisions made by the Board of Immigration Appeals, the immigration appellate body. If the attorney general uses this authority, his decision cannot be reconsidered, and his opinion becomes precedent. Immigration courts are unique in that no other court system is located within or controlled by the executive branch. Focusing on key historical eras, this Comment compares the development of immigration law and policy with tax law and policy, two areas that are evolutionarily similar and continue to be highly charged politically. This Comment argues that Congress structured immigration court differently from tax court because of xenophobic sentiment and nativist practices that have been commonplace in American society and politics since its founding. Finally, this Comment uses tax court as a guide to restructure immigration court and make the necessary changes to establish constitutionality.

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I. INTRODUCTION

When Congress approved Theodore Roosevelt’s 1939 Reorganization Act, it made the immigration court system vulnerable to racism and xenophobia.¹ Congress allowed the executive branch to maintain a stake in immigration court proceedings: “In the event of disagreement between the head of any department or agency and the Attorney General concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, final determination shall be made to the Attorney General.”² Congress, declining to follow the structure of other Article I courts, made the executive branch the final arbiter in select immigration matters.³

Why then did Congress depart from other Article I courts’ structure and destroy the longstanding principle of judicial independence, when there is nothing inherent in immigration that compels it to be under attorney general and executive control?⁴ Evidence points to anti-immigrant history and policy that has plagued the United States since the 1700s.⁵ By comparing

¹ Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (Jun. 15, 1940).

² *Id.*

³ *Id.* *Article I tribunal*, BALLOTPEDIA, https://ballotpedia.org/Article_I_tribunal#:~:text=An%20Article%20I%20tribunal%20is,the%20executive%20and%20legislative%20branches (last visited Apr. 13, 2023). Also known as legislative courts, Congress set up Article I courts to review agency decisions. *Id.* For example, the United States tax court adjudicates IRS disputes. *Id.*

⁴ *Article I tribunal*, *supra* note 3.

⁵ See generally Howard Markel & Alexandra Minna Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 THE MILBANK Q. 757 (2002); *Fact Sheet: The Secure Fence Act of 2006*, THE WHITE HOUSE (Oct. 26, 2006), <https://georgewebush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>. In 1891, with the Immigration Act’s passage, the federal government issued detailed regulations governing immigrant eligibility for entry into the country. *Id.* at Markel & Stern, at 761. Immigrants had to pass “an elaborate set of medical and psychological criteria” to enter until 1924. *Id.* at 761–62. During the final debate in the Senate on the McCarran-Walter Act of 1952, which “introduced selective admission categories” for immigration, McCarran himself announced that a “sound immigration and naturalization system is essential to the

the immigration court structure to the tax court structure, this comment provides historical, legislative, and political background that lead to the inevitable conclusion that Congress placed immigration courts under executive control, so the attorney general could further the executive agenda, which was prone to xenophobic attitudes and anti-immigrant policies.⁶

Part Two of this comment will discuss the overarching theme of the separation of powers and why judicial independence and review are vital in maintaining a democratic system of government and ensuring fairness and justice in court proceedings. Part Three examines the current immigration court system and the current tax court system. Part Three also compares the two courts to highlight how tax court maintains judicial independence and review while immigration court, due to its structure, does not retain either. Part Four outlines three, critical historical eras for both immigration law and tax law development, illustrating how xenophobia influenced immigration law and policy but played no role in tax law and policy—though both areas have been hot button issues since this country’s founding. Part Five analyzes *In re D-J*, a prevalent court case, to illustrate how xenophobia influences attorney general decisions in immigration court proceedings. Part Six explains the unwanted and problematic consequences in the current immigration court system when there is a lack of judicial independence and review, and Part Seven argues that our tax court system should serve as a model on which the immigration court system should be structured and proposes necessary changes.

preservation of our way of life, because that system is the conduit through which a stream of humanity flows into the fabric of our society . . . if that stream is polluted our institutions and our way of life becomes infected.” *Id.* at 772–73. (citing 98, CONG. REC. S2550 at 5089 (May 13, 1952)). The bill became law. *Id.* at 774. More presently, former president Donald Trump was not the only president who tried to build a wall. In 2006, former president George W. Bush signed the Secure Fence Act, authorizing the construction of fencing along the Southern border and implementing more stringent checkpoints and barriers into the country. *Id.* at *Fact Sheet: The Secure Fence Act of 2006*. See also *infra* Section IV.A–C.

⁶ *Infra* Sections III–VII.

II. SEPARATION OF POWERS DOCTRINE: JUDICIAL INDEPENDENCE AND JUDICIAL REVIEW

In 1788, James Madison wrote that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”⁷ To safeguard against this tyranny, the Framers of the Constitution gave the three branches of government—legislative, executive, and judicial—different actors and distinct and limited functions.⁸ While there is inevitable overlap between the branches as a result of an increasingly complex government, this separation of powers system ensures “that no one [branch is] able to create, administer, and enforce laws at the same time”—guaranteeing modern constitutional democracy.⁹

As our government becomes more interrelated, it is inevitable that the branches will face overlap.¹⁰ To remain appropriately insulated, each branch has specific duties to keep the others in check and guarantee that each branch does not accumulate disproportionate power.¹¹ For example, Congress cannot remove executive officers because that removal power is essential to effectively executing the law, a power vested in the president.¹² On the other hand, the executive cannot interfere with the consideration and passage of proposed legislation because that duty is

⁷ James Madison, *The Federalist No. 47*, THE FEDERALIST PAPERS (Feb. 1, 1788). See also Matthew E. Glassman, *Separation of Powers: An Overview*, CONG. RSCH. SERV. 1, 1 (Jan. 8, 2016) (explaining that this fear of tyranny came from King George III’s consolidated power).

⁸ Glassman, *supra* note 7, at 1.

⁹ *Separation of Powers*, ANNENBERG CLASSROOM, https://www.annenbergclassroom.org/glossary_term/separation-of-powers/ (last visited Apr. 13, 2023).

¹⁰ *Id.*

¹¹ *Id.*

¹² Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 690 (1980) (citing *Myers v. United States*, 272 U.S. 52, 117 (1926)).

reserved for the House and Senate.¹³ As for the judiciary, “[t]he constitutional power to decide cases fairly in accordance with the law can be exercised effectively only if the deliberative process of the courts is free from undue interference by the President or Congress.”¹⁴

To remain insulated from political pressures, judges must be able to apply the law freely and fairly without outside influence or pressure from the other government branches.¹⁵ For example, other branches can usurp judicial power by retaliating against judges for deciding against a particular litigant.¹⁶ Additionally, “[w]hen majoritarian sentiment is injected as a factor in the resolution of an individual dispute, the political branches, ultimately responsible to popular pressures, have succeeded in transforming the court into a political branch as well.”¹⁷ Thus, impartiality is a crucial feature of judicial independence but may be compromised when policies implemented by another branch interfere with a judge’s decision making process.¹⁸ To safeguard judicial independence, Article III, Section I of the Constitution requires federal judges to “hold their Offices during good Behaviour.”¹⁹ This provision protects judicial independence by

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Judicial Independence*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/judicial-independence/> (last visited Apr. 25, 2023).

¹⁶ Kaufman, *supra* note 12, at 694.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. CONST. art. II, § 2; U.S. CONST. art III, § 1.

prohibiting judges from being fired for making unpopular decisions and encouraging decisions based in positive law and judicial precedent.²⁰

Additionally, judges ensure that the other branches act in accordance with the Constitution, and if the other branches act illegitimately, judges declare such acts unconstitutional.²¹ This is known as the power of judicial review.²² Judicial review maintains separation of powers by allowing judges to strike down legislative and executive law and policy that is unconstitutional to “counter the tyranny of the majority.”²³ However, judicial review is effective only if judges are insulated from political pressures because their decisions must be based on comprehensible logic and not influenced by the other government branches.²⁴ Therefore, judicial independence is a “conditional predictor” of effective judicial review, and together, they are essential in preserving the separation of powers.²⁵

²⁰ Judge Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, ABA (Nov. 18, 2019), <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/>.

²¹ *Judicial Review*, ANNENBERG CLASSROOM, https://www.annenbergclassroom.org/glossary_term/judicial-review/ (last visited DATE).

²² *See generally* *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the principle of judicial review).

²³ Rafael La Porta, Florencio López-de-Silanes, Cristian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. OF POL. ECON. 445, 447 (Apr. 2004); *see e.g., Marbury*, 5 U.S. at 138 (holding that the Judiciary Act of 1789 conflicted with the Constitution); *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (holding that all states were bound by the Supreme Court precedent set in *Brown v. Board of Education*).

²⁴ *See generally* A.B. Rubin, *Judicial Review in the United States*, 40 LA. L.REV. 67 (1979).

²⁵ Garrett Nathaniel Vande, *Essays on Judicial Review* (Aug. 2019) (Ph.D. dissertation, Texas A&M University) (ProQuest).

III. THE CURRENT IMMIGRATION COURT SYSTEM COMPARED TO THE CURRENT TAX COURT SYSTEM

A. IMMIGRATION COURT

The current immigration court system is not judicially independent and does not allow for judicial review because it is located within the Department of Justice’s Executive Office for Immigration Review (EOIR).²⁶ Accordingly, all immigration courts, the Office of the Director,²⁷ the Board of Immigration Appeals (BIA),²⁸ the Office of the Chief Immigration Judge,²⁹ and the Office of the Chief Administrative Hearing Officer are under executive supervision.³⁰ The EOIR, as a whole, adjudicates immigration cases, conducts appellate reviews, and interprets federal immigration laws under the attorney general’s authority.³¹ Its primary goal is “to provid[e] fair . . . and uniform application of the nation’s immigration laws in all cases

²⁶ *Organization, Mission and Functions Manual: Executive Office For Immigration Review*, U.S DEP’T. OF JUST., <https://www.justice.gov/doj/organization-mission-and-functions-manual-executive-office-immigration-review> (last visited Apr. 13, 2023).

