

Unfinished Business: How “Split Authority” over U.S. Asylum Adjudications Highlights the Need to Relocate the Immigration Court System to the Department of Homeland Security

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UNFINISHED BUSINESS: HOW “SPLIT AUTHORITY” OVER U.S. ASYLUM ADJUDICATIONS HIGHLIGHTS THE NEED TO RELOCATE THE IMMIGRATION COURT SYSTEM TO THE DEPARTMENT OF HOMELAND SECURITY

KIRSTEN BICKELMAN*

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INTRODUCTION

Migrants are dying.¹ Twenty-five-year-old Óscar Alberto Martínez Ramírez and his daughter, twenty-three-month-old Valeria, were found face down on the bank of the Río Grande

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¹ See Dept. of Homeland Sec., U.S. Border Patrol Fiscal Year Southwest Border Sector Deaths by Fiscal Year, <https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-southwest-border-sector-deaths-fy-1998-fy-2018> (documenting 283 deaths at the southwest border in 2018 and a total of 7,505 since 1998).

river last year.² After they were unable to present themselves to U.S. authorities to request asylum, the father and daughter drowned during their final attempt to reach the United States.³ Óscar and Valeria wanted a chance to present their asylum claim before U.S. officials, but instead faced the turbulent waters of the Río Grande, that chance at asylum forever swept away with them.⁴ Yes, immigration law is complicated,⁵ but human beings like Óscar and Valeria deserve a solution.

The United States' immigration system is broken.⁶ Immigration courts currently face a backlog of over 900,000 cases.⁷ While asylum claims represent only a portion of the cases that immigration judges hear,⁸ it is a critical one at that.⁹ Individuals, regardless of their country of origin, have undeniable rights under both federal¹⁰ and international law¹¹ to seek asylum in the United States.

The Homeland Security Act of 2002 (HSA)¹² establishes “split authority” over asylum adjudications. Some applicants appear before asylum officers at the Department of Homeland Security (DHS)¹³ while others are heard by immigration judges housed in the Executive Office for Immigration Review (EOIR) at the Department of Justice (DOJ).¹⁴ DHS asylum officers hear affirmative applications—those submitted by migrants within one year of their arrival to the

² Peter Orsi & Amy Guthrie, *A Grim Border Drowning Underlines Peril Facing Many Migrants*, ASSOCIATED PRESS (June 26, 2019), <https://www.apnews.com/2f8422c820104d6caad9b73d939063a9>.

³ *See id.* (describing that Óscar became frustrated and decided that his family's only option was to attempt to cross the Río).

⁴ *Id.*

⁵ *See U.S. Immigration Law: The Big Picture*, NOLO, <https://www.nolo.com/legal-encyclopedia/us-immigration-law-the-big-picture> (“Widely considered more complex than the tax code, U.S. immigration law is not something you can learn in five minutes. Sometimes it doesn't even make logical sense.”).

⁶ *See, e.g., Amid “Nightmarish” Case Backlog, Experts Call for Independent Immigration Courts*, A.B.A. (Aug. 9, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-nightmarish-case-backlog-experts-call-for-independent-imm/> (imploping that action be taken to ensure migrants' due process rights remain intact).

⁷ *See id.* (quoting an immigration judge who called the current backlog “nightmarish”).

⁸ *See* 8 U.S.C. § 1229(b) (2006) (allowing migrants to appear before the immigration court to protest their removal orders); *see also* § 1421(b) (indicating that noncitizens in the process of becoming legal permanent residents or naturalized citizens also appear before the immigration court).

⁹ *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 326-27 (2007) (explaining that if asylum claims are not adjudicated fairly, they could result in an effective “death sentence” for those asylum seekers whose cases are wrongly decided).

¹⁰ *See* 8 U.S.C. § 1158(a)(1) (establishing that any “alien who is physically present in the United States or who arrives in the United States” may apply for asylum).

¹¹ *See* Universal Declaration of Human Rights, Art. 14(1) (“Everyone has a right to seek and to enjoy in other countries asylum from persecution.”).

¹² Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

¹³ *See id.* § 451(b)(3) (establishing that the United States Citizenship and Immigration Service (USCIS), an office of DHS, will have statutory authority to review asylum and refugee applications).

¹⁴ *See id.* § 1102(3)(g)(1) (outlining that the EOIR is under the sole authority of the Attorney General).

U.S.¹⁵ After submitting their initial application, affirmative asylum seekers are interviewed by DHS asylum officers who either make a final determination or refer the case to the immigration court for further review.¹⁶ Alternatively, those who are apprehended by DHS and placed in removal proceedings can still apply for asylum, though their applications are considered defensive.¹⁷ All defensive asylum claims are heard by immigration judges in the EOIR, which consists of fifty-eight lower immigration courts and the Board of Immigration Appeals (BIA), the appellate body with authority to review the lower courts' decisions.¹⁸

Thus, those responsible for upholding U.S. asylum laws are spread between two different agencies, each with its own area of expertise.¹⁹ Though such overlapping authority among administrative agencies is not uncommon,²⁰ the adjudication of asylum claims deserves special attention.²¹ The fair adjudication of asylum applications demands intense fact-finding, individual credibility determinations, and up-to-date knowledge of the ever-changing international "push and pull" factors²² behind one's decision to migrate.²³ The historical and real-time expertise needed to determine the credibility of a migrant's claim, coupled with the emotional and psychological intelligence necessary to ensure a holistic understanding are what make asylum adjudication unique.²⁴

¹⁵ See Ramji-Nogales, *supra* note 9, at 307; see also *The Affirmative Asylum Process*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated April 19, 2019), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

¹⁶ See *The Affirmative Asylum Process*, *supra* note 15.

¹⁷ See Ramji-Nogales, *supra* note 9, at 305-06.

¹⁸ *Id.*

¹⁹ See *infra* Part.II.B.

²⁰ See *infra* Part.II.A.; see also Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 238 (2011) (describing common criticism of regulatory overlap on the ground that intersecting jurisdiction of administrative agencies leads to duplicative and sometimes contradictory regulation which inhibits efficiency).

²¹ See *infra* notes 146-147 and accompanying text.

²² See generally Andrew R. Arthur, *Looking for Push Factors in Central America*, CTR. FOR IMMIGR. STUD. (Oct. 18, 2018), <https://cis.org/Arthur/Looking-Push-Factors-Central-America> (explaining that push factors are those that force an individual to move, because the individual may be at risk if he stays, and pull factors are those factors in the destination country that attract an individual to leave his home).

²³ See Ramji-Nogales, *supra* note 9, at 306

Asylum decisions, whether by asylum officers *or* immigration judges, involve both a judgment about whether the applicant's story, if true, would render the applicant eligible for asylum under American law and an assessment as to whether the applicant is telling the truth about his or her personal experiences of actual or threatened persecution.

(emphasis added).

²⁴ *Cf.* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (emphasizing that because regulations are often complicated and convoluted, executive agencies are to have superior expertise in the niche areas of the law over which they preside).

With so many shifting variables, there is a heightened need for uniformity in asylum adjudication to ensure due process.²⁵ However, such uniformity in the application of immigration laws is lacking,²⁶ and major disparities in adjudication persist throughout the immigration court system.²⁷ Officials in both agencies are forced to dance on a tightrope dividing the legal from the political and facts from emotions, inevitably destined to fall.

Honoring migrants' due process rights should be at the center of any attempt at immigration reform.²⁸ Despite the constant skepticism and increased scrutiny that DHS has faced under the current administration,²⁹ there is no reason to think that the agency handcrafted to execute the nation's immigration laws is any less capable of doing so than the other executive agencies that came before it.³⁰ Instead of bolstering more attacks against DHS and the immigration court system, Congress should take care of unfinished business and provide DHS the statutory authority it needs to work efficiently.³¹ The lower immigration courts and BIA should be relocated to DHS, the agency where expertise in immigration matters truly lies.³² In turn, moving the immigration court system to DHS would make the agency more independent,³³

²⁵ See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding that the Fifth Amendment's Due Process Clause forbids the government from "depriv[ing]" any "person . . . of . . . liberty . . . without due process of law," including migrants).

²⁶ See *2019 Update Report – Reforming the Immigration System – Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, A.B.A. COMMISSION OF IMMIGR. (March 2019) at UD 2-5 (pointing out that wide disparities in asylum grant rates, both between and within particular immigration courts, persist).

²⁷ See *id.*

In FY 2017, immigration judges granted asylum claims in approximately 20% of cases nationwide. However, a number of immigration courts granted asylum claims at a significantly lower or higher rate than the national average, and at significantly higher or lower rates even when compared to immigration courts of comparable size.

²⁸ See *Immigration Court Independence*, NAT'L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/issues/immigration-court-independence>

("Due process rights and impartiality must be paramount in immigration court.").

