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The Forgotten FISA Court: Exploring the Inactivity of the ATRC

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The Alien Terrorist Removal Court (ATRC) was established in 1996 after immense political pressure from the Reagan, Bush, and Clinton Administrations and wide bipartisan support to serve as a forum to prosecute the most complex and difficult national security immigration removal cases while protecting vital classified information from public disclosure. Yet, after twenty-three years, this Article III court has not heard a single case.

This Article provides a fresh and critical inquiry into this veritable zombie court that has fallen from the public consciousness, yet still exists with a standing cadre of designated judges. It fills a significant gap in the conjunction of national security and immigration literature as the most comprehensive scholarly inquiry that has been done on the ATRC. Our novel conclusions include the reasons why the court has not ever heard a case and an analysis into its continued legitimacy despite subsequent War on Terror-era enactments that streamline the removal of most classes of noncitizen national security threats. We uniquely establish that the ATRC was dead on arrival due to its unworkable, yet legislatively remediable, procedural flaws. We examine the dynamic history of this forgotten court, analyze its structure, and propose commonsense legislative revision that would render this important national security law enforcement tool viable.

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I. INTRODUCTION

After twenty-three years and despite an always-ready cadre of five federal judges, the Alien Terrorist Removal Court (ATRC) has not heard a single case.  

Not only has the ATRC never heard a case, it has also never received or considered an ex parte, sealed application from the Department of Justice to initiate proceedings. Alien Terrorist Removal Court, 1996–Present, Fed. Jud. Ctr., https://www.fjc.gov/history/courts/alien-terrorist-removal-court-1996-present [https://perma.cc/GG4U-XZHT] (“As of 2018, the removal court had never received an application from the Attorney General for the removal of an alien terrorist, and had therefore conducted no proceedings.”).

See, e.g., N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–59 (1982) (Brennan, J., with whom Marshall, Blackmun, & Stevens, JJ. joined; Rehnquist, J., concurring in the judgment, with whom O’Connor, J., joined) (quoting U.S. CONST. art. III, § 1) (describing the necessary attributes for the exercise of the judicial power of the United States). Though some describe the ATRC as an “Article I court” based on the fact that it was created by Congress, e.g., Justin Florence, Note, Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists, 115 YALE L.J. 2148, 2178 (2006), “given that the court is staffed entirely by Article III judges serving in an adjudicative role, it appears likely that the Alien Terrorist Removal Court would be considered an Article III court.” ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 8 n.64 (2014) (citing United States v. Cavanaugh, 807 F.2d 787, 791 (9th Cir. 1987)). In a similar fashion to its creation of the ATRC, Congress “relied on its Article III power to ‘ordain and establish’ the lower federal courts when it created the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR)[,]” and “[e]ven though these
immigration courts—that exists to adjudicate civilly prosecuted alien\(^3\) deportation hearings within which the government can use classified evidence against alleged terrorists without exposing national security information to the defendant or to the public.\(^4\) Established by the Antiterrorism and Effective Death Penalty Act of 1996,\(^5\) and with a design that was heavily influenced by the Foreign Intelligence Surveillance Court to the degree that it was intended to be populated by the same judges,\(^6\) the court’s statutory predicate was championed at the request of President Clinton by then-Senators Joe Biden and Bob Dole.\(^7\)

This Article uniquely establishes that the ATRC was dead on arrival due to its unworkable—yet legislatively remediable—procedural flaws. We will examine the dynamic history of this forgotten court, analyze its structure, justify the continuing need for it in light of substantial intervening legislation, and lastly, propose a commonsense legislative revision that would render this important national security law enforcement tool viable.

In particular, there is still a continuing need for an ATRC to remove certain terrorist lawful permanent residents (LPRs). Though intervening statutes, such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)\(^8\) and the USA PATRIOT Act (PATRIOT Act),\(^9\) have provided alternative means to criminally prosecute and/or remove noncitizens who otherwise would be theoretical candidates for the ATRC, there is no other law enforcement recourse for certain terrorist LPRs than this specialized national security court.\(^10\) There is no recourse to remove LPRs against whom the sole evidence of their terrorist

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\(^3\)The Court recently utilized the term “noncitizen” in the place of “alien” to “refer to any person who is not a citizen or national of the United States.” Pereira v. Sessions, 138 S. Ct. 2105, 2109–10 n.1 (2018). This Article utilizes the term “alien” only when its use is inextricably intertwined with the nuances of the statutory scheme that it examines.

\(^4\)§ 1531–37 (2012).


\(^6\)Id. at 146 (“The removal court is modeled after the seven-member secret court set up under the Foreign Intelligence Surveillance Act of 1978 (FISA).”).


\(^10\)See infra Part III.
identity is FISA-obtained or derived from foreign intelligence information or that is not appropriate for declassification or public acknowledgment.\textsuperscript{11}

The ATRC statutes, however, are flawed in two dispositive ways. First, the conjunctive findings necessary for the United States to proceed with an ATRC removal proceeding where the court does not approve of the government’s proposed unclassified summary of key evidence should be styled in a disjunctive formulation. Under the current scheme, the ATRC must find both that:

(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.\textsuperscript{12}

The conjunctive provisions situate the government in the same type of “Catch-22” dilemma that justified the ATRC’s creation—the untenable choice between disclosing and risking sources and methods underlying national security information versus the removal of alien terrorists. As evidenced by decades of non-use, the burden placed on the government by this conjunctive provision is too high and renders the ATRC unviable.\textsuperscript{13}

Second, the language that describes the threat posed by the disclosure of the needed classified evidence establishes a problematically unclear level of classification. The ATRC statutes use the phrase “serious and irreparable harm to the national security.”\textsuperscript{14} That standard appears to exist somewhere between the standards for classifying evidence as “Secret”—“serious damage” to the national security—and “Top Secret”—“exceptionally grave damage” to the national security. In light of these settled standards for classifying evidence that have existed for more than forty years,\textsuperscript{15} Congress should incorporate this normative formulation of classification to provide clarity to both the Department of Justice and the ATRC regarding what type of classified evidence it contemplates being sufficient for proceeding without a summary.\textsuperscript{16}

Additionally, while making the foregoing critical revisions, Congress should make other minor changes related to the use of classified evidence in ATRC decision-making to clarify its original intent.\textsuperscript{17} For example, the ATRC statutes should be revised to clarify that classified evidence submitted to the court for in camera and ex parte review may be part of the basis for the court’s

\textsuperscript{11} See infra Part III.


\textsuperscript{13} See infra Part IV.A.


\textsuperscript{15} See Exec. Order No. 12,065, 43 Fed. Reg. 28,949, 28,950 (June 28, 1978) (enumerating the types of information that can be classified and the classification levels); see also Exec. Order No. 8381, 5 Fed. Reg. 1147, 1147 (Mar. 22, 1940) (establishing certain military information as “‘secret,’ ‘confidential,’ or ‘restricted’”).

\textsuperscript{16} See infra Part IV.B.

\textsuperscript{17} See infra Part IV.C.
decision, which—despite being the undisputed animating purpose of the ATRC—presently is only implied.\textsuperscript{18}

This proposal is a precise and narrow solution that would render the ATRC a viable forum for the nation’s most difficult national security immigration removal cases, maintaining an irreducible minimum of due process afforded by providing initial and direct Article III judicial involvement and oversight. These solutions, along with the underlying statutes, are designed to be constitutionally compatible, but also minimalist to achieve the court’s operability in a non-politicized way. The ATRC was never intended to be a high-volume court used for run-of-the-mill removal cases.\textsuperscript{19} It was intended to be a viable option for removing noncitizens who posed the greatest threat to the national security without having to compromise national security information and sources to do so.\textsuperscript{20}

II. HISTORY AND FRAMEWORK OF THE ATRC

A. The Legislative Story of the ATRC

The ATRC was created to address a “recurring problem experienced by the Department of Justice”—the inability to use classified information obtained in the course of antiterrorism investigations in removal proceedings without putting at risk the sources and methods responsible for such information.\textsuperscript{21} In the late 1980s, the Department of Justice famously sought to deport a group of noncitizens in Los Angeles “for their activity on behalf of the Popular Front for..."
the Liberation of Palestine (PFLP).” 22 That group came to be known as the “L.A. Eight.” 23 In January 1987, the Immigration and Naturalization Service (INS) arrested them for immigration violations and attempted to detain them pending removal proceedings. 24 The INS asserted that it had classified evidence that justified the detention, but an administrative immigration judge refused to consider such evidence and ordered their release. 25

In 1988, the Reagan Administration first proposed the creation of a court comprised of federal judges that would allow the government to balance the competing priorities of removal, where the defendant could defend against the charges and the government could protect classified information. 26

Congress did not act on President Reagan’s proposal, 27 with the Democrat-controlled Senate “refus[ing] to hold hearings on the proposal.” 28 Nor did


24 See Butterfield, supra note 23, at 4.

25 See id. After decades of litigation, including in front of the U.S. Supreme Court, it appears that ultimately none of the L.A. Eight were ordered removed, and some have become U.S. citizens. MacFarquhar, supra note 23; Judge Throws Out Charges in “Los Angeles Eight” Case, CTR. FOR CONST. RTS., https://ccrjustice.org/home/press-releases/judge-throws-out-charges-los-angeles-eight-case [https://perma.cc/63UH-9FU].. In December 2006, Aliad Barakat was naturalized in Los Angeles. See id. Three other members have been granted lawful permanent residency. Id. In October 2007, an immigration judge terminated deportation proceedings against two others, Khader Hamide and Michel Shehadeh, both of whom were lawful permanent residents when arrested and charged. Id. At least one scholar has suggested that “if the ATRC statutory framework was available in 1987, the DOJ would have successfully deported the L.A. Eight without revealing to them classified information.” Jonathan H. Yu, Combating Terrorism with the Alien Terrorist Removal Court, 5 NAT’L SECURITY L. BRIEF 1, 4 (2015).

26 Valentine, supra note 21, at 1–2. The Reagan Administration’s proposal was labeled the “Terrorist Alien Removal Act.” Blum, supra note 22, at 681; Clarence E. Zachery, Jr., The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy from Within?, 9 GEO. IMMIGR. L.J. 291, 292 (1995); see also 134 CONG. REC. H3125 (daily ed. May 10, 1988) (noting receipt of “[a] letter from the Acting Assistant Attorney General, transmitting a draft of proposed legislation entitled, ‘Terrorist Alien Removal Act of 1988’”; to the Committee on the Judiciary”); 134 CONG. REC. S7882 (daily ed. June 15, 1988) (noting receipt of “[a] communication from the Acting Secretary Attorney General, Department of Justice, transmitting a draft of proposed legislation entitled the Terrorist Alien Removal Act; to the Committee on the Judiciary”).

27 Valentine, supra note 21, at 2; Yu, supra note 25, at 2–3.

28 Blum, supra note 22, at 681; see also Zachery, supra note 26, at 292.
Congress act on the George H.W. Bush Administration’s renewed push for the creation of such a specialized court.\textsuperscript{29} Although the Department of Justice had considered the creation of such a court to be “one of its top counterterrorism legislative priorities in the mid-1990s”\textsuperscript{30} and Congress had been pushed by multiple presidential administrations. “Congress failed to pass any of the bills providing for these special procedures to remove alien terrorists” across three presidential terms, from 1989 through 1994.\textsuperscript{31}

In February 1995, then-Senator Joe Biden introduced on behalf of President Bill Clinton a bill that, inter alia, sought the creation of the ATRC.\textsuperscript{32} The bill sought to advance many of the terrorism-related provisions that both Presidents Reagan and Bush had pushed for without success.\textsuperscript{33} Two months later, on April 19, 1995, Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring hundreds of others.\textsuperscript{34} The Oklahoma City bombing captured the country’s attention and crystallized the resolve of lawmakers on both sides of the aisle to address terrorism.\textsuperscript{35}

One week after the Oklahoma City bombing, Senate Majority Leader Bob Dole introduced the then-labeled “Comprehensive Terrorism Prevention Act of

\textsuperscript{29}Valentine, \textit{supra} note 21, at 2.


\textsuperscript{31}Zachery, \textit{supra} note 26, at 292 (citing 139 CONG. REC. 15,249-01 (1993) (statement of Sen. Smith); 140 CONG. REC. 14,534-02 (1994) (statement of Sen. Smith)).

\textsuperscript{32}S. 390, 104th Cong. at 1–2 (1995); see 141 CONG. REC. S2502–03 (daily ed. Feb. 10, 1995) (statement of Sen. Biden) (noting “I have introduced this bill at the President’s request,” but expressing concerns about the ATRC provisions as written); 141 CONG. REC. S2398–99 (daily ed. Feb. 9, 1995) (letter from President Clinton to Congress on the Omnibus Counterrorism Act of 1995) (“[O]ne of the most significant provisions of the bill will . . . [p]rovide a workable mechanism, utilizing U.S. District Court Judges appointed by the Chief Justice, to deport expeditiously alien terrorists without risking the disclosure of national security information or techniques.”); Zachery, \textit{supra} note 26, at 292.

\textsuperscript{33}See Zachery, \textit{supra} note 26, at 292.


That bill contained language related to the creation of a removal court for alien terrorists, but with less comprehensive provisions than the version introduced earlier at President Clinton’s behest.\footnote{Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. (1995); 141 CONG. REC. S5841 (daily ed. Apr. 27, 1995) (statement of Sen. Dole) (“America will not be intimidated by the madmen who masterminded last week’s vicious and cowardly bomb attack in Oklahoma City.”).}

The following week, five Democrat Senators (Joe Biden, Thomas Daschle, Dianne Feinstein, Christopher Dodd, and Herb Kohl) introduced a revamped version of President Clinton’s proposed legislation as Senate Bill 761, adding additional provisions seeking “to provide . . . Federal law enforcement the necessary tools and fullest possible basis allowed under the Constitution of the United States to address . . . acts of international terrorism occurring within the United States.”\footnote{Senator Biden referred to the Dole-introduced bill as “[t]he Republican substitute bill,” noting that it was “built largely around [the] proposals” in the bill he had introduced earlier in the year on behalf of President Clinton. See 141 CONG. REC. S7484 (daily ed. May 25, 1995) (statement of Sen. Biden); see also David B. Kopel & Joseph Olson, Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation, 21 OKLA. CITY U. L. REV. 247, 248 (1996) (discussing “the President’s very broad bill (Clinton bill) and majority leader Dole’s slightly narrower bill (Dole bill)”).}

Notably, S.761 included more robust language related to the ATRC, including provisions that were not in the Dole bill regarding the possibility that the ATRC might deem inadequate the government’s proposed unclassified summary of evidence showing the alien had engaged in terrorist activity, and the circumstances in which removal proceedings nonetheless would be permitted to press forward without the provision of an adequate summary.\footnote{Omnibus Counterterrorism Act of 1995, S. 761, 104th Cong. (1995); see 141 CONG. REC. S6202 (daily ed. May 5, 1995) (statement of Sen. Daschle) (“Coupled with the President’s earlier antiterrorism bill directed at international terrorism, this is a sound step to respond to a national threat without throwing overboard the civil rights of law-abiding citizens.”).}

Thereafter an agreement was reached, in which more robust provisions related to the ATRC—including provisions concerning proceeding without a summary—were included in the Dole bill,\footnote{Compare Omnibus Counterterrorism Act of 1995, S. 761, 104th Cong. (1995) (Democrat Bill), with Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. (1995) (Republican Bill).} which was eventually renamed the Comprehensive Terrorism Prevention Act of 1995.\footnote{S. Amend. 1199 to S. 735, 104th Cong. (1995); 141 CONG. REC. S7553–70 (daily ed. May 25, 1995) (filed on behalf of Senators Dole, Hatch, Nickles, Inhofe, Gramm, and Brown); see S. 735, 104th Cong. (June 7, 1995) (as engrossed in the Senate), https://www.congress.gov/104/bills/s735/BILLS-104s735es.pdf [https://perma.cc/8JKP-9U5S].}

Although Senate Democrats and Senate Republicans introduced competing bills to establish the ATRC’s procedures, they agreed on the court’s basic purpose.” John Dorsett Niles, Note, Assessing the Constitutionality of the Alien Terrorist Removal Court, 57 DUKE L.J. 1833, 1834 n.2 (2008) (citing 141 CONG. REC. 4225 (1995) (statement of William J. Clinton, President of the United States)); see also Kopel & Olson, supra note 37, at 248 (“[A] deal was arranged by which various provisions from the Clinton bill would be added to the Dole
“Antiterrorism and Effective Death Penalty Act of 1996” (AEDPA). An amendment sponsored by Senator Arlen Specter was then adopted, which added language requiring dismissal of the action if the ATRC deemed inadequate the government’s initial proposed unclassified summary.

Almost a year to the day after the Oklahoma City bombing, the Senate began debating AEDPA. Congress passed AEDPA with broad, bipartisan support, and on April 24, 1996, President Clinton signed AEDPA into law, formally creating what would become known as the ATRC. In his signing statement, President Clinton lauded the creation of the ATRC as one of the “tough new tools to stop terrorists before they strike.”

The ATRC statutes were revised later in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and, among other changes, Congress restored the possibility that removal proceedings might proceed even if the ATRC deemed the proposed unclassified summary inadequate, so long as certain criteria related to national security are met.
B. Processes and Standards for Using Classified Evidence

Congress established a detailed process for ATRC removal proceedings.\(^{48}\) Removal proceedings under the ATRC may only be pursued when the U.S. Department of Justice files a statutorily obligated application, including a certification by the Attorney General or Deputy Attorney General, establishing, among other things, probable cause to believe that the proposed defendant is an alien terrorist for whom traditional removal proceedings would pose a risk to the national security of the United States.\(^{49}\) Proceedings are not initiated unless an ATRC judge agrees that the application establishes probable cause on both points.\(^{50}\) These preliminary steps are done ex parte, in camera, and under seal,\(^{51}\) and none of the evidence submitted can be considered by the ATRC in determining whether to issue a removal order unless it is resubmitted in the government’s case in chief.\(^{52}\)

In order to use classified evidence in the removal proceeding itself, the government also must submit for the court’s review a proposed unclassified summary that could be given to the alien defendant.\(^{53}\) The court, in possession of both the classified evidence and the proposed unclassified summary, must determine whether the summary is “sufficient to enable the alien to prepare a defense.”\(^{54}\) If the court finds the summary adequate, the case proceeds with the classified evidence included as part of the government’s case in chief, but without such information being disclosed to the alien defendant other than in the unclassified summary.\(^{55}\)

If the court finds the proposed summary inadequate, however, “the removal hearing shall be terminated” unless the judge finds both that “the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person,” and “the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any


\(^{49}\) Id. § 1533(a)(1).

\(^{50}\) Id. § 1533(c)(2). The government may supplement its application with “information, including classified information, presented under oath or affirmation” and testimony at a hearing on the application. Id. § 1533(c)(1).

\(^{51}\) Id. § 1533(a)(2).

\(^{52}\) Id. § 1534(c)(5).

\(^{53}\) Id. § 1534(e)(3)(A), (B).


\(^{55}\) Id. § 1534(f), (i), (j). If the alien defendant holds permanent resident status, the ATRC will appoint cleared counsel who can “review[] in camera the classified information on behalf of the alien” and “challeng[e] through an in camera proceeding the veracity of the evidence contained in the classified information.” Id. § 1534(e)(3)(F)(i). Cleared counsel may not, however, “disclose the [classified] information to the alien or to any other attorney representing the alien.” Id. § 1534(e)(3)(F)(ii)(I).
person."56 Where the judge finds that both criteria are met, the removal hearing proceeds, the alien is advised that “no summary is possible,” and the classified information is entered as evidence for the court’s consideration.57

The removal hearing itself is open to the public and must occur “as expeditiously as practicable.”58 The alien defendant has the rights to be represented by counsel at government expense,59 and to present evidence,60 subpoena witnesses,61 and cross-examine the government’s witnesses (except on issues related to classified information).62 The alien may not, however, seek to suppress evidence on the basis that it was unlawfully obtained.63

Following the hearing, the ATRC must issue a written ruling,64 which either party may appeal to the U.S. Court of Appeals for the District of Columbia Circuit.65 Notably, if an alien was not provided with an unclassified summary of the classified evidence by the government, appeal is automatic66 and findings of fact are reviewed de novo.67 All appeals are to be handled on an expedited basis, with the court of appeals required to issue a decision within sixty days of the ATRC’s decision.68

Notwithstanding this detailed process, the ATRC has not been used in any way since its creation in 1996,69 Although the court has remained continuously constituted by five federal judges who are selected by the Chief Justice of the

56 Id. § 1534(e)(3)(D)(ii), (iii). The government is also provided one opportunity to revise the unclassified summary in an attempt to “correct the deficiencies identified by the court.” Id. § 1534(e)(3)(D)(i).
57 Id. § 1534(e)(3)(E).
58 Id. § 1534(a).
59 Id. § 1534(c)(1).
61 Id. § 1534(d).
62 Id. § 1534(c)(3), (d)(1), (d)(5), (e)(2).
63 Id. § 1534(e)(1)(B).
64 Id. § 1534(j). The court must redact any portion of its written decision “that would reveal the substance or source” of classified information that was submitted in camera and ex parte. Id.
65 Id. § 1535(c).
67 Id. § 1535(c)(4)(D).
68 Id. § 1535(c)(4)(A), (B).
69 See supra note 1.
United States, the Department of Justice has yet to submit an application for

III. THE CONTINUING NEED FOR THE ATRC

In light of the ATRC’s complete non-use since its genesis and the
subsequent enactment of legislation implicating its potential pool of cases, the
threshold question of whether such a court is needed must be addressed.\footnote{Notably, the ATRC is not the only zombie federal court to have existed. For example, in 1971, Congress created the Temporary Emergency Court of Appeals (based on the prior Emergency Court of Appeals), which had “exclusive jurisdiction to hear appeals from the decisions of the U.S. district courts in cases arising under the wage and price control program of the Economic Stabilization Act of 1970.” Temporary Emergency Court of Appeals, 1971–1992, FED. JUD. CTR., https://www.fjc.gov/history/courts/temporary-emergency-court-appeals-1971-1992 [https://perma.cc/363Z-YX4J]. That court was abolished in 1992. Id. And in 1973, Congress created the Special Railroad Court, “which facilitated the consolidation and management of several railroads undergoing bankruptcy reorganization.” Special Railroad Court, 1974–1997, FED. JUD. CTR., https://www.fjc.gov/history/courts/special-railroad-court-1974-1997 [https://perma.cc/FA9T-ETVN]. The Special Railroad Court was abolished in 1997. Id. The authors are unaware, however, of any other Article III court that, like the ATRC, has never heard a case and has not been abolished. It bears noting, however, that the FISA Review Court heard its first case more than twenty years after its creation. See In re Sealed Case, 310 F.3d 717, 719 (FISA Ct. Rev. 2002) (noting that this case was the first appeal to the Court of Review since the passage of FISA in 1978). Theoretically, it is possible that the ATRC is simply a once-every-twenty-five-years court and its time for use has not yet come.} Indeed, subsequent legislative changes to other sections of the Immigration and Nationality Act (INA) have materially changed the landscape upon which the ATRC was originally designed. Even taking these factors into account, however, we believe there is still a need for the ATRC as a venue for the most difficult removal cases.
The ATRC was intended to be a low-volume court. Congress created numerous threshold barriers for potential cases before they would reach the ATRC. For example, an application seeking to initiate ATRC proceedings must certify that "removal under [conventional administrative removal proceedings before an immigration judge] would pose a risk to the national security of the United States." Thus, cases should strictly go through conventional removal proceedings if possible without risking the exposure of national security information. Congress specified that the ATRC is only to be used where the Attorney General determines that resorting to conventional removal proceedings would jeopardize national security. Moreover, given the Department of Justice’s law enforcement mission and the significant burden the ATRC statutes place on the most senior Department leadership before initiation of an action, there is strong incentive for the government to pursue criminal charges whenever possible.

Significant legislative reforms have undeniably narrowed the scope of potential cases necessitating utilization of the ATRC. In September 1996, five months after creating the ATRC, Congress enacted IIRIRA. IIRIRA modified the process for removal proceedings to require that a respondent placed in conventional administrative removal proceedings has the initial burden to prove lawful admission by an immigration officer, or if he cannot prove prior admission to the United States, to prove that he is admissible to the United States. Only if the individual proves lawful admission does the burden shift to the government to prove removability from the United States. Notably, the government may introduce and rely on classified information that the

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73 See, e.g., Andrew Becker, Terrorist Court Unused 16 Years After Creation, CAL. WATCH (Apr. 12, 2012), https://archive.ph/v0ga3 [https://perma.cc/JYJ8-DHRC] (citing DOJ officials as indicating "the court was intended to be low volume, as most suspected foreign terrorists can be removed without the use of classified evidence").


75 Id.

76 Id.


79 Notably, however, conviction and removal are not mutually exclusive; an alien convicted of a terrorism offense who serves out his or her criminal sentence is likely removable, see id. §§ 1227(a)(2)(A)(iii) (aggravated felony), 1227(a)(4)(B) (terrorist activity), and 1101(a)(43) (listing aggravated felonies), and presumably, removal proceedings will be initiated against such individuals in most if not all cases. See, e.g., Meskini v. Att’y Gen., No. 4:14-cv-42, 2018 WL 1321576, at *2 (M.D. Ga. Mar. 14, 2018) (discussing post-incarceration efforts to remove individuals convicted of terrorism-related offenses).


81 8 U.S.C. § 1229a(c)(2).

82 Id. § 1229a(c)(3)(A).
immigration court reviews ex parte and in camera in circumstances where the noncitizen argues that he is admissible at the time of the commencement of the conventional removal proceedings rather than some previous admission. Thus, IIRIRA erected a key threshold barrier for potential ATRC cases by making it easier to use conventional removal proceedings in situations where the respondent was never inspected. Importantly, however, the IIRIRA amendments did not provide the ability to rely ex parte on classified evidence to establish removability of a subclass of noncitizens, lawful permanent residents (LPR).

In 2001, the PATRIOT Act expanded the definition of “engag[ing] in terrorist activit[y]” under the INA. The PATRIOT Act amendments further impacted the pool of potential ATRC cases by modifying the lack-of-knowledge defense to ensure that individuals who provided material support to a terrorist organization, regardless of their claimed subjective belief concerning the intended purpose for such support, could be found to have engaged in terrorist activity and be removable. Thus, a wider range of conduct, some of which might be provable without needing to rely on classified evidence, would support conventional removal proceedings on terrorism-related grounds.