²⁷ *Director*, U.S DEP’T. OF JUST., <https://www.justice.gov/legal-careers/job/director-2> (Apr. 25, 2023). The attorney general delegates authority to the Director to supervise the Deputy Director, the Chairman of the Board of Immigration Appeals, the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel. *Id.*

²⁸ *Board of Immigration Appeals*, U.S DEP’T. OF JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Sep. 14, 2021). The BIA provides appellate review of immigration cases. *Id.*

²⁹ *Officer of the Chief Immigration Judge*, U.S DEP’T. OF JUST., <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last visited DATE). The Office of the Chief Immigration Judge “provides overall program direction and establishes priorities for approximately 600 immigration judges located in 68 immigration courts and three adjudications centers throughout the Nation.” *Id.*

³⁰ *Organization, Mission and Functions Manual: Executive Office For Immigration Review*, *supra* note 26. See also Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General’s Referral Power*, 52 CASE W. RES. J. INT’L L. 599, 604 (2020). The Immigration and Nationality Act (“INA”) codified in 1952, guides the current immigration law system. *Id.*

³¹ *Id.* See also *Attorney General*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/attorney_general (Apr. 25, 2023). The attorney general, appointed by the President of the United States, represents the U.S. in litigation and “advises the President and heads of federal executive departments on legal matters.” *Id.*

while ensuring the standards of due process and fair treatment for all parties involved.”³² However, this objective runs contrary to the design of the immigration court system because not all cases get the opportunity to be reviewed by a neutral third-party if the attorney general (from the executive branch) steps in.³³

An immigration court case begins at detention by ICE or CBP.³⁴ Within seventy-two hours of detention, ICE provides a Notice to Appear that explains the reason for removal and begins the court case.³⁵ First, a non-citizen in removal proceedings appears before an immigration judge who is appointed to serve as the attorney general’s delegate.³⁶ After the immigration judge determines if alienage and removability are established, the losing party may appeal to the BIA for review.³⁷ The BIA is composed of twenty-three appellate immigration

³² *About the Office*, U.S. DEP’T. OF JUST., <https://www.justice.gov/eoir/about-office> (last updated Apr. 25, 2023). See also *Creation of the Department of Homeland Security*, HOMELAND SEC., <https://www.dhs.gov/creation-department-homeland-security> (last visited Apr. 25, 2023); *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES <https://www.uscis.gov/about-us/our-history> (last updated Nov.18, 2022); *Functions And Duties Of The U.S. Border Patrol*, U.S. DEP’T. OF JUST. OFF. OF JUST. PROGRAMS (Feb. 1971), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/functions-and-duties-us-border-patrol>. In 2002 Congress passed the Homeland Security Act in response to the September 11, 2001, terrorist attacks, which split the INS into the Immigration and Customs Enforcement (“ICE”), the U.S. Citizenship and Immigration Services (“USCIS”), and Customs and Border Protection (“CBP”). *Id.* at *Creation of the Department of Homeland Security*. All of these agencies reside within the Department of Homeland Security. *Id.* ICE, for example, enforces federal statutes concerning border control, customs, trade, and immigration while USCIS facilitates lawful immigration by processing citizenship applications. *Id.* at *Our History*. CBP patrols the borders to detect and prevent illegal entry into the United States. *Id.* at *Functions And Duties Of The U.S. Border Patrol*.

³³ See *infra* note 44.

³⁴ Bryan Lonigan & the Immigration Law Unit of the Legal Aid Society, *Immigration Detention and Removal: A Guide for Detainees and their Families*, THE LEGAL AID SOC’Y 1, 2 (2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf.

³⁵ *Id.*

³⁶ Jonathan P. Riedel, *Chevron and the Attorney General’s Certification Power*, 95 N.Y.U. L. REV. 271, 280 (Apr. 2020); Menke, *supra* note 30, at 607.

³⁷ Lonigan, *supra* note 34, at 2.

judges—also appointed by the attorney general—who represent “the highest administrative body for interpreting and applying immigration laws.”³⁸ The BIA should exercise independent judgment when hearing appeals.³⁹ The losing party on appeal may seek judicial review at a federal court of appeals.⁴⁰

Congress, however, granted the attorney general the power to review BIA decisions, denying some cases judicial review at the federal court of appeals level.⁴¹ Known as the “referral power,”⁴² the attorney general can unilaterally overturn BIA precedent if he “directs the [BIA] to refer [cases] to him.”⁴³ If the attorney general decides to refer the case to himself, the non-citizen cannot seek judicial review in a federal, Article III court, and the “determination and ruling by the Attorney General with respect to all questions of law shall be controlling,” as

³⁸ *Board of Immigration Appeals*, *supra* note 28.

³⁹ *Id.*

⁴⁰ Riedel, *supra* note 36, at 280.

⁴¹ 8 C.F.R. § 1003.1(h)(1)(i).

⁴² Menke, *supra* note 30, at 608.

⁴³ 8 C.F.R. § 1003.1(h)(1)(i), *supra* note 41. *See e.g. Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (vacating BIA decision from 2019); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (vacating BIA decision from 2014). *See also* Riedel, *supra* note 36, at 282 (stating that the George W. Bush administration exercised the referral power fifteen times, the Obama administration exercised the power four times, and the Trump administration exercised the power seventeen times—more than any other administration). The attorney general may take up a case “to efficiently exercise policy control and knit adjudications, rulemaking, and other bureaucratic decisions into one coherent immigration policy framework, as well as to solve disagreements between the BIA and INS.” Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, MIGRATION POL’Y INST. 1, 3 (Jan. 2021). However, this paper argues the contrary: the attorney general takes up cases to manipulate immigration policy to fit the executive branch’s agenda, and instead of creating coherence, it creates confusing and changing immigration precedent from one administration to the next. *Id.*

determined by the INA.⁴⁴ Consequently, the attorney general’s decision is binding on the BIA and lower immigration courts.⁴⁵

The attorney general has the power to not only reverse BIA decisions but also to remove immigration and BIA judges as he sees fit.⁴⁶ Neither immigration nor BIA judges serve fixed terms, and they have no protection against removal without cause.⁴⁷ So, if the attorney general disagrees with an immigration or BIA judge’s expert decisions, he can remove them.⁴⁸ BIA judges, specifically, remain accountable to the attorney general, who may elect to review their decisions and overturn BIA precedent.⁴⁹ This oversight power enables the attorney general to “politicize the BIA by directly firing members or indirectly threatening to reverse their opinions” if such members oppose executive policy or their opinions are inconsistent with the current administration’s.⁵⁰

First, the attorney general’s referral power and the fact that immigration courts are located within the U.S. Department of Justice prevents judicial independence because the law is

⁴⁴ 8 U.S.C § 1103(a)(1).

⁴⁵ Menke, *supra* note 30, at 608–09. The attorney general has even more discretion than an Article III court judge when reviewing BIA decisions because “[u]nlike decisions by the BIA, which are confined to *de novo* review of questions of law and *clearly erroneous* review of facts, the attorney general has *de novo* review of *all* aspects of the BIA’s decisions.” *Id.* at 608. Ultimately, the attorney general can review both legal and factual errors and does not have to follow precedent. *Id.* Additionally, unlike BIA judges, the attorney general is not required to have specialized expertise in immigration matters. *Id.*

⁴⁶ Rebecca Baibak, *Creating an Article I Immigration Court*, 86 UNIV. OF CIN. L. REV. 997, 1004 (2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Menke, *supra* note 30, at 608.

⁵⁰ Baibak, *supra* note 46, at 1005.

no longer being applied or determined by an impartial judge.⁵¹ Rather, the attorney general interferes with an immigration judge’s decision-making process by supplanting judicial judgment with his own.⁵² This interference hinders judges meaningful independence from the partisan, executive branch and makes “immigration courts and their judges *subject to*, not independent of, one of the parties to the cases before them, a prosecutorial party motivated by political policy objectives rather than impartial administration of justice.”⁵³

Second, because immigration and BIA judges can be fired without cause and their decisions reversed, they have no incentive to exercise independent judgment when their decisions can be overruled, but those same decisions determine whether they get to keep their job.⁵⁴ Furthermore, after the attorney general decides to overturn BIA precedent, there is no longer judicial review because the determination becomes binding without consideration from the judiciary.⁵⁵ Allowing “executive review” by the attorney general in immigration proceedings destroys the separation of powers by preventing judicial independence and review.⁵⁶

⁵¹ *See supra* p. 4.

⁵² *See supra* p. 8.

⁵³ Judge Joan V. Churchill, *Compelling Reasons for an Article I Immigration Court*, ABA (Mar. 11, 2022), https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/winter/compelling-reasons-an-article-i-immigration-court/.

⁵⁴ *See supra* pp. 8–9.

⁵⁵ *See supra* p. 8.

⁵⁶ *See supra* pp. 2–5.

B. TAX COURT

When creating tax court, Congress recognized the importance of maintaining an independent agency.⁵⁷ Accordingly, Congress designated tax court as an Article I legislative court instead of handing power over to the attorney general.⁵⁸ Though tax court remained within the executive branch, Congress allowed it to operate as an autonomous judicial tribunal.⁵⁹ The tax court statute specifically states that “[t]he Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”⁶⁰

A tax case often begins with the Commissioner of Internal Revenue issuing a notice of deficiency to inform the taxpayer that they owe an additional tax.⁶¹ The taxpayer can either pay the additional amount or file a petition with the tax court.⁶² Final tax court decisions are binding precedent that can be appealed to and decided by the correct federal circuit court “in the same

⁵⁷ Nicholas R. Metcalf & Mary W. Proser, *Litigating a Case Before the U.S. Tax Court*, THE FED. LAW. 32, 33 (Aug. 2014), <https://www.fedbar.org/wp-content/uploads/2014/08/feature2-aug14-pdf-1.pdf>.