²⁹ See Matt Ford, *Dismantle the Department of Homeland Security*, NEW REPUBLIC (Feb. 21, 2018), <https://newrepublic.com/article/147099/dismantle-department-homeland-security> ("The case for abolishing the wasteful, incompetent, and abusive mega-agency has become especially urgent under Trump.").

³⁰ See *About Us*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated March 6, 2018), <https://www.uscis.gov/aboutus> (describing USCIS as the office tasked with "administer[ing] the nation's lawful immigration system").

³¹ See Susan B. Glasser & Michal Grunwald, *Department's Mission Was Undermined From Start*, WASH. POST (Dec. 22, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122102327_pf.html ("To some extent, the department was set up to fail. It was assigned the awesome responsibility of defending the homeland without the investigative, intelligence and military powers of the FBI, CIA and the Pentagon.").

³² See *infra* Part.II.

³³ See *infra* Part.II.C.; see also Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L.REV. 15, 26 (emphasizing that there is no exhaustive list of mechanisms that must be employed to insulate an agency from outside political influence, rather there exist various and ever-changing ways in which agency independence can be achieved).

thus creating an after-effect that could garner bipartisan support—a robust asylum adjudication process honoring migrants’ constitutional right to due process while still prioritizing DHS’s security concerns.

Part I.A.³⁴ of this Comment briefly traces executive agency authority over the immigration court system prior to September 11, 2001. Part I.B.³⁵ discusses the state of the lower immigration courts and the BIA after 9/11 with the creation of DHS. Part I.C.³⁶ addresses two consequential decisions that took place during DHS’s creation, highlighting the ongoing need for a solution. Part II³⁷ explains the significance of agency expertise in administrative law. Part II.A.³⁸ utilizes *Gonzales v. Oregon*³⁹ to highlight the role that expertise plays when statutes establish “split authority” among agencies. Part II.B.⁴⁰ argues that DHS should oversee the immigration court system—thus all asylum adjudications—by examining the HSA’s legislative history, the DOJ’s lack of resources and specialized knowledge to adequately manage the legal and emotional complexities involved in making asylum determinations, and the DOJ’s own rhetoric about its mission. Part II.C.⁴¹ describes how the relocation of the lower immigration courts and the BIA will increase agency independence and result in a more robust delivery of due process for migrants. Part III⁴² recommends relocation of the immigration court and the BIA to DHS through statutory amendment of the HSA. Part III.A.⁴³ details procedural “next steps” should the relocation take place.

I. HISTORICAL BACKGROUND – IMMIGRATION ADJUDICATION OVER TIME

A. EXECUTIVE AGENCY AUTHORITY OVER IMMIGRATION BEFORE 9/11

Statutes governing United States’ immigration laws are widely recognized as more convoluted than the tax code,⁴⁴ and tracing the ebb and flow of the history of immigration law is no simpler. While it is evident that the rhetoric surrounding immigration has been riddled with

³⁴ See *infra* Part.I.A.

³⁵ See *infra* Part.I.B.

³⁶ See *infra* Part.I.C.

³⁷ See *infra* Part.II.

³⁸ See *infra* Part.II.A.

³⁹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

⁴⁰ See *infra* Part.II.B.

⁴¹ See *infra* Part.II.C.

⁴² See *infra* Part.III.

⁴³ See *infra* Part.III.A

⁴⁴ See *U.S. Immigration Law*, *supra* note 5.

xenophobic overtones since the country's beginning⁴⁵—a theme still present today⁴⁶—the reasons behind the ever-shifting placement of key actors in the immigration system, like the lower immigration courts and the BIA, are not as apparent.

Perhaps contributing to the country's inability to fully understand what it takes to achieve progress on immigration is the complicated history of executive authority over immigration. 1891 marked the implementation of the first major piece of immigration legislation, the Immigration Act of 1891,⁴⁷ which officially placed immigration under federal control.⁴⁸ The Immigration Act of 1891 established an Office of Immigration within the Department of the Treasury, allowing the Secretary of Treasury to review all immigration-related decisions.⁴⁹ Twelve years later, immigration responsibilities moved from the Department of the Treasury to the newly created Department of Commerce and Labor.⁵⁰ Afterward, immigration authority was placed solely under the Department of Labor when the originally conjoined Department of Commerce and Labor split into two separate entities.⁵¹ The Immigration and Naturalization Service (INS) was created in 1933 to spearhead immigration matters within the Department of Labor.⁵² Seven years later, the INS moved from the Department of Labor to DOJ, permitting the Attorney General to create the BIA, an adjudicatory body that reports solely to the Attorney General in reviewing appeals cases from the lower immigration courts.⁵³ Finally, in 1983, the

⁴⁵ See Howard S. Myers, III, *Immigration Law: An Examination of America's Immigration System at a Time of Uncertainty*, 44 WM. MITCHELL L. REV. 744, 746 (2018)

Those who come hither are generally of the most ignorant Stupid Sort of their own Nation . . . and as few of the English understand the German Language, and so cannot address them either from the Press or Pulpit, 'tis almost impossible to remove any prejudices they once entertain . . . Not being Liberty, they know not how to make a modest use of it.

(quoting Benjamin Franklin).

⁴⁶ See Michael D. Shear, *Trump Presses His Argument of a Border Crisis in California Visit*, N.Y. TIMES (April 5, 2019), <https://www.nytimes.com/2019/04/05/us/politics/trump-border-wall.html> (describing President Trump's recent comments that the country is "full" and thus cannot "take" any more immigrants).

⁴⁷ See 26 Stat. 1084, 51 Cong. Ch. 551, Sec. 1 (outlining classes of "aliens" such as "idiots" and "insane persons" who would not be admitted to the country).

⁴⁸ See *id.* (enacting a federal law in the fifty-first session of the United States Congress); see generally *Evolution of the U.S. Immigration Court System: Pre-1983*, THE U.S. DEP'T OF JUST. (last updated April 30, 2015), <https://www.justice.gov/eoir/evolution-pre-1983>.

⁴⁹ See *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 48 (explaining that the Office of Immigration had the authority to examine and exclude individuals seeking entry into the United States and deport individuals who violated the law while still allowing for an appeals process which the Secretary of Treasury could review).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *id.* (emphasizing that the BIA has the sole authority to decide case appeals and reports directly to the Attorney General); see also 5 Fed. Reg. 3,502 (Sept. 4, 1940) ("In the exercise of the powers conferred upon it the Board of Immigration Appeals shall be responsible solely to the Attorney General.").

EOIR was created within DOJ—the executive body that continues to house the BIA and lower immigration courts today.⁵⁴

Created after an internal DOJ reorganization, the EOIR assumed authority over the BIA and the immigration judges who sit on lower immigration courts throughout the country.⁵⁵ Unlike before, the creation of the EOIR as a separate entity within DOJ aimed to make the immigration courts independent of the INS—the office tasked with enforcing federal immigration laws.⁵⁶ The Director of the EOIR reports to the Deputy Attorney General.⁵⁷ The EOIR’s stated goal is to “adjudicate immigration cases in a careful and timely manner.”⁵⁸

B. EXECUTIVE AGENCY AUTHORITY OVER IMMIGRATION AFTER 9/11 – THE CREATION OF THE DEPARTMENT OF HOMELAND SECURITY

The events of September 11, 2001 provided for yet another transformation in the way the country approached immigration. While there is no doubt that 9/11 had lasting effects both domestically and internationally, some of those consequences are less visible than others.⁵⁹ Few recognize the impact that September 11, 2001 had on our immigration system.⁶⁰

Just a week before 9/11, the climate around immigration reform seemed hopeful.⁶¹ On September 6, 2001, President George W. Bush welcomed Mexican President Vicente Fox to the White House, and the two leaders came close to reaching a comprehensive immigration reform plan.⁶² Though the two men considered each other friends,⁶³ 9/11 fundamentally changed the dynamic of not only their personal relationship, but also the diplomatic ties between the United

⁵⁴ See 48 Fed. Reg. 8,038, 8,039 (Feb. 25, 1983).

⁵⁵ *Id.*; see also *About the Office*, THE U.S. DEP’T OF JUST. (last updated Aug. 14, 2018), <https://www.justice.gov/eoir/about-office>.

⁵⁶ See 48 Fed. Reg. 8,038, 8,039 (referencing goals to make immigration adjudication more “effective and efficient”).

⁵⁷ *Id.* at § 3.0.

⁵⁸ See *About the Office*, *supra* note 55 (“EOIR’s primary mission is to adjudicate immigration cases in a careful and timely manner, including cases involving detained aliens, criminal aliens, and aliens seeking asylum as a form of relief from removal, while ensuring the standards of due process and fair treatment for all parties involved.”).

⁵⁹ See generally *9/11 Attacks*, HIST. (last updated May 21, 2019), <https://www.history.com/topics/21st-century/9-11-attacks> (focusing predominantly on the U.S.’s swift military response to 9/11, Operation Enduring Freedom).