The IIRIRA and PATRIOT Act provided additional law enforcement tools that reduced the pool of potential cases in which the ATRC might be needed. Notwithstanding, we believe there is continuing need for the ATRC in relation to a specific type of case: LPRs for whom the only viable removal charge is based on terrorism activity that can only be proven by reliance on national

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83 Id. § 1229a(b)(4)(B) (“[T]hese rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this chapter.”). Notably, the government may rely on classified evidence in all conventional removal proceedings to oppose an alien’s request for forms of discretionary relief from removal. Id.

84 See ELDREDGE ET AL., supra note 30, at 98 (“A major reason for the lack of use of the ATRC was that new immigration laws permitted the use of classified evidence in traditional deportation hearings, making recourse to a special court unnecessary.”).

85 See 8 U.S.C. § 1229b(b).


88 See, e.g., ELDREDGE ET AL., supra note 30, at 98. We note that it is theoretically possible that the PATRIOT Act’s expanded definition language might qualify more cases for ATRC consideration.
security information that cannot be declassified. A removal of terrorist LPRs was likely the “main impetus of the ATRC.”

LPR defendants—which, at this point, are likely to be the only defendants due to the availability of other criminal and civil enforcement tools—are entitled to additional procedural protections that are not available to other noncitizens if there is no unclassified summary provided. These include a court-appointed, government-funded, cleared counsel who is entitled to review the underlying classified information and challenge it on the merits. This is similar to the procedural rights afforded by the Classified Information Procedures Act (CIPA) context, and like the classified information accessed under a CIPA protective order, such attorney is prohibited from disclosing any of the classified information to the defendant.

Moreover, LPR terrorists present a real threat, according to data on terrorist attacks by foreign-born individuals. A 2019 Cato Institute report found that foreign-born terrorists were responsible for at least eighty-six percent (or 3037) of the 3518 murders caused by terrorists on U.S. soil from 1975 through the end of 2017. The report also found that there were “192 foreign-born terrorists who planned, attempted, or carried out attacks on U.S. soil from 1975 through 2017.” The most common category of immigration status for the foreign-born terrorists was LPR; indeed “[m]ore terrorists have taken advantage of the LPR

89 See, e.g., Sarah Lorr, Note, Reconciling Classified Evidence and a Petitioner’s Right to a “Meaningful Review” at Guantánamo Bay: A Legislative Solution, 77 FORDHAM L. REV. 2669, 2708 (2009) (noting that, theoretically, “the ATRC could be used to remove residents currently within the country and also permanent residents entering at a border where the government has secret evidence against them”).

90 Blum, supra note 22, at 685 (“[T]he main impetus of the ATRC appears to be deporting LPRs who are engaging in terrorist activity.”); id. at 691 (“Congress presumably created the ATRC to deal with LPRs charged under terrorist grounds of deportability.”).


92 Id. § 1534(c)(1), (e)(3)(F). One scholar has argued that this provision renders the classified evidence “non-secret.” See Niles, supra note 40, at 1860 (arguing that where cleared counsel is provided and allowed to review the classified evidence, e.g., where the case involves an LPR, “the evidence is not secret . . . [a]lthough the resident alien does not view the secret evidence personally, for the purposes of cross-examining the evidence the alien may fairly be said to view it constructively through the eyes of the special attorney”).

93 Lorr, supra note 89, at 2710 (“As in CIPA, the attorney cannot disclose the classified information to the alien.”).


96 See id. An additional “68 were murdered by unidentified terrorists.” Id.

97 Id. Notably, the report “counts terrorists who were discovered trying to enter the United States on a forged passport or visa as illegal immigrants.” Id. By contrast, there were “788 native-born terrorists who planned, attempted, or carried out attacks on U.S. soil from 1975 through 2017.” Id. That said, there is no method for removing a natural-born terrorist.
category than of any other visa category.” Thus, contrary to what might be expected, “most foreign-born terrorists often live [in the United States] peacefully for years before concocting their schemes.” It is important to have a tool to remove such individuals where the government discovers and classified evidence shows that they are engaging in terrorist activity, including planning an attack.

The ATRC is also necessary to utilize specific types of evidence without compromising the underlying sources. Most notably, the ATRC statutes waive the requirement of notice to a defendant where the government intends to use evidence that is obtained or derived from an electronic surveillance under the Foreign Intelligence Surveillance Act (FISA). This varies from the general rule requiring such notice, which otherwise applies in every “trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States.” Similarly, using the ATRC may be necessary for cases involving evidence that was collected by a foreign government, particularly by human intelligence sources, and shared with the United States. Thus, using such evidence in a criminal case or as part of the case in chief in conventional removal proceedings for an LPR would require disclosing its existence, which “can pose an obstacle to future cooperation between the United States and the foreign government.”

Evidence obtained via the intelligence of a foreign government is often provided to the United States with the caveat that it and the cooperation that furnished it remain secret. And where the evidence comes from a witness who is a foreign intelligence agent or human source, the foreign government may simply refuse to allow the witness to testify. Foreign governments do not always follow the same protocols as United States law enforcement when collecting evidence.
Importantly, regardless of how the United States obtained the evidence, the ATRC will not entertain motions by the defendant to suppress the evidence.\textsuperscript{107}

Finally, maintaining the ATRC is generally a cost-neutral proposition.\textsuperscript{108} The five judges who serve on the ATRC do so as a collateral responsibility and do not receive additional compensation.\textsuperscript{109} The ATRC has no budget or staff, and “exists without a website or even a physical meeting place.”\textsuperscript{110} The court’s procedures were enacted decades ago and remain in place, waiting for the moment when the court is called into action.\textsuperscript{111} To the extent there is any cost, it is substantially outweighed by the “human cost of LPR terrorism” which one estimate totals as $255 million over a forty-three-year period ending in 2017.\textsuperscript{112}

IV. LEGISLATIVE PROPOSALS

A commonly advanced hypothesis to explain the ATRC’s non-utilization is the lack of certainty regarding the constitutionality of the court’s adjudicatory procedures under the Fifth Amendment’s due process guarantee.\textsuperscript{113} While


\textsuperscript{109} Sorrell, \textit{supra} note 108 (citing a spokesperson for the Administration Office of the U.S. Courts); Becker, \textit{supra} note 73.


\textsuperscript{112} See Nowrosteh, \textit{supra} note 95.

\textsuperscript{113} \textit{See}, \textit{e.g.}, \textsc{Stephen Dycus et al., National Security Law} 856 (4th ed. 2007) (“It may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it.”); Blum, \textit{supra} note 22, at 703 (“Many scholars have argued that the ATRC deprives aliens of procedural due process under the Fifth Amendment; hence, its non-use may reflect a fear that if it was used to remove aliens based on classified evidence, it may be struck down as unconstitutional.”); \textit{id.} at 704–10 (reviewing arguments made against constitutionality of ATRC); Niles, \textit{supra} note 40, at 1837 (“Perhaps out of fear about the ATRC’s constitutionality, the attorney general has never used the court.”).
debate on that topic is to be expected because the statutory scheme has never been judicially tested, we view such explanation as incomplete because it does not meaningfully consider or examine the nuance we explore in this Article.\textsuperscript{114} The United States has proven itself willing to test the due process muster of its various national security or immigration enforcement tools.\textsuperscript{115} Presumably, a number of circumstances have arisen since the AEDPA’s passage that would justify risking constitutional challenges to the statute or to the court by using it. The 9/11 Commission staff report indicates that at least 100 cases had been referred to and reviewed by the Department of Justice for possible ATRC proceedings.\textsuperscript{116} The report acknowledges that many of the potential cases were “overwhelmed” by “the procedural complexities,” or “stalled by internal Justice Department deliberations” related to, among other things, the risk to the underlying classified information, which the FBI refused to make available for prosecution purposes.\textsuperscript{117}

Accordingly, we conclude that the non-use of the ATRC is due to procedural hurdles erected by the original legislation.\textsuperscript{118} In particular, the dual findings required for the ATRC to authorize the use of classified evidence without an unclassified summary of such evidence impose an unworkably high burden on the government, preventing use of the ATRC for exactly the type of cases that it was intended to hear.\textsuperscript{119} Additionally, the unique and imprecise

\textsuperscript{114} See ELDRIDGE ET AL., supra note 30, at 98 (noting numerous reasons why cases were not pursued, including “procedural complexities that soon overwhelmed these terrorist cases”).


\textsuperscript{116} See ELDRIDGE ET AL., supra note 30, at 97–98 (“[B]y 1998, Justice attorneys in the Terrorism and Violent Crime Section had led a department review of 50 cases for possible application to the ATRC, but they were all rejected. Over the following two years, another 50 cases were rejected.” (internal footnotes omitted)).

\textsuperscript{117} See id. at 98. The 9/11 Commission Staff’s report was based, among other things, on interviews in 2003 and 2004 with former INS Commissioner Doris Meissner and Dan Cadman and Laura Baxter, who worked for INS’s National Security Unit, which was then responsible for case referrals to the ATRC. Id. at 96, 108. Notably, some potential ATRC cases also stalled because of internal deliberations regarding “alien rights [] and sufficiency of evidence.” Id. at 98.

\textsuperscript{118} Cf. David A. Martin, Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate, 18 GEO. IMMIGR. L.J. 305, 316 (2004) (“To date the ATRC has not been used, probably owing to the very narrow range of circumstances that come within its jurisdiction—a statutory restriction that is not well understood.”); Valentine, supra note 21, at 1–2 (“[T]he statutory restraints on the [ATRC] make it effectively useless.”).

\textsuperscript{119} 147 CONG. REC. S11,578 (daily ed. Nov. 8, 2001) (statement of Sen. Smith) (“I have been informed that the notice requirements and other procedural obstacles that force the Federal Government to disclose classified information just basically renders the [ATRC]
standard that describes the threat posed by publicly disclosing necessary classified evidence severely diminishes the utility of the ATRC statutes as a prosecutorial tool. These barriers should be acknowledged and legislatively corrected to render the ATRC a viable forum for appropriate cases, as originally intended.

A. The Dual Findings Necessary to Utilize Classified Information Where No Adequate Summary Is Possible Should Instead Be Alternative Options

The ATRC was created so that the federal government could introduce classified evidence in support of its effort to remove noncitizens engaged in terrorist activity while preserving the classified nature of that evidence and its sources. As discussed above, the government can only introduce classified evidence in the ATRC removal proceeding in two circumstances. First, classified evidence can be admitted where the ATRC deems the government’s proposed unclassified summary to be “sufficient to enable the alien to prepare a defense.” Second, even where the court finds the proposed summary inadequate, it can nonetheless admit the classified information into evidence if

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121 As a threshold point and notwithstanding questions of judicial deference doctrine applicability or the congressional Article III court creation authority, the Department of Justice lacks the authority to regulate to remedy some of these and other issues because the ATRC statutes—as they relate to judicial administration and standards—are not organic to the Department. See, e.g., Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 674–75 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

122 See supra Part III.

123 8 U.S.C. § 1534(e)(3) (2012). This is specific to the removal hearing itself, as opposed to the application for the initiation of such a proceeding. See id. § 1533(a).

124 Id. § 1534(e)(3)(C).
it makes certain findings.\textsuperscript{125} It is those findings that pose one of the biggest barriers to the use of the ATRC.

By statute, the ATRC can only admit classified information into evidence without the provision of an unclassified summary if it determines that:

(I) the continued presence of the alien in the United States would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person, and (II) the provision of the summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.\textsuperscript{126}

Because the statute uses the conjunctive “and,” the ATRC must find that both (I) and (II) are satisfied.

It would be imprudent for the government to begin the ATRC process in precedent-setting circumstances when it is not reasonably confident that it will be able to rely on the very classified evidence that warrants the use of such venue from the start.\textsuperscript{127} It would be rare that the government can rest assured that its proposed summary will be deemed adequate.\textsuperscript{128} If such a summary were

\textsuperscript{125}Id. § 1534(e)(3)(D)(ii).

\textsuperscript{126}Id. § 1534(e)(3)(D)(ii)–(iii). The government is also provided one opportunity to revise the unclassified summary in an attempt to “correct the deficiencies identified by the court.” Id. § 1534(e)(3)(D)(i).

\textsuperscript{127}Although many aspects of the ATRC process are similar to the Classified Information Procedures Act (CIPA), the two are analytically distinct and used for very different purposes. See Blum, supra note 22, at 681 n.9. CIPA, applies only to criminal cases. See CIPA, Pub. L. No. 96-456, 94 Stat. 2025, 2025 (1980) (“An Act [t]o provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.”) (emphasis added)); United States v. Sum of $70,990,605, No. 12-cv-1905, 2015 WL 1021118, at *5 (D.D.C. Mar. 6, 2015) (“CIPA is reserved for criminal cases . . . .”). CIPA is intended to allow the government to know what classified information must be produced in discovery and what may come in at trial. Sum, 2015 WL 1021118, at *5. (“CIPA provides criminal procedures that permit a trial judge to rule on the relevance or admissibility of classified information in a secure setting.”) (citation omitted)); 18 U.S.C. App. 3 §§ 4, 6, 8 (2009).

Unlike the ATRC, CIPA does not allow the introduction of evidence in the case in chief to which the Defendant does not personally have access. Id. § 6(f); Lorr, supra note 89, at 2712 (“[I]mmigration is the only area of the law where absolutely secret evidence is permitted as evidence in an adversarial setting.”); id. at 2699 (“CIPA does not allow a jury to see any information that the defendant himself cannot see.”). In 2001, Rep. David Bonior unsuccessfully proposed legislation that would have made CIPA applicable to immigration proceedings, including proceedings in the ATRC. See generally Secret Evidence Repeal Act of 2001, H.R. 1266, 107th Cong.

\textsuperscript{128}Niles, supra note 40, at 1857. As Niles notes, the adequate summary requirement is “unrealistic” in most cases that would end up at the ATRC. Id. A case will have only made it to that stage after the Attorney General found, and an Article III judge agreed, there is probable cause to believe the defendant is an alien terrorist and that conventional removal proceedings would pose a risk to the national security. Id. at 1857–58; 8 U.S.C. § 1533; see also Jennifer A. Beall, Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism, 73 IND. L.J. 693, 707 (1998) (arguing “[i]t is also
sufficiently specific, it would risk revealing to the alien or others the government’s classified information, sources, and, potentially, methods of collection. This results in a Catch-22, which one former high-level Department of Justice official has described:

If the government prepares an unclassified summary of the evidence that is too vague and general, it will not be approved by the Judge. If, on the other hand, the evidence is too clear and specific, the classified evidence itself will be effectively disclosed, thus harming national security by compromising sources and methods of intelligence gathering.

Given this Catch-22 and the very real likelihood that it will be unable to share enough information for the ATRC to deem the summary adequate, before initiating a case, the Department of Justice must determine whether it can satisfy the standard for proceeding without an adequate unclassified summary. Meeting both prongs of that standard, however, imposes an untenable burden on the government. The government must show not only that the information is properly classified at a very high level (Finding II), but also that allowing the alien to remain in the United States would cause “serious and irreparable

unclear how detailed the summary must be” as it appears to be left entirely to judicial discretion.

See Niles, supra note 40, at 1857; see also 147 Cong. Rec. S11,577–78 (daily ed. Nov. 8, 2001) (statement of Sen. Smith). Senator Smith attributed non-use of the ATRC to the statute’s notice provision “that render the court ineffective and useless”: “[The Federal Government and intelligence community] are damned if they do and damned if they don’t because if they provide the information, they compromise their own sources and methods. If they don’t provide it, we can’t deport them.” Id.


Kendall, supra note 108, at 269 (noting that it has been argued that the ATRC was designed to allow the government to avoid having “to choose between allowing the alien’s continued stay in the U.S., which threatens national security, or to disclose its reasons for initiating the alien’s deportation, a disclosure which in itself could endanger the country”).

See Proposed Amend. 2114 to S. 1428, 147 Cong. Rec. S11,630–31 (daily ed. Nov. 8, 2001) (proposing an amendment to the ATRC statutes to allow for use of classified information without any requirement for an unclassified summary) (“The [ATRC] has never been used because the United States is required to submit for judicial approval an unclassified summary of the classified evidence against the alien. If too general, this summary will be disapproved by the Judge. If too specific, this summary will compromise the underlying classified information.”); 147 Cong. Rec. S11,577 (daily ed. Nov. 8, 2001) (statement by Sen. Smith) (“The reason for [the ATRC’s non-use] is we are required under the law to submit to the terrorist a summary of the intelligence we gathered on him and how we got it. Obviously, if the terrorist gets that information, then the people who provided that information are going to be killed or their lives will be at risk.”).

See infra Part IV.B discussing the lack of clarity regarding the level of classification required.
harm” to the national security or grave physical harm to another person (Finding I).134

Consider two illustrative hypothetical fact patterns of possible ATRC candidate cases that would ultimately fail due to the conjunctive finding requirement:

**Hypothetical Case 1.** Suppose the government had FISA-obtained information classified at the Top Secret level—utilized only where disclosure of the information would result in exceptionally grave damage to the national security—indicating that the alien defendant was raising funds for a new terrorist organization that has stated its intention to attack U.S. citizens abroad, and has what appears to be a viable plan for doing so, but whose immediate capabilities are nonexistent or seriously in question.135 Such information would likely satisfy required Finding II because of the damage that would likely be caused by revealing the classified information or source, but it might not establish that the alien’s continued presence in the United States “would likely” result in serious and irreparable damage to the United States or an individual (required Finding I).136

**Hypothetical Case 2.** Conversely, suppose the government had information obtained other than from a human source and classified at the Secret level—utilized where disclosure of the information would result in serious damage to the national security—indicating that the alien defendant was intending to physically attack a senior official at a foreign country’s mission to the United Nations in New York City.137 Such information would likely satisfy required Finding I because of the danger to the individual, but arguably not required Finding II because the classification level of the evidence would indicate that disclosure of such information is not expected to rise to the level of “serious and irreparable” damage.138

Both hypotheticals assume that the dispositive evidence cannot not be declassified and that traditional administrative removal proceedings are not viable, and thus, present as the type of cases that the ATRC was created to handle. It seems inappropriate to force the government to make a Hobson’s choice between (a) allowing such individuals to remain in the United States and dedicating substantial law enforcement resources to monitor their activity or (b)

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136 8 U.S.C. § 1534(e)(3)(D)(iii); see also infra Part IV.B discussing the lack of clarity regarding the level of classification required.
138 8 U.S.C. § 1534(e)(3)(D)(iii); see also infra Part IV.B.
disclosing the classified information (and perhaps burning the underlying methods or sources) in order to seek the terrorist-alien’s removal.\footnote{139}

To render the ATRC workable, Congress should revise 8 U.S.C. § 1354(e)(3)(D)(iii) so that either finding would allow the removal hearing to move forward without a summary. Replacing the conjunctive “and” with the disjunctive “or” would increase the likelihood that the Department of Justice will utilize the ATRC for the most serious removal cases. Such change would make the above hypothetical cases viable cases for ATRC consideration as a statutory and practical administration matter.

Moreover, changing the statute to the disjunctive comports with the bills originally introduced by President Clinton and several senior Democrat Senators.\footnote{140} Both of those bills provided that the removal hearing could proceed without a summary if the ATRC found:

(A) the continued presence of the alien in the United States, or
(B) the provision of the required summary would likely cause serious and irreparable harm to the national security or death or serious bodily injury to any person.\footnote{141}

Thus, the original proposals by the Democrat Senators required the ATRC to make either Finding I or Finding II, not both.\footnote{142}

The legislative history is unclear how the findings ended up being written in the conjunctive, which appears to have occurred when Republican leadership incorporated a more robust version of the ATRC provisions into the bill originally proposed by Senator Dole one week after the Oklahoma City bombing.\footnote{143}

Regardless of whether the findings were required in the conjunctive by way of a drafting error or intentionally, revising them to be disjunctive alternatives

\footnote{139 Cf. 141 CONG. REC. S7480 (daily ed. May 25, 1995) (statement of Sen. Hatch) (“The success of our counter-terrorism efforts depends on the effective use of classified information used to infiltrate foreign terrorist groups. We cannot afford to turn over these secrets in open court, jeopardizing both the future success of these programs and the lives of those who carry them out.”)).

\footnote{140 See S. 390, 104th Cong. § 502(e)(2) (1995) (introduced on behalf of President Clinton) (using disjunctive “or”); 141 CONG. REC. S2508 (daily ed. Feb. 10, 1995) (section-by-section analysis) (using disjunctive “or”); Omnibus Counterterrorism Act of 1995, S. 761, 104th Cong. § 502(e)(2) (introduced by five Democrat Senators) (using disjunctive “or”); 141 CONG. REC. S6206 (daily ed. May 5, 1995) (section-by-section analysis) (using disjunctive “or”). The Reagan Administration-sponsored bill that originally sought to create a special alien terrorist court likewise allowed for proof in the disjunctive. See 137 CONG. REC. S1187 (daily ed. Jan. 24, 1991) (including language that read “if necessary to prevent serious harm to the national security or death or serious bodily injury to any person, a statement informing the alien that no such summary is possible” (emphasis added)).

\footnote{141 See S. 390, 104th Cong. § 502(e)(2) (emphasis added); S. 761, 104th Cong. § 502(e)(2) (emphasis added).

\footnote{142 See S. 390, 104th Cong. § 502(e)(2); S. 761, 104th Cong. § 502(e)(2).

\footnote{143 See supra Part II.A discussing the legislative history of the ATRC.}
would be a serious step toward addressing “the Catch-22 situation that has crippled the Alien Terrorist Removal Court.”

B. The Classification Level for Evidence Deemed Sufficient to Proceed Without a Summary Is Unclear and Should Be Revised

As shown above, in most if not all cases, the ATRC will be required to determine whether the government has made the showing required to proceed without an unclassified summary. In addition to imposing too heavy of a burden on the government, the current statutory scheme uses language that has no clear legal analogue to describe the risk to the national security posed by the release of specific evidence.

Specifically, § 1534(e)(3)(D)(iii) uses the phrase “serious and irreparable harm to the national security,” a novel phrase in the United States Code that does not appear in any court decision. Utilization of such an untethered standard creates a framework that lacks clarity for both the Department of Justice and the ATRC, and further impairs the viability of the court. To remedy this situation and render the ATRC a viable venue, Congress should revise the statute to utilize its preferred classification level.

“Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity.” In 1951, President Harry S. Truman extended the classification system from the military to civilian departments and agencies of the federal government, and created the familiar classification levels of “top secret,” “secret,” and “confidential.” And since at least 1978, the United States has used the same standards for classifying evidence at each of those levels. Given the durability and consistency of their use, the standards are

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144 Valentine, supra note 21, at 3.
145 See supra Part IV.A.
146 See supra Part II.A.
147 The only other context in which we have located this phrase is in U.S. Department of Justice Assistant Attorney General Rex Lee’s testimony to the U.S. House of Representatives Select Committee on Intelligence in 1975 regarding the committee’s release of classified information. U.S. Intelligence Agencies & Activities: Intelligence Costs and Fiscal Procedures: Hearings Before the H. Select Comm. on Intelligence, 94th Cong. 679 (1975) (statement of Asst’t Gen. Rex E. Lee, Civil Division, Department of Justice) (“In addition, the release of classified information such as the Committee has done, and has stated it will continue to do, causes serious and irreparable harm to the national security and foreign relations of the United States.”). This statement did not require judicial application of the standard.
This familiarity renders workable executive determinations on classification, and judicial review of such determinations.

In direct contrast to the well-established standards for classification levels, the ATRC statutes utilize the phrase “serious and irreparable harm to the national security.” This combination of words has only been used in the ATRC statute. Though standing alone, the “serious and irreparable harm” standard aligns with the equitable standard for issuing a preliminary injunction, its application to the more nebulous concept of “national security” is less clear than its application to a specific organization or individual.

Moreover, the language used to describe the harm to the national security is also in direct contrast to the utilization of a well-established standard with regard to the harm that would be caused to an individual. The ATRC statutes allow for the use of classified evidence without a summary if the court determines that the “continued presence of the alien in the United States” and the “provision of [an adequate] summary would likely cause . . . death or serious bodily injury to any person.” The “death or serious bodily injury” standard is relatively simple to apply. “Death,” of course, is self-explanatory. And “serious bodily injury” is a term that is defined elsewhere in federal statutes, and in


153 The closest phrasing the authors located in a statutory or Article III context was a line in a brief filed on behalf of the Secretary of the Navy. See Brief of Federal Defendants-Appellants at 10, Nat. Res. Def. Council, Inc. v. Winter, 508 F.3d 885 (9th Cir. 2007) (No. 07-56157), 2007 WL 3069208 (“The district court then dismissed in a single sentence the evidence showing that a preliminary injunction would cause serious and irreparable harm to the Navy and national security.”).

154 See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

155 “National security” is statutorily defined within the ATRC statutes to broadly mean “the national defense and foreign relations of the United States,” a definition incorporated from the Classified Information Protection Act. 8 U.S.C. § 1531 (2012) (incorporating 18 U.S.C. App. 3 § 1 (2009)); cf. AMOS A. JORDAN ET AL., AMERICAN NATIONAL SECURITY 4 (6th ed. 2009) (noting the multiple principles covered by the term “national security” and stating that “[p]reserving the national security of the United States requires safeguarding individual freedoms and other U.S. values, as well as the laws and institutions established to protect them”).


157 See, e.g., 18 U.S.C. § 1365(h)(3) (2012) (“[T]he term `serious bodily injury’ means bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function
the U.S. Sentencing Guidelines.\textsuperscript{158} It is a familiar, discernible standard that can be applied to determine whether the government has adduced sufficient evidence to satisfy the ATRC standards with regard to the risk posed to an individual.

Legislative revision would bring similar predictability and uniformity to the ATRC’s standard for the type of harm posed to the national security. In light of the well-established classification level standards and the nature of the court, Congress would be well served to utilize the language that has become so ingrained in the national security framework. The application of these standards would permit the Department of Justice sufficient predictability in assessing whether the classified information in support of removing the potential defendant is of the type intended by Congress to justify proceeding without an unclassified summary.\textsuperscript{159}

As noted above, the ATRC statutes use the phrase “serious and irreparable harm to the national security.”\textsuperscript{160} That standard appears to exist somewhere between the standards for classifying evidence as “Secret” (“serious damage”) and “Top Secret” (“exceptionally grave damage”).\textsuperscript{161} In light of Congress’s original drafting choice, we suggest that the classification standard for Secret be used. This would facilitate the United States’ non-disclosure of information that would pose serious damage to the national security to the public and to a defendant for whom the Attorney General and an Article III judge on the ATRC have already found probable cause to believe is an alien terrorist.\textsuperscript{162} This is a functional solution, particularly in light of the fact that the alien defendant may be entitled to government-financed, cleared counsel who will be able to review the classified evidence against the defendant,\textsuperscript{163} and to automatic expedited appeal under a de novo standard of review.\textsuperscript{164}
C. Other Revisions to Better Enumerate Congress’s Intent

While making the foregoing critical changes to the ATRC statutes, Congress should also utilize the opportunity to clarify its original intent with certain clarifications.