⁵⁸ *Congressional Power to Establish Non-Article III Courts: Current Doctrine*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/article-3/section-1/congressional-power-to-establish-non-article-iii-courts-current-doctrine> (last visited Apr. 25, 2023). Legislative, Article I, courts differ from Article III courts in that Congress created them pursuant to its general legislative powers. *Id.* Essentially, they did not need to follow the guidelines set forth in Article III of the Constitution concerning tenure and salary. *Id.* Rather, legislative courts are highly specialized to help Congress carry out functions that were at one time legislative duties. *Id.* See also Craig A. Gargotta, *Who Are Bankruptcy Judges and how did they Become Federal Judges?*, THE FED. LAW. 11, 11 (Apr. 2018). Bankruptcy courts are also legislative courts that derive their powers from Article I of the Constitution rather than Article III. *Id.*

⁵⁹ Bolon B. Turner, *The Tax Court of The United States, Its Origin and Functions*, WILLIAM & MARY ANN. TAX CONF. 31, 40–41 (1955); see also *Stern v. Comm’r*, 215 F.2d 701, 708 (3d Cir. 1954) (finding that though the tax court is placed in the executive branch for convenience “it is an ‘independent’ judicial agency the work of which is not subject to supervision or review in the Executive Branch of the Government but only by the federal appellate courts.”)

⁶⁰ Churchill, *supra* note 53.

⁶¹ Bolon, *supra* note 59, at 708.

⁶² *Id.*

manner and to the same extent as decisions of the District Courts in civil actions tried without a jury.”⁶³ Federal circuit court judgments are final unless appealed to the United States Supreme Court, so tax cases never come under “executive review.”⁶⁴

To foster impartiality, the president appoints tax court judges—all experts in federal tax law—to serve a fifteen-year term and be removed only for cause.⁶⁵ Fixed terms and removal for cause encourages tax court judges to rule impartially which in turn fosters judicial independence within the tax court system.⁶⁶ Accordingly, tax court judges do not face the same pressure that immigration court judges face because they cannot be removed for unfavorable judgments contrary to executive desires.⁶⁷

Tax court judges not only face fewer consequences if they make unpopular decisions, but tax cases are subject to proper judicial review unlike immigration cases.⁶⁸ If tax cases are appealed they are reviewed by an Article III judge only—a judicial branch actor—sitting on a federal circuit court or the Supreme Court, to ensure accountability.⁶⁹ While immigration cases *can* be appealed from the immigration court, to the BIA, and then to a federal circuit court, there

⁶³ *Id.* at 37.

⁶⁴ 26 U.S.C. § 7482.

⁶⁵ Metcalf & Proser, *supra* note 57, at 34. Article I tax court judges serve for a set fifteen-year term whereas Article III judges serve a lifetime. *Id.*; U.S. CONST. art. III. *See also* Kevin A. Diehl, *Dealing with Tax Court Judges’ Conflicts of Interest: Barrar v. Commissioner*, ABA (Jun. 1, 2017), https://www.americanbar.org/groups/taxation/publications/abataximes_home/17jun/17jun-ac-diehl-dealing-with-tax-court-judges-conflicts-of-interest/.

⁶⁶ Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 137 (2005); Diehl, *supra* note 65.

⁶⁷ *See supra* Section III.A.

⁶⁸ *See supra* p. 11.

⁶⁹ *See supra* p. 10.

is always a possibility that the attorney general will intercept the case after a BIA ruling.⁷⁰ Tax cases, however, will never be decided by the attorney general and therefore separation of powers, more specifically judicial review, remains intact.⁷¹

IV. HISTORICAL CONTEXT: WHAT LED TO THE DIFFERENCES IN COURT STRUCTURE

Congress used its power, under Article I, Section 8, to structure two diametrically different court systems.⁷² The question is: why? Immigration and tax developed in the same era.⁷³ Both have been historically controversial since the United States' founding, and both remain hot button issues that tend to be split down partisan lines.⁷⁴ However, historical evidence reveals deep-rooted xenophobic attitudes drove national policy and supported an immigration court system focused on enforcement by the executive.⁷⁵

⁷⁰ *See supra* Section III.A.

⁷¹ *See supra* p. 10.

⁷² U.S. CONST. art. I, § 8, cl. I (“The Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts”); U.S. CONST. art. I, § 8, cl. IX (“To establish an uniform Rule of Naturalization”).

⁷³ *See Evolution of the U.S. Immigration Court System: Pre-1983*, U.S DEP’T. OF JUST. (Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983#:~:text=The%20Attorney%20General%20established%20the,the%20Nation’s%20immigration%20court%20system;U.S.TaxCourtEstablished,ANNENBERGCLASSROOM,https://www.annenbergclassroom.org/timeline_event/u-s-tax-court-established/ (last visited Apr. 26, 2023).

⁷⁴ *See infra* pp. 14–27.

⁷⁵ *See generally* ERIKA LEE, AMERICA FOR AMERICANS (Basic Books 2019 or 2021).

A. MID-NINETEENTH CENTURY: XENOPHOBIA INFILTRATED LAW AND POLITICS⁷⁶

During the 1855 election, the Know Nothing Party “transformed xenophobia into an organized political movement.”⁷⁷ The Know Nothings ran on an anti-Irish Catholic platform and believed that the large group of immigrants coming to the United States was biologically inferior.⁷⁸ The party advocated for eliminating immigrant rights, mobilized voters to elect anti-immigrant lawmakers who would pass anti-immigrant legislation, and demonized foreigners by blaming them for the ills of America.⁷⁹ The Know Nothings successfully applied “rhetoric and politics of nativism to immigration” which “fueled xenophobic legislation that attacked the civil and political rights of Catholic immigrants and Catholic Americans.”⁸⁰ By the end of 1855, the Know Nothings held eight governorships, controlled nine state legislatures, and elected more than one hundred congressmen and mayors.⁸¹ Most notably, the Know Nothings “expanded the state government’s authority” to deport immigrants and, by doing so, they also “broadened the category of people who could be deported.”⁸²

⁷⁶ *Id.* at 17. Even before the mid-nineteenth century, anti-immigrant rhetoric and legislation existed. *Id.* In 1755, Benjamin Franklin thought that those who were coming to American from overseas were “the most ignorant stupid . . . of their own nation.” *Id.* Shortly after the Constitution’s ratification, Congress passed the Naturalization Act of 1790, limiting United States citizenship to free white people of good character who had been living in the United States for two years or longer. H.R. 40, Naturalization Bill, Mar. 4, 1790.

⁷⁷ LEE, *supra* note 75, at 43.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 43–44.

⁸¹ *Id.* at 68.

⁸² *Id.* at 69–70.

“The nativist spirit of the Know Nothing movement has never quite disappeared” nor have their policies on immigration restriction.⁸³ “The Native American Democratic Association formed . . . on a platform of bringing ‘American Born Citizens’ together to protect the growing influence of ‘aliens’ in the city.”⁸⁴ Other organizations such as the American Republican Party, Democratic Association, Order of the United American Mechanics, and the American Protestant Society all formed at this time on similar platforms—save America from immigrants.⁸⁵ Furthermore, the Know Nothing’s approach to immigration enforcement served as a “precursor[] to the immigration raids that federal immigration officials would later use as part of federal deportation policy” and influenced national immigration policy.⁸⁶

Anti-Irish Catholic sentiment quickly turned into an anti-Chinese movement primarily in the West.⁸⁷ Congress passed the Chinese Exclusion Act in 1882.⁸⁸ The 1882 Act was “[t]he first law to establish significant federal control over immigration” and “legalize[] xenophobia on an unprecedented scale.”⁸⁹ Additionally, the Chinese Exclusion Act laid the foundation for immigration inspectors and surveillance.⁹⁰ “[I]nspectors for Chinese immigrants (under the

⁸³ *The Know Nothing Party*, VILL. U., <https://exhibits.library.villanova.edu/chaos-in-the-streets-the-philadelphia-riots-of-1844/know-nothings> (last visited Jan. 25, 2023).

⁸⁴ LEE, *supra* note 75, at 50–51.

⁸⁵ *Id.* at 50–52.

⁸⁶ *Id.* at 70.

⁸⁷ *Id.* at 75–79.

⁸⁸ Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (“[I]n the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof”).

⁸⁹ LEE, *supra* note 75, at 79.

⁹⁰ *Id.* at 96.

auspices of the US Customs Service) were the first to be authorized to act as immigration officials on behalf of the federal government under the terms of the Exclusion Act,” and Chinese immigrants, residents, and U.S.-born citizens were required to have identification documents similar to passports.⁹¹ Finally, this Act defined illegal immigration as a crime, implying that immigration posed a safety concern, constituted a national security threat, and demanded heavy-handed enforcement.⁹²

Soon thereafter, Congress passed the Immigration Act of 1891, barring categories of individuals from entry (polygamists, individuals convicted of crimes of moral depravity, and those with loathsome diseases) and creating the Office of the Superintendent of Immigration (the Office of Immigration), a federal agency within the Treasury Department.⁹³ In 1893, Congress passed another Immigration Act that created the Boards of Special Inquiry (BSIs), responsible for reviewing each immigrant exclusion case.⁹⁴

Not unlike immigration, Americans have felt strongly about tax policy since the 1700s.⁹⁵ Anti-Federalists strongly opposed a federal tax⁹⁶ whereas the Federalists believed that taxes were

⁹¹ *Id.* at 96–97.

⁹² *Id.* at 97–98.

⁹³ *Origins of the Federal Immigration Service*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Jul. 30, 2020), <https://www.uscis.gov/about-us/our-history/overview-of-ins-history/origins-of-the-federal-immigration-service>; *see also* Immigration Act of 1891, 26 Stat. 1084, 51st Cong. (1891); *Overview of INS History*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf>. *See also* Lee, *supra* note 75, at 99 (“These initial forays into federal immigration regulation would be further codified for all immigrants in the Immigration Act of 1891, helping to turn the United States into a “deportation nation.”).

⁹⁴ *INS Boards of Special Inquiry (BSI) Records*, NAT’L ARCHIVES (Apr. 7, 2021), <https://www.archives.gov/research/immigration/boards-of-special-inquiry>. *See also* Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong. (1984).