⁶⁰ See Myers, *supra* note 45, at 777 (explaining that 9/11 effectively rewrote an immigration agenda that had been leaning toward comprehensive reform and returned the focus toward national security and away from attempts at developing a pathway to citizenship).

⁶¹ See *America’s Story: An Immigrant Story*, CARNEGIE, <https://www.carnegie.org/interactives/immigration-reform/#/> (“Prior to September 11, President Bush had been moving away from the ‘get tough’ ethos that President Clinton [had] established . . .”).

⁶² See *id.* (“If somebody is willing to do jobs others in America aren’t willing to do, we ought to welcome that person to the country, and we ought to make that a legal part of our economy.”) (quoting President George W. Bush during the state visit of Mexican President Vicente Fox on September 6, 2001, five days before 9/11).

⁶³ See Alfredo Corchado, *Once Solid, the George W. Bush-Vicente Fox partnership faded after 9/11*, DALLAS NEWS (April 2013), <https://www.dallasnews.com/news/mexico/2013/04/27/once-solid-the-george-w-bush-vicente-fox-partnership-faded-after-9-11/> (referring to the two leaders as “the two amigos”).

States and Mexico, bringing any progress on immigration reform to a halt.⁶⁴ The momentum had officially shifted.⁶⁵ As President Vicente Fox urged the United States to push forward on immigration reform in the aftermath of 9/11,⁶⁶ legislators on Capitol Hill no longer focused on fulfilling the United States' place on the world stage as a "country of immigrants."⁶⁷ Rather, President Bush and members of Congress alike doubled down on "border build-up plans and heightened restrictions on immigration."⁶⁸ Facing increased political pressure and public outcry, a skeptical President Bush signed the HSA into law, creating a new executive agency—DHS—tasked with, among other things, securing the nation's borders.⁶⁹

The creation of the new department was no easy endeavor and faced criticism from its inception.⁷⁰ To this day, critics argue that DHS is nothing more than an instinctual reaction to the events of September 11, 2001 and have coined it "Frankenstein[']s monster" of executive agencies.⁷¹ Before 9/11, DOJ acted as the "lead agency" tasked with combatting terrorism and ensuring national security.⁷² The HSA altered that makeup, combining twenty-two federal agencies into one and transferring the functions of those existing agencies that had even a remote connection to homeland security to the various units within DHS.⁷³

The placement of the EOIR was of utmost importance for the future of immigration law in the United States and the migrants whose lives depended on the fair adjudication of those laws. Although the EOIR began functioning years before DHS in 1983, questions remained

⁶⁴ See *id.* ("Gone were ambitious plans for immigration, and thrown into question was whether the two countries could overcome historical suspicion of each other to forge a stronger relationship.").

⁶⁵ See Myers, *supra* note 45, at 777.

⁶⁶ See Ginger Thompson, *Threats and Responses; After 9/11, Fox Still Waits for U.S. Moves on Mexico*, N.Y. TIMES (Sept. 13, 2002), <https://www.nytimes.com/2002/09/13/world/threats-and-responses-after-9-11-fox-still-waits-for-us-moves-on-mexico.html?mtrref=www.google.com&gwh=012E890F22BE008D4FB6D224EBF17C06&gwt=pay> (pointing out that President Fox "urged President Bush not to forsake his promise" to work with Mexico on issues including broad immigration reforms).

⁶⁷ See *America's Story*, *supra* note 61 (highlighting that nearly one of every four Americans—70 million people—is an immigrant or the child of parents who came from another country); see also *A Nation Built By Immigrants*, GEORGE W. BUSH PRESIDENTIAL CTR. (2019), <https://www.bushcenter.org/publications/resources-reports/reports/immigration.html> (emphasizing that immigrants "played a leading role in building what has become the most prosperous nation in the history of the world").

⁶⁸ See Myers, *supra* note 45, at 777.

⁶⁹ Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (2002).

⁷⁰ See Jonathan Thessin, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 516 (2003) ("Unlike most federal initiatives, homeland security draws upon the capabilities of a range of executive departments."); see also Glasser & Grunwald, *supra* note 31, ("[T]he department was set up to fail.").

⁷¹ See Ford, *supra* note 29 (arguing that the Bush administration rallied around the term "homeland security" in response to the September 11 attacks); see also Matt Mayer, *Why We Should Eliminate the Department of Homeland Security*, REASON (June 23, 2015), <https://reason.com/2015/06/23/president-bush-was-right-before-he-was-w/> ("Let's dismantle the Frankenstein monster and divide its responsibilities more effectively.").

⁷² See Thessin, *supra* note 70, at 514.

⁷³ See Myers, *supra* note 45, at 744; see also Thessin, *supra* note 70, at 520 ("The new Department includes components from the Departments of Treasury, Justice, Agriculture, Commerce, Health and Human Services, Energy, and Defense.").

about whether Congress would relocate the EOIR and thus, the immigration courts and the BIA, to DHS as the new agency took shape.⁷⁴

C. CONSEQUENTIAL DECISIONS – ESTABLISHING “SPLIT AUTHORITY” OVER ASYLUM CLAIMS

Ultimately, in enacting the HSA, Congress decided that the EOIR, home to the lower immigration courts and the BIA, should remain part of the DOJ.⁷⁵ The reasoning behind this move to this day remains unclear.⁷⁶ While the “experts”⁷⁷ decided to relocate the United States’ immigration trial attorneys to DHS, immigration judges, on the other hand, were left out, destined to remain with the DOJ as part of the EOIR.⁷⁸ Reports suggest that when pressed on the issue by Capitol Hill staffers, advisors to DHS’s future Secretary, Tom Ridge, conceded that they simply had not known that immigration courts existed and thus had never contemplated their relocation to the new department.⁷⁹

While the consequences of the experts’ ignorance are plentiful,⁸⁰ one area in particular illustrates how this decision, or lack thereof, has led to a fundamental breakdown in due process for migrants— asylum. The way in which decision makers process asylum claims best illustrates the logistical nightmare that such shared responsibility between DHS and the DOJ has created. Final asylum decisions are made *either* by asylum officers *or* immigration judges, depending on the type of application.⁸¹ The crux of the problem is that asylum officers are housed under DHS’s United States Citizenship and Immigration Services (USCIS) throughout eight regional asylum offices,⁸² while immigration judges and the BIA remain part of the DOJ in the EOIR.⁸³

⁷⁴ *About the Office*, *supra* note 55.

⁷⁵ Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (2002).

⁷⁶ See Glasser & Grunwald, *supra* note 31 (“Some of the decisions were almost random.”) (“The plan had been put together with such speed and secrecy that after its release angry officials had to explain to the White House how their agencies really worked.”).

⁷⁷ *Id.* (describing that a “select group of policy aids” soon to be coined the “Gang of Five” had been secretly commissioned to plot the administration’s “about-face”).

⁷⁸ See Myers, *supra* note 45, 779 (outlining that the Homeland Security Act abolished the INS, which previously housed U.S. immigration trial attorneys, and created the United States Citizenship Services (USCIS)); see also Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 5 (2014),

available at: https://digitalcommons.law.uga.edu/fac_artchop/986 (establishing that today, immigration attorneys who represent the government in immigration court are part of Immigration and Customs Enforcement (ICE)).

⁷⁹ See Glasser & Grunwald, *supra* note 31 (describing the chaos that ensued on Capitol Hill when experts were “barraged by Hill staffers” to explain why if trial attorneys were being moved to the new department, immigration judges were staying with the DOJ).

⁸⁰ See generally Michael D. Shear et al., *The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (April 10, 2019) <https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html> (stating that although there have been warning signs that the immigration system has been on the brink of collapse for years, the time for ultimate failure may be right now).

⁸¹ See Ramji-Nogales, *supra* note 9, at 305-06 (explaining that the asylum process is like playing a game of “roulette,” affirmative applications being reviewed by asylum officers at the DHS and defensive applications being reviewed by immigration judges at the DOJ).

⁸² *Id.* at 306.

⁸³ *Id.* at 307.

Not only does this partition of authority make it impossible for DHS to efficiently do its job, but many times it also results in an unequal, and thus unconstitutional, adjudication of asylum seekers' claims.⁸⁴ Such statutory slice and dice is concerning and demands a solution, especially in this context, when it is not uncommon for asylum decisions to be a choice between life and death for the migrants depending on them.⁸⁵

It should come as no surprise that DHS faces continued criticism⁸⁶ and little faith is put in the United States' immigration courts⁸⁷ when the agency tasked with "administer[ing] the nation's lawful immigration system"⁸⁸ does not have statutory authority over immigration judges and the BIA, thus splitting the asylum process down the middle. Although the judges who sit on lower immigration courts and the BIA have taken a constitutional oath to perform the same such "administering" of the nation's immigration laws as DHS officials,⁸⁹ the department has no authority over them. Undoubtedly, "Frankenstein[']s monster"⁹⁰ is not equipped to ensure that all asylum applicants, whether affirmative or defensive, receive adequate constitutional due process, but finally giving him the statutory tools he needs to succeed could mark the first step toward a much needed solution.