1. Clarifying that Classified Evidence Is Appropriate for Consideration on the Merits

The ATRC statutes should be modified to make clear that classified evidence submitted to the court for in camera and ex parte review is properly part of the basis for the court’s removal decision.\footnote{165}{See \textit{id.} § 1534(c)(5).} The ability to introduce classified evidence in support of removal is the ATRC’s raison d’être.\footnote{166}{See \textit{Effective Immigration Controls to Deter Terrorism, Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary, 107th Cong. 47 (2001), https://www.hsdl.org/?abstract&did=2388} [https://perma.cc/U3J7-8SDY] (statement of Jeanne A. Butterfield, Executive Director, American Immigration Lawyers Association) (“[T]he new Alien Terrorist Removal Procedures . . . were designed to allow the government to conduct deportation hearings with the use of secret evidence.”); \textit{ELDRIDGE ET AL.,} supra note 50, at 97 (“[T]he Alien Terrorist Removal Court . . . [was] expressly designed to remove alien terrorists by using classified evidence to support a terrorist allegation and by staffed by [sic] counsel possessing the security clearances necessary to review classified evidence.”); \textit{Alien Terrorist Removal Court}, 45 U.S. ATTORNEYS’ BULL. 55, 55 (1997), https://www.justice.gov/sites/default/files/usao/legacy/2007/01/11/usab4505.pdf [https://perma.cc/8XJE-AGQJ] (“[The] ATRC is designed to allow the United States to deport alien terrorists on the basis of classified information without having to disclose that information to the alien or the public.”); Martin, \textit{supra} note 118, at 316 (“Only since 1996 has the government been authorized to use confidential information as part of the case in chief supporting removability of an admitted alien, and only in the context of unique proceedings before a special tribunal known as the Alien Terrorist Removal Court . . . .”).\footnote{167}{§ U.S.C. § 1534(c)(5). This is in contrast to the provision allowing the ATRC to base its initial probable cause determination on such evidence. \textit{id.} § 1533(c)(1) (“In determining whether to grant an application under this section, a single judge of the removal court may consider, ex parte and in camera, in addition to the information contained in the application—(A) other information, including classified information . . . .”).\textit{ Id.} § 1534(a)(2).\textit{ Id.} § 1534(j) (“Any portion of the order that would reveal the substance or source of information received in camera and ex parte pursuant to subsection (e) of this section shall not be made available to the alien or the public.”).}

Notably that “removal hearing” is “open to public.”\footnote{168}{See \textit{id.} § 1534(a)(2).} But Congress provided elsewhere that the ATRC’s written “decision as to whether the alien shall be removed” should only be made publicly available after appropriate redactions have been made.\footnote{169}{See \textit{id.} § 1534(j).} Thus, Congress contemplated that
the court would receive classified evidence in support of removal in camera and
ex parte, and be able to rely on such information in making its removal
determination.170 We propose the inclusion of similar language to clarify that
consideration of such information is proper. Congress should include the phrase
“and all classified evidence submitted to the court for in camera and ex parte
review” at the end of the subparagraph delineating the evidence that can be
relied upon in making the removal decision.171

2. Clarifying that the ATRC Should Be Evaluating the Risk Posted by
Disclosure of an “Adequate Summary,” Which Would Include
Disclosure of Classified Information

The reference to “summary” in the subsection establishing the standard for
when the government can proceed without the provision of an unclassified
summary should be clarified.172 It refers to “the summary,” which is unclear
because the subsection applies only in the context where the government has
proposed an unclassified summary (i.e., one which would not pose such a
risk)173 which the ATRC has determined to be inadequate.174 The language
should be revised to say “an adequate summary” to capture Congress’s intent
that the ATRC evaluate the risk posed to the national security by producing a
summary that would be adequate (i.e., one that would likely contain classified
information).

3. Correcting Clerical Errors in Statutory Language and Cross
References

Any legislation to address the issues discussed in this Article should also
include provisions to correct several clerical errors. The cross-reference in
§ 1535(c)(4)(D) providing for de novo review of factual findings where a
defendant was not provided with a summary of the classified evidence should
be corrected so that it refers to the provision of § 1534 that actually addresses
that possibility.175 Likewise, § 1534 should be revised to use the singular

170 See id.
171 Id. § 1534(c)(5).
172 Id. § 1534(e)(3)(D)(iii)(II) (“The findings described in this clause are, with respect
to an alien, that . . . (II) the provision of the summary would likely cause serious and
irreparable harm to the national security or death or serious bodily injury to any person.”).
173 8 U.S.C. § 1534(e)(3)(B) (“With respect to such information, the Government shall
submit to the removal court an unclassified summary of the specific evidence that does not
pose that risk.”).
174 See generally id. § 1534(e)(3)(D).
175 See id. § 1535(c)(4)(D). Compare id. § 1534(c) (addressing a defendant’s “[r]ights
in hearing”), with id. § 1534(e)(3) (addressing “[t]reatment of classified information” and
situations in which the case can proceed without summary).
“proceeding” rather than the plural form, and to maintain uniformity in how it refers to forms of ancillary relief that are unavailable in ATRC proceedings.\textsuperscript{176}

D. This Legislative Proposal for Changes to the ATRC Is Likely Constitutional

The only actual determinant of constitutionality of the ATRC would be judicial review—which would likely culminate with Supreme Court review—of an as-applied challenge to ATRC proceedings. Much of the literature that examines the ATRC concludes that the court may be susceptible to Fifth Amendment Due Process Clause vulnerability.\textsuperscript{177} Unsurprisingly, it is difficult to guarantee whether a novel specialty court that literally considers “secret” (or “top secret”) evidence ex parte is constitutional.\textsuperscript{178} However, there are strong arguments in favor of the ATRC’s ability to withstand Fifth Amendment due process scrutiny that are not adversely affected by our proposal, especially as it applies to LPRs, the principal class of noncitizen terrorists for which we think the ATRC is still required following the passage of IIRIRA and the PATRIOT Act.\textsuperscript{179} As described below, the ATRC statutes provide LPRs with important procedural protections that are superior to protections in conventional administrative removal proceedings. Accounting for the possibility of a court identifying heightened due process rights for an LPR in ATRC proceedings,\textsuperscript{180} a due process analysis that contemplates an LPR defendant where an unclassified summary is not provided is not only the most likely scenario for the

\textsuperscript{176} See id. § 1534(e)(1)(A) (using plural “proceedings” where sentence structure calls for singular “proceeding”); see also id. § 1534(k) (including adverb “by” in a context where it makes no logical sense and is inconsistent with other disjunctive subsections).

\textsuperscript{177} See, e.g., DYCUS ET AL., supra note 113, at 856 (“It may be that constitutional doubts about the extraordinary Star Chamber quality of this special court are why the government has never used it.”); Blum, supra note 22, at 703 (“Many scholars have argued that the ATRC deprives aliens of procedural due process under the Fifth Amendment; hence, its non-use may reflect a fear that if it was used to remove aliens based on classified evidence, it may be struck down as unconstitutional.”); id. at 704–10 (reviewing arguments made against the constitutionality of ATRC); Niles, supra note 40, at 1837 (“Perhaps out of fear about the ATRC’s constitutionality, the attorney general has never used the court.”); cf. Zachery, supra note 26, at 294 (“The [ATRC] is an amalgamation of statutes which are independently constitutional . . . select[ing] constitutionally valid provisions from each statute. The result is legislation that is within the letter of the law but is arguably not within the spirit of our democracy . . . ”).

\textsuperscript{178} We do not examine the constitutionality of the detention provisions in the ATRC statutes, 8 U.S.C. §§ 1534(i), 1536(a)(2)(A), due to the high variability of their potential use and the fact that there is ample detention authority contained elsewhere in the INA under 8 U.S.C. §§ 1226, 1231 (2012).

\textsuperscript{179} See supra Part III.

\textsuperscript{180} See Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (contemplating possible variable due process protection for “an alien subject to a final order of deportation” depending on “status and circumstance”).
court’s use, but also the scenario that triggers the most procedural protections available to the defendant.

Congress carefully considered the constitutionality and the due process implications of the ATRC statutes at the time of AEDPA’s enactment. Congress intentionally engaged in due process balancing, designing what it believed would be “an effective means of removing alien terrorists from our shores, while at the same time protecting due-process concerns.” Moreover, the statutorily compliant utilization of the ATRC by senior Department of Justice leadership would squarely implicate plenary powers doctrinal considerations that could weigh in the Executive Branch’s favor on judicial review.

Due process protections are a central feature to the counter-majoritarian protections contained in the Bill of Rights, and the adjudication of a due process claim is an individualized determination. The Supreme Court has traditionally relied on the three-part balancing test in *Mathews v. Eldridge* to adjudicate Fifth Amendment procedural due process claims. In a prospective
as-applied challenge to the revised ATRC—one that is based on legislative revision and aligns with the recommendations of this Article—a court would first need to consider the varying private interest particulars of the case including any limitations on access to classified evidentiary materials, the nature of the unclassified summary to the extent one is provided, the fullness of notice related to the allegations of fact, the judgment of the ATRC on questions of both fact and law, and potentially other considerations.

The court then would likely weigh the foregoing against the government’s national security and INA enforcement interests against alleged noncitizen terrorists, along with the panoply of pro-defendant and pro-transparency procedures, especially in comparison with administrative removal proceedings, to determine “the risk of an erroneous deprivation” of the defendant’s protected interest(s) and the “probable value, if any, of additional or substitute procedural safeguards.”186 In some respects, the pro-defendant procedures of the ATRC exceed those that were afforded by the Supreme Court in its maximalist opinion regarding a welfare recipient in Goldberg v. Kelly187 and in comparison with procedures that exist in conventional administrative removal proceedings.

In particular and unlike administrative removal proceedings, there is direct political accountability for the initiation of ATRC cases, vested in the Attorney General or the Deputy Attorney General.188 There is also Article III accountability for such case initiation with a weighty probable cause standard.189 Unlike administrative removal proceedings that reserve Article III review until the completion of a two-stage administrative adjudicatory process, there is Article III administration of all stages of an ATRC case from initiation through final judgment and appeal.190 Unlike administrative removal proceedings, there is a statutory requirement for speedy proceedings in ATRC

186 Mathews, 424 U.S. at 335.
187 Goldberg v. Kelly, 397 U.S. 254, 268–71 (1970). Notably, limitation of access to classified information can implicate the particularized notice, cross-examination capability, and breadth of the written decision following the adjudication procedures that the welfare recipient in Goldberg was entitled. Id.
188 Compare 8 U.S.C. § 1229(a) (2012) (administrative removal proceedings are initiated by the lodging of a “notice to appear,” which flows from delegable authority), with id. § 1533(a)(1) (requiring non-delegable authorization).
189 Id. § 1533(c)(2). The government may supplement its application with “information, including classified information, presented under oath or affirmation” and testimony at a hearing on the application. Id. § 1533(c)(1).
190 Compare id. § 1252(a)(5)–(b) (describing a petition for review process for administratively final orders of removal), with id. §§ 1531–37 (contemplating the Article III function at all stages of adjudication).
cases,\footnote{191} and the ATRC statutes enumerate a right to government-financed counsel.\footnote{192} Moreover, LPRs who were not provided a written summary of classified information earlier in proceedings are entitled to government-funded, cleared “special” counsel to access and challenge the veracity of classified information,\footnote{193} as well as appellate de novo review of ATRC factual findings.\footnote{194} Such defendants are also entitled to a “release hearing” before an ATRC judge upon the Department of Justice’s filing of a case-initiating application to the court.\footnote{195} On appeal, there are number of unique defendant-centric advantages in ATRC proceedings that weigh favorably for the government in a Mathews inquiry.\footnote{196} There is an automatic stay of a removal order during the pendency of appeal.\footnote{197} There is automatic appeal of certain decisions,\footnote{198} and there is a requirement for expedited appeal.\footnote{199}

Given the numerous procedures that Congress mandated to make the ATRC less Star Chamber-like, a visual reference is helpful to convey the superior procedural protections that LPR noncitizens are afforded in an ATRC proceeding.

\footnote{191}{Id. § 1534(a)(1) (“[A] removal hearing shall be conducted under this section as expeditiously as practicable.”); Denise Lu & Derek Watkins, Court Backlog May Prove Bigger Barrier for Migrants than Any Wall, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html [https://perma.cc/788M-VHDG] (examining the consequences of an immigration court backlog in excess of 800,000 cases).} \footnote{192}{Id. § 1534(c)(1).} \footnote{193}{Id. § 1534(e)(3)(F).} \footnote{194}{Id. § 1535(c)(4)(D) (2012).} \footnote{195}{Id. § 1536(a)(2)(A).} \footnote{196}{See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).} \footnote{197}{Id. § 1535(c)(1).} \footnote{198}{Id. § 1535(c)(2).} \footnote{199}{Id. § 1535(c)(4).}
## Comparison of Procedures for ATRC and EOIR Proceeding for LPRs

<table>
<thead>
<tr>
<th>Procedure</th>
<th>ATRC proceedings</th>
<th>EOIR proceedings</th>
<th>Process advantage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article II political accountability to initiate and prosecute removal?</td>
<td>Yes; 8 U.S.C. § 1533(a)(1)</td>
<td>No</td>
<td>ATRC defendant</td>
</tr>
<tr>
<td>Article III probable cause threshold determination required to initiate proceeding?</td>
<td>Yes; 8 U.S.C. § 1533(c)(2)</td>
<td>No</td>
<td>ATRC defendant</td>
</tr>
<tr>
<td>Classified evidence availability without disclosure to LPR, including FISA and foreign intelligence evidence?</td>
<td>Yes; e.g., 8 U.S.C. § 1534(c)(2), (d)(5), (e)(1), (e)(3)</td>
<td>No, limited classified info. in limited situations; 8 U.S.C. § 1229a(b)(4)(B)</td>
<td>EOIR respondent</td>
</tr>
<tr>
<td>Right to (potentially cleared) counsel at the government’s expense?</td>
<td>Yes; 8 U.S.C. § 1534(c)(1), (e)(3)(F)</td>
<td>No</td>
<td>ATRC defendant</td>
</tr>
<tr>
<td>Article III removal hearing and adjudication?</td>
<td>Yes; e.g., 8 U.S.C. § 1534(i)</td>
<td>No</td>
<td>ATRC defendant</td>
</tr>
<tr>
<td>Applicability of Federal Rules of Evidence?</td>
<td>No; 8 U.S.C. § 1534(h)</td>
<td>No; see 8 U.S.C. § 1229a(c)(3)</td>
<td>N/A</td>
</tr>
<tr>
<td>Availability of nationwide subpoena power to summon witnesses, including government-funded attendance and fees?</td>
<td>Yes; 8 U.S.C. § 1534(d)(1)–(4)</td>
<td>No</td>
<td>ATRC defendant</td>
</tr>
<tr>
<td>Expedited hearing?</td>
<td>Yes; 8 U.S.C. § 1534(a)(1)</td>
<td>No</td>
<td>ATRC defendant (for detention purposes)</td>
</tr>
<tr>
<td>Immediate and potentially automatic expedited Article III appeal availability?</td>
<td>Yes; 8 U.S.C. § 1535(c)</td>
<td>No; administrative exhaustion is required, 8 U.S.C. § 1252(d)</td>
<td>ATRC defendant</td>
</tr>
</tbody>
</table>
Accordingly, there are ample procedures that could lead Article III jurists to conclude that the ATRC passes due process muster under a *Mathews* analysis, but the ultimate test will come in an as-applied challenge if and when the court is used, and then predicated principally on how persuasively primary and cleared counsel argue that the withholding of certain classified evidence creates an unacceptably high probability of judicial error.

**V. Conclusion**

Though the ATRC currently presents as a zombie court, it was created for the discrete and important purpose of reconciling the congressional imperatives of protecting national security information and removing noncitizen terrorists while maintaining fidelity to the Constitution and providing due process. It took three successive presidential administrations to enact its statutory framework, and it has existed for nearly a quarter century without hearing a single case. The IIRIRA and PATRIOT Act have since provided alternative mechanisms to hold accountable and remove non-LPRs noncitizens. Even so, the importance of the ATRC remains static for the few terrorist LPRs who cannot otherwise be removed from the United States. To the extent Congress enacts the commonsense and narrow reforms to the statutes that we propose in this Article, it is likely the ATRC will finally be rendered functional and able to fulfill its important function to provide an avenue for the removal of the most serious LPR threats to national security. Indeed, because of the ATRC’s procedural impediments, such individuals may very well currently be present in the United States for want of prosecutorial tools to remove them without compromising critical national security sources and information.
APPENDIX

Proposed Legislative Language

A BILL

To amend the provision in Title 8, United States Code, related to the Alien Terrorist Removal Court (8 U.S.C. §§ 1531–1537) to clarify the standards for utilization of the ATRC.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. UPDATING THE ALIEN TERRORIST REMOVAL COURT

(1) Title 8, United States Code, Subchapter V (8 U.S.C. 1531–1537), is amended:
   (a) by striking the period after “hearing” in section 1534(c)(5) and inserting the following language at the end: “and all classified evidence submitted to the court for in camera and ex parte review.”;
   (b) by striking “proceedings” in section 1534(e)(1)(A) and replacing with “proceeding”;
   (c) by striking “person, and” in section 1534(e)(3)(D)(iii)(I) and replacing with “person, or”;
   (d) by striking “serious and irreparable harm” in section 1534(e)(3)(D)(iii)(I) and replacing with “serious damage”;
   (e) by striking “serious and irreparable harm” in section 1534(e)(3)(D)(iii)(II) and replacing with “serious damage”;
   (f) by striking “the summary” in section 1534(e)(3)(D)(iii)(II) and replacing with “an adequate summary”; and
   (g) by striking the cross-reference to “1534(c)(3)” in section 1535(e)(4)(D) and replacing with “1534(e)(3)”. 
Judicial Ideology as a Check on Executive Power

DAVID E. ADELMAN† & ROBERT L. GLICKSMAN‡

The ideological outlook of federal judges has long been a focal point for criticism of the judiciary, but it has taken on new urgency with the escalating political rhetoric and polarization in Washington. President Trump’s recent reference to a district court judge as an “Obama Judge,” after the judge ruled against the Administration in an immigration case, exemplifies the increasingly partisan view of federal judges. In an unusually high-profile response, Chief Justice Roberts defended the judiciary by asserting categorically that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”

Justice Roberts’s statement may appear defensive or naive, particularly in an era of hyper-politicized judicial confirmations. However, setting aside the Supreme Court, the evidence that exists on the influence of judicial ideology is mixed at best, as most empirical studies find that a judge’s politics have only a modest impact on case outcomes. Existing studies also overlook how changes in executive branch policies affect judicial review and thus confound the influence of judicial ideology with presidential politics. In this study, we find that the influence of judicial ideology on case outcomes is mediated by the partisanship of the executive branch. Thus, while public debates about the federal judiciary focus on whether judges are political, the underlying driver is often politically driven conflicts between executive branch policies and governing statutes.

Overall, judicial ideology affected case outcomes in less than five percent of the appellate cases we analyzed over roughly a fifteen-year period spanning the George W. Bush and Barack Obama Administrations. The influence of ideology on case outcomes was lowest during the Obama Administration, when presidential politics aligned strongly with the environmental laws we studied. Moreover, when it was a factor during the Bush Administration, judicial ideology had a moderating effect on executive branch policies through judicial

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opinions that guided policies towards centrist positions more in line with statutory mandates, which may or may not align with the current political views of the executive branch or Congress.

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I. INTRODUCTION

The ideological outlook of federal judges has long been a focal point for criticism of the judiciary, but it has taken on new urgency with the escalating
political rhetoric and polarization in Washington. President Trump’s recent reference to district court Judge Jon Tigar as an “Obama Judge,” after he ruled against the Administration in an immigration asylum case, exemplifies the increasingly partisan view of federal judges. In an unusually high-profile response, Chief Justice Roberts defended the judiciary by asserting categorically that:

We do not have Obama judges or Trump judges, Bush judges or Clinton judges . . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.

Justice Roberts’s statement may appear defensive or naive, particularly in an era of hyper-politicized judicial confirmations. However, setting aside the

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3 Liptak, supra note 2. President Trump followed up with “[s]orry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ . . . and they have a much different point of view than the people who are charged with the safety of our country.” Id.

Supreme Court, the evidence that exists on the influence of judicial ideology is mixed at best, as most empirical studies find that a judge’s politics have only a modest impact on case outcomes. The disconnect between perceptions and empirics persists, in part, because most studies emphasize the disparities between Republican- and Democratic-appointed judges through the exclusive use of relative rates for case outcomes without considering the small absolute number of cases impacted. Further, existing studies overlook how changes in executive branch policies affect judicial review and thus confound the influence of judicial ideology with presidential politics. We find that the influence of judicial ideology on case outcomes is mediated by the partisanship of the executive branch. Thus, while public debates about the federal judiciary focus on whether judges are political, the underlying driver is often politically driven conflicts between executive branch policies and statutory mandates.

This Article examines the influence of judicial ideology in administrative review cases and presents new empirical results that qualify its significance in district and appellate courts. Focusing on litigation under two prominent environmental laws, the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), we observe statistically significant differences in plaintiffs’ success rates across circuits and presidential administrations. Our data span the George W. Bush and Barack Obama Administrations, which provide contrasting ideological outlooks for assessing the impact of presidential politics on judicial review. Overall, we find that the influence of judicial ideology affects case outcomes in less than five percent of the appellate cases.

5 See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 807 (2008) [hereinafter Miles & Sunstein, *Real World*] (finding that “our data demonstrate that judicial ideology is not playing a dominant role and that judicial policy choices are not driving arbitrariness review”).

6 See, e.g., id. (explaining that “Republican appointees vote to validate most liberal agency decisions, and Democratic appointees vote to validate most conservative agency decisions”).


8 See infra Part IV.


10 We define each judge’s political/ideological outlook by the party of the appointing president: judges appointed by Republican presidents were designated as Republican judges; judges appointed by Democratic presidents were designated as Democratic judges. The party of the appointing president is a rough proxy for judicial ideology, but it has the virtue that it errs on the side of obscuring the impact of ideology because the party of the appointing president does not necessarily reflect the ideology of the judge. Accordingly, if we observe a statistically significant effect, it is likely to be a lower bound on the actual influence of ideology.
In absolute terms, this translates to about 9 cases out of 180 under the ESA and 11 cases out of 334 under NEPA over roughly a fifteen-year period. The influence of judicial ideology was lowest during the Obama Administration, when presidential politics aligned strongly with the two environmental statutes. Moreover, when it was a factor, judicial ideology had a moderating effect on executive branch policies through judicial opinions that guided policies towards centrist positions consistent with statutory mandates. These findings demonstrate the critical role that external political factors play in mediating the influence of judicial ideology and elucidate the conditions under which they can break down.

A rich literature, focused largely on the Supreme Court and federal appellate courts, has evolved over the last two decades and examines the influence of ideology on judicial review. Researchers have found that judicial ideology is a statistically significant factor in the resolution of cases over a wide range of legal areas, and that the Supreme Court—as opposed to the Executive or Congress—has the greatest influence on judicial decision-making. They also find that the influence of judicial ideology is moderated on appellate panels with a mix of Republican- and Democratic-appointed judges, largely owing to the

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12 See infra Part IV.D.


14 See, e.g., Revesz, Ideology, supra note 13, at 1767–68 (explaining that the D.C. Circuit regards the Supreme Court, rather than Congress, “as the primary reviewer of their decisions”).
strong norm of unanimity that exists on appellate courts.\textsuperscript{15} The prominence of these “panel effects” has produced different models of judicial decision-making, ranging from deliberative theories, in which judges influence each other through persuasive argumentation, to whistleblower theories, in which a judge’s threat to dissent in a case provides leverage for compromise with her colleagues.\textsuperscript{16} The literature explores the practical and normative implications of these and other theories, but no single theory has prevailed that explains why ideologically mixed panels have such a powerful moderating effect on opinions.\textsuperscript{17} We extend this work by incorporating new factors into the analysis and by evaluating the results in context to assess their practical significance.

This study differs from the existing literature by covering an extended time period, roughly fifteen years, and by including geographic information at the national, circuit, and state levels. We focus on litigation under NEPA and the ESA because they are frequently the subject of litigation and have long been the target of intense political battles.\textsuperscript{18} Both statutes are currently the target of major regulatory and legislative reform efforts,\textsuperscript{19} and concerns about litigation are a prominent theme.\textsuperscript{20} Litigation under NEPA and the ESA has the additional

\begin{footnotesize}
\begin{enumerate}
\item See Sunstein et al., \textit{supra} note 7, at 337–38 (explaining the phenomenon of “collegial concurrences”).
\item See \textit{id.} at 344–45 (describing the “whistleblower effect”).
\item See \textit{infra} Part II.
\end{enumerate}
\end{footnotesize}
virtue that it is unevenly distributed across the country (nearly two-thirds of the cases were filed in the Ninth and D.C. Circuits), which strengthened our statistical analyses and inter-circuit comparisons. Finally, both statutes have powerful procedural mandates that federal judges interpret strictly. The legal posture of the cases consequently heightens the influence of judicial ideology because judges are less deferential to federal agencies when such procedural claims are raised than, for example, when administrative challenges implicate agency expertise or experience.

The distinctive attributes of the cases and the duration of our study expose the conditions under which judicial review is more likely to check executive power. In district courts, we find that plaintiffs were 1.8 times more likely to prevail before a Democratic than a Republican judge, and they were 2.5 times more likely to prevail in the Ninth Circuit than in other circuits. At the appellate level, environmental plaintiffs were two to four times more likely to prevail before an all-Democratic panel than before a majority-Republican panel, and they were about twice as likely to prevail during the Bush Administration as during the Obama Administration. However, the disparity in case outcomes between appellate panels dominated by judges with opposing political affiliations largely disappeared during the Obama Administration, falling from roughly thirty to five percentage points. Most of this convergence was attributable to a decline in the rate at which majority-Democratic panels ruled in favor of environmental plaintiffs, whereas little change was observed for Republican-majority panels. In other words, judicial ideology had a moderating effect overall on administrative policies during the Bush Administration.

21 See infra Figures 1–2.
22 See 42 U.S.C. § 4332 (2012); 16 U.S.C. § 1536(a)(2) (2012); see also Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (“[T]he strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”); Daly v. Volpe, 350 F. Supp. 252, 257–58 (W.D. Wash. 1972) (“The provisions of NEPA are not highly flexible, but establish a strict standard of procedure.”).
24 See infra notes 163–66 and accompanying text.
25 See infra notes 168–70 and accompanying text.
26 See infra notes 170–71 and accompanying text.
27 See infra Part III.B.1.
Administration, with Democratic judges guiding executive branch policies towards a centrist position when they considered them to be inconsistent with statutory mandates.