⁹⁵ *The Revolutionary War to the War of 1812*, TAXANALYSTS, <https://www.taxnotes.com/tax-history-project/tax-history-museum/1777-1815> (last visited Mar. 7, 2023).

vital for the federal government’s survival.⁹⁷ At around the same time that xenophobia infiltrated politics, Congress imposed the first income tax to increase revenue during the Civil War⁹⁸ and created the Bureau of Internal Revenue (BIR)—within the Treasury Department—tasked with assessing and collecting income tax.⁹⁹

B. WORLD WAR I AND WORLD WAR II: THE “NOT-SO” PROGRESSIVE IMMIGRATION ERAS

World War I strengthened anti-immigrant sentiments in the United States, which led to strict limitations on immigration.¹⁰⁰ During World War I, anti-German and anti-Russian attitudes increased,¹⁰¹ and as part of the war effort, former President Theodore Roosevelt denounced “so-called hyphenated Americans who did not offer complete allegiance” to the country, calling for a “nationalized and unified America” and an “AMERICA FOR AMERICANS.”¹⁰² Accordingly, Congress established quotas based on nationality and established literacy requirements for entry,

⁹⁶ *Id.*

⁹⁷ Janice R. Brenman, *Federalist No. 30 - Concerning the General Power of Taxation, From the New York Packet*, CONSTITUTING AM. (Jun. 8, 2010), <https://constitutingamerica.org/june-8-2010-%E2%80%93-federalist-no-30-%E2%80%93-concerning-the-general-power-of-taxation-from-the-new-york-packet-%E2%80%93-guest-blogger-attorney-janice-r-brenman/>; *see also* Alexander Hamilton, THE FEDERALIST NO. 30 (Alexander Hamilton).

⁹⁸ Harold Dubroff and Bryant J. Hellwig, *The United States Tax Court: An Historical Analysis* 1, 3 (Dec. 23, 2014, 9:13 AM), https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf.

⁹⁹ *Id.*; *see also* *Internal Revenue Service*, NAT’L ARCHIVES, <https://www.archives.gov/chicago/finding-aids/irs> (last visited Mar. 7, 2023).

¹⁰⁰ *Immigration and the Great War*, NAT’L PARK SERV. U.S. DEP’T OF THE INTERIOR (Oct. 30, 2018), <https://www.nps.gov/articles/immigration-and-the-great-war.htm>; *see also* Lee, *supra* note 75, at 139 (“World War I had transformed xenophobia into a mainstream political issue, and support for immigration restriction based on race increased.”).

¹⁰¹ *Immigration and the Great War*, *supra* note 100.

¹⁰² LEE, *supra* note 75, at 135; *see also* Theodore Roosevelt, *America for Americans*, Afternoon Speech of Theodore Roosevelt at St. Louis (May 31, 1916), *in* THE PROGRESSIVE PARTY, ITS REC. FROM JAN. TO JULY, 1916.

which numerically limited immigration and achieved further exclusion.¹⁰³ The United States thus viewed immigration as a problem the federal government should solve.¹⁰⁴

In 1924, Congress drastically curtailed immigration from Europe and completely excluded immigrants from Asia with the Johnson-Reed Act.¹⁰⁵ Former President Coolidge, who had “long expressed his support for immigration restriction based on race . . . [and] declared that ‘America must be kept for Americans,’” signed the Act into law.¹⁰⁶

As soon as the United States entered World War II, resident and non-resident immigrants alike encountered serious restrictions.¹⁰⁷ Non-citizen Japanese, Germans, and Italians “were required to re-register and receive new identification certificates and carry them at all times.”¹⁰⁸ Thousands of German Jews who tried to seek refuge in the United States were barred from entering because “[t]he Roosevelt administration made no attempt to bypass existent [stringent] laws to rescue Jewish refugees,” so Jewish people remained on the visa waiting list and never made it off.¹⁰⁹ With immigration laws and policy becoming stricter as fear of foreigners increased, former President Franklin D. Roosevelt presented Reorganization Plan Number V

¹⁰³ *Overview of INS History*, *supra* note 93; Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION AND HUM. SEC. 217, 223 (2017); *see also* Lee, *supra* note 75, at 136. The Immigration Act of 1917 “actively tried to reduce the number and types of immigrants coming into the United States rather than merely keeping records of new arrivals.” *Id.*

¹⁰⁴ LEE, *supra* note 75, at 134–35.

¹⁰⁵ *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Jan. 25, 2023).

¹⁰⁶ LEE, *supra* note 75, at 143.

¹⁰⁷ Roger Daniels, *Immigration Policy in a Time of War: The United States, 1939-1945*, 25 J. AM. ETHNIC HIST. 107, 108 (2006).

¹⁰⁸ *Id.*

¹⁰⁹ LEE, *supra* note 75, at 144–45.

where he recommended moving immigration functions to the DOJ,¹¹⁰ “the nation’s leading prosecutor and law enforcement agency” within the Executive Branch.¹¹¹ Roosevelt further proposed that all immigration and naturalization functions “be administered under the direction and supervision of the Attorney General” and “[i]n the event of disagreement . . . concerning the interpretation or application of any law pertaining to immigration, naturalization, or nationality, the final determination shall be made by the Attorney General.”¹¹² The House of Representatives approved Reorganization Plan Number V and made it effective only ten days after enactment.¹¹³

Although both immigration and tax administration became more involved during this time period, Congress dealt with these two areas of law differently and distinctly.¹¹⁴ The federal income tax increased as a result of World War I, which in turn increased the complexity of the law and the number of people affected.¹¹⁵ Congress responded by creating the Board of Tax Appeals (the Board) to independently review tax deficiencies before assessment and collection.¹¹⁶ Then the Great Depression hit and “taxes were filed by few households and paid

¹¹⁰ Reorganization Plan No. V of 1940, *supra* note 1.

¹¹¹ *The Attorney General’s Judges: How The U.S. Immigration Courts Became A Deportation Tool*, INNOVATION L. LAB & S. POVERTY L. CTR. 3, 7 (Jun. 25, 2019) [hereinafter *The Attorney General’s Judges*].

¹¹² Reorganization Plan No. V of 1940, *supra* note 1, at 225.

¹¹³ John D. Millett and Lindsay Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. ADMIN. REV. 176, 186 (1941); *see also Overview of INS History*, *supra* note 93. The Immigration Board of Review became the Board of Immigration Appeals (BIA) after moving to the DOJ. *Id.*

¹¹⁴ *See supra* pp. 19–21.

¹¹⁵ Dubroff and Hellwig, *supra* note 98, at 4, 6, 8.

¹¹⁶ *Id.*

by even fewer,” showing Congress had a greater need to enforce tax policy.¹¹⁷ However, unlike immigration which was moved to the DOJ to focus on enforcement and prosecution, Congress made the Board independent of the United States Department of the Treasury (the Treasury), an executive department,¹¹⁸ through the Tax Reform Act of 1969 because Congress felt “[t]roubled by the propriety of one executive agency sitting in judgment of the determinations of another.”¹¹⁹ Additionally, Congress recognized the need for a uniform body of precedents in tax law¹²⁰ and the importance of “secur[ing] an impartial and disinterested determination of the issues involved,” and ensuring that “each member of the board [would] sit solely as judge and not as both judge and advocate.”¹²¹ Therefore, the Board—later named tax court—emerged as a judicial body outside of the executive branch whereas immigration court did not.¹²²

¹¹⁷ Ellen R. McGrattan, *Capital Taxation During the U.S. Great Depression*, FED. RESERVE BANK OF MINNEAPOLIS AND UNIV. OF MINN.: RSCH. DEP’T. STAFF REP. 451, 1, 2 (Jan. 2012).

¹¹⁸ Roy G. Blakey, *The Revenue Act of 1924*, 14 THE AM. ECON. REV. 475, 494 (Sept. 1924). Congress also made the Board independent of the Bureau—now known as the Internal Revenue Service or IRS—part of the Treasury. *Id.*

¹¹⁹ Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, WASH. AND LEE U. SCH. OF L. SCHOLARLY COMMONS 269, 270 (2016).

¹²⁰ James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update*, TAX NOTES 1279 (2016).

¹²¹ Blakey, *supra* note 118, at 495; *see also* J. Gilmer Korner, *The United States Board of Tax Appeals*, 11 AM. BAR ASSOC. J. 642, 642 (Oct. 1925) (“[T]he administration of the tax law in the executive branch of the government had been reposed exclusively within the Treasury Department. This system gave rise to the criticism, among the taxpaying public, that under it there was not that degree of impartiality and independence in the appellate bodies within the Treasury Department, as was desirable.”).

¹²² Hellwig, *supra* note 119, at 270; *see also* *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991) (concluding that the tax court “exercises a portion of the judicial power of the United States.”).

C. FROM THE LATE TWENTIETH CENTURY TO NOW: NEW FORMS OF XENOPHOBIA

In the 1980s and the 1990s, the focus shifted from anti-European sentiment to anti-Mexican sentiment.¹²³ Mexican immigration became inextricably linked to societal degradation because of “deep-rooted stereotypes linking Mexicans to crime, poverty, and welfare dependency,” and “[i]llegal aliens’ were clearly understood to be *Mexican*.”¹²⁴ Former President Ronald Reagan championed regaining control of US borders and fighting the drug war at the US-Mexico border.¹²⁵ In 1986 he signed the Immigration Reform and Control Act (IRCA), which “imposed more restrictions and regulatory provisions to improve enforcement of existing laws, including steady increases to immigration enforcement agencies and greater requirements for employers to check the work authorization of employees,” while simultaneously providing amnesty for long-term residents.¹²⁶

Anti-Mexican sentiment persisted throughout the 1990s, and these widely-held views turned into federal policy under former President Bill Clinton.¹²⁷ Clinton signed the Antiterrorism and Effect Death Penalty Act (AEDPA) and the Illegal Immigration Reform and

¹²³ LEE, *supra* note 75, at 253. It is important to note that mass Mexican deportation also took place around the time of the Great Depression. *Id.* at 148.

¹²⁴ *Id.* Mass media contributed to this anti-Mexican immigration sentiment. *Id.* at 258. Lee states as follows:

“One example was *US News and World Report’s* March 7, 1983, cover story, ‘Invasion from Mexico: It Just Keeps Growing.’ Other popular descriptions of undocumented immigrants labeled them ‘alien invaders’ who ‘outgunned’ the Border Patrol in their attempts to ‘defend’ the border. But this ‘Latino threat’ narrative was not just about undocumented immigration. It was about all immigration from Mexico.” *Id.*

¹²⁵ *Id.* at 259.