II. THE AGENCY-AS-EXPERT MODEL

Despite the existence of a Nondelegation Doctrine,⁹¹ when designing administrative agencies, Congress grants significant authority to them to pursue policy solutions in their given area of practice.⁹² Because Congress often lacks the specialized knowledge needed to solve complex policy disputes, agency expertise plays a leading role in justifying the broad authority

⁸⁴ See *id.* at 305-06 (an affirmative asylum application is sought by an individual on his own initiative, beginning when the individual voluntarily identifies himself to DHS, while a defensive applicant applies for asylum only after having been apprehended by DHS and placed in removal proceedings in immigration court); see also *Immigration Court Independence*, NAT'L IMMIGRANT JUST. CTR., <https://www.immigrantjustice.org/issues/immigration-court-independence>.

⁸⁵ See *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, SOUTHERN POVERTY L. CTR. (June 25, 2019), <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool> (urging that improvement of the immigration court system is paramount due to the life-or-death stakes of many immigration cases).

⁸⁶ See Mayer, *supra* note 71.

⁸⁷ See *Immigration Court Independence*, *supra* note 84 ("Access to justice in the immigration court system, already crippled by backlogs and unacceptable disparities in decisionmaking, is being further diminished by highly politicized DOJ policies.").

⁸⁸ See *About Us*, *supra* note 30; see also Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (2002) ("[USCIS] shall establish national immigration services policies and priorities . . .").

⁸⁹ See Ramji-Nogales, *supra* note 9.

⁹⁰ See Mayer, *supra* note 71.

⁹¹ See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); see also *Touby v. United States*, 500 U.S. 160, 165 (1991) (providing that Congress may not constitutionally delegate its legislative power to another branch of government).

⁹² See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472-76 (2001) (holding that the nondelegation doctrine is generally weak); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321 (1936) (referencing Congress's "unwisdom" and providing that the nondelegation doctrine is even more toothless in the realm of foreign affairs).

bestowed upon administrative departments, and so should it in contemplating the steps the United States should take toward comprehensive reform of asylum adjudication.⁹³ In addition to the general acknowledgement of the prominence of expertise in the field of administrative law, the importance of agency expertise is further evidenced by landmark decisions like *Chevron*⁹⁴ and the passage of the Administrative Procedure Act (APA).⁹⁵

Chevron made clear that “those with great expertise and charged with responsibility for administering the [statute] would be in a better position to [choose an appropriate policy].”⁹⁶ While statutes can be thought of like commands handed down from the legislature to the agency, sometimes those commands are not always straightforward.⁹⁷ It is up to the agency to interpret Congress’s command in a reasonable way.⁹⁸ Ambiguity is preferred, often intentionally left by Congress to allow agencies with superior knowledge and resources to do the bulk of statutory interpretation and implementation.⁹⁹

Passage of the APA further illustrates the courts’ heavy reliance on awarding deference to agency interpretations based on their concentrated skillset. The APA mandates that federal judges affirm agency rules so long as they are not “arbitrary [and] capricious.”¹⁰⁰ Deferring generally to agency expertise, review under the arbitrary and capricious standard is narrow and does not allow a court to substitute its own judgment for that of the expert agency.¹⁰¹ Instead,

⁹³ See Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097 (2015) (“Expertise plays a starring role in administrative law. Congress established administrative agencies and often gives them substantial discretion because it lacks the expertise and political agreement to resolve the policy issues that are likely to arise under a statutory scheme.”).

⁹⁴ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

⁹⁵ 79 Pub. L. 404, 60 Stat. 237 (1946).

⁹⁶ See 467 U.S. at 865 (emphasizing that Congress cannot possibly consider and deal with all of the questions that may arise under a given statutory scheme, and thus decides to “take [its] chances with the scheme devised by the agency”); see also Shapiro, *supra* note 93, at 1097

The Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* required deference to agency constructions of ambiguous statutory language because agencies have greater expertise and political accountability concerning the policy issues involved in resolving an ambiguity.

⁹⁷ See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (pointing out that Congress leaves “gaps” in legislation both explicitly and implicitly).

⁹⁸ See *United States v. Shimer*, 367 U.S. 374, 383 (1961) (holding that if an agency’s choice represents “a reasonable accommodation of conflicting policies,” the Court should “not disturb it”).

⁹⁹ See 467 U.S. at 843-44 (maintaining that when Congress has explicitly left a gap for the agency to fill, such intentional ambiguity acts as an “express delegation of authority to the agency”).

¹⁰⁰ 79 Pub. L. 404, 60 Stat. 237 § 10(e).

¹⁰¹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency must only examine relevant data and articulate a “satisfactory explanation” for its decision to be awarded judicial deference).

the court must only determine whether the agency’s decision was based on “reasoned decisionmaking.”¹⁰²

A. USING GONZALES AS A GUIDE IN “SPLIT AUTHORITY” SITUATIONS

Although the *Chevron* decision and the implementation of the APA reaffirm the significance of agency expertise in administrative law, there is evidence that focus on expertise sometimes evades Congress’s thinking.¹⁰³ Complicating Congress’s efforts to pass enabling statutes with agency expertise in mind is the existence of significant overlap among agencies regulating under the same statute. For example, in *Gonzales v. Oregon*,¹⁰⁴ the Attorney General issued an interpretive rule on Oregon’s Death with Dignity Act, claiming he could do so under the authority granted to him in the Controlled Substances Act (CSA), which also delegated significant power to the Secretary of the Department of Health and Human Services.¹⁰⁵ Ultimately, the court in *Gonzales* held that when decisionmaking powers are shared among statutory actors, the agency with the most familiarity and policymaking expertise should be presumed to be the agency that has been delegated interpretive power for that issue.¹⁰⁶

Gonzales highlights a situation parallel to the one currently affecting asylum seekers: two agencies, with two notably different sets of specialized knowledge, given authority under the same statute to adjudicate in the same area.¹⁰⁷ Because of the HSA’s structure, asylum applicants are split into two groups, their fate often dependent on which side of the divide they will fall.¹⁰⁸ Agency expertise is emphasized in pursuit of uniformity, but such uniformity is lacking in the United States’ asylum process.¹⁰⁹ Uniform application of the law is not only desirable, but constitutionally demanded.¹¹⁰ While necessary in all administrative agency contexts, the need for uniformity, and thus, the significance of expertise, is arguably even more

¹⁰² See *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (elaborating that “reasoned decisionmaking” refers to evidence that the agency articulated “any rational connection between the facts found and the choice made”).

¹⁰³ See Shapiro, *supra* note 93, at 1097 (“For a concept that is so central to administrative law, there has been a surprisingly impoverished understanding of expertise and its role in the rulemaking process.”).

¹⁰⁴ 546 U.S. 243 (2006).

¹⁰⁵ See *id.* at 294-95 (highlighting that while the CSA states that physicians must obtain a registration from the Attorney General for some prescriptions, the Secretary of Health and Human Services has “exclusive authority over scientific and medical determinations”).

¹⁰⁶ See *id.* at 265 (holding that all decisions of a medical nature are to be made by the Secretary of Health and Human Services and the Secretary’s scientific and medical expertise “bind the Attorney General”).

¹⁰⁷ Compare 79 Pub. L. 404, 60 Stat. 237 § 451(b)(3) (transferring adjudication of asylum and refugee applications to DHS’s USCIS) with § 1102(g)(1) (granting the Attorney General authority over all laws relating to immigration and naturalization, including asylum).

¹⁰⁸ See *supra* notes 15 and 17 and accompanying text.

¹⁰⁹ See Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 509 (2013) (explaining that *Chevron*’s goal when affording agencies decisionmaking deference is ultimately one of uniformity).

¹¹⁰ See *Truax v. Corrigan*, 257 U.S. 312, 331 (1921) (“Our whole system of law is predicated on the general fundamental principle of equality of application of the law. ‘All men are equal before the law,’ ‘This is a government of laws and not men. . .”).

apparent in asylum cases.¹¹¹ The stakes of an immigration court proceeding are higher than many other agency adjudications, the consequences of an unfavorable decision often being deportation to a country that the individual originally fled seeking not just economic, but also personal security.¹¹²

Like parties involved in traditional Article III court proceedings,¹¹³ migrants whose asylum claims come before the immigration court have a right to notice of the legal consequences of their actions and an opportunity to be heard before an impartial tribunal.¹¹⁴ While this point, solidified in the nation's founding document, is not debatable, the asylum process is complicated by questions about which administrative agency truly has the expertise necessary to oversee the fair adjudication of asylum claims.¹¹⁵ Echoing the Court's view in *Gonzales*, it should be presumed that Congress intended to grant authority to the agency most constitutionally suited to oversee the asylum process¹¹⁶ and guarantee that regardless if asylum claims are heard by asylum officers or the immigration court, all applicants are in equal receipt of robust due process.¹¹⁷

B. DHS v. DOJ – WHICH IS THE ASYLUM EXPERT?

Just as the Court in *Gonzales* declared that the Attorney General was not the appropriate official to issue science-intensive rules, nor should the Attorney General oversee the lower immigration courts and the BIA in the adjudication of asylum claims.¹¹⁸ First, the HSA's

¹¹¹ See Chaffin, *supra* note 109, at 503 (setting forth that uniformity is “especially desirable” in the immigration context).