We believe that the variation observed in the influence of judicial ideology is structural and that it is active during liberal and conservative administrations. The principal factor is the political alignments and misalignments between judges, the statute under review, and the presidential administration in power. If a statute associated with liberal values, such as NEPA or the ESA, is under review, the influence of judicial ideology will depend on the political orientation of the presidential administration. During a Republican administration, Republican judges will be sympathetic to the administration and unsympathetic to the liberal goals of the statute (both factors aligning against plaintiffs seeking to enforce statutory requirements), whereas Democratic judges will be sympathetic to the goals of the statute but unsympathetic to the administration (both factors aligning in favor of plaintiffs). Further, while ideological differences between judges may be exacerbated by more extreme policies, the effect on case outcomes will be asymmetric due to the deferential standards of review under the Administrative Procedure Act (APA) and associated judicial doctrines. During a Democratic administration, by contrast, Republican judges will be unsympathetic to the statute’s goals and to the administration (both factors essentially neutral towards plaintiffs), whereas Democratic judges will be sympathetic to both (one factor favoring and the other working against plaintiffs). These dynamics will reverse for statutes associated with conservative values, such that judicial ideology will be influential during liberal administrations but have little effect during conservative ones. The ideological outlook of a judge therefore is most likely to be a factor when the politics of a presidential administration are most at odds with the legal mandate of a statute under review.

The Article is divided into three principal parts. We review the existing literature on the influence of judicial ideology in federal courts in Part I, focusing on the more complex dynamics of appellate courts and current theories of judicial decision-making. In Part II, we present our study results and discuss the inferences that can be drawn from several statistical regressions. The broad descriptive statistics highlight the modest influence of judicial ideology in the decisions of district and appellate courts, whereas the regression results provide insights into the relative importance of different factors on case outcomes—the influence of judicial ideology, presidential politics, and circuit-level attributes (i.e., volume of cases, political balances of judges within a circuit, and any systematic ideological bias of judges in a circuit). This analysis provides a more complete picture of the factors that mediate the impact of a judge’s ideological outlook on judicial review. Finally, Part III examines the normative and

28 For judges politically aligned with the administration, their only option is deferring to the agency on issues concerning agency fact-finding, statutory interpretation, or the adequacy of agency reason-giving, whereas judges with opposing political views can overturn agency action in any of these areas.
practical implications of our results. We argue that the influence of judicial ideology can enhance the likelihood of judicial checks on executive overreach, but we caution that this is contingent on structural features of the federal courts system and, in the administrative law context, the deferential nature of judicial review. The insights provided by the expanded framework we propose is then illustrated by applying that framework to three contemporary debates that center on structural and jurisdictional aspects of the federal courts—proposals to break up the Ninth Circuit, statutory provisions creating exclusive jurisdiction over certain types of cases in specific courts, and partisan schemes to dramatically expand the number of federal judges.

II. JUDICIAL IDEOLOGY AND THE MODERATING EFFECT OF CONSENSUS VOTING

Studies examining the influence of judicial ideology on case outcomes date back to the early 1990s. Over this time, the analytical methods have evolved from simple hypothesis testing to multivariate methods and sophisticated study designs developed to elucidate the influence of appellate judges on each other. At the same time, the areas of law studied have expanded from discrete fields, such as environmental law, and specific courts, typically the D.C. Circuit, to national studies that encompassed the most ideologically freighted fields of law, including civil rights, labor law, affirmative action, constitutional takings, and capital punishment. Throughout much of this work, the party of the appointing president is used as a proxy for the ideological outlook of federal judges, with judges appointed by Democratic presidents presumed to be “liberal” and judges appointed by Republican presidents presumed to be “conservative.” Moreover, despite a proliferation of alternative, seemingly more sophisticated proxies, the party of the appointing president remains a valid and robust proxy for judicial ideology.

Numerous hypotheses have been tested over the years, often formulated through the lens of principal-agent theory. For example, scholars have

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29 See, e.g., Schuck & Elliott, supra note 13, at 984, 988.
30 See, e.g., Hazelton et al., supra note 13, at 447.
31 See, e.g., Sunstein et al., supra note 7, at 311–12.
33 Compare Fischman, Voting Patterns, supra note 13, at 819 (observing that “[w]hile [the party of the appointing president is] admittedly a simplistic measure of judicial ideology, this variable has been demonstrated to robustly correlate with judicial voting behavior across a wide variety of issue areas”), and Jessie Allen, A Theory of Adjudication: Law as Magic, 41 SUFFOLK U. L. REV. 773, 822 (2008) (“The studies confirm that among federal appellate judges, the party affiliation of the president who appointed a judge is a fairly strong predictor of how the judge will rule in some types of cases whose outcomes are ideologically polarized.”), with Joshua B. Fischman & David S. Law, What Is Judicial Ideology, and How Should We Measure It?, 29 WASH. U. J.L. & POL’Y 133, 155 (2009) (noting that “proxy variables have traditionally included the party of the President who appointed the judge”).
34 Lindquist & Haire, supra note 13, at 234–35.
evaluated whether strong congressional support for a challenged policy increases the likelihood that judges will decide cases in its favor; whether district and appellate court judges will be more (less) likely to decide cases in favor of a policy when it is supported by the Supreme Court; and whether judges appointed by a Democratic (Republican) president will be more (less) likely to decide a case in favor of a liberal (conservative) policy. This work has shown that the influence of Congress is typically weak and short-lived, and that the influence of the Supreme Court’s jurisprudence is by far the most important factor, although it too is found to have a relatively short half-life. The work on judicial ideology, particularly in the Supreme Court and appellate courts, has generated a greater mix of results and competing theories of judicial decision-making, with no single theory clearly receiving consensus support. To this day, theories of judicial decisions premised on “deliberative processes,” “whistleblowing dissents,” “collegial concurrences,” and “group polarization” are debated and remain in contention with each other. We will review the evolution of the leading empirical studies, focusing on appellate

35 Id. at 240–46 (concluding that busy judges will defer to expert agencies).
36 Id. at 255 (finding little evidence that presidential administrations influenced circuit court decisions); Revesz, Ideology, supra note 13, at 1735 (suggesting, but not finding, that the political balance of Congress could affect judicial votes due to the risk of a legislative override).
37 Lindquist & Haire, supra note 13, at 255–56; Revesz, Ideology, supra note 13, at 1767–68 (finding support for the hypothesis that “judges act more ideologically when their decisions are unlikely to be reviewed,” notably where only procedural challenges were at issue, and that the Supreme Court, rather than Congress or the president, had the greatest influence on D.C. Circuit judges).
38 See Hazelton et al., supra note 13, at 447–51 (discussing the competing theories of judicial decision-making).
39 Revesz, Ideology, supra note 13, at 1732–34 (explaining that, according to the “deliberation hypothesis” and “dissent hypothesis,” judges moderate their respective positions through reasoned analysis of cases).
40 Cross & Tiller, supra note 13, at 2156 (stating that the potential that a “whistleblower” on an appellate panel “whose policy preferences differ from the majority’s...will expose the majority’s manipulation or disregard of the applicable legal doctrine” greatly diminishes the influence of ideology).
41 Sunstein et al., supra note 7, at 337–38 (providing a variety of reasons for the prominence of “collegial concurrence” on ideologically mixed panels, ranging from the impact of collective deliberations, to the burden and perceived futility of writing a dissent, to conflict aversion among judges). The “dissent hypothesis” overlaps with collegial concurrences, but it is limited to judges in the ideological minority moderating their position to be consistent with the majority to avoid the burden of writing a dissent. Revesz, Ideology, supra note 13, at 1732–34.
42 Sunstein et al., supra note 7, at 340–41 (attributing “group polarization” and the tendency to “go to extremes” of ideologically uniform panels to the lack of opposing views and arguments, the propensity for like-minded views to be self-reinforcing, and social pressures between judges to align their views with those of their colleagues).
courts because so few studies of district courts exist, and critically assess their implications.  

A. Empirical Studies of Politics in Judicial Decision-Making

Professor Richard Revesz published an early study of judicial ideology in 1997 that focused on environmental decisions in the D.C. Circuit between 1970 and 1994. Revesz’s findings centered on three hypotheses: (1) that the political outlook of appellate judges would influence their decisions; (2) that ideological voting would be a greater factor in cases less likely to be reviewed by the Supreme Court; and (3) that “panel effects” driven by the politics of judges on appellate panels would influence their decisions. While the results had many nuances, the politics of the plaintiff(s) and panel effects were observed to be important factors. The most consistent finding was that appellate judges favored plaintiffs with interests consistent with their own ideological preferences. By contrast, panel effects were more variable and found to be particularly strong in industry challenges—both Republican and Democratic judges “voted more ideologically on panels [with] at least one colleague of the same party,” and the influence was substantially greater on all-Republican panels. Revesz concluded that his data provided, at best, mixed support for the “deliberation” and “dissent” hypotheses, with the only support coming from industry challenges. In addition, Revesz found some evidence that Republican judges were more likely to uphold decisions of the U.S.


44 Revesz, Ideology, supra note 13, at 1721.

45 Specifically, Democratic judges will be more likely to reverse the U.S. Environmental Protection Agency (EPA) if the plaintiff is an environmental organization, whereas Republican judges will be more likely to reverse EPA if an industry group is the plaintiff. Id. at 1728.

46 Revesz reasoned that, because procedural matters tend to be “very fact specific” and rarely “involve . . . legal principle[s] of general applicability,” the Supreme Court very seldom grants certiorari on such issues. Id. at 1729–31.

47 Id. at 1719. Revesz suggested further that “the party affiliation of the other judges on the panel [will have] a greater bearing on a judge’s vote than his or her own affiliation.” Id.

48 For example, Revesz observed that environmental organizations have “far greater success” in statutory cases than industry challengers and suggested that this difference could be due to stricter triaging of cases given their limited resources. Id. at 1749.

49 Id. at 1742–43. However, while Republican judges were significantly more likely to rule against the government in procedural challenges brought by industry, this was not true of Democratic judges when the plaintiff was an environmental organization. Id. at 1749.

50 Revesz, Ideology, supra note 13, at 1756.

51 Id.
Environmental Protection Agency (EPA) “when they are defended in court by a Republican administration, and that Democratic judges [will be] more likely to do the reverse.”

Frank Cross and Emerson Tiller published a similarly groundbreaking study centered on judicial review of statutory interpretation by federal agencies under the *Chevron* doctrine. Premising their analysis on a whistleblower hypothesis, they argued that an appellate panel would be more likely to comply with a legal doctrine “when [it] is politically or ideologically divided.” Their empirical results revealed that appellate panels were 31% more likely to defer to an agency’s interpretation when the policy under review was in alignment with the panel majority’s political preferences. Further, they found that while ideologically divided panels adhered to the deferential *Chevron* standard 62% of the time, ideologically uniform panels did so in only 33% of

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52 *Id.* at 1735.
53 *Cross & Tiller, supra* note 13, at 2155.
55 *Chevron* enunciates a two-step standard for judicial review of agency statutory interpretations. *Id.* As interpreted by the lower courts, if a statute is clear, review is de novo. *Id.* at 842–43; *U.S. Sugar Corp v. EPA*, 830 F.3d 579, 663 (D.C. Cir. 2016) (quoting Nat’l Ass’n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007) (explaining that at step one of *Chevron*, the court must “first examine the statute de novo, employing traditional tools of statutory construction”)); *Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir. 2015) (“At step one of the familiar *Chevron* analysis, we ask whether, ‘applying the normal tools of statutory construction,’ the statute is ambiguous, INS v. St. Cyr, 533 U.S. 289, 321 n.45 (2001); we consider this question de novo.”); *Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007) (“At *Chevron* step one, we consider de novo whether Congress has clearly spoken to the question at issue.”). If the statute is ambiguous, however, courts are obliged to defer to any permissible (reasonable) interpretation by the agency. *Chevron*, 467 U.S. at 843.

56 *Cross & Tiller, supra* note 13, at 2156.
57 *Id.* at 2159.
58 *Id.* at 2169, 2171 (concluding that “when the agency’s policy outcome is consistent with the policy preferences of the panel’s majority, the court is more likely to defer than if there is no such convergence”).
the cases. The authors concluded that “the presence of a whistleblower makes it almost twice as likely that [Chevron] will be followed when doctrine works against the partisan policy preferences of the court majority.” Cross and Tiller’s paper bolstered the empirical grounds for the influence of judicial ideology on appellate courts and provided the clearest support to that date for the mitigating effects of politically divided panels.

Professor Cass R. Sunstein along with several co-authors has published a series of papers further exploring the impact of the ideological composition of appellate panels on case outcomes. In a 2004 paper, he and his co-authors examined the panel effects in appeals that spanned a broad range of subject areas. Their principal findings were (1) that judges in the political minority on politically divided panels often issue “collegial concurrences” that correspond closely to the views of their panel colleagues; and (2) that judges on politically uniform panels often succumb to “group polarization” when they amplify each other’s ideological preferences. This study is also one of the few to examine differences across circuits. The authors’ strongest finding was that case outcomes were closely correlated with the balance of Republican and Democratic judges in a circuit; specifically, the opinions in the Ninth and Second Circuits were observed to be significantly more liberal than those in the other circuits.

In two subsequent papers, Professors Sunstein and Thomas Miles evaluated the influence of ideology on judicial review of agency action. Focusing exclusively on cases filed against the EPA and the National Labor Relations

59 Id. at 2171–72 (observing that “although the significance of these results is somewhat less (p = 0.09)[,] . . . it is 17% less likely that the court will defer [under the Chevron doctrine] when it is unified than when it is split 2-1”).
60 Id. at 2172.
61 Miles & Sunstein, Policy, supra note 13, at 823; Miles & Sunstein, Real World, supra note 5, at 766; Sunstein et al., supra note 7, at 304.
62 Sunstein et al., supra note 7, at 304. The legal fields included affirmative action, campaign finance, sex discrimination, disability discrimination, race discrimination, and environmental regulation. Id.
63 Id. at 337–38, 340. The authors found that group polarization was most pronounced on panels with exclusively Republican-appointed judges, who “vote[d] against industry challenges” in environmental cases “just 27% of the time,” whereas panels with a Republican majority did so in 50% of the cases, and those with a single Republican judge did so in 63%. Id. at 323.
64 See id. at 307.
65 Id. at 332. The authors found that “[t]he rankings, in terms of ideology, correlate strongly but not perfectly with the percentage of Democratic appointees on the relevant court in 2002 (r = .59),” and that disparities in case outcomes between exclusively Democratic and exclusively Republican panels in each circuit varied from less than 8% in the Third, Seventh, and Fifth Circuits to 27% in the Ninth Circuit. Id.
66 Miles & Sunstein, Policy, supra note 13, at 825; Miles & Sunstein, Real World, supra note 5, at 766.
Board (NLRB). The studies examined judicial voting patterns in cases reviewing agency decisions defined as “conservative” if the plaintiff was a public-interest organization and “liberal” if the plaintiff was a business entity. Following the work of Tiller and Cross, the first study focused on judicial review under the Chevron doctrine and the results of this study reinforced those of the prior one. The authors found that Democratic appointees were fourteen percentage points more likely to affirm liberal agency decisions than Republican appointees, while Republican appointees were nineteen percentage points more likely to affirm conservative agency decisions than Democratic appointees. Their results also showed that panel effects were an overriding factor: the presence of just one judge appointed by the opposing political party essentially neutralized the influence of ideology. In summary, the authors concluded that most of the differences observed in case outcomes were attributable to group polarization on ideologically uniform panels.

The second Miles and Sunstein study focused on judicial review under the “arbitrary and capricious” standard of the APA. The most striking feature of their results is a “seesaw pattern” in Republican and Democratic voting, which they characterize as the “smoking gun” of ideological voting. Specifically, “[w]hen the agency decision is liberal, the Democratic validation rate is 72 percent and the Republican validation rate is 58 percent. When the agency decision is conservative, the Democratic validation rate drops to 55 percent and

67 Miles & Sunstein, Policy, supra note 13, at 825 (noting that the authors coded all published opinions between 1990 and 2004; of the 253 opinions, “183 involved the EPA, and 70 involved the NLRB”); Miles & Sunstein, Real World, supra note 5, at 774 (involving coding of all published opinions between 1996 and 2006; of the 653 opinions, 554 involved the NLRB and 99 involved the EPA).

68 Miles & Sunstein, Policy, supra note 13, at 830–31 (explaining that an agency decision was coded as “conservative” or as “liberal” based, “simply and crudely, by reference to the identity of the party challenging it”). The authors eschew using the party of the president at the time the case was heard because administrations typically make a mix of conservative and liberal decisions; empirically, they also observe little differences in judicial voting across administrations. Id. at 850 tbl.8, 860 (finding about a twenty-four percentage-point difference between Democratic and Republican judges during Democratic administrations versus a thirteen percentage point difference during Republican administrations).

69 Compare Cross & Tiller, supra note 13, at 2172, with Miles & Sunstein, Policy, supra note 13, at 826–27.

70 Miles & Sunstein, Policy, supra note 13, at 826–27, 849. These differences more than doubled for ideologically uniform panels to thirty-one percentage points for Democratic panels reviewing liberal agency decisions and forty-nine percentage points for Republican panels reviewing conservative agency decisions. Id. at 855 tbl.9, 856.

71 Id. at 858.

72 Id.

73 Miles & Sunstein, Real World, supra note 5, at 773–74. Similar to the Chevron study, this study also “classified] agency decisions as ‘conservative’ or ‘liberal’ on the basis of the identity of the party making the challenge.” Id. at 775.

74 Id. at 806.
the Republican validation rate rises to 72 percent.”

However, virtually all of the seesawing they observed was associated with the NLRB opinions, which accounted for 85% of the cases, whereas case outcomes before Republican and Democratic judges differed by just two percentage points in the EPA opinions. The small sample sizes for the subclasses of conservative opinions and ideologically uniform panels also limited the statistical grounding of their results. Nevertheless, the authors suggest that the disparities in voting are largely driven by ideologically uniform panels, citing the twenty-nine percentage point disparity in affirmation rates between all-Democratic and all-Republican panels.

Further, although they concede that judicial ideology was not a “dominant” factor, they caution that “[a]n unbalanced federal judiciary might well act as a brake on agencies’ ability to implement the liberal or conservative policies of a new executive.”

Subsequent studies have incorporated a variety of statistical methods and designs to elucidate the panel effects in appellate courts. While the newest studies continue to find strong evidence that ideology is a factor in the decisions...
of appellate judges, the strong norm of consensus is consistently found to be a crucial mitigating factor. Among the recent work, Joshua Fischman has conducted several of the most innovative studies of panel effects. In a 2011 study of immigration cases in the Ninth Circuit, Fischman finds that Democratic appointees supported asylum claimants in 25% of the cases they heard, whereas Republican appointees did so in just 12%. Similar to Miles and Sunstein, he finds that judges’ opinions were reinforced on ideologically uniform panels and moderated on ideologically mixed ones. Fischman concludes that “the hypothesis that judges vote independently can be rejected” and that “a norm of consensus pushes judges’ voting rates toward the mean.” Fischman quantifies this effect through a simulation, which estimates that judges voted consistent with their personal views in only 55% of the cases. The striking disconnect that Fischman uncovers between judges’ political outlooks and their voting refutes claims that low dissent rates reflect the relative ease of deciding cases and limited discretion that judges have in resolving them.

In a subsequent meta-analysis of eleven prior studies and three new datasets, Fischman provides compelling evidence that judges are influenced by their colleagues’ votes in a case rather than their colleagues’ ideological outlook. Across a wide range of legal areas, Fischman finds that “each colleague’s vote increases a judge’s probability of voting in the same direction

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82 See, e.g., Fischman, Estimating Preferences, supra note 13, at 793.
83 See, e.g., JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 102 tbl.6 (2002) (observing that about 95% of appellate cases have no dissent, which reflects a strong norm of consensus among judges); Fischman, Estimating Preferences, supra note 13, at 803–04 (recognizing the influence of “consensus voting”).
84 Fischman, Estimating Preferences, supra note 13, at 793.
85 See id. (finding that all-Democratic panels decided for the asylum claimant 35% of the time, majority-Democratic panels 20% of the time, majority-Republican panels 15% of the time, and all-Republican panels 6% of the time).
86 Id. at 796–98 (finding that a “consensus voting model correctly classifies 76 percent of votes, the sincere voting model correctly classifies 67 percent, and the party-of-appointment model correctly classifies 65 percent”).
87 Id. at 803.
89 Fischman also exposes shortcomings in prior studies that qualify their findings statistically; specifically, because they rely on judges’ political affiliation as a regressor, the statistical models are misspecified due to endogenous effects. Fischman, Voting Patterns, supra note 13, at 820–21.
90 See id. at 809 (describing the study as “compar[ing] two empirical models of panel voting—one that models influence using colleagues’ characteristics, the other using colleagues’ votes—and reexam[ining] data from 11 prior studies of panel voting and three novel data sets”). Fischman characterizes voting as an “endogenous” effect and judicial ideology as a “contextual” effect: “Endogenous effects occur when an individual’s behavior is influenced by the behavior of the group. Contextual effects occur when an individual’s behavior is influenced by the characteristics of the group members.” Id. at 811.
by roughly 40 percentage points,\textsuperscript{91} whereas the influence of a colleague’s ideological outlook varies widely depending on the nature of the case.\textsuperscript{92} To put this in perspective, Fischman estimates that the influence of colleagues’ votes is equivalent to roughly 80\% of the effect that would be observed if appellate panels operated exclusively by consensus.\textsuperscript{93} In other words, panel effects that mitigate the influence of judicial ideology are largely driven by the strong norm of consensus among appellate judges. Fischman suggests that this lends credence to theories, such as “dissent aversion” and “whistleblowing,” that turn on votes in a specific case rather than colleagues’ generally held ideological perspectives,\textsuperscript{94} whereas deliberative theories are less plausible because they implicate the ideological perspectives of the judges.\textsuperscript{95} This study provides the clearest empirical grounds for distinguishing among these competing theories.

Fischman concludes by estimating the influence of judicial ideology in conjunction with mediating panel effects. To do this, he posits that disparities in case outcomes between all-Democratic and all-Republican panels “correspond to average differences between Democratic and Republican judges if they voted autonomously.”\textsuperscript{96} Overall, he finds that the differences between ideologically uniform panels will be 2.3 times larger than the differences observed between individual Republican and Democratic judges.\textsuperscript{97} This ratio

\begin{itemize}
  \item \textsuperscript{91}Id. at 809–10. According to Fischman, “The impact of the norm of consensus appears to be uniform across high- and low-profile cases, in complex cases as well as simple ones, and in all circuits studied.” Id. at 829.
  \item \textsuperscript{92}See id. at 827–29 (finding that “[t]he number of Democratic panel colleagues has a significant effect on a judge’s vote in nine of the 14 regressions, and the impact of each colleague’s party is typically one-half to two-thirds as large as the impact of a judge’s own party”).
  \item \textsuperscript{93}See id. at 810–11 (observing that “[t]he distinction between these effects depends upon whether the colleagues’ characteristics have a direct impact on the judge’s vote or whether the colleagues’ characteristics predict their votes, which in turn influence the judge’s vote”).
  \item \textsuperscript{94}Id. at 811–12 (“[U]nder the ‘dissent aversion’ theory, a judge’s willingness to vote in a particular direction is affected by the other judges’ votes. Judges’ votes may be correlated with their colleagues’ characteristics, but only insofar as these characteristics predict the colleagues’ votes. Similarly, ‘whistleblowing’ is a theory of endogenous effects, since the majority is influenced by the minority judge’s willingness to dissent.”).
  \item \textsuperscript{95}See Fischman, Voting Patterns, supra note 13, at 812 (suggesting that personal beliefs may cause judges to work harder to find information or legal theories to support a liberal vote, which will in turn influence their colleagues’ votes).
  \item \textsuperscript{96}Id. at 834–35 (emphasis added). Fischman further observes that:

It represents the average difference in voting rates between the two types of judges, given that they are constrained by panel colleagues. It does not predict how Democratic and Republican judges would differ if voting autonomously. Nor does it capture the full causal effect of substituting Democratic judges for Republican judges, since it does not account for the impact of such substitutions on panel colleagues.

\item Id. at 835.
  \item \textsuperscript{97}Id. at 835.
\end{itemize}
reflects the degree to which the views of the average judge are moderated on ideologically mixed panels relative to their voting patterns if they were to vote autonomously.98 Using these estimates, he finds that “different panels would reach different results at least 20% of the time, and perhaps much more,” assuming dissent rates that are typical of federal courts.99 While the contingency rate he derives for panel-dependent case outcomes is significant, it is substantially lower than the 30%–40% disparities between ideologically uniform panels often highlighted in prior studies.100 Fischman’s work provides a rigorous measure of the mediating effect that randomized three-judge panels have on judicial ideology when the judiciary is ideologically balanced.101 The picture that emerges is decidedly mixed—ideological differences between judges are much greater than dissent rates would suggest, but they are held in check by a strong norm of consensus and the low relative frequency of ideologically uniform panels.

In a more recent project, Kent Barnett, Christina Boyd, and Christopher Walker, based on a database of more than 1600 circuit court decisions over an eleven-year period, assessed the extent to which judicial ideology affects review of agency statutory interpretations.102 The authors concluded that “politics play some role in how circuit courts review agency statutory interpretations,” with conservative (liberal) panels being more likely to agree with conservative (liberal) agency interpretations.103 They found, however, that “panels of all ideological stripes use the [Chevron] framework similarly and reveal modest ideological behavior.”104 Unlike Tiller and Cross, Barnett, Boyd, and Walker found no “whistleblower effects” in appellate court application of Chevron, concluding that:

98 Id. at 834–35. Fischman derives a within-panel multiplier for judges, as opposed to the average judge on each side and finds that in most cases it ranges from 3.6 to 8.2. Id. at 836.

99 Id. at 836. Fischman notes that “[e]specially, ironic is Kress’s claim that ‘[i]t would be surprising to find that the dissent rate was four percent yet judges disagreed in forty percent of all cases,’ since his implied 10:1 ratio is easily within the plausible range for the within-panel multiplier.” Id. at 836–38 (internal citation omitted).

100 See id. at 837 tbl.5, 838.

101 Fischman, Voting Patterns, supra note 13, at 838.

102 See generally Kent Barnett et al., Administrative Law’s Political Dynamics, 71 Vand. L. Rev. 1463 (2018). For additional empirical evaluation of panel effects on judicial review of agency statutory interpretations, see Hazelton et al., supra note 13, at 467–73.