¹²⁶ *Immigration Reform and Control Act (IRCA) (1986)*, IMMIGR. HIST. (2019), <https://immigrationhistory.org/item/1986-immigration-reform-and-control-act/>.

¹²⁷ LEE, *supra* note 75, at 278.

Immigrant Responsibility Act (IIRIRA).¹²⁸ Under AEDPA, immigrants, regardless of status, could be deported for both violent and nonviolent crimes.¹²⁹ Furthermore, the IIRIRA made immigrants be “detained and deported for even minor crimes and everyday legal infractions,” allowing immigrants to be prosecuted for criminal acts and immigration violations.¹³⁰ Known as “crimmigration,” “[i]mmigrants, both undocumented and lawfully present, became subjected to a double standard that allowed the US government to inflict a far greater punishment (deportation) than the crime (traffic offenses, for example) merited and treated noncitizens far more harshly than citizens.”¹³¹ U.S. immigration laws were not just deporting illegal aliens but rather creating “criminal aliens.”¹³²

The notion that the president had to be “hard on immigration” continued across party lines.¹³³ In response to September 11, 2001, terrorist attacks, former President George W. Bush created the Department of Homeland Security, which consisted of Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services, and U.S. Customs and Border Protection.¹³⁴ Though President Bush put agencies and policies in place to curb terrorism, many immigrants deported never committed crimes.¹³⁵ Moreover, instead of deporting “terrorists,” this

¹²⁸ *Id.* at 279.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 280.

¹³³ LEE, *supra* note 75, at 280.

¹³⁴ *Id.*

¹³⁵ *Id.*

increased enforcement affected those who did not pose a national security threat,¹³⁶ and rather disproportionately affected Latin American immigrant communities.¹³⁷ Additionally, the Bush administration increased Border Patrol enforcement to stop unauthorized border crossings, but instead of achieving deterrence these efforts, “significantly curtailed prosecutorial discretion—a hallmark of the U.S. criminal justice system—by mandating criminal prosecution of immigrants charged with entering or reentering the United States without authorization.”¹³⁸

The Obama administration continued to deport record numbers of immigrants and increase immigration enforcement funding.¹³⁹ So, when Donald Trump began his presidential campaign in 2015, though his explicitly xenophobic rhetoric was shocking,¹⁴⁰ his immigration

¹³⁶ Edward Alden, *National Security and U.S. Immigration Policy*, 1 J. OF INT’L AND COMPAR. L. 19, 23 (2010).

¹³⁷ LEE, *supra* note 75, at 281.

¹³⁸ Michael Corradini, Jonathan Allen Kringen, Laura Simich, Karen Berberich, & Meredith Emigh, *Operation Streamlining: No Evidence that Criminal Prosecution Deters Migration*, VERA INS. OF JUST. 1, 1 (June 2018).

¹³⁹ LEE, *supra* note 75, at 283. “The total detention budget for 2017 was a staggering \$2.6 billion” and “[a] total of 5,370,849 individuals were apprehended, 5,281,115 individuals were deported, and another 3,307,017 were apprehended at the US-Mexico border” during Obama’s eight-year term. *Id.* Arguably, the Obama administration passed pro-immigration initiatives such as DACA, “that protects eligible immigrants who came to the United States when they were children from deportation” and provided these undocumented immigrants with deportation protection and a work permit. *DACA Information*, UNDOCUMENTED STUDENT PROGRAM U. OF CAL. AT BERKELEY (Oct. 20, 2022), [¹⁴⁰ Donald Trump, Presidential Campaign Announcement \(Jun. 16, 2015\) \(“When Mexico sends its people, they’re not sending their best . . . \[t\]hey’re bringing drugs. They’re bringing crime. They’re rapists.”\); Nick Gass, *The 15 Most Offensive Things That Have Come Out of Trump’s Mouth*, POLITICO \(Dec. 8, 2015\), <https://www.politico.eu/article/15-most-offensive-things-trump-campaign-feminism-migration-racism/> \(“The fact that I want a strong border and the fact that I don’t want illegal immigrants pouring into this country, that doesn’t make me a racist, it means I love this country and I want to save this country.”\).](https://undocu.berkeley.edu/legal-support-overview/what-is-daca/#:~:text=DACA%20is%20an%20administrative%20relief,be%20renewed%20every%20two%20years. However, even DACA recipients “are not granted [] lawful immigration status and are not put on a pathway to [] lawful immigration status,” furthering the notion that even the most liberal of programs refuses to grant immigrants permanent status as residents or citizens. Andorra Bruno, <i>The DACA and DAPA Deferred Action Initiatives: Frequently Asked Questions</i>, CONG. RSCH. SERV. 1, 4 (Feb. 15, 2017).</p></div><div data-bbox=)

policy followed the presidents before him and was not dissimilar from previous Republican and Democratic administrations alike.¹⁴¹ Former President Trump also reinvigorated anti-Muslim sentiment, known as Islamophobia.¹⁴² In 2017, Trump signed Executive Order 13769, prohibiting entry of all aliens from Iran, Iraq, Libya, Sudan, Somalia, Syria, and Yemen, imposing an indefinite ban on Syrian refugees, and suspending the United States Refugee Admissions Program (USRAP) that identified and admitted qualified refugees.¹⁴³ Though President Trump stated the Muslim travel ban was to keep “radical Islamic terrorists out of the United States,”¹⁴⁴ such immigration policies do not protect against terrorist attacks.¹⁴⁵ In fact, this Executive Order “ha[d] the potential to trigger violence by individuals who [were] already leaning toward extremism” because of increased isolation, decreased trust in the government,

¹⁴¹ *Immigration Reform That Will Make America Great Again*, TRUMP, <https://tictimes.net/wp-content/uploads/2015/08/Immigration-Reform-Trump.pdf> (last visited DATE); *Fact Sheet: The Secure Fence Act of 2006*, THE WHITE HOUSE (Oct. 26, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html>. Trump advocated for building a permanent border wall at the US-Mexico border much like President G.W. Bush authorized the construction of fencing along the US Southern border in the Secure Fence Act of 2006. *Id.* See also Muzzaffar Chishti and Sarah Pierce, *Trump’s Promise of Millions of Deportations Is Yet to Be Fulfilled*, MIGRATION POL’Y INST. (Oct. 29, 2020), <https://www.migrationpolicy.org/article/trump-deportations-unfinished-mission>. Not unlike Obama, Trump sought to increase immigration enforcement from the interior. *Id.*

¹⁴² LEE, *supra* note 75, at 290–91; see also Faiza Patel and Rachel Levinson-Waldman, *The Islamophobic Administration*, BRENNAN CTR. FOR JUST. 1, 1 (2017). After the September 11, 2001, terrorist attacks, “President George W. Bush built, and President Barack Obama allowed to stand, national security laws and policies that treat American Muslims as suspects, subjecting them to widespread surveillance and preemptive prosecution.” *Id.*

¹⁴³ Protecting the Nation From Foreign Terrorist Entry Into the United States, Executive Order 13769 (Jan. 27, 2017); *Refugee Admissions*, U.S. DEP’T OF STATE, <https://www.state.gov/refugee-admissions/> (last visited Mar. 8, 2023).

¹⁴⁴ LEE, *supra* note 75, at 291.

¹⁴⁵ Kenneth J. Franzblau, *Immigration’s Impact on U.S. National Security and Foreign Policy*, U.S. COMM’N ON IMMIGR. REFORM 1, 4–5 (Oct. 1997).

and anger among Muslim partners around the world.¹⁴⁶ The United States had “created a well-funded and highly resourced immigration enforcement regime that [has been] supported and expanded by politicians in both major parties.”¹⁴⁷

Like immigration, taxation has been at the forefront of presidential agendas.¹⁴⁸ For example, former President Ronald Reagan, who strongly disliked high federal incomes taxes, pursued “Reaganomics,” which promoted tax cuts to encourage economic expansion, resulting in increases in federal government revenue at a lower rate.¹⁴⁹ Former President Barack Obama increased tax rates for the richest 0.1% of people in the United States but taxed the middle-class historically less.¹⁵⁰ Former President Trump’s tax plan cut corporate tax rates but only

¹⁴⁶ Daniel Benjamin, *How the New Immigration Rules Might Threaten Our National Security*, BROOKINGS (Jan. 31, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/01/31/how-the-new-immigration-rules-might-threaten-our-national-security/>; see Franzblau, *supra* note 145, at 4–5; Elizabeth Neumann, *Immigration Is Not a National Security Threat*, INSIDER PERSPS.: NAT’L SEC. AND IMMIGR. 1 (Mar. 4, 2021), https://www.immigrationresearch.org/system/files/Immigration-Is-Not-a-Security-Threat-3_4_2021_0.pdf. Restrictive immigration policy does not help reduce crime internally because “[c]rime rates measured from the 1960s show no obvious link with trends in immigration.” Franzblau, *supra* note 145, at 11. Furthermore, immigrants are not the ones committing the crimes. *Id.* at 11. Undocumented immigrants are arrested for felonies at a lower rate than native born U.S. citizens, and there is no evidence showing “that undocumented criminality has increased in recent years.” Neumann at 4. So, even “the most aggressive immigrant removal programs have not delivered on their crime reduction promises and are unlikely to do so in the future.” *Id.*

¹⁴⁷ LEE, *supra* note 75, at 293. The Coronavirus pandemic (COVID-19) also exacerbated xenophobia. *Id.* at 341. Though not necessarily related to immigration law and policy, former President Trump advertised COVID-19 as the “Chinese Virus,” demonizing Chinese people and increasing anti-Asian hate. *Id.* at 350–51.