¹¹² See *Fleeing For Our Lives: Central American Migrant Crisis*, AMNESTY INT'L, <https://www.amnestyusa.org/fleeing-for-our-lives-central-american-migrant-crisis/> (providing that since 2014, there has been a 432% increase in asylum applications from countries like Mexico, Belize, Costa Rica, Nicaragua, and Panama, many of which indicate that the applicants are “fleeing for their lives”).

¹¹³ See U.S. CONST. art. III, § 9 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

¹¹⁴ See *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (“The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.”); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“Parties whose rights are to be affected are entitled to be heard.”); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

¹¹⁵ See *Ramji-Nogales*, *supra* note 9, at 307 (explaining that while both DHS asylum officers and DOJ immigration judges make asylum decisions, DHS asylum officers may also “defer” claims to the immigration court, which happens in a large portion of cases).

¹¹⁶ See *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) (stating that the Attorney General's attempt to claim authority over determining appropriate medical standards would be at odds with congressional commentary on the CSA's regulation of medical practice).

¹¹⁷ See *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (advocating that the extent to which procedural due process must be afforded is influenced by the extent to which an individual has “suffer[ed] grievous loss”).

¹¹⁸ See *infra* Part III.

legislative history points to Congress's intention to handcraft DHS as the expert agency on homeland security issues, one of which involves determining who can and cannot enter the United States.¹¹⁹ Second, determining the validity of one's asylum claim involves both fact and emotion-intensive inquiries into countless aspects of the applicant's life and home country conditions, a task that, as evidenced by ongoing disparities, the DOJ does not have the resources or specialized knowledge to adequately accomplish.¹²⁰ Last, at a baseline, a study of how each agency speaks about its own mission provides further evidence that DHS, and not the DOJ, is the expert agency on immigration.¹²¹

Congressional rhetoric leading up to the passage of the HSA points to members' intense focus on authority over immigration matters as they drafted the department's enabling legislation.¹²² Members urged that as a result of the events of 9/11, "America must look with new and urgent scrutiny at illegal immigration, as well as at how to better screen the more than 200 million people traveling to [the] country each year."¹²³ It was clear—immigration was at the forefront of lawmakers' minds.¹²⁴ Congress was not only concerned with immigration in a national security sense,¹²⁵ but also with drafting the legislation in a way that finally gave immigration matters the "focus and attention they deserve."¹²⁶ The new department, while largely focused on increasing domestic defenses to promote security, also valued aiding immigrants through the citizenship process and working toward "long-overdue" immigration reforms.¹²⁷

To address the complexities that accompany a major government merger, Congress held hearings, oftentimes focusing specifically on immigration-related issues.¹²⁸ During one hearing, members of Congress questioned immigration experts in an attempt to determine whether visas should continue to be issued by the Department of State, or rather, if that authority should be transferred to the new DHS.¹²⁹ Overwhelmingly, testifying experts agreed that the visa function should be transferred from the Department of State to DHS in an effort to "form a single, unified Government entity responsible for the formulation and implementation of U.S. immigration

¹¹⁹ See *infra* note 122 and accompanying text.

¹²⁰ See *infra* notes 134 and 135 and accompanying text.

¹²¹ See *infra* note 158 and accompanying text.

¹²² STAFF OF S. GOV'T AFFAIRS COMM., 107TH CONG., CASE FOR THE HOMELAND SECURITY DEPARTMENT ENDORSED BY BIPARTISAN VOTE OF SENATE GOVERNMENTAL AFFAIRS COMMITTEE (Comm. Print 2002).

¹²³ *Id.* at 2.

¹²⁴ See *id.* (emphasizing that persisting "internal conflicts" surrounding immigration needed to be dealt with in the DHS's enabling legislation).

¹²⁵ See *id.* at 1 (referring to "seizing a historic opportunity" to reform the way the U.S. addresses its national security vulnerabilities).

¹²⁶ *Id.* at 2.

¹²⁷ STAFF OF S. GOV'T AFFAIRS COMM, *supra* note 122.

¹²⁸ See *Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing on H.R. 5005 Before the Subcomm. On Immigration, Border Sec., And Claims, 107th Cong. 2* (2002) (statement of Congressman Elton Gallegly) (pointing out that many immigration questions remained).

¹²⁹ See *id.* at 3 (observing that "it is unclear" why a "hybrid structure" between the State Department and DHS would be created with respect to the issuance of visas).

policy.”¹³⁰ However, at the same time that advocates argued for a uniform, expert immigration agency with respect to the issuance of visas, no such concerns were raised regarding the split adjudication of asylum claims.¹³¹

Ultimately, Congress’s failure to press immigration experts on the potential repercussions of such divided authority in the asylum context has resulted in an unequal delivery of justice.¹³² Currently, there are eight regional asylum offices, where DHS asylum officers make asylum determinations in a non-adversarial setting, and fifty-eight DOJ immigration courts, each with a varying number of judges, positioned throughout the country.¹³³ The data depicting how asylum decisions are being dealt in the immigration courts reveal serious disparities,¹³⁴ inconsistencies that are not evidenced in similar decisions being made by DHS asylum officers.¹³⁵ Although complete uniformity may be unrealistic, one would expect little variation from one adjudicator to another, especially in their analysis of the applicable legal standard.¹³⁶ Unfortunately, such controlled but acceptable variation does not exist in the immigration courts.¹³⁷ Instead, they are riddled with extremes,¹³⁸ discrepancies existing not just between courts, but also within them.¹³⁹

Such inconsistencies among and within the immigration courts cannot be ignored, as they are directly attributable to the lack of immigration expertise within the department tasked with

¹³⁰ See *id.* at 7 (statement of John. R. Ratigan, Immigration Consultant, Baker & McKenzie) (advocating that while his position on creating a “single, unified” immigration entity in charge of issuing visas may seem “radical,” it is in fact a “rational and sensible change” that would advance a “single policymaking and implementing body in the field of immigration”).

¹³¹ See *id.* at 66 (statement of Dana Marks Keener, President, National Association of Immigration Judges) (acknowledging that some asylum applicants are placed in proceedings before the immigration court but failing to go so far as to point out potential problems arising from this divided system of asylum adjudication).

¹³² See U.S. GOV’T ACCOUNTABILITY OFF., GAO 17-72, VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES (2016) (uncovering “significant variations in the outcomes across immigration courts and judges.”).

¹³³ Jeanne Atkinson & Michelle Mendez et al., *The Human Rights of Asylum Seekers in the United States*, INTER-AM. COMMISSION ON HUM. RTS. (Dec. 2, 2016) at 4.

¹³⁴ See Ramji-Nogales, *supra* note 9, at 342-43 (For example, “female immigration judges granted asylum at a rate of 53.8%, while male judges granted asylum at a rate of 37.7%. An asylum applicant assigned by chance to a female judge therefore had a 44% better chance of prevailing than an applicant assigned to a male judge.”); see also U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 132 (revealing that asylum applications before the Atlanta Immigration Court had a grant rate of 6%, while the New York Immigration Court granted asylum at a rate of 54%).

¹³⁵ See Ramji-Nogales, *supra* note 9, at 342-43 (emphasizing that, “In contrast, no appreciable difference existed in the grant rates of male and female [DHS] asylum officers.”) (emphasis added).

¹³⁶ See *id.* at 306 (differentiating that while variation should be minimal among adjudicators with respect to legal analysis, assessments of credibility may be more prone to variation based on the subjective inquiry required).

¹³⁷ See TRACIMMIGRATION, IMMIGRATION JUDGE REPORTS – ASYLUM (2018), available at <https://trac.syr.edu/immigration/reports/judgereports/> (documenting that in the Houston, Dallas, Charlotte, and Las Vegas regional courts, statistics indicate that applicants are granted asylum at a rate of nearly 0%).

¹³⁸ See Ramji-Nogales, *supra* note 9, at 328 (providing that Chinese asylum seekers had a 7% success rate in Atlanta, 76% success rate in Orlando, and a 47% success rate nationwide).