103 Barnett et al., supra note 102, at 1468.

104 Id. They add:

For instance, both liberal and conservative panels are more likely to find the statute unambiguous when the agency’s interpretation is contrary to the panel’s ideological preferences. Likewise, both liberal and conservative panels are more likely to find the statute ambiguous when the agency’s interpretation aligns with the panels’ ideological preferences. This means that panels permit agencies more policymaking space when the administrative interpretations are consistent with the panels’ views.

Id. at 1468–69.
Whether a panel is ideologically uniform or diverse does not affect whether circuit courts apply the *Chevron* framework, nor does it affect agency-win rates on judicial review. Indeed, we saw only minor differences at either ideological extreme (where we would have most anticipated whistleblowing effects to occur), and those differences were in the opposite direction than expected.105

The authors explain this apparently “startling” result as a product of *Chevron*’s powerful constraint on the influence of partisanship in judicial decision-making, leaving little room for a panel’s ideological composition to play an additional constraining role.106 Thus, the authors conclude the elimination or weakening of *Chevron* deference, as some scholars and judges have called for,107 could enhance the role of partisanship in judicial review of agency statutory interpretations and foster greater interpretive disparities.108

Professors Barnett, Boyd, and Walker conducted another study, based on analysis of circuit court opinions handed down between 2003 and 2013, in which they assessed the political dynamics of deciding whether to apply *Chevron* deference.109 They concluded that judges do not consistently apply *Chevron*.110 In particular, they found that liberal, moderate, and conservative panels of appellate court judges are nearly equally likely to apply *Chevron* deference when reviewing liberal agency interpretations.111 When reviewing conservative agency interpretations, however, “liberal panels apply *Chevron* significantly less frequently than conservative panels.”112 The authors argue that, in light of these findings, “notable prior empirical studies reporting that judges’ political preferences drive case outcomes when utilizing the *Chevron* doctrine underreport the political dynamics at play in this arena.”113

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105 Id. at 1469–70.
106 Id. at 1470.
107 See, e.g., Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* “permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design”); see also Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733, 737 (2019) (noting the likelihood that Justice Gorsuch “will continue pushing the Court to curtail or even repudiate . . . *Chevron*”).
108 Barnett et al., *supra* note 102, at 1470.
110 See id. at 599.
111 Id.
112 Id. Liberal judges apply *Chevron* as much as 16% less frequently than conservative judges when reviewing conservative agency interpretations. Id. at 614.
113 Id. at 599 (emphasis added). The authors also found no evidence of whistleblower or disciplining effects on mixed panels. Id. They posit that the increased flexibility courts have in deciding whether to apply *Chevron* after cases such as United States v. Mead Corp., 533 U.S. 218 (2001), which was decided before their study period began, may have lessened the need for “doctrine-based whistleblowing.” Id. at 616.
B. Viewing Judicial Politics in Absolute Rather than Relative Terms

All of the existing studies present their results in relative terms as percentage differences, with little or no indication of the absolute number of cases at stake. This oversight is important because ideologically uniform panels account for roughly 26% of the cases litigated, assuming roughly equal numbers of Republican and Democratic judges. For example, in the Sunstein and Miles study of judicial review under the *Chevron* doctrine, there were twenty-two all-Democratic panels and forty all-Republican panels, which together accounted for about 25% of the total. If you assume that the affirmation rates for the mixed panels reflected an “ideologically neutral” position, the “proper” affirmation rate would be roughly 62%. Under this reading, all-Democratic panels would be overly deferential to agencies in about 25% of the liberal cases and not deferential enough in 8% of the conservative cases, whereas all-Republican panels would not be sufficiently deferential in 12% of the liberal cases and would be too deferential in 38% of the conservative cases. In absolute terms, four cases with all-Democratic judges and eight cases with all-Republican judges would have been wrongly decided over twenty-five years. This amounts to a “departure rate” from neutrality of 5%, which while not *de minimis*, does not appear to be unreasonable—particularly given the vagueness of the *Chevron* doctrine. A similar departure rate, 4% (27 out of 653 cases over eleven years), is observed in Sunstein and Miles’s study of judicial review under the arbitrary and capricious standard.

The importance of considering absolute numbers of cases applies to all of the empirical studies to date, which report differences between ideologically mixed and uniform panels of roughly 10%–40%. Assuming, for example, an average of 25% for the “departure rate” from neutrality of ideologically uniform panels and relatively equal numbers of Democratic and Republican judges, the overall departure rate for ideologically uniform panels would be about 6%.

114 See, e.g., Miles & Sunstein, *Policy*, supra note 13, at 870.
115 See id. at 855 tbl.9.
116 See id.
117 See id.
118 All-Democratic panels heard a total of fourteen liberal cases and 25% of fourteen is three cases, and they heard eight conservative cases, and 8% of eight is one (rounding up), for a total of four erroneous opinions. See id. Similarly, all-Republican panels heard a total of twenty-seven liberal cases and 12% of twenty-seven is 3.2 cases, and they heard thirteen conservative cases, and 38% of thirteen is 4.4, for a total of eight (rounding up) erroneous opinions. See id.
119 Miles & Sunstein, *Real World*, supra note 5, at 788 tbl.3. In this study, the validation rate for mixed panels was 65%, and the all-Democratic panels were overly deferential in about 16% of the liberal cases and not deferential enough in 27% of the conservative cases, whereas Republican judges were not sufficiently deferential in 12% of the liberal cases and were too deferential in 17% of the conservative cases. See id. Thus, the decisions of ten all-Democratic panels and seventeen all-Republican panels were wrongly decided, for a total of twenty-seven out of 653 (4%) over eleven years, or about 2.5 per year. Id.
However, as the Sunstein and Miles studies illustrate, the actual number of “ideologically decided” cases annually will be very low, no more than a handful, in most areas of law. Further, aggregate national statistics ignore the geographic structure of the appellate court system, which is in part designed to reflect differing ideological preferences across the country. This variability is implicit in the deference given to senators for the states encompassed by the circuit to which a judge is being appointed; the appointment process is designed to ensure that the outlook and jurisprudence of federal judges will, at least in part, reflect the perspectives of the states from which the cases they hear originate.

One of the most important points we draw from the literature is the resilience of the federal judiciary to ideological variance across judges. This is an inherent byproduct of randomized selection of three-judge panels in federal appellate courts. In the current political context, it is especially important to be measured when interpreting the results of empirical studies on the influence of judicial ideology. Overall, the existing empirical studies provide few grounds for concluding that ideology is an overriding factor in appellate cases—in absolute or relative terms; in many areas of law, the studies suggest that ideology will affect a handful of cases over the course of a decade at the appellate level. Further, national statistics can be misleading insofar as they convolve inter-circuit variance, which is built into the system, and inter-judge variance, which is potentially more problematic. Understanding the relative importance of circuit-level and inter-judge effects remains an open question of critical importance to the controversy surrounding judicial appointments and the politics of judges. The work reported below examines these inter-circuit effects and looks more closely at the influence of presidential politics by evaluating differences in case outcomes across administrations, which has been overlooked so far in the literature.

120 See id.; see also Miles & Sunstein, Policy, supra note 13, at 855 tbl.9.
121 See, e.g., Miles & Sunstein, Real World, supra note 5, at 765–66.
123 See Fischman, Estimating Preferences, supra note 13, at 782 (noting that the cases assigned to and composition of judicial panels are random).
124 See, e.g., Miles & Sunstein, Policy, supra note 13, at 855 tbl.9.
III. REEXAMINING JUDICIAL REVIEW IN LIGHT OF CIRCUIT STRUCTURES, JUDICIAL IDEOLOGY, AND PRESIDENTIAL POLITICS

NEPA and the ESA are among the most important and most heavily litigated federal environmental statutes.\textsuperscript{125} Within the broader domain of public law, NEPA is exemplary of a purely procedural legal framework that covers all federal agencies, whereas the ESA is much narrower in scope and contains a mix of procedural elements (that mirror those found in NEPA) and strict standards.\textsuperscript{126} Both statutes implicate important economic interests in the public and private spheres, and they often involve highly technical questions that require difficult scientific judgments to be made by government officials.\textsuperscript{127} These characteristics create a valuable context in which to assess the influence of judicial ideology, as they raise countervailing factors that weigh for or against deferring to agency judgment. For example, the complexity and uncertainty in environmental science often favors greater deference to agencies, particularly on substantive regulatory determinations, but the procedural focus and express purpose of each statute to promote adequate consideration of environmental impacts by federal agencies is premised on a less deferential approach to judicial review. In addition, to the extent that purely procedural questions are less likely to be reviewed by appellate courts or the Supreme Court, there is evidence that judicial ideology has greater influence on case outcomes.\textsuperscript{128}

NEPA, which went into effect on January 1, 1970, established a national policy to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent, or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.”\textsuperscript{129}

It declares a “continuing policy of the Federal government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”\textsuperscript{130}

\textsuperscript{125} See Malcom & Li, supra note 18, at 15,844; see also Miller, supra note 18, at 223–24.
\textsuperscript{127} Malcom & Li, supra note 18, at 15,845; see also Miller, supra note 18, at 223–24.
\textsuperscript{128} See, e.g., Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm’n, 606 F.2d 1031, 1044–45 (D.C. Cir. 1979) (stating that judicial review is appropriate for reviewing procedural decisions in a limited context).
\textsuperscript{129} 42 U.S.C. § 4321 (2012).
\textsuperscript{130} Id. § 4331(a). To fulfill this policy, the statute makes it “the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources,” Id. § 4331(b).
Notwithstanding these ambitious goals, NEPA has only one significant operative provision. It directs all federal agencies to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement,” which is referred to as an environmental impact statement (EIS), that assesses the proposal’s environmental impact. Each EIS is also required to consider the alternatives to the proposed action, including a comparative evaluation of their environmental impacts. If an agency determines that a proposed action lacks one of the triggers for preparation of an EIS, most commonly that it will not have significant environmental impacts, it may prepare an environmental assessment (EA) along with a finding of no significant impact. However, judicial review is limited to procedural violations, such as failure to prepare an EIS when the statute required one or preparation of an inadequate EIS.

The ESA’s goals are similarly ambitious. Its declared purposes are “to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species.” Two agencies are responsible for overseeing implementation of the ESA, the Interior Department’s Fish and Wildlife Service (FWS) and the Commerce Department’s National Marine Fisheries Service (NMFS) (the Services). They are charged with listing species that qualify as endangered or threatened and designating their critical habitat. The statute provides for the preparation of recovery plans for listed species, although the plans are largely immune to

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131 Id. § 4332(C).
132 Id. § 4332(C)(i).
133 Id. § 4332(C). Agencies must consider appropriate alternatives even when not required to prepare an EIS. Id. § 4332(E).
137 16 U.S.C. § 1531(b) (2012). In addition, Congress declared a policy “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance” of the ESA’s purposes. Id. § 1531(c)(1).
138 The NMFS has jurisdiction over anadromous fish and ocean-based aquatic life, while the FWS has jurisdiction over freshwater and land-based plants and animals. Jennifer Jeffers, Note, Reversing the Trend Towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard into ESA Section 7 Jeopardy Analyses, 35 ECOLOGY L.Q. 455, 457 n.3 (2008).
139 16 U.S.C. § 1533(a)(1), (b)(1). For the difference between endangered and threatened species, see id. § 1532(6), (20).
140 Id. § 1533(a)(2), (b)(2). Critical habitat is defined at id. § 1532(5).
141 Id. § 1533(f).
judicial challenges.142 Other requirements are enforceable, however. Section 7 of the ESA imposes a duty on all federal agencies, in consultation with one of the Services, to ensure that the actions they authorize, fund, or carry out will not “jeopardize” the continued existence of listed species or adversely affect their critical habitat.143 This mandate imposes strict procedural and substantive duties on federal agencies.144 In addition, Section 9 of the ESA prohibits the taking of endangered species by either government agencies or private landowners.145 The ESA authorizes any person to file a civil action in federal district court to enjoin any person, including a federal agency, alleged to be in violation of the statute or its implementing regulations.146

This study analyzes litigation under NEPA and the ESA between 2001 and 2016. On average, about 100 NEPA cases were filed in district court and about twenty-five appeals were filed annually. To make the review process manageable, we analyzed samples of about 500 district court and 330 circuit court opinions with NEPA claims. The volume of cases was much smaller under the ESA, however, with roughly thirty district court cases and about ten appeals filed each year. Given these modest numbers, we coded the entire population of ESA cases with dispositive opinions issued during this sixteen-year period.147

Under both statutes, the volume of cases litigated covers a very small percent of the actions subject to each statute, which number in the tens of thousands annually.148 The relatively small volume of litigation under the two statutes suggests that, whether due to strategic considerations or limited resources, plaintiffs are selective in the cases they file. The selectivity of the cases filed is reflected in the success rates of environmental organizations,149

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144 Courts may enjoin actions on which the agencies should have consulted with the Services but failed to do so, for example. See, e.g., California ex rel. Lockyer v. U.S. Dep’t of Agric., 575 F.3d 999, 1005 (9th Cir. 2009); Nat. Res. Def. Council v. Houston, 146 F.3d 1118, 1123 (9th Cir. 1998).
146 16 U.S.C. § 1540(g)(1). A citizen suit, for example, may seek to compel one of the Services to perform its nondiscretionary statutory duty to list a species or designate its critical habitat. Id. § 1540(g)(1)(C).
147 The details of the empirical methods and protocols are the same as those described in David E. Adelman & Robert L. Glicksman, Presidential and Judicial Politics in Environmental Litigation, 50 ARIZ. ST. L.J. 3 app. at 64–67 (2018) [hereinafter Adelman & Glicksman, Judicial Politics], except that we applied these methods to cases decided under the ESA as well as NEPA for this Article.
149 We divided plaintiffs into five broad classes: local environmental organizations; national environmental organizations; other nongovernmental organizations; businesses and
which filed about three-quarters of the cases under NEPA and the ESA. The success rates of environmental organizations under NEPA and the ESA were higher than the averages for challenges to agency action in a wide range of empirical studies, and they were far higher than during the Bush Administration. The combination of careful selection of cases and the geographic concentration of cases in liberal states suggests that local politics were a significant factor in deciding where to file cases. Environmental plaintiffs sought to ensure that their cases were both legally meritorious and, to the extent possible, that they would not provoke a political backlash from local communities.

A. Patterns of Litigation over Space and Time

The NEPA and ESA cases we analyzed were concentrated in the Ninth and D.C. Circuits. Roughly half of them were filed in the Ninth Circuit and another 12–15% in the D.C Circuit. In district court, about 60% of the cases under each business associations; and cities, counties, states, and tribes. We defined “national environmental organizations” narrowly to include a small number of high-profile environmental organizations (e.g., Sierra Club, Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity) to identify the organizations that litigated a large share of the NEPA and ESA cases. While there was substantial overlap between the organizations that dominated litigation under each statute, there were a few organizations in each case that were unique to the specific statute.

Environmental plaintiffs, whether national or local organizations, were more successful—prevailing, on average, at rates ten to twenty percentage points higher—than other plaintiffs.

The disparity in success rates between environmental and other plaintiffs was far greater during the Bush than the Obama Administration. Specifically, during the Bush Administration environmental organizations prevailed in 45% and other plaintiffs in just 20% of the cases; during the Obama Administration, they prevailed in 24% and 13%, respectively, of the cases. On appeal during the Bush Administration, environmental organizations prevailed in 35% of the cases and other plaintiffs prevailed in 16%, whereas during the Obama Administration, the success rates converged to 17% and 15%, respectively.
statute were filed in either the Ninth or Tenth Circuits and 15% were filed in the D.C. Circuit (Figures 1–2). Moreover, the distribution of appeals largely matches the district court filings.\textsuperscript{153} Within each circuit, the actions on which NEPA and ESA cases originated were also overwhelmingly located in politically centrist or Democratic states, or they spanned multiple states. Only about 15% of the underlying actions originated in Republican states.\textsuperscript{154}

\textsuperscript{153} Under NEPA, 52% of the appeals were in the Ninth Circuit, 10% in the D.C. Circuit, 12% in the Tenth Circuit, and 5.1% in the Sixth Circuit; under the ESA, 64% of the appeals were in the Ninth Circuit, 15% in the D.C. Circuit, 7% in the Eleventh Circuit, and 5% in the Tenth Circuit.

\textsuperscript{154} We used the index for citizen ideology developed by William D. Berry et al. See William D. Berry et al., Measuring Citizen and Government Ideology in the American States, 1960–93, 42 Am. J. Pol. Sci. 327, 327–48 (1998). See generally Richard C. Fording, State Ideology Data, WORDPRESS (June 18, 2018), https://rcfording.wordpress.com/state-ideology-data/ [https://perma.cc/FBT7-UCJ8]. The citizen ideology index was used to categorize states into three categories: (1) Republican states (<45), (2) centrist states (45> and <55), and (3) Democratic states (>55). The index for each state was averaged over the years 2001–2016 to cover the period of the two studies.
The pattern of litigation observed was not preordained by the geographic distribution of the underlying actions. NEPA requires an EIS for any federal action that has “significant” environmental impacts, and while one would anticipate some geographic variation, there is no reason to expect that the cases would be so disproportionately concentrated in these circuits, particularly given

population and development patterns nationally. Yet, EPA data reveal that roughly 47% of the EISs, the most rigorous level of environmental review engaged in by agencies, prepared from 2012 through 2016 involved actions that were located in the Ninth Circuit. Similarly, under the ESA, while informal consultations were evenly distributed across the country, with no circuit containing more than about 15% of the consultations, 60% of formal consultations from 2008 through 2016 involved actions based in the Ninth Circuit. Accordingly, we find that although the universe of actions subject to the statutes is disbursed widely across the country, federal litigation was located disproportionately in the Ninth Circuit.

The reasons for the uneven distribution of cases likely reflect a mix of strategic and structural factors. In the case of the D.C. Circuit, the location of most federal agencies in D.C. affords plaintiffs the option of selecting it as an alternative venue in most cases; in essence, plaintiffs can use it as an option for forum shopping. The large number of cases in the Ninth Circuit is driven, in part, by the nature of the cases—most of which involve federal lands, which are heavily concentrated in the states encompassed by the Ninth Circuit. Forum shopping is also a potential factor for the Ninth Circuit, particularly given, as discussed further below, that plaintiffs prevailed at higher rates in the Ninth Circuit. This explanation has an inherent limit, however, because only about 20% of the NEPA and ESA cases in district court involved actions that spanned more than one circuit. Thus, the number of cases in which forum shopping could arise falls short of accounting for the number of cases in the Ninth Circuit. Inter-circuit disparities in plaintiffs’ success rates could still operate as a

156 Adelman & Glicksman, Citizen Suits, supra note 148, at 408.
157 Id.
158 For the difference between informal and formal consultations, see 3 GEORGE C. COGGINS & ROBERT L. GICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 29:26–27 (2d ed. 2007). Informal consultation “is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.” 50 C.F.R. § 402.13(a) (2017). Formal consultation is required if an agency determines that its action may affect listed species or critical habitat. Id. § 402.14(a).
159 Under NEPA, the D.C. Circuit cases involved challenged activities that were located in 11 circuits, with the highest number of cases originating from the Fourth Circuit (4), Sixth Circuit (4), Tenth Circuit (5), and Eleventh Circuit (3).
160 See 28 U.S.C. § 1391(e)(1) (2012) (providing that a civil action in which a defendant is the United States, a federal agency, or an official of such an agency may be brought in any judicial district in which a defendant in the action resides).
161 Most federal land is located in western states, suggesting that one would expect cases to be filed disproportionately in the Ninth and Tenth Circuits, which together encompass 99% of land managed by the Bureau of Land Management (BLM), 85% of U.S. Forest Service (USFS) land, and 91% of land under the jurisdiction of the National Park Service (NPS). See Adelman & Glicksman, Judicial Politics, supra note 147, at 31.
162 Just 12% of the NEPA cases and roughly 17% of the ESA cases spanned more than one circuit.
deterrent to filing cases in other federal circuits. If this were a significant factor, it could depress the number of cases outside the Ninth Circuit and contribute to the skewed distribution of cases geographically.

The analysis that follows utilizes a variety of statistical methods to assess the relative influence of local, executive, and judicial politics on case outcomes and the geographic distribution of the cases. Starting with basic descriptive statistics, we find substantial differences in outcomes between cases filed during the Bush Administration and those filed during the Obama Administration. Environmental plaintiffs in NEPA cases were about twice as likely to prevail in district and appellate courts during the Bush Administration as during the Obama Administration. The differences were smaller in the ESA cases, though, with environmental plaintiffs about 50% more likely to prevail during the Bush Administration at both the district and appellate court levels. In absolute terms, the cross-administration differences were nineteen and fourteen percentage points for NEPA and ESA cases, respectively.

Geographically, the Ninth Circuit was not only the center of activity, it was also a favorable venue for plaintiffs. In the Ninth Circuit, environmental plaintiffs prevailed at the district court level in NEPA and ESA cases at rates ten to twenty-five percentage points higher than other circuits (collectively). The D.C. Circuit was a somewhat less favorable venue, with rates that were about ten percentage points lower than those in the Ninth Circuit. On appeal, the Ninth Circuit stood out during the Bush Administration, with environmental plaintiffs advantaged in ESA and NEPA cases by fifteen and thirty percentage points, respectively. However, while this advantage persisted for the ESA cases, it largely disappeared for NEPA cases during the Obama Administration.

These findings reveal that district judges in the Ninth Circuit were consistently less deferential to agencies than their counterparts in other circuits, whereas Ninth Circuit appellate judges were less deferential in ESA cases across both

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163 Environmental plaintiffs won 42% of the district court NEPA cases during the Bush Administration versus 23% of the district court cases during the Obama Administration; at the appellate level, plaintiffs won 36% of the NEPA cases during the Bush Administration versus 17% of the cases during the Obama Administration.

164 Under the ESA, plaintiffs won 47% of the district court ESA cases during the Bush Administration versus 32% of the district court cases during the Obama Administration; at the appellate level, plaintiffs won 34% of the ESA cases during the Bush Administration versus 22% of the cases during the Obama Administration.

165 Under NEPA, environmental plaintiffs won 50% of the district court cases in the Ninth Circuit, 42% in the D.C. Circuit, and 25% in other circuits during the Bush Administration; these rates dropped to 28%, 21%, and 6%, respectively, during the Obama Administration. Under the ESA, environmental plaintiffs won 52% of the district court cases in the Ninth Circuit, 42% in the D.C. Circuit, and 29% in other circuits during the Bush Administration; these rates dropped to 28%, 21%, and 6%, respectively, during the Obama Administration.

166 Environmental plaintiffs in the Ninth Circuit during the Obama Administration prevailed in 19% of the NEPA cases versus 14% in all other circuits collectively; for ESA cases, plaintiff success rates were 27% and 11%, respectively.
administrations but in NEPA cases they were less deferential only during the Bush Administration.

The influence of judicial ideology on case outcomes was more nuanced and less pronounced than the impact of the circuit and presidential politics. At the district court level, plaintiffs’ success rates were roughly fifteen percentage points higher before Democratic-appointed judges than Republican-appointed judges in cases filed during the Bush Administration; however, the differential dropped to about ten percentage points during the Obama Administration and was no longer statistically significant. This result suggests that the influence of judicial ideology declined with the shift in presidential politics—it was statistically significant when the conservative ideology of the Bush Administration conflicted with the liberal statutory mandates of NEPA and the ESA but was neutralized when the priorities of the Obama Administration were largely in alignment with those of the statutes.

At the appellate level, the influence of judicial ideology was complicated by the permutations of three-judge panels. Consistent with studies discussed above, we observed the greatest differences in case outcomes between the two administrations when panels were ideologically uniform, either all Republican or all Democratic appointees, whereas ideologically mixed panels tended to moderate plaintiffs’ success rates. During the Bush Administration, environmental plaintiffs prevailed before all-Democratic panels at rates that were about fifty percentage points above those before all-Republican panels. However, the impact of judicial ideology diminished during the Obama Administration, with plaintiffs’ success rates in NEPA and ESA cases dropping overall and disparities across panels with different ideological mixes generally declining to ten to fifteen percentage points. While we cannot know whether

\[167\] For the NEPA cases, plaintiffs prevailed before Republican and Democratic judges in 31% and 44% of the cases (p-value of 0.046), respectively; for ESA cases, plaintiffs prevailed before Republican and Democratic judges in 33% and 51% of the cases (p-value of 0.003), respectively.

\[168\] For the NEPA cases, plaintiffs prevailed before Republican and Democratic judges in 16% and 23% of the cases (p-value 0.265), respectively; for ESA cases, plaintiffs prevailed before Republican and Democratic judges in 27% and 39% of the cases (p-value of 0.071), respectively.

\[169\] See supra Part II.A.

\[170\] The one exception was NEPA cases with majority-Democratic panels during the Bush Administration, before which plaintiffs prevailed at modestly higher rates than all-Democratic panels (53% versus 47%, respectively).

\[171\] For the NEPA appeals during the Bush Administration, plaintiffs prevailed 0% of the time before an all-Republican panel versus 48% before all-Democratic panels; for ESA appeals, plaintiffs prevailed 20% of the time before an all-Republican panel versus 73% before all-Democratic panels. The p-values were all below 5% with the exception of ESA cases during the Obama Administration.

\[172\] The one exception was plaintiff success rates before all-Democratic panels in NEPA cases, which remained static around 50%. By contrast, while the rate for all-Democratic panels in ESA cases remained relatively high, it fell by more than half and was not statistically significant.
the long-term baselines for plaintiffs’ success rates under either statute are closer to the level observed during the Bush or Obama Administrations, the observed declines in the influence of judicial ideology on politically uniform panels is striking.

We believe that the interplay we observe between judicial and presidential politics is likely generalizable to statutes that reflect conservative values (e.g., immigration, regulatory reform, school choice); however, for such conservative statutes, the influence of ideology on judicial review would decline during Republican administrations. We find evidence for this in the trends we observe across the two administrations. Specifically, the pattern for the influence of judicial ideology is inverted for cases filed by plaintiffs other than environmental organizations and it is Republican judges who favor them. In most of these cases, the plaintiffs are private entities (often landowners) or local governments seeking to weaken or avoid regulations under the ESA. Although the number of cases is much smaller (thirty-six appellate cases), the success rate of non-environmental plaintiffs before Republican-majority appellate panels doubled between the Bush and Obama administrations, from 23% to 44%, whereas it was essentially flat before Democratic-majority panels. A similar pattern is observed in the district court cases, with non-environmental plaintiffs prevailing at double the rate before Republican judges during the Obama Administration (24% versus 48%), while their success before Democratic judges remained the same. The small number of cases, particularly at the appellate level, limits the inferences that we can draw from the data, but these findings are nevertheless consistent with either conservative or liberal presidential politics impacting the degree to which ideology is a significant factor during judicial review of agency action.