¹⁴⁸ Joseph J. Thorndike, *The Republican Roots of New Deal Tax Policy*, TAXANALYSTS (Aug. 28, 2003), <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/DC6A3F1BAA03052A85256DFE005981FB?OpenDocument>; see also *Presidential Elections*, HISTORY (Jan. 20, 2021), <https://www.history.com/topics/us-presidents/presidential-elections-1#1932-franklin-d-roosevelt-vs-herbert-hoover>.

¹⁴⁹ *The Reagan Presidency*, NAT’L ARCHIVES, <https://www.reaganlibrary.gov/reagans/reagan-administration/reagan-presidency> (last visited Mar. 8, 2023).

¹⁵⁰ Tanya Somander, *Here’s What President Obama Has Done to Make the Tax Code Fairer*, THE WHITE HOUSE (Apr. 14, 2016), <https://obamawhitehouse.archives.gov/blog/2016/04/14/tax-day-what-president-obama-has-done-make-tax-code-fairer>.

temporarily cut individual tax rates.¹⁵¹ Furthermore, tax evasion “is illegal and is an underappreciated problem in the United States.”¹⁵² The IRS estimates the gross tax gap—the amount of tax liability not paid voluntarily and timely—to be \$458 billion.¹⁵³ The IRS stated: “Sustaining and improving taxpayer compliance is important because small declines in compliance cost the nation billions of dollars in lost revenue and shift the tax burden away from those who don’t pay their taxes onto those who pay their fair share on time every year.”¹⁵⁴ Accordingly, effective enforcement is critical to reduce the tax gap and recover lost government revenue.¹⁵⁵

Since immigration and taxation developed similarly, Congress should have structured their respective adjudicative bodies similarly.¹⁵⁶ Yet, Congress did not do this; instead, Congress gave the attorney general the final determination in immigration court, dispensing with judicial independence and review.¹⁵⁷ On the other hand, Congress allowed tax court cases to be properly appealed to an Article III court (without interference from the executive branch), maintaining

¹⁵¹ David Floyd, *Explaining the Trump Tax Reform Plan*, INVESTOPEDIA (Jan. 23, 2023), <https://www.investopedia.com/taxes/trumps-tax-reform-plan-explained/>.

¹⁵² William G. Gale & Aaron Krupkin, *How Big is the Problem of Tax Evasion?*, BROOKINGS (Apr. 9, 2019), <https://www.brookings.edu/blog/up-front/2019/04/09/how-big-is-the-problem-of-tax-evasion/>.

¹⁵³ *Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2008-2010*, INTERNAL REVENUE SERV. (May 2016), <https://www.irs.gov/pub/irs-soi/p1415.pdf>.

¹⁵⁴ *The Tax Gap*, INTERNAL REVENUE SERV. (Oct. 28, 2022), <https://www.irs.gov/newsroom/the-tax-gap>.

¹⁵⁵ Daniel Reck, Max Risch, & Gabriel Zucman, *Tax Evasion at the Top of the U.S. Income Distribution and How to Fight It*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 22, 2021), <https://equitablegrowth.org/tax-evasion-at-the-top-of-the-u-s-income-distribution-and-how-to-fight-it/>; see Gale and Krupkin, *supra* note 152 (“People who evade taxes are not just cheating the government, they are also stealing from their neighbors who are following tax laws and regulations.”).

¹⁵⁶ See *supra* pp. 12–23.

¹⁵⁷ See *supra* p. 8.

both judicial independence and review.¹⁵⁸ The notable difference between immigration and taxation is that the former does not involve a natural-born U.S. citizen. Tax debtors have not faced the same type of prejudice and discrimination ingrained in this country’s politics, policies, and attitudes; immigrants, on the other hand, have.¹⁵⁹ Naturally, allowing the executive branch to determine immigration court cases was a logical evolution of America’s xenophobic tradition.¹⁶⁰ It only made sense to give the attorney general enforcement power to “fight the war on immigration.”¹⁶¹

V. IN RE D-J-: HOW THE ATTORNEY GENERAL USED REFERRAL POWER TO ADVANCE THE EXECUTIVE BRANCH’S XENOPHOBIC AGENDA

A. HISTORICAL BACKGROUND: ANIMOSITY TOWARDS HAITIANS

The United States government historically made concerted efforts to keep Haitians out of the country.¹⁶² When Haitian migration began in the 1970s, the Reagan administration reacted by announcing an interdiction policy in 1981, which intercepted vessels suspected of carrying illegal migrants and sent them back to their home country.¹⁶³ From 1981 to 1990, during the

¹⁵⁸ See *supra* p. 11.

¹⁵⁹ See *supra* pp. 12–23.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Judy Amorosa, *Dissecting In re D-J-: The Attorney General, Unchecked Power, and the New National Security Threat Posed by Haitian Asylum Seekers*, 38 CORNELL INT’L L. REV. 263, 269 (2005); see generally Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT’L L.J. (1994).

¹⁶³ Claire P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT’L L. 151, 151 (1984).

duration of this policy, only six Haitians were allowed to present asylum claims while 21,455 were interdicted and repatriated to Haiti.¹⁶⁴

Former President H.W. Bush continued to reject Haitian refugees when he signed the “Kennebunkport Order,” which authorized intercepting Haitian migrants on the high seas and sending them back to their home country without any kind of screening or interview process to determine if they could seek asylum.¹⁶⁵ The case *In re D-J-* exemplifies how the attorney general has used his referral power to make decisions rooted in xenophobia.

B. THE FACTS OF *IN RE D-J-*

David Joseph, a Haitian teenager, arrived on U.S. soil via boat.¹⁶⁶ Upon arrival, the U.S. Coast Guard sought to interdict the vessel and apprehend the passengers in accordance with U.S. policy.¹⁶⁷ After Joseph was placed in removal proceedings and claimed asylum,¹⁶⁸ Joseph asserted that he had neither been arrested nor committed a crime, and upon release he would live with his uncle in New York City.¹⁶⁹ The immigration judge denied Joseph’s application for asylum, but he appealed the decision to the BIA.¹⁷⁰ The attorney general decided to intercept and decide the case himself.¹⁷¹

¹⁶⁴ Christina Carole De Matteis, *Forced Return of Haitian Migrants under Executive Order 12,807: A Violation of Domestic and International Law*, 18 N.C. J. INT’L L. 431, 437 (1993).

¹⁶⁵ *Id.* at 438.

¹⁶⁶ *In re D-J-*, 23 I&N Dec. 572, 572 (A.G. 2003).

¹⁶⁷ *Id.* at 572–73.

¹⁶⁸ *Id.* at 573.

¹⁶⁹ Amorosa, *supra* note 162, at 272.

¹⁷⁰ *In re D-J-*, 23 I&N Dec. 572, 573 (A.G. 2003).

¹⁷¹ *Id.* at 573–74.

C. LEGAL ANALYSIS AND THE ATTORNEY GENERAL'S DECISION

In his decision, the attorney general stated that “release of respondent [Joseph] on bond was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut by the release of respondent and other undocumented alien migrants who unlawfully crossed the borders of the United States.”¹⁷² He subsequently determined that Joseph “failed to demonstrate adequately that he does not present a risk of flight if released on bond and that he should be denied bond on that basis as well.”¹⁷³

The attorney general supported his decision with unsubstantiated national security rationales.¹⁷⁴ He asserted that “release of aliens such as respondent [Joseph] . . . would tend to encourage further surges of mass migration from Haiti by sea,” but then referenced the September 11, 2001, attacks stating that “there is increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process.”¹⁷⁵ A more compelling rationale for the attorney general’s decision is “[t]he historic animosity of the U.S. government towards Haitian asylum seekers.”¹⁷⁶ The attorney general used national security and war on terrorism rhetoric as an excuse for dealing harshly with an immigrant group that the United States systematically discriminated against in policy and practice.¹⁷⁷

¹⁷² *Id.* at 574.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 576–77; *see supra* pp. 22 and note 138.

¹⁷⁵ *Id.*

¹⁷⁶ *Amorosa, supra* note 162, at 281.

¹⁷⁷ *Id.* at 281–82.

Another problem with the attorney general's decision in *In re D-J-* was his desire to send a message to all Haitian migrants—enforcement and punitive punishment—rather than adjudicate Joseph's claims on the merits and provide him with a fair court proceeding.¹⁷⁸ This sentiment was reiterated when the attorney general declared that:

“[T]he release of respondent and hundreds of others from the October 29 migrant group would strongly undercut any resultant deterrent effect arising from the policy. The persistent history of mass migration from Haiti, in the face of concerted statutory and regulatory measures to curtail it, confirms that even sporadic successful entries fuel further attempts.”¹⁷⁹

The decision in *In re D-J-* exemplifies the attorney general's unconstitutional power and highlights the likelihood of abuse of discretion when there is no judicial review.¹⁸⁰ This is a clear demonstration of the attorney general's loyalty to anti-immigrant executive policy over fair administration and application of positive law and process to seek justice.

VI. OTHER CONSEQUENCES STEMMING FROM THE ATTORNEY GENERAL'S REFERRAL POWER

As currently structured, the immigration court system prevents judicial review, inhibits judicial independence, and produces inconsistent and arbitrary rulings.¹⁸¹ First, exercising the referral power prevents judicial review because, once the attorney general decides to intercept a case after BIA determination, that case can no longer be appealed to a federal court.¹⁸² Not only

¹⁷⁸ *Id.*

¹⁷⁹ *In re D-J-*, 23 I&N Dec. 572, 580 (A.G. 2003).

¹⁸⁰ *Amorosa*, *supra* note 162, at 292.

¹⁸¹ Camille J. Mackler, *To Fix the Immigration System, We Need To Start With Immigration Courts*, JUST SEC. (Apr. 6, 2021), <https://www.justsecurity.org/75675/to-fix-the-immigration-system-we-need-to-start-with-immigration-courts/>.