¹³⁹ See *id.* at 335-36 (describing that in Miami three judges granted asylum at rates of only 3%, 5%, and 6%, while three different judges granted asylum at 75%, 61%, and 38%).

overseeing them—the DOJ.¹⁴⁰ The absence of specialized immigration knowledge within the DOJ is not something that can be easily corrected.¹⁴¹ As has been previously emphasized, immigration law is complicated,¹⁴² and DHS is the only administrative agency with the protocols in place to make life-altering asylum decisions in a constitutionally permissible way.¹⁴³ Although the structure of the HSA makes DHS asylum officers and DOJ immigration judges equally responsible for using their knowledge and training to determine whether an asylum applicant’s story is true, and would thus render the individual eligible for asylum in the United States,¹⁴⁴ the resources deployed by the DOJ to ensure that such responsibility is being taken seriously are anything but equal to those utilized by DHS.¹⁴⁵

Making a final asylum decision requires both legal expertise and emotional intuition.¹⁴⁶ Officials must perform an intense assessment of credibility about the applicant’s description of her personal experiences and likelihood of actual or threatened persecution if forced to return to her country of origin.¹⁴⁷ To do that, DHS requires every asylum officer to complete an intensive five-week basic training module, which includes periodic testing.¹⁴⁸ Further, once asylum officers are in their regional placements, regional offices conduct four hours of training each week on prominent legal issues, country conditions, and procedures.¹⁴⁹ A supervisory officer, who has been vetted, trained, and tested on immigration law, reviews each asylum decision made by regional asylum officers before the decision is finalized.¹⁵⁰ Above the supervisory officer is a training officer who then re-reviews the supervisor’s judgement and reports to the Regional Director when inconsistencies arise.¹⁵¹

¹⁴⁰ See *id.* at 378 (comparing the current way in which asylum decisions are made by DOJ immigration judges to “a spin of the wheel of chance”).

¹⁴¹ See, e.g. *Governor in Council Appointed Members*, IMMIGR. AND REFUGEE BOARD OF CANADA, <https://irb-cisr.gc.ca/en/jobs/Pages/MemComEmpl.aspx> (last updated June 25, 2018) (outlining that Canadian immigration judges are selected through a rigorous hiring process that requires evaluation of the applicant’s competency, self-control, and cultural sensibility, among other factors).

¹⁴² See *supra* note 5 and accompanying text.

¹⁴³ See Ramji-Nogales, *supra* note 9, at 381 (pointing out that DHS asylum officers currently receive much more “initial and ongoing training” than that required of DOJ’s immigration judges).

¹⁴⁴ See *supra* note 107 and accompanying text.

¹⁴⁵ See IMMIGRATION JUDGE REPORTS – ASYLUM, *supra* note 137 (documenting the DOJ’s lackluster effort to appoint judges of diverse professional backgrounds with five of the six Atlanta immigration judges having a law enforcement background and four of those five previously serving as federal prosecutors prior to becoming immigration judges).

¹⁴⁶ See *Credible and Reasonable Fear Interviews*, IMMIGR. JUST. CAMPAIGN, <https://www.immigrationjustice.us/get-trained/cfi-rfi> (establishing that the credible fear interviews initially required by those seeking asylum task asylum officers with determining an applicant’s eligibility based on his direct testimony regarding his need for protection from persecution).

¹⁴⁷ See Ramji-Nogales, *supra* note 9, at 306.

¹⁴⁸ *Id.* at 311.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

In all, an asylum decision rendered by a DHS asylum officer is not definitive until it has been approved by three—and, in difficult and inconsistent cases, four—immigration law professionals.¹⁵² In addition, each regional office hires staff dedicated solely to conducting country research, participating in conference calls with headquarters, and identifying emerging patterns in asylum claims, all of which later gets reported to asylum officers to aid them in making their decisions.¹⁵³

While it is true that the DOJ provides some training, a 2018 training manual reveals that a recent educational program for incoming immigration judges lasted only three days from around 8:30 a.m. to 5:00 p.m.¹⁵⁴ The training consisted mainly of PowerPoint presentations and breakout sessions, rather than intensive study and subsequent testing on substantive legal material, and did not appear to be compulsory.¹⁵⁵ The DOJ cannot teach immigration law over the course of three days in a style reminiscent of a first-year law school class.¹⁵⁶ Unlike the DOJ, DHS has put in place the training and safeguards needed in order to legitimately call itself the expert agency in asylum adjudication.¹⁵⁷

Even with DHS's superior knowledge in immigration matters readily apparent, the agency's own words and mission additionally support its immigration expertise.¹⁵⁸ A brief search of DHS's website reveals "Secur[ing] U.S. Borders and Approaches," as one of the department's "core missions."¹⁵⁹ Within the description of this mission, it mentions immigration three times.¹⁶⁰ One of the four goals of the mission is to "Enforce U.S. Immigration Laws"—DHS further referencing its "responsibility" to "faithfully" do so.¹⁶¹ A similar search of the DOJ's mission statement reveals no mention of immigration specifically, though it does

¹⁵² Ramji-Nogales, *supra* note 9, at 311.

¹⁵³ *Id.*

¹⁵⁴ EXECUTIVE OFFICE OF IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE, 2018 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW LEGAL TRAINING PROGRAM (June 2018) (unpublished document obtained by FOIA request by Hoppock Law Firm and published online by American Immigration Lawyers Association), <https://www.aila.org/infonet/eoir-2018-training-program-judges>.

¹⁵⁵ *See id.*

¹⁵⁶ *See* Michelle Mark, *Jeff Sessions Said Immigrants Should 'Wait Their Turn' to Come to the US – Here's How Complicated that Process Can Be*, BUS. INSIDER (May 3, 2018), <https://www.businessinsider.com/how-to-green-card-visa-legal-immigration-us-news-trump-2017-4> (depicting various pathways and roadblocks to legally immigrating to the United States that make lawful immigration "challenging, if not impossible").

¹⁵⁷ *Asylum Division Training Programs*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (last updated Dec. 19, 2016), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> ("All Asylum Officers are required to attend and complete the Asylum Officer Basic Training Course (AOBTC), which is a national training course that is specific to asylum adjudications. Instructors for this course are from HQ Asylum Division and field Asylum offices, as well as non-governmental organizations, law schools, and the UNHCR.").

¹⁵⁸ *Secure U.S. Borders and Approaches*, THE U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/administer-immigration-laws> (last updated July 5, 2019).

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* (outlining that DHS is responsible for addressing individuals who ignore lawful *immigration* processes, enforcing *immigration* laws, and properly administering *immigration* benefits) (emphasis added).

¹⁶¹ *See id.* ("It is DHS's responsibility to faithfully execute and enforce the immigration laws of the United States in a manner that eliminates [sic] abuses.").

describe the department’s duty to “enforce the law” and “defend the interests of the United States according to the law” more generally.¹⁶² The closest the DOJ comes to referencing its responsibilities vis-à-vis immigration is to describe its role in “ensur[ing] public safety against threats foreign and domestic.”¹⁶³

Though Congress clearly intended to handcraft an expert immigration agency in the wake of 9/11,¹⁶⁴ and DHS’s superior knowledge in handling both legally and emotionally complex asylum adjudications is evidenced by its ongoing efforts to require staff to undergo rigorous training and continuing education,¹⁶⁵ the HSA’s business remains unfinished.¹⁶⁶ Even the DOJ does not attempt to coin itself as an agency with expert knowledge and interest in immigration,¹⁶⁷ and neither should the U.S. Congress.¹⁶⁸ While such “split authority” is not uncommon throughout statutory schemes,¹⁶⁹ Congress should take a page from the Supreme Court’s *Gonzales* opinion and put an end to the divided authority over asylum adjudication that does nothing more than perpetuate injustice.¹⁷⁰

C. A WELCOMED CONSEQUENCE – INCREASED DHS INDEPENDENCE

Though relying on the agency-as-expert model is persuasive, the argument to relocate the lower immigration courts and the BIA does not stop there. Critics are quick to point out that agencies cannot base decisionmaking purely on expertise because of the existence of countless fluctuating factors that agencies must balance, some of which are political.¹⁷¹ This point is not up for debate—it’s true.¹⁷² Though taken,¹⁷³ the skepticism surrounding an agency’s ability to independently assert its expertise in the decisionmaking process does not have to be understood

¹⁶² *About DOJ*, THE U.S. DEP’T OF JUST., <https://www.justice.gov/about>.

¹⁶³ *Id.*

¹⁶⁴ *See supra* note 122 and accompanying text.

¹⁶⁵ *See supra* note 157 and accompanying text.

¹⁶⁶ *See Assembly Line Injustice: Blueprint to Reform America’s Immigration Courts*, APPLESEED (May 2009) at 15 (urging that it makes little sense that asylum officers receive more intensive training than the immigration judges who may be tasked with reviewing their decisions upon appeal).

¹⁶⁷ *See supra* note 162 and accompanying text.

¹⁶⁸ *See infra* Part.III.