B. The Relative Importance of Institutional and Political Factors

We conducted multiple regressions using the district and appellate court data. Table 1 below displays the results from four logistic regressions using

173 At least one earlier study suggests that the average is closer to rates observed during the Obama Administration. Robert W. Malmsheimer et al., National Forest Litigation in the US Courts of Appeals, 102 J. FORESTRY 20, 22 (2004) (finding that the USFS prevailed in 64% of the ESA cases during the George H.W. Bush Administration and 80% of the cases during the first Clinton Administration).

174 During the Bush Administration, non-environmental plaintiffs won three out of thirteen cases before majority-Republican panels versus zero of five before majority-Democratic panels; during the Obama Administration, non-environmental plaintiffs won four out of nine cases before majority-Republican panels versus one of eight before majority-Democratic panels.

175 Because the dependent variable—whether the plaintiff prevailed on at least one of its claims—was categorical, logistic regression was used in place of conventional ordinary-least-squares regression. ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA 302–04 (rev. 3d ed. 2012). This type of regression generates a “likelihood” or “odds” ratio, which in our analysis is simply the ratio of the likelihood of a plaintiff prevailing when the value of the
two variations on parameters for each statute to assess the influence of key variables relative to each other. The dependent variable in each regression is case outcome, where success was defined as a plaintiff prevailing on at least one of either the NEPA or ESA claims. Likelihood ratios for plaintiff success rates appear above the z-values, which are in brackets, and the asterisks indicate the degree of statistical significance for each parameter. We conducted regressions with interaction terms to test whether the variables operated independently. None of the interaction terms were found to be statistically significant.

1. The Principal Predictors of Case Outcomes

The results in Table 1 confirm that the Ninth Circuit, judicial ideology, and class of plaintiff, specifically environmental organizations, have a statistically significant impact on the outcomes of ESA and NEPA cases in district court. Plaintiffs were 1.7–1.8 times more likely to succeed in an ESA or NEPA case before a Democratic judge than a Republican judge; they were roughly 1.7–2.5 times more likely to succeed in the Ninth Circuit; and plaintiffs were 1.5–2.5 times more likely to prevail if they were a national environmental organization. The statistical significance of the circuit variable implies that inter-circuit differences cannot be reduced to the ideology of judges. Structural features of the circuits must also be factors, particularly the balance of Republican and Democratic district court judges in the circuit, and whether the applicable dummy variable is “one” over the likelihood when it is “zero.” Id. For example, the dummy variable for presidential administration in our analysis designates the Bush Administration as “0” and the Obama Administration as “1.” Accordingly, the likelihood ratio is the odds of a plaintiff winning its case during the Obama Administration over the odds of a plaintiff prevailing during the Bush Administration. In this case, a likelihood ratio of “0.5” implies that a plaintiff has a 50 percent lower chance of winning an ESA suit during the Obama Administration than during the Bush Administration; conversely, a likelihood ratio of “1.5” implies that a plaintiff has a 50% greater chance of prevailing during the Obama Administration.

176 A “z-value” is a complementary measure of statistical significance that indicates the number of standard deviations the observed data deviate from the value predicted by the statistical model. Z-Score: Definition, Formula and Calculation, STATISTICS HOW TO, https://www.statisticshowto.datasciencecentral.com/probability-and-statistics/z-score [https://perma.cc/76M8-975A].

177 The statistical significance of the coefficient for the D.C. Circuit may have been limited by statistical power. Only sixty cases were filed in the D.C. Circuit, which, while large relative to most circuits, was small for purposes of statistical power—for our data, the statistical power was less than sixty for any sample with fewer than ninety-four cases.

178 The dummy variable, designating whether or not a case was published, was included as a control variable.

179 The success rates of environmental plaintiffs diverged somewhat across administrations—national environmental organizations had higher success rates than local ones (53% versus 40% percent, respectively) during the Bush Administration, but they converged during the Obama Administration (25% and 21%, respectively).
politics of “Republican” and “Democratic” judges differ across circuits (i.e., a Republican judge in the Ninth Circuit may not be as conservative as one in the Fifth Circuit). For NEPA cases alone, environmental plaintiffs were about 2.7 times more likely to prevail during the Bush administration and two times more likely to prevail if they were a local environmental organization. Other potential factors, such as the identity of the defendant federal agency, were also evaluated but found not to be statistically significant.

The regressions for the appellate cases appear in Table 2 below. The dependent variable in each regression is again case outcome, with success defined as a plaintiff prevailing on at least one of its NEPA or ESA claims. The other statistics in Table 2 mirror those of Table 1 apart from judicial ideology, which treats the four ideological combinations of three judges separately using panels with two Republican judges and one Democratic judge as the baseline against which the other panels were measured. An ideologically mixed panel was chosen as the baseline on the premise that it reflects a relatively neutral position ideologically. With regard to other ESA and NEPA claims, the smaller sample sizes of our appellate databases and the low rates at which most claims were raised limited the statistical power of our analysis.

Table 1: Logistic Regression for District Court Case Outcomes

<table>
<thead>
<tr>
<th></th>
<th>NEPA Ruling</th>
<th>NEPA Ruling</th>
<th>ESA Ruling</th>
<th>ESA Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administration</td>
<td>0.374***</td>
<td>0.362***</td>
<td>0.786</td>
<td>0.788</td>
</tr>
<tr>
<td></td>
<td>(-4.34)</td>
<td>(-4.53)</td>
<td>(-1.25)</td>
<td>(-1.24)</td>
</tr>
<tr>
<td>Appointing President’s</td>
<td>1.809**</td>
<td>1.851**</td>
<td>1.760**</td>
<td>1.776**</td>
</tr>
<tr>
<td>Party for Judge</td>
<td>(2.64)</td>
<td>(2.76)</td>
<td>(2.91)</td>
<td>(2.98)</td>
</tr>
<tr>
<td>DC Circuit</td>
<td>1.620</td>
<td>1.757</td>
<td>0.613</td>
<td>0.615</td>
</tr>
<tr>
<td></td>
<td>(1.26)</td>
<td>(1.49)</td>
<td>(-1.43)</td>
<td>(-1.43)</td>
</tr>
<tr>
<td>Ninth Circuit</td>
<td>2.607***</td>
<td>2.468***</td>
<td>1.728*</td>
<td>1.745*</td>
</tr>
<tr>
<td></td>
<td>(3.51)</td>
<td>(3.37)</td>
<td>(2.33)</td>
<td>(2.38)</td>
</tr>
<tr>
<td>National Environmental</td>
<td>2.476**</td>
<td>2.539**</td>
<td>1.580</td>
<td>1.481*</td>
</tr>
<tr>
<td>Organization</td>
<td>(2.93)</td>
<td>(3.02)</td>
<td>(1.78)</td>
<td>(2.04)</td>
</tr>
</tbody>
</table>

180 We conducted multiple regressions on specific claims under the ESA and NEPA; only a single claim under NEPA, whether an agency took a “hard look” at the environmental impacts of a federal action, was statistically significant. However, judges may have used the hard look review in a generic manner that raises questions of endogeneity—in other words, judges convinced on independent technical grounds that the agency’s analysis was adequate often ended their opinion by concluding that the agency had undertaken the required hard look.
The regression coefficients in Table 2 are roughly consistent across the ESA and NEPA cases for the presidential administration, whether the defendant (typically the government) was an appellee, and all-Democratic appellate panels.\textsuperscript{181} On average, plaintiffs were about twice as likely to prevail during the Bush Administration, and they were two to four times more likely to prevail in cases before all-Democratic panels than panels with two Republican judges and one Democratic judge. The identity of the appellee, whether it was a defendant or plaintiff, was also a significant factor despite the small number of appeals initiated by defendants (fewer than twenty-five cases under either statute); defendants were about four times more likely to prevail on appeal than plaintiffs. For the NEPA cases, the Ninth Circuit and environmental plaintiffs were each statistically significant factors. Plaintiffs were roughly 2.5 times more likely to win in the Ninth Circuit, and environmental plaintiffs were about two times more likely to prevail than other classes of plaintiffs.

### Table 2: Logistic Regression for Appeals Outcome

<table>
<thead>
<tr>
<th></th>
<th>NEPA Ruling</th>
<th>NEPA Ruling</th>
<th>ESA Ruling</th>
<th>ESA Ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other Circuits-</td>
<td>2.294\textsuperscript{**}</td>
<td>2.757\textsuperscript{***}</td>
<td>0.751</td>
<td>0.740</td>
</tr>
<tr>
<td>Ninth Circuit</td>
<td>(2.43)</td>
<td>(3.25)</td>
<td>(-0.63)</td>
<td>(-0.67)</td>
</tr>
<tr>
<td>Administration\textsuperscript{182}</td>
<td>0.537\textsuperscript{**}</td>
<td>0.572\textsuperscript{*}</td>
<td>0.462\textsuperscript{*}</td>
<td>0.500\textsuperscript{*}</td>
</tr>
</tbody>
</table>

\textsuperscript{181} While the statistical significance is weaker under the ESA, this is likely due to the smaller number of cases. Given that our sample of NEPA cases includes over 340 cases and is almost equally divided between the Bush and Obama Administrations, statistical power is unlikely to be a problem.

\textsuperscript{182} The time lag associated with appeals makes it more difficult to define when one administration stops and another begins. We experimented with different cutoff dates, but the results did not vary significantly. As a consequence, we adopted a “middle of the road” approach that defines the Bush Administration as encompassing all circuit cases filed.
2. Presidential Politics and Plaintiff Success Rates

The results of the regressions for the appellate cases differ both across the two statutes and with those for district courts. Case outcomes under both statutes were influenced by the presidential administration, which was associated with a decrease in success rates of about twenty percentage points between the Bush and Obama Administrations. This result could be driven by multiple factors, including changes in the cases plaintiffs filed or the policies of the presidential

<table>
<thead>
<tr>
<th></th>
<th>(-2.06)</th>
<th>(-1.89)</th>
<th>(-1.85)</th>
<th>(-1.70)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Published¹⁸³</td>
<td>2.646**</td>
<td>2.611**</td>
<td>1.243</td>
<td>1.269</td>
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<tr>
<td></td>
<td>(2.56)</td>
<td>(2.56)</td>
<td>(0.37)</td>
<td>(0.41)</td>
</tr>
<tr>
<td>Hard Look</td>
<td>0.448**</td>
<td>0.442**</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(-2.33)</td>
<td>(-2.43)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellee</td>
<td>0.219***</td>
<td>0.223***</td>
<td>0.218***</td>
<td>0.257**</td>
</tr>
<tr>
<td></td>
<td>(-2.81)</td>
<td>(-2.94)</td>
<td>(-2.78)</td>
<td>(-2.54)</td>
</tr>
<tr>
<td>Environmental Organization</td>
<td>2.094**</td>
<td>2.032**</td>
<td>1.905</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2.21)</td>
<td>(2.17)</td>
<td>(1.51)</td>
<td></td>
</tr>
<tr>
<td>Circuit Panel 3-Reps</td>
<td>0.770</td>
<td>1.483</td>
<td>1.408</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(-0.43)</td>
<td>(0.58)</td>
<td>(0.51)</td>
<td></td>
</tr>
<tr>
<td>Circuit Panel 1-Rep/2-Dems</td>
<td>1.291</td>
<td>1.334</td>
<td>1.363</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.70)</td>
<td>(0.37)</td>
<td>(0.40)</td>
<td></td>
</tr>
<tr>
<td>Circuit Panel 3-Dems</td>
<td>2.247*</td>
<td>4.157*</td>
<td>4.146**</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1.86)</td>
<td>(1.94)</td>
<td>(1.97)</td>
<td></td>
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</tbody>
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<table>
<thead>
<tr>
<th>N</th>
<th>330</th>
<th>334</th>
<th>158</th>
<th>158</th>
</tr>
</thead>
</table>

Exponentiated coefficients; z statistics in parentheses; * p < 0.10, ** p < 0.05, *** p < 0.01

¹⁸³ Whether the case was published is a control variable, but it does not change the results significantly if it is excluded. The principal impact is on the Ninth Circuit variable for NEPA cases, which falls below statistical significance if publication is removed. The coefficients for other independent variables change only modestly.
administration. Given the Bush Administration’s deregulatory bias, a plausible explanation is that the Bush Administration’s compliance with the statutes was weak and that this caused appellate judges to rule in favor of plaintiffs more often—correcting instances in which district court judges were overly deferential. It is notable that plaintiffs’ success rate on appeal was not affected by their high success rates in district court (and the resulting smaller pool of cases) during the Bush Administration—they won at higher rates in both district and appellate court. Thus, even though district court judges ruled in favor of plaintiffs at greater rates, the pool of cases for appeal was, on average, stronger during the Bush Administration than during the Obama Administration. While we cannot definitively distinguish between the potential factors at work, we believe that the high success rates of plaintiffs in district court and on appeal suggests strongly that administration policies and implementation were central factors.

Our reasoning turns on the inference that plaintiffs were not more selective in the cases they appealed during the Bush Administration, which is premised on three observations. First, the number of appeals filed annually was comparable during the two administrations, despite plaintiffs’ success rate in district court during the Bush Administration being higher than it was during the Obama Administration. Second, the threshold for choosing a case to appeal was quite high (only about a quarter of NEPA and a third of ESA cases were appealed), which substantially narrowed the range of cases. This selectivity would tend to diminish the differences observed in appellate outcomes across administrations assuming plaintiffs were effective in selecting cases with a

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185 In essence, the more selective plaintiffs are in determining which cases to appeal, the narrower the range will be with regard to the strength of their claims. Their efficacy in this respect will depend on how proficient plaintiffs are at selecting stronger cases—and focused on this as a criterion. See, e.g., Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework with Empirical Tests, 19 J. LEGAL STUD. 337, 337–38 (1990) [hereinafter Eisenberg, Selection Effect]; Theodore Eisenberg & Henry S. Farber, Why Do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?, 15 AM. L. & ECON. REV. 73, 105 (2013); John M. de Figueiredo, Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation, 21 J. L. ECON. & ORG. 501, 503–04 (2005).
higher likelihood of winning.\textsuperscript{186} Third, if selection criteria did vary, one would expect environmental plaintiffs to be less selective—that is more aggressive—during the Bush Administration. But, contrary to our results, such a strategy would lead to lower, rather than higher, success rates in court. The higher success rates of plaintiffs during the Bush Administration therefore appear more likely to be attributable to shifts in administration policies and implementation rather than the litigation strategies of environmental plaintiffs.

3. Appellate Panels Effects and Circuit Structure

The other major factor that was common to both statutes was judicial ideology, but its impacts were statistically significant only for all-Democratic panels. As noted above, the role of ideology on three-judge panels is mediated by the strong norm of unanimity that exists among circuit judges.\textsuperscript{187} This norm reduces the influence of judicial ideology on mixed panels, which predominate in circuits with relatively balanced numbers of judges based on political affiliation. This theory is consistent with the small, statistically insignificant differences we observe in the coefficients for ideologically mixed panels.\textsuperscript{188} Unlike prior studies, however, we find that the coefficient for panels with all-Republican judges did not differ meaningfully from the ideologically mixed panels, whereas the coefficients for all-Democratic panels were higher by a factor of two to four.\textsuperscript{189} This asymmetry is the opposite of what Revesz observed in his study of D.C. Circuit cases, where he found that all-Republican panels were the most extreme ideologically.\textsuperscript{190}

\textsuperscript{186} Eisenberg, Selection Effect, supra note 185, at 338 n.3 (affirming the importance of selection effects on appeal).

\textsuperscript{187} This norm is clearly evident in our sample data: dissents were filed in just 5.5% of the cases. See Sean Farhang & Gregory Wawro, Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making, 20 J. L. Econ. & Org. 299, 307 (2004) (observing that the norm of consensus among appellate judges stems from “a view among judges that unanimous court opinions promote the appearance of legal objectivity, certainty, and neutrality, which fosters courts’ institutional legitimacy”); see also Renee Cohn Jubelirer, Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court, 82 L. & Contemp. Pros. 103, 105–06 (2019) (contrasting collegial deliberative and adversarial collaborative processes of judicial decision-making).

\textsuperscript{188} The baseline for the regression is a panel with two Republican-appointed judges and one Democratic. The results in Table 2 show that the increase in plaintiff success rate above this baseline for a panel with two Democratic-appointed judges and one Republican is less than 30% and that it is not statistically significant.

\textsuperscript{189} See supra Table 2. Statistical power was likely a factor for the NEPA cases, given the small number of appeals with all-Republican panels. Because of the adverse combinatorics, uniform panels were relatively rare in our sample, representing thirty-seven and fifty-two cases for the all Republican-appointed and all Democratic-appointed panels, respectively.

\textsuperscript{190} See Revesz, Ideology, supra note 13, at 1754 tbl.11. While the coefficient in supra Table 2 regression is not statistically significant at the 5% level, a much larger study would
the government was an appellee, the small number of defendant-initiated appeals limits what we can infer—beyond that appellate judges appear to be especially deferential to government agencies when they initiate an appeal.

The results for NEPA cases exhibit two additional statistically significant factors at the appellate level—whether the case was filed in the Ninth Circuit and whether the plaintiff was an environmental organization. The persistence of circuit effects for appeals of NEPA cases is likely attributable, in part, to the large share (more than 50%) of the cases in the Ninth Circuit, which is important because the number of cases heard by ideologically uniform three-judge panels scales nonlinearly with the number of cases in a circuit. In the Ninth Circuit, this effect was reinforced by the roughly 60%–40% split between Republican and Democratic circuit judges. Accordingly, 65% of the NEPA appeals nationally were decided by majority-Democratic panels, and 83% of those with all-Democratic panels were Ninth Circuit cases. Thus, rudimentary statistics effectively amplified the disparity in NEPA case outcomes between the Ninth Circuit and other circuits collectively. The second factor, the equal or higher success rates of environmental plaintiffs on appeal, underscores the relative merits of their claims, as they prevailed at higher rates than other plaintiffs before both Democratic and Republican judges.

It is notable that the Ninth Circuit is a favorable venue for ESA cases at the district court level but not on appeal. This could simply be a matter of selection effects and the smaller number of ESA cases relative to those filed under NEPA. Since so few ESA cases were appealed, the high threshold for pursuing an appeal may have dampened any cross-circuit differences. The relatively small number of cases may also have resulted in somewhat idiosyncratic distributions of cases. For example, the principal difference between the two statutes appears to be with panels having two Democratic

have to be conducted to achieve the necessary statistical power given that fifteen years of data produced just fifty-two cases with all Democratic-appointed panels. However, the sample size, which represents roughly two-thirds of the 2001–2016 appeals, gives us sufficient confidence to treat the coefficient as meaningful and not a statistical fluke.

In our full sample, 49% of the judges were appointed by Democratic presidents and 51% were appointed by Republican presidents. The split in the D.C. Circuit was close to the national average—47% versus 53% for Democrat- and Republican-appointed judges, respectively; however, the split in the Tenth Circuit was 41% versus 59% for Democrat- and Republican-appointed judges, respectively.

Similarly, within the Ninth Circuit, 73% of the ESA appeals were heard by majority Democrat-appointee panels and 25% were heard by all Democrat-appointee panels (roughly double the rate, on average, if there were equal numbers of Democratic- and Republican-appointed judges). By contrast, only a single appeal was heard by an all Democratic-appointed panel in the D.C., Tenth, or Sixth Circuits, which were the only other circuits with more than fifteen cases in our sample.

See supra Tables 1 & 2.
judges and one Republican judge, which for ESA cases in the Ninth Circuit ruled against plaintiffs at a rate higher than panels on which Republicans were in the majority. Two factors may be at play here: (1) a disproportionate share of the Republican-majority panels heard cases during the Bush Administration, which could raise plaintiffs’ success rates in relative terms; and (2) while majority-Democratic panels were evenly distributed over time, panels with two Democrats were highly deferential to the Obama Administration, which prevailed in 94% of the cases. This speculative analysis illustrates the inherent indeterminacies created by the interplay of case selection effects, judicial panels, and the volume of cases. Resolving these effects is not always feasible; instead, the clearest inferences we can draw center on the relative importance of the statistically significant factors found in the regressions.

4. Judicial Ideology and Case Outcomes

The regression results make it clear that judicial ideology is not a predominant factor in case outcomes; while it is consistently a factor, the administration, the Ninth Circuit, and the class of plaintiff are often of comparable or substantially greater importance. In the district courts, we find that the influence of judicial politics, the Ninth Circuit, and the plaintiff are comparable for ESA cases and that the Ninth Circuit, presidential administration, and plaintiff have significantly greater influence than judicial ideology for NEPA cases. On appeal, judicial ideology is a significant factor only for all-Democratic panels, which account for a small proportion of the cases under either statute. For NEPA appeals, the ideological influence of all-Democratic panels is comparable to the influence of the administration, the Ninth Circuit, and the plaintiff. By contrast, the influence of ideology on all-Democratic panels in ESA cases was roughly double that of the presidential administration, which was the only other statistically and practically significant factor. Accordingly, judicial ideology is one of several factors in district court and, while still significant and even dominant in magnitude on appeal, its influence is discernable in a relatively small number of cases. Overall, judicial ideology is observed to impact more district court than appellate cases, but its influence is substantially smaller, on average, than in the subset of appeals with ideologically uniform panels.

More concretely, if we assume that the “ideologically neutral” rate for overturning agency decisions during the study period was midway between the rates observed for Democratic and Republican district court judges, roughly ten

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195 By contrast, in the NEPA cases, such panels in the Ninth Circuit decided in favor of plaintiffs at rates just slightly lower than all-Democratic panels, whereas such panels in other circuits ruled at rates that were comparable to those of Republican-majority panels.

196 See supra Table 1.

197 See supra Table 2.

198 See id.

199 See id.
NEPA and four ESA cases were wrongly decided annually, with the cases evenly divided between those overly deferential and those second guessing the agency. At the appellate level, the numbers would be about two and one annually for NEPA and ESA appeals, respectively, assuming that the ideologically mixed panels represent the ideologically neutral position. These estimates lead to “departure rates” from nominally neutral adjudication of 10%–13% in district court cases and 3%–5% on appeal. These departure rates are useful proxies for estimating the number of cases that were decided on ideological grounds rather than on an admittedly idealized, neutral, or balanced legal basis. Whether expressed in absolute or relative terms, the departures from neutrality are modest, particularly given the imprecision of the statutory provisions and applicable legal doctrines on judicial review. Moreover, many of the ESA and all of the NEPA cases involved procedural issues for which judicial deference is likely to be low and thus the potential for ideological distortions would be higher than the average administrative review cases. 200 The final section explores potential explanations for the trends we observe and assesses their practical and normative implications.

IV. INSTITUTIONAL MECHANISMS THAT MEDIATE POLITICS IN THE FEDERAL JUDICIAL SYSTEM

The study results show that the influence of judicial ideology on case outcomes is mediated by two principal factors in addition to randomized selection of judges. The structure of circuits impacts the volume of cases in each circuit, which at the district court level can alter the balance of Republican and Democratic judges that hear cases and at the appellate level can affect the number of ideologically uniform panels. Presidential policies create alignments and misalignments between judicial ideology, statutory mandates, and the executive branch, which cause the politics of judges to figure more or less prominently in legal opinions. 201 We believe that identifying the conditions that moderate or exacerbate the influence of judicial ideology is critical to the legitimacy of judicial review. Our analysis of the NEPA and ESA cases indicates that concerns about judicial ideology at the district and appellate court levels tend to be overstated and that the escalating battles over judicial appointments appear to be out of step with reality. In most circumstances, judicial ideology plays a secondary role. Outside the Supreme Court, where a single appointment has the potential to flip the ideological balance of the Court, the politicization of judicial appointments has had limited effect. 202 If a single President is able to fill an unusually high number of lower court vacancies, as

200 Revesz, Ideology, supra note 13, at 1728.
201 Id. at 1735.
President Trump has been able to do during the first three years of his presidency, politicization becomes more of a threat. Understanding the institutional mechanisms that mediate the influence of judicial ideology and their vulnerabilities to being undermined or overridden is of critical importance to integrity of the legal system.

Our central finding is that presidential politics, the class of plaintiff, and the filing of a case in the Ninth Circuit frequently have a greater impact on case outcomes than judicial ideology. While we cannot definitively determine the reasons each of these factors affects case outcomes, we identify the most likely explanations. In the case of environmental plaintiffs, Republican judges are unlikely to be particularly sympathetic to their claims, and yet environmental groups prevail at higher rates before judges of either political affiliation. We suggest that careful case selection, driven by resource constraints, is the most likely reason for these groups’ higher success rates, which is consistent with the low frequency of litigation relative to the number of federal actions that could be challenged. Similarly, the higher success rates of environmental plaintiffs during the Bush Administration is most likely attributable to weaker agency compliance with the statutes, as opposed to greater selectivity in challenging agency actions or less aggressive litigation tactics. By contrast, the unique status of the Ninth Circuit is driven by circumstantial and structural factors—the high volume of cases, the balance of Republican and Democratic judges, and systemic differences in the politics of Republican and Democratic judges across circuits. Importantly, while the high threshold that must be cleared before environmental plaintiffs are willing to sue likely diminishes the potential influence of judicial ideology, the divergent policies of the two administrations and the large volume of cases in the Ninth Circuit provide statistical variance and power, respectively, that make it easier to discern the effects of the mediating institutional mechanisms in the federal judicial system.

This part of the Article incorporates and expands upon the literature on the impact that judges’ politics have on judicial review. Most importantly, we consider institutional mechanisms that mediate the influence of judicial ideology beyond randomly selected three-judge appellate panels. While our empirical results for appellate cases are consistent with prior studies of judicial ideology, the mediating impact of circuit geography and the degree of alignment between presidential policies and statutory objectives also play an important role in mediating the influence of judicial ideology. Our study of district court cases also extends the existing studies, which have focused almost exclusively on the appellate courts. We begin with a discussion of how the different dynamics of trial and appellate court litigation reduce the impact of judicial ideology in the district courts. We then turn to evaluating the capacity of judicial review to moderate the influence of presidential politics by invalidating agency decisions in tension with statutory goals, and to the manner in which geographic

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203 See supra Tables 1 & 2.
and ideological inter-circuit differences drive case outcomes. The final section focuses on the normative and practical implications of our findings.