¹⁸² *See supra* Section III.A.

does federal court review add an important layer of protection by allowing higher courts to “catch inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws,” but it also “builds confidence about the fairness and accuracy of immigration procedures.”¹⁸³

Second, the attorney general serves at the pleasure of the president and, therefore, faces more political pressure than both immigration court and BIA judges¹⁸⁴. In turn, the attorney general might act in accordance with the current administration’s desires rather than law and precedent because he fears that going against the administration’s wishes will result in losing his position, compromising judicial independence as a result.¹⁸⁵ Consequently, when a new administration takes office—especially when there is a shift in party leadership—immigration precedent changes because the attorney general is likely to decide cases in line with the president’s agenda.¹⁸⁶ For example, in 2018 in the *Matter of A-B-*, the attorney general’s decision furthered the executive branch’s agenda even though it was unsupported by positive law.¹⁸⁷ The INA states that individuals can seek asylum based on “persecution of a well-founded

¹⁸³ *Background on Judicial Review of Immigration Decisions*, AM. IMMIGR. COUNCIL 1, 1 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/background_on_judicial_review_of_immigration_decisions.pdf.

¹⁸⁴ *See generally* *Myers v. United States*, 272 U.S. 52 (1926) (holding that the president’s appointment power gives him the unilateral power to remove appointed officers).

¹⁸⁵ *The Attorney General’s Judges*, *supra* note 111 (“Under the Trump administration, immigration judges are viewed as the attorney general’s proxies for enforcing deportations—not as independent case-by-case adjudicators.”).

¹⁸⁶ *See e.g.*, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018); *see also* Lee, *supra* note 75, at 316. Former President Trump appointed Jeff Sessions as attorney general after finding out that “he supported the passage of legislation like the 1920s quota laws to stem the growth of the foreign-born population in the United States and to put an end to the ‘indiscriminate acceptance of all races.’” Lee, *supra* note 75, at 316.

¹⁸⁷ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

fear or persecution on account of race, religion, nationality, membership in particular group, or political opinion.”¹⁸⁸ BIA and circuit court precedent has interpreted “membership in a particular social group” to include survivors of gender-based violence.¹⁸⁹ However, former Attorney General Sessions used his referral power to take up the case, and, by doing so, he overruled immigration precedent, holding that survivors of domestic violence did not qualify for asylum under “membership in a particular social group.”¹⁹⁰ Sessions’ decision runs contrary to the notion that administrative agencies should determine questions of statutory interpretation.¹⁹¹ Immigration experts already determined that a “particular social group” includes individuals of the same sex,¹⁹² yet Sessions, in the *Matter of A-B-*, used his own interpretation instead.¹⁹³ Therefore, it was unsurprising that Sessions, an appointee of former President Trump at the time, ruled in conformance with the Trump administration’s immigration policy instead of following precedent. The Trump administration policy focused on securing the United States’ southern border and making specific efforts to halt asylum among individuals from countries such as Honduras, El Salvador, and Guatemala.¹⁹⁴ However, just three years later Attorney General

¹⁸⁸ 8 U.S.C. § 1101(a); INA § 101(a).

¹⁸⁹ *Matter of A-R-C-G-*, 26 I&N Dec. 388, 392 (BIA 2014) (holding that “married women in Guatemala who are unable to leave their relationship” constituted a “particular social group.”); *see also* *Perdomo v. Holder*, 611 F.3d 662, 668–69 (9th Cir.).

¹⁹⁰ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

¹⁹¹ *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (granting deference to a government agency’s interpretation of a statute that it administers).

¹⁹² *See Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

¹⁹³ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

¹⁹⁴ *Immigration*, THE WHITE HOUSE, <https://trumpwhitehouse.archives.gov/issues/immigration/> (last visited Apr. 25, 2023); *see also* Exec. Order No. 13,780, 82 Fed. Reg. 13, 209 (2017); Exec. Order No.

Merrick Garland vacated Sessions’ *Matter of A-B-* decision, alerting immigration and BIA judges that they should no longer follow 2018 precedent and should instead follow 2014 precedent.¹⁹⁵

The *Matter of L-E-A-* provides another example illustrating how the attorney general can single-handedly overrule immigration precedent.¹⁹⁶ In 2017, the respondent requested asylum after cartel members harassed and threatened him and his family to sell drugs in their family store.¹⁹⁷ Though the BIA did not find that the respondent had established membership in a particular social group, it held that immediate family constitutes a cognizable social group for asylum purposes.¹⁹⁸ Two years later, however, Attorney General Barr overturned the BIA’s determination that immediate family constitutes a particular social group and, in doing so, “contradicted decades of precedent.”¹⁹⁹ Instead, Attorney General Barr “provided his own interpretation of the term ‘particular social group’ as it applies to family,” focusing narrowly on what he believed to be family ties.²⁰⁰ Barr’s new executive precedent disregarded case law from

13,769, 82 Fed Reg, 8,977 (2017). In both executive orders, Trump banned Muslim immigrants from seven countries from entering the United States. *Id.*

¹⁹⁵ *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021); *see also* Memorandum from Vanita Gupta, to the Civ. Div., U.S. Dep’t of Just. (Jun. 16, 2021) (instructing immigration and BIA judges to revert to prior precedent after Attorney General Garland vacated *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)); Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129, 137–38 (2017). In *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011), “[t]he Attorney General remanded a BIA decision to deny immigration benefits to a married, binational same-sex couple after the White House and Justice Department declined to defend the Defense of Marriage Act (“DOMA”) before the federal courts.” *Id.* at 137–38.

¹⁹⁶ *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

¹⁹⁷ *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017).

¹⁹⁸ *Id.*

¹⁹⁹ *Matter of L-E-A-: Attorney General Overrules Finding of Family as a Social Group*, 133 HARV L. REV. 1500 (Feb. 10, 2020), <https://harvardlawreview.org/2020/02/matter-of-l-e-a/>.

²⁰⁰ *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

the 1980s that included immediate families as part of a particular social group.²⁰¹ “The histories of many of these cases make it clear that [the attorney general] carefully selected [them] to achieve a particular policy goal, instead of responding to legal issues that arose organically and needed resolution.”²⁰²

The attorney general also faces constant pressure from the president to remain loyal to the administration and carry out the president’s wishes in matters unrelated to immigration, which illustrates just how partisan the position is and proves that the attorney general acts as the president’s proxy.²⁰³ For instance, former President Trump accused former Attorney General Sessions of not protecting him when Sessions recused himself from all DOJ investigations relating to the 2016 election and Russian interference.²⁰⁴ Former President Trump also attacked Sessions after the DOJ brought criminal charges against two Republican Congressmen “over accusations of improper use of campaign funds and insider trading.”²⁰⁵ In response to former President Trump’s criticism that Sessions had not taken control of the Department of Justice, Sessions acknowledged the President’s desire to control the attorney general’s decisions and stated “[w]hile I am attorney general, the actions of the Department of Justice will not be improperly influenced by political considerations.”²⁰⁶ There is strong evidence to believe that

²⁰¹ *Id.*

²⁰² Pierce, *supra* note 43, at 12.

²⁰³ Tessa Berenson & Katie Reilly, *Jeff Sessions Just Resigned as Attorney General. Here’s a Timeline of His Rocky Relationship With President Trump*, TIME (Nov. 7, 2018, 4:52 PM), <https://time.com/5203216/trump-sessions-timeline/>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Reuters Staff, *Sessions Hits Back at Trump, Says Justice Won’t Be Influenced*, REUTERS (Aug. 23, 2018, 10:26 AM), <https://www.reuters.com/article/us-usa-trump-sessions-statement-idUSKCN1L822T>.

Sessions' disagreements with President Trump contributed to his resignation from attorney general.²⁰⁷

Third, in addition to eliminating judicial review, the attorney general's referral power allows precedent to change from one presidential administration to the next (more commonly when the political party changes), thus, reducing predictability and transparency and making it challenging for judges to apply the law consistently.²⁰⁸ For instance, without providing any public notice or briefings, former Attorney General Janet Reno "reversed the BIA's determination that amendments to the *Immigration and Nationality Act* could be given only limited retroactive effect" in Soriano, 21 I&N Dec. 516 (1997).²⁰⁹ Just four years later, former Attorney General Reno reversed her own decision after eight federal courts of appeals disagreed with her outcome and reasoning.²¹⁰ Immigrations judges also reported that they found it difficult

²⁰⁷ Nicole Goodkind, *Why Did Jeff Sessions Resign? Six Times President Donald Trump Clashed with the Attorney General*, NEWSWEEK (Nov. 7, 2018, 3:56 PM), <https://www.newsweek.com/jeff-sessions-fired-trump-why-fight-mueller-1206172>. In a 50-minute interview with *The New York Times* in July 2017, Trump said that "Sessions should have never recused himself [from the Mueller Investigation], and if he was going to recuse himself, he should have told me before he took the job and I would have picked somebody else." *Id.* On July 24, 2017, Trump tweeted: "So why aren't the Committees and investigators, and of course our beleaguered A.G. [Sessions], looking into Crooked Hillarys [sic] crimes & Russia relations?" *Id.* Two days later, Trump asked: "Why didn't A.G. Sessions replace Acting FBI Director Andrew McCabe, a Comey friend who was in charge of Clinton investigation." *Id.* In February 2018, Trump tweeted: "Question: If all of the Russian meddling took place during the Obama Administration, right up to January 20th, why aren't they the subject of the investigation? Why didn't Obama do something about the meddling? Why aren't Dem crimes under investigation? Ask Jeff Sessions!" *Id.* Trump continued to attack Sessions on his decision to recuse himself until Sessions finally announced his resignation in November 2018. *Id.* See Letter from Jeff Sessions, former Attorney General, to Donald Trump, former President (Nov. 7, 2018), (on file with the Office of the Attorney General) ("At your request, I am submitting my resignation.").

²⁰⁸ *The Attorney General's Judges*, *supra* note 111. "The tremendous disparities in asylum grant rates across judges 'show the amount of leeway immigration judges have and the impact their biases can have if left unchecked.'" *Id.* at 12.

²⁰⁹ Pierce, *supra* note 43, at 10.