¹⁶⁹ *See supra* note 105 and accompanying text.

¹⁷⁰ *See supra* note 116 and accompanying text.

¹⁷¹ *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 970 (1997) (“At its core, the argument is that administrative action . . . cannot be understood in the neutral, scientific, apolitical sense in which it was understood by the founders of the administrative state. It is instead now seen by all to be essentially ‘political’—involving an essentially ‘political choice.’”).

¹⁷² *See id.* at 967-68 (emphasizing that a simple dichotomy between law and politics does not exist and that tension between the legal and the political will endure even when agencies attempt to make decisions based on expert knowledge alone).

¹⁷³ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (“The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”).

as a concession to the core argument made in this Comment.¹⁷⁴ Rather, relocating the immigration court and the BIA to DHS will lead to increased independence throughout the agency¹⁷⁵ and further insulate the immigration courts from political influence when overseeing the adjudication of asylum claims.

Despite the commonly understood theory that agencies adhere neatly to a binary division—either executive or independent—it is impossible to pin down a single form by which an agency can earn its “independent” status.¹⁷⁶ Instead, to accurately determine an agency’s level of independence, various factors stemming from the agency’s enabling legislation must be considered.¹⁷⁷ At the heart of an analysis of agency independence is an effort to deconstruct the agency’s relationship to the President.¹⁷⁸ Though the consensus view believes that the dividing line between independent and executive agencies lies in the presence of for-cause removal protection,¹⁷⁹ not all agencies considered independent possess such a clause.¹⁸⁰

Relocating the immigration court system to DHS would grant the agency with litigation authority, an added element of agency power that would promote the use of impartial, independent expertise while overseeing asylum adjudications.¹⁸¹ Since 1966, the DOJ has had centralized-agency litigation authority.¹⁸² The default understanding is that the Attorney General will spearhead all litigation that names the United States as a party, “[e]xcept as otherwise authorized by law.”¹⁸³ While Congress has outlined some exceptions to the centralized-litigation

¹⁷⁴ See Kirti Datla, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 769 (2013) (“As it turns out, there is no single feature, structural or functional, that every agency thought of as independent shares—not even the for-cause removal provision commonly associated with independence.”).

¹⁷⁵ See *id.* at 769-70 (explaining that agency independence should be understood as falling within a spectrum and that numerous factors in an agency’s enabling legislation may allow it to function as an independent, expertise-focused rule maker).

¹⁷⁶ See *id.* at 772 (“Agencies cannot be neatly divided into two categories. Independent agencies are almost always defined as agencies with a for-cause removal provision limiting the President’s power to remove the agencies’ heads to cases of ‘inefficiency, neglect of duty, or malfeasance in office.’ But, as some scholars acknowledge, the so-called independent agencies do not share a single form.”).

¹⁷⁷ See *id.* (analyzing removal protection, specified tenure, multimember structure, partisan balance requirements, litigation authority, budget and congressional communication authority, and adjudication authority).

¹⁷⁸ See *id.* at 773 (explaining that achieving status as an independent agency signifies limitations on presidential control that restrict the President beyond what is specified in the agency’s enabling legislation).

¹⁷⁹ See Datla, *supra* note 174, at 778 (basing such view on the 1935 decision in *Humphrey’s Executor v. United States*); see also *Humphreys Executor v. United States*, 295 U.S. 602, 602 (1935) (holding that the President could not remove a Federal Trade Commission (FTC) official based solely on their policy disagreements and declaring the FTC an agency completely independent of presidential control).

¹⁸⁰ See Adrian Vermuele, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (“There are many important agencies that are conventionally treated as independent, yet whose heads lack for-cause tenure protection.”); see also Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000).

¹⁸¹ See Datla, *supra* note 174, at 777 (arguing that the goal of formulating independent agencies is to promote impartial expertise in administrative proceedings and rulemaking).

¹⁸² See 28 U.S.C. § 516 (reserving the “conduct of litigation” to the DOJ).

¹⁸³ *Id.*

authority the DOJ currently possesses, the exceptions are not systematic.¹⁸⁴ Though Congress’s decisionmaking process may not be predictable, history shows that such exceptions are possible.¹⁸⁵ If Congress grants DHS litigation authority by allowing it to oversee the immigration court system, it will increase both the agency’s level of independence from the executive and its ability to ensure consistent asylum determinations made by both DHS asylum officers and immigration judges.¹⁸⁶

III. RECOMMENDATION

The Deference Principle of administrative law addresses those statutory situations that leave practitioners scratching their heads—“split authority” circumstances like the one described throughout this Comment.¹⁸⁷ Courts must show deference to agency judgments based on the agency’s superior technical knowledge,¹⁸⁸ and though the judgments made by immigration judges are awarded deference every day, there is no evidence that the DOJ possesses such knowledge, education, or training in the area of immigration.¹⁸⁹ Instead, immigration lawyers who regularly appear before the immigration courts speak of a high level of unprofessionalism among immigration judges who approach asylum claims with a “presumptive skepticism” rather than as neutral arbiters of justice.¹⁹⁰ Former immigration judges themselves have gone so far as

¹⁸⁴ See Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 207-08 (1998) (explaining that in decentralizing litigation authority for some administrative agencies, Congress must work against an intense backdrop of often conflicting preferences).

¹⁸⁵ Cf. 15 U.S.C. §§ 2604(e), 2604(f), 2606 (granting the Environmental Protection Agency (EPA) litigation authority over specific violations of the Toxic Substances Control Act); see also id. § 56(a)-(c) (2006) (empowering the Federal Trade Commission (FTC) with broad litigation authority).

¹⁸⁶ See Datla, *supra* note 174, at 801 (“The effect of independent litigation authority is a degree of insulation from executive control.”).

¹⁸⁷ *The Deference Principle*, 2 STATE ENV’T L. § 15:48 (2018).

¹⁸⁸ *Id.*

Courts reviewing an agency’s actions regularly comment that they lack the expertise necessary to “second-guess” the agency’s conclusions. Asserting that they cannot match the agency’s technical knowledge, courts unanimously endorse the principle that they must defer to the agency’s expertise in conducting judicial review of agency decisionmaking.

¹⁸⁹ Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump> (describing a training conference in which a former immigration judge, Rebecca Jamil, states, “The entire conference was profoundly disturbing. Do things as fast as possible. There was an overarching theme of disbelieving aliens and their claims and how to remove people faster. That is not what I saw my job as an immigration judge to be. I was not trained to do that.”).

¹⁹⁰ See *Assembly Line Injustice: Blueprint to Reform America’s Immigration Courts*, *supra* note 166, at 12 (describing one immigration judge’s conduct as “so egregious that law school clinics will not allow their students to appear in front of her”); see also *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 85, at 12 (“[I]mmigration judges approached asylum claims with ‘presumptive skepticism’ and often questioned respondents the way a government attorney would on cross-examination, rather than conducting proceedings in a fair and neutral manner.”).

to reveal, “[T]here isn’t even any attempt at proper training. The whole indoctrination is you’re not judges, you’re really enforcement”¹⁹¹

Despite the constant skepticism and increased scrutiny that DHS has faced both historically and under the current administration, nothing inherently wrong or corrupt exists regarding the officials that comprise the agency. In fact, DHS has put plans in place in an effort to retain employees with highly specialized knowledge who have often worked with the department from its beginning.¹⁹² The issue stems not from the government officials who comprise the department, rather, the real problem comes from the department’s enabling legislation: 187 pages of statutory slice and dice between existing agencies, executive offices, and various other administrative actors.¹⁹³

The HSA in its current form does not work,¹⁹⁴ and the unfinished statutory business has led to a deprivation of asylum seekers’ due process rights.¹⁹⁵ Considering the abundant importance placed on agency expertise in the world of administrative law, Congress should amend the HSA to transfer the immigration court and the BIA to DHS. By removing the courts from the DOJ, Congress would place them where they have rightly belonged since DHS’s creation seventeen years ago.¹⁹⁶

Seven years before DHS’s creation, Justice Breyer, in his book, *BREAKING THE VICIOUS CIRCLE TOWARD EFFECTIVE RISK REGULATION*,¹⁹⁷ warned against agencies “implicitly and often inconsistently” making decisions.¹⁹⁸ Currently, the nation faces the exact situation Justice Breyer warned of. Immigration judges who are ill-prepared and ill-equipped are arbitrarily making life-or-death asylum decisions.¹⁹⁹ Removing these judges from an agency unable to train, counsel, and supervise them appropriately and placing them under DHS control, which holds itself out as an expert in immigration and has the training procedures in place to show for

¹⁹¹ See *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 85, at 18.

¹⁹² See *Recruitment and Retention Incentives*, DEP’T OF HOMELAND SECURITY MGMT. DIRECTIVE SYS. (March 31, 2004) at 19 (describing the retention allowances provided by DHS to current employees with unusually high or unique qualifications in an effort to retain the employee).