A. Institutional Constraints on the Influence of Judicial Ideology

The structural differences and hierarchical relationship between district and appellate courts each impacts the influence of judicial ideology on case outcomes. Most importantly, district court cases are not subject to the mediating effect of three-judge panels. Reliance on a single judge results in judicial ideology being a persistent factor in district court opinions, but its influence appears to be tempered by the low political salience of most cases. District court cases, due to the heightened selectivity of appeals, are typically lower stakes and raise legal issues that are less contentious or problematic than the average case that is appealed. These characteristics make it less likely that judges’ ideological perspectives will become a significant factor, and this generalization is likely to be especially true for the highly technical issues often raised in NEPA and ESA cases. We observe this tempering effect in the modest influence judicial ideology has on case outcomes—about a fifteen percentage-point difference between Republican and Democratic district court judges across both administrations. The influence of judicial ideology in district court opinions is further moderated by the potential for an appellate court to overturn district court opinions. This can occur directly, through actual appeals, or indirectly, through precedential opinions or the threat of an appeal. Moreover, the threat of a reversal on appeal is significantly greater for a district court decision than for a court of appeals case due to the small and dwindling number of cases that the Supreme Court agrees to review each year. Thus, the consistent but modest influence of judicial ideology we observe in district court opinions has several institutional origins.

The influence of judicial ideology in appellate courts, as we have seen, has greater variance, but this variability is driven by a small subset of cases. Accordingly, while judicial ideology can lead to strikingly large disparities in the rates (often more than forty percentage points) at which plaintiffs prevail before ideologically uniform panels with opposing political affiliations, the actual number of cases implicated relative to the total appealed annually is quite

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204 See Fischman, Voting Patterns, supra note 13, at 820–21.
205 See supra Table 1.
206 Carney, supra note 122 ("Appeals courts, in particular, are a top priority for McConnell because the circuit courts hear thousands of cases every year—compared to the Supreme Court, which heard 69 cases during their last term—and often have the final say for states within their jurisdiction.").
207 See supra Table 1.
small. This pattern is observed throughout the literature and follows from the institutional mechanism that drives it—the system of randomized selection of three-judge appellate panels. Simple combinatorics strictly bounds the number of ideologically uniform panels based on the numbers of Republican and Democratic judges in a circuit. The strong norm of unanimity among appellate judges, along with the relative infrequency of ideologically uniform panels, moderates the overall influence of ideology by tempering its influence on ideologically mixed panels and limiting the instances in which it is relatively unconstrained to a small subset of cases. We estimate that the departure rate from a nominally neutral position is roughly 5% and that, in absolute terms, this corresponds to fewer than a handful of appellate opinions annually being ideological outliers.

These constraints are contingent on there being a fair balance of Republican and Democratic appellate judges. A large shift in the number of judges appointed by one political party could disrupt this dynamic by shifting the balance dramatically towards judges with views that align strongly with Democratic or Republican politics. Conservative scholars, for example, have urged Congress to double or triple the number of federal appeals court and district court judges with the explicit goal of “undoing the judicial legacy of President Barack Obama.” Such a plan would dramatically increase the number of ideologically uniform panels if all or most of the vacancies were filled by the same president and passing a strong ideological litmus test were a precondition to being appointed.

Barring such an effort, it is difficult to view modest departure rates from neutrality referred to above as posing a significant threat to the legitimacy of the federal court system. Given the indeterminacies of legal analysis and the imprecision of most statutory regimes, such deviations appear relatively benign. Some might argue that the relative differences in case outcomes are nevertheless troubling or, perhaps, that they are more important than the small absolute numbers would suggest. We recognize that the characterization of the observed

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209 See, e.g., Revesz, Ideology, supra note 13, at 1771–72.
210 “Departure rate” is used loosely here to indicate the percentage of cases in which plaintiffs prevailed above what would be projected if plaintiffs’ success rates before ideologically uniform panels were the same as those before ideologically mixed panels.
trends in absolute or relative terms shapes how we view them. Pragmatically, we have emphasized the practical limits of judicial review—because perfection is unattainable, we should aim for a reasonable level of variance in case outcomes and a 5% departure rate from neutrality appears, to us at least, well within the bounds of reasonable expectations for complex and inherently discretionary judicial proceedings.

One potential critique of this approach is that the departure rate from neutrality that we derive is not a conventional stochastic error rate. To the contrary, the large variance observed in plaintiffs’ success rates was associated with ideologically uniform panels, and more often panels from the Democratic end of the spectrum. Typically, the rationale that underlies acceptance of stochastic error rates is that it is either impossible or extremely costly to reduce them below a certain point. That is clearly not the case here, as a relatively low-cost option exists for reducing the variance in case outcomes observed across appellate panels—as several commentators have already advocated, a rule barring ideologically uniform panels could simply be adopted. We view this as a reasonable proposal if your principal objective is consistency. But as Ralph Waldo Emerson once observed, “[a] foolish consistency is the hobgoblin of little minds.”

We believe that a risk exists here, if the tradeoffs are not adequately considered, of falling into a narrow focus on protecting the “rule of law” above all else.

Evaluating the potential tradeoffs necessarily implicates the other institutional mechanisms that mediate the influence of judicial ideology. It therefore requires that we work through them before a full assessment of the tradeoffs can be conducted. Anticipating the fuller discussion below, we believe that the enhanced check on executive branch policies provided by ideologically uniform panels, in part because it is structurally bounded, has significant value and minimal costs given that it has a moderating effect. To the extent that it cuts off innovative policies, it will do so on a limited basis given the relatively low frequency of such panels; on the other hand, such panels are substantially more likely, on average, to provide an effective check on agency policies when they stray significantly from statutory mandates. The legally centrist asymmetric nature of judicial review limits the threat to “rule of law” principles while enhancing the potential to protect against ultra vires executive branch policies.

B. Judicial Ideology as an Instrument of Political Moderation

The convergence we observe in the success rates of environmental plaintiffs before Republican- and Democratic-majority appellate panels is a striking result. We interpret it as evidence that the influence of judicial ideology was largely neutralized in appeals during the Obama Administration.

212 See supra Table 2.
213 Spitzer & Talley, supra note 13, at 645–48.
214 RALPH WALDO EMERSON, THE ESSAY ON SELF-RELIANCE 23 (1908).
Constitutionally, it reveals a mechanism by which the system of checks and balances adjusts to presidential policies that are in tension with statutory mandates. In essence, misalignment of presidential politics with a statute’s mandate increases the influence of ideology on case outcomes because a judge’s political sympathies will side either with the president or the statute. By contrast, when presidential politics and statutory mandates are aligned judges will be either indifferent, because their political sympathies favor neither the president nor the statute, or will be pulled in opposing directions, because their political sympathies are split between them. While this study centers on two environmental statutes, which are aligned strongly with the Democratic party, we believe that similar alignments and misalignments can occur with statutes associated with the Republican party or conservative politics. Thus, a Democratic administration’s implementation of a politically conservative statute can be expected to heighten the likelihood of a Republican judge ruling against the government. To our knowledge, this is the first time that the interaction between presidential politics and judicial ideology has been elucidated in this manner.

We believe that several reasons exist for the absence of a similar convergence in the district court cases. First, because the influence of judicial ideology in the district court cases is relatively small across both administrations, the lower variance in case outcomes makes it harder to detect statistically meaningful changes.215 By contrast, we observed a large drop in the disparity in appellate case outcomes between panels dominated by judges with opposing political affiliations from roughly 34% to 5%, between majority-Democratic and majority-Republican panels across the two administrations.216 Moreover, essentially all of the convergence is attributable to majority-Democratic panels; while success rates of environmental plaintiffs were consistently about 18% before majority-Republican panels, they dropped from 52% to 20% before majority-Democratic panels.217 In other words, majority-Democratic panels were much more deferential to the Obama Administration than the Bush Administration.218 Indeed, we observe the opposite trend for cases brought by non-environmental plaintiffs under the ESA, many of which directly challenged ESA species protections: non-environmental plaintiffs prevailed before majority-Republican panels at a higher rate than before majority-

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215 In the NEPA cases, we do not observe significant differences in the success rates of other plaintiffs either across administrations or between majority-Democratic and majority-Republican panels. In the ESA cases, we find that the success rates of other plaintiffs invert—they are relatively low before Republican judges during the Bush Administrations, and they double during the Obama Administration, whereas their rates before Democratic judges are essentially unchanged across the two administrations.

216 See supra Part III.B.

217 This convergence is reflected in our regression results, where the presidential administration is a statistically and practically significant factor in the appellate cases under both statutes. See supra Table 2.

218 If only the population of cases were changing, the success rates of plaintiffs might change but this alone could not affect differences based on judicial ideology.
Democratic panels, and this disparity increased during the Obama Administration. Although the small number of cases limits what we can infer from these results, the pattern inverts for non-environmental plaintiffs because their interests were opposed to both the principal mandate of the ESA and the politics of the Obama Administration.

The alignment of interests between the judges, statutory mandates, and presidential politics is captured by four basic scenarios reflected in our data, namely, cases filed during each administration with either majority-Democratic or majority-Republican appellate panels. Starting with the Bush Administration, Republican judges were sympathetic to the Administration and unsympathetic to the liberal goals of NEPA (both factors aligning against environmental plaintiffs), whereas Democratic judges were sympathetic to the goals of NEPA but unsympathetic to the politics of the Administration (both factors aligning in favor of environmental plaintiffs). However, during the Obama Administration, Republican judges were unsympathetic to NEPA’s goals and to the politics of the Administration (both factors essentially neutral towards environmental plaintiffs), whereas Democratic judges were sympathetic to both (one factor favoring and the other opposing environmental plaintiffs). As a consequence, the ideological commitments of the judges were either split between the statutory mandate and the administration or neutral towards them, which diminished the influence of judicial ideology.

The interaction we observe between presidential politics and judicial ideology likely applies beyond NEPA and the ESA. However, empirical studies of judicial review under other statutes, particularly those aligned ideologically with Republican politics, must be conducted to substantiate this claim. In addition, while the degree to which judicial review places a check on executive branch policies will be greater when the politics of a presidential administration diverge from the mandate of a statute, the vibrancy of that check will depend strongly on the balance of judges with liberal or conservative views in each circuit and their alignment with the mandates of the governing statute. From a normative perspective, our data reveal that the influence of judicial ideology is not per se reason for concern. To the contrary, it provides an inherently centrist and moderating check on executive branch policies, at least as long as judicial appointments are not heavily skewed toward one political party or the other.

While we have focused on differences between majority-Democratic and majority-Republican panels, ideologically uniform panels, on average, tend to favor plaintiffs more strongly than ideologically mixed panels. In our study,

219 During the Bush Administration, non-environmental plaintiffs won three out of thirteen ESA cases (23%) before majority-Republican panels versus zero of five ESA cases before majority-Democratic panels. During the Obama Administration, non-environmental plaintiffs won four out of nine ESA cases (44%) before majority-Republican panels versus one of nine ESA cases (11%) before majority-Democratic panels.

220 See supra Table 2.

221 An all-Republican panel that rejects an environmental group’s NEPA challenge exercises its authority passively by confirming the administration’s exercise of policy
their net effect was modest because they represent a small share of the total number of cases. However, because the number of ideologically uniform panels depends nonlinearly on the number of Republican and Democratic judges, they could have a much greater impact if the ideological balance of federal judges were upset significantly. As illustrated in Figure 3 below, the percentage of ideologically uniform panels rises rapidly, from essentially 2% to 50% of the panels, as the number of judges with a Republican (or Democratic) affiliation rises from 20% to 80% of the population of appellate judges. Maintaining a relatively even balance of Republican and Democratic judges is therefore of critical importance for our findings to hold.222

Figure 3: Percentage of All-Republican Panels versus Percentage of Republican Appellate Judges

judgment. Such decisions typically cannot push statutory policies in new directions. On the other hand, an all-Democratic panel that rules in favor of an environmental group’s NEPA challenge serves the checking function we have described above. Thus, this asymmetry means that judicial intervention tends to push agency decisions toward the political middle. There are no circumstances in which a court could reverse an agency on the ground that its NEPA compliance was excessive. Such cases are possible under the ESA. See, e.g., Home Builders Ass’n of N. Cal. v. U.S. Fish and Wildlife Serv., 268 F. Supp. 2d 1197, 1211 (E.D. Cal. 2003) (invalidating critical habitat designation due to agency’s failure to identify physical or biological features that were essential to the conservation of the species).

222 At the same time, even in the very unlikely scenario in which 80% of the judges were appointed by one party, 50% of appellate panels will still include judges from each party. See infra Figure 3.
In the near term, these dynamics show that judicial review can serve a valuable checking function in environmental cases when an administration, such as the Trump Administration, has an anti-regulatory outlook that conflicts with long-standing congressional mandates written into environmental statutes. As the Senate confirms Trump appointees to the federal courts, however, this checking function could weaken, as an increasing number of environmental cases are heard by panels comprised of Trump, and other Republican, appointees and the number of majority-Democratic panels declines. The extent to which Trump Administration policies receive broad judicial deference will depend not only on the number of new appointments, but also their distribution across the federal circuits. The forty-one successful appointments made as of June 24, 2019, to the appellate courts, for example, are relatively evenly distributed across the federal circuits, with slightly higher numbers of appointments in the Fifth (five), Sixth (six), and Ninth (six) Circuits. In many cases, the new appointments replace retiring Republican judges in conservative circuits, which will limit new appointees’ potential impact on the overall balance of Republican and Democratic judges in the federal system. To the extent that President Trump succeeds in making additional appointments, particularly those in more liberal circuits that replace Democratic judges, future Democrat administrations would be subject to review more often by Republican appointees who would be more likely to overturn executive actions in tension with statutes that reflect conservative values. Thus, while judicial ideology has the capacity to moderate presidential policies by ensuring that they conform with statutory mandates, the process of appointing and confirming federal judges influences whether the heightened checks associated with judicial ideology favor conservative or liberal statutes.

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225 Sullivan & DeBonis, supra note 4.
C. Inter-Circuit Difference in Case Outcomes

The circuit-level effects we observe at the appellate level are also conditional—the frequency with which they occur depends on the distribution of cases across circuits and the balance of Democratic- and Republican-appointed judges in each circuit. Litigation under NEPA and the ESA, fortuitously, provides a context in which such circuit-level effects are magnified by the disproportionate share of cases that were filed in the Ninth Circuit, where Democratic appellate judges were in the majority by a margin of 40% to 60% during the period covered by our study. The large number of cases improved the statistics but, more importantly, it led to the Ninth Circuit accounting for most of the majority—and all-Democratic panels nationally. The geographic distribution of cases further highlights the contingencies of circuit-level effects and the importance of taking into account the circuit structure of the federal judiciary and the ideological balance of judges within them.

The existing literature ignores systemic differences in the ideological outlook of Republican and Democratic judges across circuits by focusing either on a specific circuit or national trends. For example, a Republican judge in the Fifth Circuit is likely to be more conservative than a Republican judge in the Second Circuit. This oversight is particularly surprising given that there are structural reasons for such systematic inter-circuit differences in judicial ideology. In particular, the tradition of deferring to the senators for the state in which a judgeship is held reflects an understanding that the politics and ideological perspective of judges should, to some degree, be consistent with those of the surrounding state. Yet, commentators typically assume that any intrusion of a judge’s ideological views represents a threat to the “rule of law” and little effort is made to distinguish between inter-judge and inter-circuit sources of ideological variance. In short, much as there is value in legislative experimentation, we believe that there is value in ideologically inflected variance in judicial review that is grounded on the structure of the federal circuits. Moreover, use of national statistics to assess the influence of judicial ideology must take into account that such statistics will reflect both inter-judge

226 See, e.g., Sunstein et al., supra note 7, at 316–25, 331–33.
227 Id. at 331 fig.6.
228 See supra note 122 and accompanying text (discussing the blue slip practice).
229 See, e.g., Fischman, Estimating Preferences, supra note 13, at 782–83 (analyzing a data set of asylum cases in the Ninth Circuit to show that the “consensus voting model . . . has superior explanatory power compared to a sincere voting model,” and attributing variance in case outcomes across judges to inter-judge, not inter-circuit differences in ideology); cf. Stephen J. Choi & G. Mitu Gulati, Ranking Judges According to Citation Bias (As a Means to Reduce Bias), 82 NOTRE DAME L. REV. 1279, 1301 (2007) (“Ideological bias may also matter more for particular subject matter categories (civil rights more so than tax law for example) and the degree of de-biasing we undertake should take these differences into account.”).
and inter-circuit variation in case outcomes between Republican and Democratic judges.

The factors that affect circuit-level statistics on case outcomes are threefold: the volume of cases in the circuit, the balance of Republican and Democratic judges in the circuit, and any systematic differences in judicial ideology, for both Republican and Democratic judges, noted in the preceding paragraph. The Ninth Circuit is an outlier with respect to the volume of cases and the ideological balance of its appellate judges, which is weighted towards Democratic judges—and many commentators believe that this liberal bias is systemic as well, which would cut across judges with either political affiliation. The volume of cases and ideological balance of judges in a circuit can be amplified by the combinatorics of three-judge panels. For example, because most circuits have very few NEPA appeals and all-Democratic panels are relatively rare (about 12% of the cases), the Ninth Circuit for statistical reasons alone should account for roughly half of the all-Democratic panels. Add to this the skew of the Ninth Circuit towards Democratic judges and it is unsurprising that the Ninth Circuit accounted for 83% of the appellate panels nationally with exclusively Democratic-appointed judges.

The concentration of cases in the Ninth Circuit both magnified inter-circuit differences in the rates at which environmental plaintiffs prevailed and skewed the cases towards panels with more liberal judges. In particular, all-Democratic panels, as reflected in our data and other studies, favored environmental plaintiffs, most likely because each judge’s predilections were reinforced rather than tempered by their colleagues. In addition, Ninth Circuit judges overall may be more liberal than judges in other circuits, either because of the


231 See supra Part IV.A.

232 The statistics for the four combinations of judges on an appellate panel are as follows: (1) all cases in the sample—environmental plaintiffs prevailed on at least one claim in 8% of the cases before an all-Republican panel, 17% before a panel of two Republicans and one Democrat, 26% before two Democrats and one Republican, and 39% before an all-Democrat panel; (2) Bush Administration—plaintiffs prevailed on at least one claim in 5% of the cases before an all-Republican panel, 20% before a panel of two Republicans and one Democrat, 42% before two Democrats and one Republican, and 41% before an all-Democrat panel; (3) Obama Administration—plaintiffs prevailed on at least one claim in 12% of the cases before an all-Republican panel, 13% before a panel of two Republicans and one Democrat, 9% before two Democrats and one Republican, and 36% before an all-Democrat panel.

selection process noted above or because there may be strength in numbers at the circuit level that gives judges in the majority greater sway on panels. The strong coefficient for the Ninth Circuit in our regressions support this inference. Further, as the regression results for district court cases bear out (plaintiffs were 1.7–2.5 times more likely to prevail at the district court level in the Ninth Circuit), one would expect this ideological influence to filter down to district court judges through precedent and their attentiveness to being overturned on appeal. Moreover, these results cannot be attributed to an ideological imbalance among the district judges because, unlike the appellate judges, they were evenly split between Democratic and Republican appointees. As the Ninth Circuit cases demonstrate, these structural effects are magnified when one or a small number of circuits account for a disproportionate share of the cases litigated under a statute. Whether this set of conditions skews outcomes in a liberal or conservative direction, and how far, will depend on the balance of Democratic and Republican appellate judges on the circuit(s). Conversely, if cases are distributed relatively uniformly across circuits, perhaps due to geographic factors or the absence of forum shopping, circuit-level effects will be weak or disappear. These insights also provide new grounds for understanding the special status often attributed to the Ninth Circuit. Our findings suggest that the Ninth Circuit cannot be reduced to the ideological balance of its judges or its size; the strong norm of unanimity and random selection of appellate panels are critical mediating factors along with geographic and other factors that determine the distribution of cases across federal circuits.

In combination with the influence of presidential politics, particularly their alignment or misalignments with a governing statute, these circuit-level effects can enhance or erode the likelihood of judicial review at the appellate level checking agency action. While we have described the basic phenomenon, it would be useful to model systematically how circuit-level effects are likely to vary with the number of circuits in the federal system and their relative size, both geographically and with respect to numbers of cases. The importance of these factors also exposes the structural contingencies of judicial oversight and how they mediate the influence of judicial ideology in administrative cases. In doing so, it enhances our understanding of the institutional frameworks and political forces that shape the effectiveness of the checks and balances provided by an independent judiciary.

D. Insights into Contemporary Debates About the Structure of Federal Courts

We have identified a mix of institutional and structural factors that, to varying degrees, either restrain or magnify the influence of judicial ideology. Specifically, the check that judicial review provides on executive branch authority depends on the political alignments and misalignments between

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234 See supra Tables 1 & 2.
judges, the statute under review, and the presidential administration in power.\textsuperscript{235} Judicial ideology will be a significant factor, and judicial review more likely to limit agency action, when presidential politics are at odds with the politics of the governing statute \textit{and} the ideological outlook of the judge(s); its influence will be nominal when presidential politics and statutory goals are in alignment. These alignments and misalignments, in conjunction with the deferential posture of judicial review, constrain the influence of judicial ideology to moderating presidential policies towards a centrist interpretation of statutory mandates. The same dynamic will cause judicial ideology to have a similar moderating effect when agencies exceed rather than fail to meet statutory mandates. The impact of this structural counterbalancing dynamic between judges, statutory mandates, and presidential administrations can be enhanced, as we observe in the Ninth Circuit, or moderated by the distribution of cases across circuits and the ideological balance of the judges in them.

To demonstrate the importance of considering the expanded range of factors that we have found to mediate the influence of judicial ideology, we reexamine three prominent debates about the structure of the federal judicial system: (1) recurrent proposals to split the Ninth Circuit into several smaller circuits; (2) statutory provisions creating exclusive jurisdiction of certain cases in a specific circuit or a specialized court; and (3) partisan schemes to dramatically expand the number of federal judges in order to tip the scales decisively in favor of a conservative agenda. These examples are not intended to be exhaustive; instead, they illustrate the ways in which a broader understanding of how ideology impacts judicial review can inform fundamental questions about the structure of the federal judiciary and the process of making judicial appointments.

\textbf{1. Anticipating the Consequence of Splitting the Ninth Circuit}

Practitioners\textsuperscript{236} and politicians\textsuperscript{237} have developed numerous proposals to divide the Ninth Circuit into several smaller circuits. Advocates have argued that the court’s docket has become so large that it is preventing its judges from

\textsuperscript{235} See supra Part IV.B.


effectively, efficiently, and consistently resolving cases. Some claim that the geographic expanse of the circuit impairs “collegial relations among circuit judges [and] undermines their willingness to engage in good faith deliberations over case outcomes.” In some instances, support for dividing up the Ninth Circuit has come from states with smaller populations (and different political values) than California, seeking autonomy from the dominance of California judges, who are often perceived to be too liberal. As one commentator has aptly expressed it, “the proposed split [of the Ninth Circuit] is a form of gerrymandering intended to quarantine the court’s liberal judges in a smaller, less powerful circuit.”

While the ultimate impact of splitting the Ninth Circuit would depend on the details of the proposal, our framework provides general insights into the potential tradeoffs. Recall that we identified three central factors that mediate the influence of judicial ideology on case results—the volume of cases, the

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238 The theory is that smaller courts would require judges to keep track of fewer decisions, thus reducing the chance of inconsistent rulings among panels. See Bryan Wright, But What Will They Do Without Unpublished Opinions?: Some Alternatives for Dealing with the Ninth Circuit’s Massive Caseload Post F.R.A.P. 32.1, 7 Nev. L.J. 239, 262 (2006).

239 David S. Law, How to Rig the Federal Courts, 99 Geo. L.J. 779, 789 (2011) [hereinafter Law, Federal Courts] (claiming that proposals to split the Ninth Circuit “are typically dressed in justifications of administrative necessity”); Stefanie A. Lindquist, Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts, 41 U. Rich. L. Rev. 659, 660 (2007). Among the inefficiencies resulting from the current configuration is the need for Ninth Circuit judges to travel long distances to hear cases. Frank Tamulonis III, Comment, Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?, 112 Penn St. L. Rev. 859, 862 (2008). Some Ninth Circuit judges themselves have expressed this view. Anna O. Law, The Ninth Circuit’s Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals, 25 Geo. Immig. L.J. 647, 667 (2011) (referring to Judge O’Scannlain); see also Crystal Marchesoni, “United We Stand, Divided We Fall”?: The Controversy Surrounding a Possible Division of the United States Court of Appeals for the Ninth Circuit, 37 Tex. Tech L. Rev. 1263, 1264–65 (2005) (“The obvious sheer enormity of this circuit is causing many problems, namely: (1) waste of judges’ travel time and money (from a geological standpoint); (2) case overload (from a population standpoint); (3) and a lack of a clear and consistent manner in which to decide and interpret law (from an increased Supreme Court reversal standpoint).”).

240 Lindquist, supra note 239, at 660. Some have asserted that the increased communication and collegiality among judges of smaller courts will reduce the high rate of reversal of Ninth Circuit decisions in the Supreme Court. Tamulonis, supra note 239, at 862.

241 Tamulonis, supra note 239, at 861.


243 Law, Federal Courts, supra note 239, at 789.
balance of Republican and Democratic judges in a circuit, and the political orientation of the judges, liberal or conservative, in the circuit relative to those in other circuits. All three factors could be affected by such a division. Assume, for example, that the Ninth Circuit was divided into one circuit consisting of the coastal states and a second circuit consisting of the inland states along with Alaska, and that the existing judges were simply distributed according to the location of their chambers. If this proposal were instituted today, the balance of Republican and Democratic judges in each circuit would differ substantially. For example, at the appellate level, 61% of the judges on the coastal circuit would be Democratic versus 70% on the inland circuit. In this context, about two-thirds of NEPA cases in the Ninth Circuit would be filed in the coastal circuit if the patterns of NEPA litigation remained stable over time. The new circuit structure would consequently result in NEPA cases being heard by more Republican judges and fewer all-Democratic panels than if the Ninth Circuit were retained in its current form. Moreover, because the number of all-Democratic panels scales nonlinearly with the volume of cases, the impact would be greater on the all-Democratic panels, which would constitute 21% of the panels in the coastal circuit versus 34% in the inland circuit.

Although we cannot know without additional information whether the politics of the average judge in the two new circuits would differ substantially, they could either reinforce or counteract the other effects. For example, if the Senators from the affected states influenced the selection of nominees to ensure that their views were congruent with state politics, one would expect the judges in the coastal states to be more liberal, on average, than those in the inland states. Under this scenario, the circuit-wide political bias would counteract the effect from the higher proportion of Democratic judges in the inland circuit and thus diminish the rightward shift in case outcomes associated with such a division of the Ninth Circuit. This example illustrates how the existing ideological balance of judges can, in effect, be reinforced or moderated depending on the volume and geographical distribution of cases across circuits. The fuller picture that emerges highlights the nonlinear nature of these feedbacks and the complex ways in which the circuit structure of the federal system mediates the impact of judicial ideology.