²¹⁰ *Id.* at 11.

to apply the law fairly when “[e]ven absent conscious bias, institutional directives and structural pressures prevent judges from fully considering the law and facts of each case and instead encourage bias in the form of categorical prejudgment of cases.”²¹¹

Without internal accountability or appellate oversight, the immigration court system lacks judicial review, judicial independence, and uniformity in the application of immigration law and precedent.²¹²

VII. USING TAX COURT AS A GUIDE TO RESTRUCTURE THE IMMIGRATION COURT SYSTEM

After recognizing the many similarities between the way immigration and tax laws and policies have grown and finding that the two courts only diverge at the appellate level, Congress can and should restructure immigration court to resemble tax court.²¹³ Restructuring is not unusual. For example, Congress established the U.S. bankruptcy courts in 1898 but decided to convert them into an Article I court in 1978.²¹⁴ To do so, Congress used its Article I, Section 8,

²¹¹ *The Attorney General’s Judges*, *supra* note 111, at 3. (“Under the Trump administration, the attorney general has abused his power by instructing new judges to decide their cases in ways that further the Department of Justice’s enforcement and deterrence goals, prioritizing speed over fair case-by-case adjudication.”); *see also Lawsuit Seeks to Uncover Problematic Board of Immigration Appeals’ Hiring Procedures*, AM. IMMIGR. L. ASSOC. (Mar. 19, 2020), <https://www.aila.org/advo-media/press-releases/2020/lawsuit-seeks-to-uncover-problematic-board>. (“Advocates and policymakers have become concerned that DOJ’s hiring practices for appellate immigration judges and Board Members are improperly influenced by the Trump administration’s anti-immigrant policies. Biased hiring practices for these judges are a concern for the public because these judges can set legal precedent that has the potential to negatively impact thousands of immigrants seeking protection and/or a path to lawful status in the United States.”).

²¹² *See also* Menke, *supra* note 30, at 622. The attorney general’s referral power is also problematic because it denies individual notice, the opportunity to be heard, and a decision by a neutral decision maker, which are fundamental due process rights. *Id.* *See, e.g.*, *Matter of Cristoval Silva-Tevino*, BIA (2006) (remanding back to the BIA to apply new standard without giving indication as to why or providing a briefing schedule); *Serrano-Alberto v. Att’y Gen.*, 859 F. 3d 208, 213 (3d Cir. 2017) (holding that impartial review is a requirement throughout all phases of an immigration court case).

²¹³ *See supra* Sections III.B–IV.C.

²¹⁴ Baibak, *supra* note 46, at 1010.

Clause 4 constitutional power—the exact same article, section, and clause that gave Congress the power to “establish a uniform Rule of Naturalization.”²¹⁵

Like both tax and bankruptcy courts, Congress could remove immigration courts and the BIA from the DOJ and designate it as an Article I, legislative court.²¹⁶ Removing immigration court from within the DOJ would help shift the emphasis from law enforcement and prosecution to fairness and justice.²¹⁷ Immigration court could retain its two-level structure—trial court and appellate court—but without the possibility of attorney general review.²¹⁸ Only appellate decisions, formerly BIA decisions, would be appealable to the federal circuit court to ensure judicial review by an Article III court if desired by either party. Under this system, like tax court judges, appellate judges would be appointed for a set term, such as fifteen years, by the

²¹⁵ U.S. CONST. art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . .”).

²¹⁶ Christine Lockhart Poarch, *The FBA’s Proposal for the Creation of a Federal Immigration Court*, THE FED. LAW. 10, 10 (Apr. 2014), <https://www.fedbar.org/wp-content/uploads/2019/12/Christine-Poarch-Fed-Lawyer-Article-pdf.pdf>. The immigration court would now be administered by the Administrative Office of the U.S. Courts instead of the DOJ. *Id.* at 10–11. *See also* Margaret Kelly, *How the United States Immigration Courts Can Transition into an Article I Tribunal and What the United States Can Learn from German Asylum Law*, VT. L. REV., <https://lawreview.vermontlaw.edu/how-the-united-states-immigration-courts-can-transition-into-an-article-i-tribunal-and-what-the-united-states-can-learn-from-german-asylum-law/>; Churchill, *supra* note 53. The National Association of Immigration Judges (“NAIJ”) also supports creation of an Article I immigration court, independent from the executive branch. *Id.* at 211. NAIJ has supported making an Article I immigration court since at least 1979. Churchill, *supra* note 53.

²¹⁷ ABA, *ACHIEVING AMERICA’S IMMIGRATION PROMISE: ABA RECOMMENDATIONS TO ADVANCE JUSTICE, FAIRNESS AND EFFICIENCY* 3 (2021).

²¹⁸ Baibak, *supra* note 46, at 1014.

president with Senate confirmation,²¹⁹ and appellate judges would appoint the immigration trial judges to encourage impartiality and decisions rooted in positive law.²²⁰

An Article I immigration court would be fully independent from the executive branch like tax court. This independence would give immigration trial and appellate judges the freedom to apply the law impartially without pressure to advance the executive’s immigration policy goals and without fear of losing their job for ruling contrary to the executive’s wishes. Additionally, by dispensing with the attorney general’s referral power, a non-citizen will have the opportunity for judicial review by an Article III circuit court.²²¹ Immigration court would be able to establish its own budget and control its own docket without executive review, allowing immigration judges to ease their case backlog, which has become a serious problem.²²² The executive branch would no longer have unchecked power, or any power at all, in immigration matters.²²³

While creating an Article I immigration court is ideal for promoting long-lasting change, less drastic reform may still encourage judicial review. For example, to provide a check on the

²¹⁹ Metcalf and Proser, *supra* note 57, at 34.

²²⁰ *Before the Senate Judiciary Committee, Border Security and Immigration Subcommittee Hearing on “Strengthening and Reforming America’s Immigration Court System,”* 115th Cong. 13 (2018) (statement of Judge A. Ashley Tabaddor, Senate Judiciary).

²²¹ *See supra* Section III.B.

²²² Press Release, United States Congresswoman Zoe Lofgren, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System, (Feb. 3, 2022) (on file with United States Congresswoman Zoe Lofgren) [hereinafter Press Releases]; *see also* Mimi Tsankov, *Judicial Independence Sidelines: Just One More Symptom of an Immigration Court System Reeling*, 56 CAL. WESTERN L. REV. 25, 26 (2020). The current backlog is “reportedly in the range of 800,000 to 1,000,000 pending immigration removal cases.” *Id.* at 36.

²²³ Press Release, *supra* note 222. H.R. 6577 would turn the immigration court system into an independent judiciary under Article I of the U.S. Constitution. *Id.* *See also* Churchill, *supra* note 53. Federal circuit courts have criticized the immigration court for “operating not as an impartial appellate tribunal but as a mechanism to ensure deportation.” *Id.*

executive, non-citizens could appeal an attorney general decision to a federal circuit court. Potential reversal of the attorney general's decisions would hold him or her accountable for making decisions based in law and precedent. Though this solution does not improve judicial independence, it would create a level of judicial review not seen in the current structure. Other parameters to regulate the attorney general include: (1) providing notice when he or she intends to use the referral power; (2) identifying the specific legal issues that will be subject to review when he or she refers the case; (3) allowing public comment and briefing after the decision; and (4) limiting how far back the attorney general can go to select a case for review.²²⁴ Notice of the attorney general's decision to refer the case would give parties and interested stakeholders opportunity to object to the referral, thereby increasing trust in the process and protecting against predetermined decisions or arbitrary referrals that merely advance executive policy.²²⁵ These more moderate reforms will provide greater uniformity in the application and interpretation of immigration law. By maintaining a two-tier structure (trial and appellate levels), retaining the substantive law of immigration, and keeping the same personnel, it would not be overly costly for Congress to reform the immigration court system.²²⁶

VIII. CONCLUSION

Alexander Hamilton stated: "There is no liberty, if the power of judging be not separated from the legislative and executive powers."²²⁷ Even though we refuse to tolerate "judicial

²²⁴ ABA, *supra* note 217, at 8.

²²⁵ Pierce, *supra* note 43, at 22–23.

²²⁶ Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?* 19 BARRY L. REV. 17, 43–45 (2013).

²²⁷ THE FEDERALIST NO. 78 (Alexander Hamilton).

comingling with the political branches in other areas of law,”²²⁸ such as tax law, in the immigration adjudication system it has been longstanding practice.²²⁹

After examining the evolution of immigration law and policy as compared to tax law and policy and determining that history does not necessitate any difference in court structure between the two, it becomes clearer that the difference in structure is rooted in xenophobia.²³⁰ In failing to depart from historic nativism, the United States is essentially destroying the foundation of its government—the separation of powers—by eliminating judicial independence and preventing judicial review.²³¹

To structurally change immigrations courts, the United States must be committed to understanding the roots and costs of xenophobia to combat these deep-rooted ideologies. While President Joe Biden voiced his commitment to “modernizing” the immigration system,²³² much like other presidents,²³³ he failed to propose a system that provides the necessary safeguards

²²⁸ Baibak, *supra* note 46, at 1018.

²²⁹ *See supra* Sections II–III.

²³⁰ *See supra* Sections III–IV.

²³¹ *See supra* Sections I–VI.

²³² *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>; *see also* Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 2, 2021).

²³³ Megan Slack, *President Obama’s Four Part Plan for Comprehensive Immigration Reform*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Jan. 29, 2013, 2:30 PM), <https://obamawhitehouse.archives.gov/blog/2013/01/29/president-obamas-four-part-plan-comprehensive-immigration-reform>; *President Bush’s Plan For Comprehensive Immigration Reform*, THE WHITE HOUSE PRESIDENT GEORGE W. BUSH, <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/initiatives/immigration.html> (last visited Apr. 27, 2023).

against the attorney general and his own branch of government, and he has not teamed up with Congress to create a wholly separate Article I immigration court.

The immigration court's structure is clearly reflective of this nation's intolerant views towards non-citizens. Not only does its structure perpetuate xenophobia, but it undermines the fundamental doctrine of separation of powers, judicial independence, and judicial review.²³⁴ Xenophobia, not immigration, is a graver threat to our nation. We cannot afford to practice this bigotry if it threatens the very foundation of our democracy. Therefore, immigration court should be structured like tax court where there is no executive interference.²³⁵

²³⁴ *See supra* Section II.

²³⁵ *See supra* Section II, Section III.B.