¹⁹³ Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 (2002).

¹⁹⁴ See Thessin, *supra* note 70, at 514 (“Although some consolidation of the myriad agency components that are charged with homeland security is needed, the HSA is too broad in scope and transfers too much power to the President.”).

¹⁹⁵ See *Immigration Court Independence*, *supra* note 84 (“[T]he DOJ and its component, the Executive Office for Immigration Review (EOIR), have introduced or perpetuated a number of policies that are further diminishing weakened due process protections while exacerbating inefficiencies.”).

¹⁹⁶ Glasser & Grunwald, *supra* note 31.

¹⁹⁷ Stephen Breyer, *BREAKING THE VICIOUS CIRCLE TOWARD EFFECTIVE RISK REGULATION* 65 (1995).

¹⁹⁸ *Id.*

¹⁹⁹ See Ilyce Shugall, *Op Ed: Why I Resigned as an Immigration Judge*, L.A. TIMES (Aug. 4, 2019), <https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies> (describing the unworkable and unattainable performance metrics the DOJ is imposing upon immigration judges and the “demoralizing” effect they’ve had).

it, will signify an incremental step toward much needed immigration reform in the United States.²⁰⁰

A. PROCEDURAL “NEXT STEPS”

Justice demands that administrative officials have expertise in their respective agency missions.²⁰¹ Just as society rightfully expects a heart surgeon to be completely versed in cardiovascular health, and an oncologist to have superior knowledge on the treatment of cancer, asylum applicants whose lives depend on an administrative agency’s decision must have confidence in its ability to offer a professional, objective “diagnosis.”²⁰² Though complete public trust in the expert judgment of administrative agencies would be ideal,²⁰³ no easy solution exists when attempting to improve difficult, life-altering processes like those that take place in the immigration court system.²⁰⁴

While this Comment relies on the agency-as-expert model to argue that Congress should relocate the lower immigration courts and the BIA to DHS,²⁰⁵ the push for progress must go further. Admittedly, the agency-as-expert model is not fool proof, and DHS must strictly adhere to the APA to ensure that DHS fully lives up to its potential as the immigration expert.²⁰⁶

To further provide for a robust system of due process in the immigration court, upon transfer to DHS, Congress should require immigration judges, both on lower immigration courts and the BIA, to become official administrative law judges (ALJs),²⁰⁷ subject to all APA procedures and guidelines. While the current immigration court system has a reputation of lackluster hiring procedures,²⁰⁸ ALJ appointments follow APA standards and require judges to

²⁰⁰ See *supra* Part.II.B.

²⁰¹ See Shapiro, *supra* note 93, at 1138 (revealing the ongoing demand and challenge in the United States to “legitimize” public administration).

²⁰² See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1678 (1975) (arguing that persons subject to the administrator’s control should be no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor).

²⁰³ See Shapiro, *supra* note 93, at 1138 (describing the ongoing challenge the United States faces in striving to “legitimize” public administration).

²⁰⁴ See *Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3169 (2010) (emphasizing the vast complexity of “administrative structures, exercising different kinds of administrative authority, to achieve their legislatively mandated objectives.”) (Breyer, J., dissenting); see also Shapiro, *supra* note 93, at 1134 (“Expertise is complex, complicated, and multifaceted.”).

²⁰⁵ See *supra* Part.II.

²⁰⁶ See 79 Pub. L. 404, 60 Stat. 237 (1946) (stating that the goal of the APA is to “improve the administration of justice” and promote “fair administrative procedure”).

²⁰⁷ See *Administrative Law Judges*, JUSTIA, <https://www.justia.com/administrative-law/administrative-law-judges/> (last updated 2019) (“In the United States, an administrative law judge, or ALJ, serves as the judge and trier of fact who presides over administrative hearings.”).

²⁰⁸ See 2019 Update Report – *Reforming the Immigration System – Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, *supra* note 26 (explaining that public skepticism about the immigration court system stems partially due to allegations of politicized, non-credential based hiring).

complete a four-hour written and oral exam before a panel prior to taking the bench.²⁰⁹ Notably, the ALJ appointment process is the “only one based on merit in the United States.”²¹⁰ With that, the Attorney General should no longer appoint immigration judges to serve at his or her pleasure.²¹¹ Rather, DHS should provide oversight and hire these judges based on ability and proven expertise in immigration law. Congress can implement this procedural next step relatively easily, as DHS asylum officers already undergo extensive training before earning the privilege to render asylum decisions.²¹²

CONCLUSION

The United States cannot turn away asylum seekers.²¹³ Óscar and Valeria had a legal right to present themselves at the border and request asylum.²¹⁴ The United States denied them of that right, and the United States must rectify such injustices.²¹⁵ Relocating the immigration court system to DHS will reduce the feeling of impossibility that DOJ immigration judges currently face and provide them with the resources they need to deliver due process to those who stand before them.²¹⁶ Most importantly, the relocation will allow asylum applicants to present their claims with confidence, rather than fear, with assurance that regardless of whether they are presenting their claims before an asylum officer or immigration judge, they have the same shot at success.²¹⁷

While not a perfect agency, DHS is in the best position to oversee asylum adjudication and the immigration court system.²¹⁸ Longstanding emphasis on agency expertise,²¹⁹ the HSA’s legislative history,²²⁰ the DOJ’s inability to apply niche-level knowledge when overseeing asylum determinations made by immigration judges,²²¹ and DHS and DOJ’s own words all

²⁰⁹ See *Administrative Law Judges*, *supra* note 207 (explaining that the panel is made up of representatives from the American Bar Association, the Office of Personnel Management, and a current federal ALJ).

²¹⁰ *Id.*

²¹¹ Homeland Security Act of 2002, 107 Pub. L. No. 296, 116 Stat. 2135 § 1102(3)(g)(1) (2002) (placing the EOIR under the Attorney General’s sole discretion).

²¹² See *supra* note 148 and accompanying text.

²¹³ See generally Shaw Drake & Edgar Saldivar, *Trump Administration Is Illegally Turning Away Asylum Seekers*, ACLU (Oct. 30, 2018), <https://www.aclu.org/blog/immigrants-rights/trump-administration-illegally-turning-away-asylum-seekers> (reiterating that both U.S. and international law dictate that “noncitizens arriving at our borders have a right to apply for asylum,” and they cannot legally be turned away).

²¹⁴ See *supra* notes 10 and 11 and accompanying text.

²¹⁵ See Drake & Saldivar, *supra* note 213 (pointing out that when asylum seekers are turned away they are put at risk of facing “extreme violence and frequent kidnappings”).

²¹⁶ See *Amid “Nightmarish” Case Backlog, Experts Call for Independent Immigration Courts*, *supra* note 6; see also Shugall, *supra* note 199 (quoting a former immigration judge who described the impact that DOJ policies had on herself and her colleagues and their ability to “render correct and well-reasoned decisions”).

²¹⁷ See *supra* note 140 and accompanying text.

²¹⁸ See *supra* Part.II.

²¹⁹ *Id.*

²²⁰ See *supra* note 122 and accompanying text.

²²¹ See *supra* note 154 and accompanying text.

support relocation.²²² Congress should amend the HSA to relocate the immigration court and the BIA from the DOJ to DHS, finally permitting the executive agency where expertise in immigration matters truly lies to oversee all asylum adjudications.²²³

True immigration reform continues to evade the United States all while its bronze lady urges, “Give me your tired, your poor, your huddled masses yearning to breathe free”²²⁴ Those very words lead tens of thousands of asylum seekers to knock on the nation’s door each year,²²⁵ and they too should be the words used to guide the country in its pursuit of a just asylum adjudication process.²²⁶

²²² See *supra* note 162 and accompanying text.

²²³ See *supra* Part.III; see also Enforce and Administer Our Immigration Laws, THE DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/administer-immigration-laws> (last updated Aug. 15, 2018) (“The Department is focused on smart and effective enforcement of U.S. immigration laws while streamlining and facilitating the legal immigration process.”).

²²⁴ See generally James F. Hollifield, *What Makes Immigration Reform So Hard*, GEORGE W. BUSH INST. (2018), <https://www.bushcenter.org/catalyst/immigration/hollifield-immigration-reform.html> (“Economic, cultural, legal, and security interests all stand in the way of finding a policy solution to manage the flow of immigrants into the U.S.”); see also Emma Lazarus, THE NEW COLOSSUS (1883) (“Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”).

²²⁵ See Nadwa Mossaad, *Refugees and Asylees: 2017*, DEP’T OF HOMELAND SECURITY OFF. OF IMMIGR. STAT. (March 2019) (documenting that a total of 53,691 individuals were admitted to the United States as refugees in 2017).

²²⁶ See Lazarus, *supra* note 224 (“A mighty woman with a torch, whose flame Is the imprisoned lightning, and her name Mother of Exiles.”).