244 See supra Part IV.B.
246 See supra Figure 3.
247 See Historical Presidential Elections, 270 to WIN, https://www.270towin.com/historical-presidential-elections/ [https://perma.cc/C4JS-PTGH] (showing that since 2000, west coast inland states have primarily voted Republican in presidential elections, and coastal states have voted Democrat).
2. The Tradeoffs of General Versus Limited Appellate Court Jurisdiction

Appellate court jurisdiction is rarely limited to specific circuits. The most notable—and still hotly debated—exception is the Federal Circuit, which essentially has exclusive jurisdiction over appeals involving patent disputes.248 In the field of environmental law, several statutes contain provisions limiting the jurisdiction over certain types of claims to a specific court. In the case of the Clean Air Act (CAA), all challenges to national regulations must be filed in the D.C. Circuit.249 However, little consistency exists across statutes, as illustrated by the Clean Water Act (CWA), which lacks an analogous provision despite its abundance of national implementing regulations.250 Typically, jurisdictional restrictions, along with specialized courts, are created to manage the technical complexity of the subject cases,251 to mitigate problems with doctrinal uniformity and consistency (including those associated with forum shopping),252 or to enhance the efficiency of judicial proceedings.253 To our knowledge, the existing literature has not considered how such jurisdictional limits affect the politics of judicial review or the judicial appointments process. The closest commentary involves concerns about doctrinal rigidity, a common critique of the Federal Circuit, but it focuses on particular judges and the insularity associated with jurisdictional limits rather than broader structural considerations.254

252 See Lauran M. Sturm, Rapanos and the Clean Air Act: Linking Wetland and Single Source Determinations, 28 NAT. RESOURCES & ENV’T 27, 30 (2014); see also ROBERT L. CHIESA ET AL., AM. BAR ASS’N STANDING COMM. ON FED. JUD. IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 215 (1989) (“[C]ases of nationwide significance should be subject to review by a single, national forum... [T]he principal benefit would lie in preserving nationwide uniformity in a program administered by a single, national agency. These benefits could be obtained by restricting the venue of judicial review of agency action, as is now done in some environmental legislation.”).
253 See Marchesoni, supra note 239, at 1264–65.
254 See Edith H. Jones, Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction, 73 TEX. L. REV. 1485, 1502 n.101 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994)) (arguing that “specialized courts also tend to become parochial and in so doing may, like some administrative agencies, focus on their particular ‘constituencies’ rather than broader public interests,” and that “the area of law consigned to a specialized court, having become too rarefied for most lawyers or laypersons to understand, resists reform and innovation”). Professor Revesz has analyzed the relationship between the
Viewed through the lens of our framework, it is immediately apparent that centralizing cases in a specific court carries a significant risk that it will elevate the importance of judicial ideology. As we have shown, the influence of judicial ideology is mediated by the volume of cases and ideological balance of judges in a circuit—it rises when cases are concentrated in a circuit and with greater imbalances in the ideological outlook of the judges.\(^\text{255}\) In our data, we observed these effects in the Ninth Circuit, which was dominated by Democratic judges and accounted for a disproportionate share of the cases heard nationally. Jurisdictional limits go further because they concentrate cases in a single court and, in doing so, eliminate the averaging across circuits with different mixes of judges. The absence of jurisdictional restrictions also makes it much harder for politicians to influence case outcomes through the judicial appointments process—the ideological balance would have to be shifted on multiple circuits, as opposed to just one.

Limiting challenges to national regulations under the CAA to the D.C. Circuit provides a concrete illustration of the tradeoffs and how they can vary. In the spectrum of issues that range from the purely local to the national, the CAA regulations are explicitly national in scope.\(^\text{256}\) This simplifies the analysis because it effectively neutralizes concerns about federal courts fairly reflecting local values. In this light, the case for centralization appears to lack any countervailing considerations—except that it overlooks the ways in which circuit structure mediates the balance of Republican and Democratic judges that hear the cases. Restricting jurisdiction to the D.C. Circuit reduces the range of judges hearing the cases and, much like the Supreme Court, elevates the significance of individual judicial appointments—both because each appointment carries greater weight and because controlling the ideological balance on a single court is easier. Further, appellate courts, unlike the Supreme Court, hear cases as three-judge panels and, as we have seen, the frequency of ideologically uniform panels increases nonlinearly as the proportion of Republican or Democratic judges rises above 50%.\(^\text{257}\) As a consequence, concentrating cases in a single circuit increases the likelihood that the checks provided by judicial review will occur disproportionately from a single political camp, or that the dominant ideological perspective will shift from one side to the other with the political party that has control over judicial appointments. The volume of cases and number of judges will determine the frequency of the

\(^{255}\text{See supra Part IV.B.}\)

\(^{256}\text{See 42 U.S.C. § 7607(b) (2012).}\)

\(^{257}\text{See supra Figure 3.}\)
resulting doctrinal changes, moderated by precedent, and the impact on a central rationale for jurisdictional restrictions—doctrinal uniformity. Limiting jurisdiction in this manner circumvents the decentralization of the federal court system that operates as a buffer to political forces. While the increased efficiency and efficacy may be worth the loss, the increased exposure to congressional politics and escalating battles over judicial appointments should also be factored into such jurisdictional decisions.

3. Misconceptions About Ideologically Driven Court Packing

If the two preceding examples highlight the nuances and pitfalls of circuit structure, recent calls to pack federal courts with conservative judges illustrate its resilience to such baldly partisan schemes. As noted above, a massive expansion of the federal judiciary was recently proposed, in all seriousness, by Steven Calabresi.258 Some commentators have associated such proposals, not unreasonably, with Franklin Roosevelt’s ill-fated court-packing plan of 1937.259 One skeptical observer has noted that “it is not unfair to conclude that court-packing is a major objective of [such a] proposal, even if it is not the only one.”260 This begs the question of whether, and under what conditions, a court-packing plan could succeed or, to put it in the terms explored in this Article, whether it would upend the mediating effects that the circuit structure of the federal courts and mechanics of judicial decision making have on judicial ideology.

258 See supra note 211 and accompanying text.
260 Somin, supra note 259; see also Shesol, supra note 259 (asserting that the Calabresi plan reflects conservatives’ view that the institutions of government are “territory to be seized and held by whatever means”).
Even though the Calabresi plan appears farfetched insofar as it calls for at least a 36% increase in the number of federal judges, it nevertheless appears to be calibrated, knowingly or not, to overcome the inherent inertia of the appointments process. Although the Trump Administration has succeeded in accelerating the appointments process, these efforts have resulted, at the time of this writing, in the appointment of forty-one circuit court judges. This is undoubtedly a significant number of judgeships, but they are spread over thirteen circuits. At least for now, about 40% of the appointments affected the balance of Republican and Democratic judges on a circuit, as the departing judges in 60% of the cases were Republican appointees. One of the central reasons for this pattern is that judges can delay their retirement until the party with which they are affiliated is in power, a dynamic that may be particularly true now given the polarizing politics of the Trump Administration. This leaves, as Calabresi apparently recognizes, a major expansion of judgeships as the only viable option for decisively shifting the ideological orientation of federal judges.

The breaks on the impact of judicial ideology may weaken if Trump appointments reverse the balance of a significant number of circuits. Yet, even if the Republicans succeeded with a plan like Calabresi’s, the random appointment of three-judge panels would provide some ballast. For example, if Republican judges occupied 80% of the appellate judgeships, 50% of the panels would still have at least one Democratic judge, assuming that the balance of Republican and Democratic judges was consistent across circuits. If, however, Republicans focused on specific circuits, the dominance of Republican judges could be much greater, with essentially no all-Democratic panels and few majority-Democratic panels hearing cases in most circuits. Further, plaintiffs would likely be far more selective in where they filed cases, which could exacerbate the inter-circuit differences we already observe in the implementation and interpretation of statutes under NEPA and the ESA. It is also important to recognize the limits of judicial review noted above, namely, that Democratic administrations would be largely immune to judicial review to the extent they operated within the clear bounds of their statutory authority.

261 CALABRESI & HIRJI, supra note 211, at 21.
262 List of Federal Judges Appointed by Donald Trump, supra note 224.
264 As of May 2019, President Trump’s appointments had flipped the Third Circuit to Republican-majority status and was “nearing potential flips” in three others (the Second, Fourth, and Eleventh). Tom McCarthy, All the President’s Judges: How Trump Can Flip Courts at a Record-Setting Pace, GUARDIAN (May 11, 2019), https://www.theguardian.com/law/2019/may/11/trump-judge-nominees-appointments-circuit-court-flip [https://perma.cc/VC35-LQV8].
265 See supra Figure 3.
266 The degree to which a Republican-dominated judiciary could constrain agency action and discretion will also necessarily depend on the nature of the statute that provides the
More importantly, given that most cases involve challenges premised on inadequate agency action, the impact of stacking the courts would be asymmetric—it would be most effective in protecting Republican administrations against claims that they were falling short of statutory mandates. As these numbers illustrate, the transformation required goes far beyond anything ever contemplated, including Roosevelt’s infamous court-packing plan. However, the structural sources of resilience in the judicial system on closer analysis demonstrate that more modest efforts are unlikely to have a sizeable impact because judges have control over the timing of their retirements and this naturally spreads judicial openings across administrations, and geographically over circuits, in ways that allow relatively modest shifts in the balance of Republican and Democratic judges. The system is not beyond breaking, as demonstrated by the heightened sensitivity of ideologically uniform panels to the volume of cases and ideological balance of judges, but the large scale of the federal courts and their circuit structure are powerful mediating elements.

V. CONCLUSION

The political controversies surrounding judicial review and appointments of federal judges overstate the influence of ideology in judicial opinions and presume that it is bad per se. The empirical study presented above shows that the influence of judicial ideology is of secondary importance in most cases and that when it is a significant factor in case outcomes, judicial ideology typically moderates executive branch policies towards centrist positions consistent with statutory mandates. We propose a novel framework that explains these dynamics and the contingencies that can enhance them as well as the conditions under which the limited but positive influence of judicial ideology can be seriously compromised.

authority for the challenged decisions. As noted above, NEPA and the ESA differ in that judicial decisions under NEPA can uphold agency actions that give short shrift to NEPA procedures but cannot force agencies (under a Democratic administration) to curtail their NEPA responsibilities. See supra note 21. Judicial review of agency decisions under the ESA can narrow the scope of agency authority to take protective actions as well as forcing more aggressive regulatory action. See supra note 144 and accompanying text.
Aging Judges

FRANCIS X. SHEN*

America’s judiciary is aging. The average age of federal judges is sixty-nine years old, older than it has been at any other time in the country’s history. The typical reaction to this demographic shift is concern that aging judges will serve past their prime. Scholars have thus offered proposals for mandatory judicial retirement, judicial term limits, and mechanisms for judicial removal. In this Article, I critique such proposals and draw on cognitive neuroscience to argue that rather than forcing their retirement, we should empower aging judges.

The central neuroscientific insight is that individual brains age differently. While at the population level, age generally leads to reductions in information processing speed, and for some, serious deficits in memory and decision-making capacity, there is much individual variation.

Given individual differences in how aging affects cognitive decline, the current system—which mandates intense health scrutiny when a judge is younger, followed by no formal cognitive evaluation for the rest of the judge’s career—can be improved. I argue that we can empower judges by providing them opportunities for confidential, accurate, and thorough cognitive assessments at regular intervals throughout their judicial careers.

If carefully developed and implemented so as to avoid politicization and to ensure complete confidentiality of results, individualized judicial
cognitive health assessments will allow judges to make more informed
decisions about when and how to modify their service on the bench.
More individualized assessment will allow the legal system to retain the
wisdom of experienced judges, while avoiding the injustice that comes
with handing over the courtroom to a judge who is no longer capable
of running it.

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VI. A PATH FORWARD: TOWARD INDIVIDUALIZED ASSESSMENT OF
The people... have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient.

—Justice Sandra Day O'Connor

The average age of America’s federal judges is sixty-nine years old—older than it has been at any other time in the country’s history. On the United States Supreme Court, in addition to Justice Ginsburg, who is eighty-six years old, Stephen Breyer is eighty-one, and Clarence Thomas is seventy-one. In the lower courts, there are eleven federal judges over the age of ninety who still hear cases. Concerns about aging judges have reignited the long-running interest in implementing term limits, mandatory retirement ages, and forced removal for federal judges.
In this Article, I critique such proposals and draw on cognitive neuroscience to argue that rather than forcing them to retire, we should empower aging judges. The key innovation I propose is individualized, brain-based assessment of legally relevant cognitive functioning. Drawing on recent advances in the detection of dementia, I propose in this Article a new path forward that mandates (1) the development of a judicial cognitive assessment tool; and (2) confidential, individualized cognitive assessment using the tool for all judges at least every five years. The results of the assessment would remain confidential to the judge, and the proposal would not introduce mandatory retirement, term limits, or new protocols for removing judges. Rather, the system is premised on empowering judges with better data to inform their personal, private decisions about when and how to modify their judicial workloads.

The Article also turns its attention to aging judges in state judiciaries. A majority of states employ a mandatory judicial retirement age, but several states have raised the retirement age in recent years. In upholding state mandatory retirement ages for judges, Justice O’Connor wrote, “It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age.” At the population level, age generally leads to reductions in information processing speed, and for some, serious deficits in memory and decision-making capacity. But there is much individual variation. While an eighty-year-old judge is at significantly greater risk for dementia than a fifty-year-old judge, it does not follow that all eighty-year-old judges have diminished cognitive capacities, nor that all fifty-year-old judges are free from dementia. Mandatory retirement regimes conflate age with diminished judicial capacity, overlooking the wisdom that comes with experience and the scientific reality that age is a risk factor for, but not dispositive of, cognitive decline.

At present, neither the federal nor state judicial systems formally provide judges with regular opportunities to assess their cognitive health. The lack of cognitive health assessments for older judges is striking when contrasted with the data requested of younger judges during the nomination process. The judicial nomination process is the one time in a judge’s career when judges are routinely required to undergo a cognitive health examination.

The United States Senate Committee on the Judiciary requires that nominees undergo a medical exam, and the medical form provided to nominees includes several items directly related to brain health. There is a long list of conditions that may be disqualifying, and they include “progressive

6 See discussion infra Part V.
8 See discussion infra Part III.A.
9 U.S. DEP’T OF JUSTICE, PHYSICAL QUALIFICATION—JUDICIARY [on file with author].
neurological disorders,” “current emotional or mental instability,” and “any other condition that is disabling or potentially disabling in the foreseeable future.”10 Later in the form, the medical provider is instructed to check either “Yes” or “No” in answer to the question: “Do you find any abnormal condition or disease of . . . [the] Brain & Nervous System?”11

If the judicial nominee clears the health exam and the broader nomination process, the judge will join the bench, enjoy life tenure, and never again be required to undergo a brain health checkup.12 The current system—which mandates intense scrutiny when a judge is younger, followed by zero required follow-up as a judge ages—can be improved.

Specifically, I propose a judicial cognitive health assessment program that: (1) mandates and funds the collection of baseline neuroimaging and neuropsychology data at the nomination stage, and follow-up neuroimaging and neuropsychology data in regular five-year intervals thereafter; and (2) requires that the results of the testing remain fully confidential and private, with no exceptions.

While the judge’s physician may make recommendations about disclosure, in my proposed system the judge will retain power over their brain data. This is important because it empowers judges, is less likely to become politicized, and can be administered outside of media scrutiny.

As described in Part II, my proposal harnesses the promise, while navigating the perils, of recent advances in dementia biomarkers. In the past two decades, there have been “revolutionary changes in dementia research and practice, with a growing array of imaging and fluid biomarkers taking center stage in diagnostic evaluation and monitoring of progression.”13 Appropriate use of these biomarkers would allow the system to more effectively identify and anticipate judicial cognitive decline.

The Article is organized into seven parts. Part I provides context by discussing the aging of the federal judiciary. Part II reviews the science of age-related cognitive decline. It should be noted at the outset that “dementia” is an umbrella term to capture multiple neurodegenerative diseases, including but not limited to Alzheimer’s disease (AD).14 I primarily focus on AD in this Article

10 Id.
11 Id.
12 See infra Part II.B.
for illustrative purposes, but the proposed judicial cognitive health evaluation would screen for many types of dementia.

Part III explores the formal and informal mechanisms by which the federal system identifies and responds to judges experiencing cognitive decline. Formal mechanisms of redress are rarely used, leaving informal mechanisms as the primary strategy for addressing judicial cognitive decline. I argue that the “honor system” has largely worked well but could function even better with the addition of individualized assessment data.

Part IV reviews the states’ use of mandatory judicial retirement ages, currently the most widely adopted solution to address the challenge of aging judges. Given individual variation in how brains age, I argue that mandatory retirement is an inefficient and constitutionally suspect response to age-related judicial cognitive decline.

Having described and critiqued the existing federal and state strategies to address judicial cognitive decline, Part V proposes the introduction of individualized judicial cognitive assessments, including baseline and follow-up neurological and neurocognitive testing. In establishing the core cognitive competencies required to carry out judicial duties, the proposal draws on judicial canons of conduct, as well as existing state and federal health questionnaires for judicial nominees. Because my proposed solution involves the collection of baseline and follow-up brain biomarker data, I address concerns specific to brain data. Part VI discusses several possible implications of, and extensions to, the proposed system. I discuss constitutionality, feasibility, and legitimacy. Part VII concludes.

II. AMERICA’S AGING JUDICIARY

This Part briefly explores the reasons why America’s judiciary is getting older. Part A utilizes data from the Federal Judicial Center to discuss how the average age of judges in the federal system has increased over time. Part B discusses the availability of “senior status” for federal judges and judges’ general hesitance to fully retire. Part C presents the available data on ages of state judges and discusses recent trends to raise the mandatory retirement age in several states.

A. Federal Judges Are Getting Older

The ability to extend life has led to a greater number and a greater proportion of older adults in the United States. Based on census data, it is estimated that by “2050, the population aged 65 and over is projected to be 83.7 million, almost double its estimated population of 43.1 million in 2012.”15 The economic,

political, and social implications of these demographic trends have been the subject of much analysis.\textsuperscript{16}

In line with these broader demographic trends, the federal judiciary is also getting older. Data from the Federal Judicial Center shows a steady increase in judicial age. \textsuperscript{17} Today, the average age of Article III judges is sixty-nine years old, the highest it has ever been. \textsuperscript{18}

B. Life Tenure, Senior Status, and Retirement

The aging judiciary is, in part, the result of medical advances that allow humans to live longer. But longer lifespans are only an enabling condition; in many sectors, the aging population has not altered the average age of the workers. For instance, in professional football, the average age is falling, as is the average length of an NFL career.\textsuperscript{19} This is because NFL football players do not enjoy job security and are readily replaced by younger players.\textsuperscript{20}

To take another example from a different industry, the lack of older truck drivers is not


\textsuperscript{17} Demography of Article III Judges, 1789–2017, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges [https://perma.cc/9ASS-MRL3]. Over the span of 1790–2017, the average age has risen from forty-nine to sixty-nine. Id. As discussed in the text, this increase in average age is also due, in part, to the ability of judges to take senior status while still regularly hearing cases. Id.

\textsuperscript{18} Id. It should be noted that while average age is rising, the age at appointment has slightly decreased over the last half-century. Albert Yoon, Federal Judicial Tenure, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 70, 71 (Lee Epstein & Stefanie A. Lindquist eds., 2017) (“[T]he average age at commission has declined, albeit modestly, from the Truman to Obama administrations.”).

\textsuperscript{19} Kevin Clark, The NFL Has an Age Problem, RINGER (Sept. 7, 2016), https://www.theringer.com/2016/9/7/16077250/the-nfl-has-an-age-problem-7068825845e4 [https://perma.cc/47N3-CTWZ].

\textsuperscript{20} Id.

because younger truck drivers are pushing them out, but rather because most older truck drivers follow the pattern of older workers generally—they retire. Although there is variation by education level, the average retirement age for Americans is sixty-four for men and sixty-two for women.

It is worth reflecting on this comparison for a moment. The average retirement age for most Americans is between sixty-two and sixty-four years old. The average age of Article III judges is sixty-nine. Clearly, federal judges prefer to keep working than to retire.

This preference was enabled by the advent of “senior status.” In 1919, Congress “created the office of Senior Judge and thus enabled the federal judiciary to continue to benefit from the service of many dedicated and experienced judges.” This allows federal judges to take one of four paths:

1. judges can continue in active service until they die;
2. judges can take “senior status” at some point before death (provided they continue to provide substantial service to the court), which allows them to continue receiving both a salary and salary increases;
3. judges can “retire,” which means they receive an annual salary without salary increases, but can re-enter private practice; or
4. judges can “resign,” which allows them to enter (lucrative) private practice, but means that all compensation ceases and there are no federal retirement benefits.

24 Demography of Article III Judges, supra note 17.
25 See Yoon, supra note 18, at 70 (discussing why federal judges stay on the bench).
26 The introduction of senior status has been described as an “ingenious” and “elegant response” to the problem that, absent this senior status option, judges would face strong financial incentives to remain in active status. Betty Binns Fletcher, A Response to Stras & Scott’s Are Senior Judges Unconstitutional?, 92 CORNELL L. REV. 523, 524 (2007).
27 Frederic Block, Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings, 92 CORNELL L. REV. 533, 535 (2007). It is beyond the scope of this article, but worth noting, that there has been academic debate over the constitutionality of the senior status statute. Compare David R. Stras & Ryan W. Scott, Are Senior Judges Unconstitutional?, 92 CORNELL L. REV. 453, 456 (2007), with Fletcher, supra note 26, at 524.
28 Block, supra note 27, at 536.
29 Id.
30 Id.
31 Id.
32 Id.
Today, senior status can be claimed by any Article III judge or justice “after meeting the age and service requirements of the ‘Rule of Eighty’—your age and years of service must add up to eighty, you must be at least sixty-five years old, and you must have been on the bench for at least ten years.” A judge who takes senior status does not fully retire. Rather, “senior judges continue to perform the same judicial duties and receive the same salary as active judges.” Senior status is attractive to judges because it allows judges to continue their professional lives and provides them with more control over the cases they hear. Judges’ decisions to take senior status are related to the judicial pension system, and the average age at which active judges take senior status has declined over time, likely because of “changing rules for pension qualification from seventy years (and ten years of service) to sixty-five years (and fifteen years of service).”

Data from the Federal Judicial Center makes clear that the vast majority of Article III judges move to senior status, rather than to full retirement. For most professions, one does not die on the job. Not so for federal judges. Federal Judicial Center data shows that nearly 75% of judges leave the bench because they die. As the Federal Judicial Center observes, “In recent decades, many federal judges have assumed senior status even though eligible for full retirement. This trend may help account for the growing proportion of judges whose terms have ended in death rather than resignation or retirement.”

Senior judges are presently 40% of the federal judiciary, and this number is likely to grow. Federal Judicial Center data finds that from 1997 to 2015, “senior-status judges presided over between approximately 15 and 25 percent
of all completed district court trials.” In some districts, however, that number is greater. In the Eastern District of New York in 2007, for instance, “senior district judges [had] on average higher caseloads than the active judges.”

Senior judges handle many high-profile cases. For instance, in 2017, eighty-year-old Judge Nathaniel Gorton, of the U.S. District Court for the District of Massachusetts, heard one of the first cases on President Trump’s travel ban. The case involved, in the judge’s own words, a “flurry of activity,” and the opinion offered on February 3, 2017 came just a week after the Executive Order was issued on January 27, 2017.

C. State Judges

States differ from the federal system in how judges are selected, elected, and retained. Without life tenure, in the states “the most common method of retention is some form of election: partisan, nonpartisan, or retention.” The prevalence of mandatory retirement ages, the retention machinery of elections, and the political reappointment process mean that older state judges have more difficult barriers to surpass than their federal counterparts if they wish to continue serving. As a result, it stands to reason that the average age of state judges would be lower than in the federal system.

The best available data on the age of state judges comes from law professors Stacey George and Albert Yoon. George and Yoon lead a project called “The Gavel Gap,” in which they investigate whether the demographics of state court judges reflect the demographics of citizens in that state. They find a gap, on race and gender dimensions, between citizens and their judges. The study, which was supported by the American Constitution Society, is impressive because it is the first to widely collect comparable judicial demographic data.

References:

43 Demography of Article III Judges, supra note 17 (figures from caseload reports of the Administrative Office of the United States Courts).
44 Block, supra note 27, at 540.
46 Id.
49 Kritzer, Impact, supra note 48, at 356 (discussing how some states utilize reappointment, and how the process may vary by level of the court within the state).
51 See George & Yoon, supra note 50; Exposing the Gavel Gap, supra note 50.
across the states. Although not the focus of their analysis, they observed birth year data for 5378 state judges (out of 10,295 in their total dataset). Based on this birth year data, they calculate average state judge age to be 59.6, with a median age of sixty (max age of eighty-eight). Twenty-four percent of judges are over age sixty-five, but only 1.4% of judges are over age seventy-five. This final statistic, suggesting that 99% of judges in state courts are age seventy-five or younger, likely reflects the effect of mandatory retirement ages and the more rigorous judicial retention process in the states. Another contributing factor to the differences in ages between state and federal judges is that federal judges often serve as state judges first.

In addition, many states have mechanisms whereby a “retired” judge can be “recalled” into service without violating the mandatory retirement statute. To illustrate: in New Jersey, the state supreme court held that

... the modern State Constitution of 1947 provides for mandatory retirement of judges, but the document is silent on the subject of recall. Nowhere does the plain language of the Constitution forbid recall ... [or] conflict with temporary recall assignments because the two concepts are distinct. One prevents lifelong tenure; the other affords judges neither tenure nor a seven-year term and does not reverse a judge’s retirement.

Even within mandatory retirement regimes, then, older judges may be playing critical roles.

While at present state judges appear to be younger, on average, than their federal counterparts, it is possible that state judges will start to serve longer as mandatory retirement ages are raised. Currently, thirty-two states have mandatory retirement ages for judges. But in several states, there are proposals to raise the mandatory retirement age or to eliminate it altogether.

Proponents of raising or eliminating the retirement age generally argue that “[v]ery competent jurists are being forced to retire in the primes of their careers.” Proponents also argue that states have formal processes to remove
judges on a case-by-case basis for age-related illness or cognitive impairment. In the words of Indiana State Senator Jim Buck, “[W]e can address these situations on a case-by-case basis . . . . We’ve got lawyers in their 80s whose minds are steel traps. There’s no reason to cast aside that kind of legal mind.”

Developments in the states include:

- **Maryland**: In February 2018, a bill was proposed in the Maryland House that would give voters an opportunity to vote on a constitutional amendment to raise the mandatory judicial retirement age from seventy to seventy-three.\(^6\)
- **Florida**: In November 2018, Florida voters approved a state constitutional amendment to raise the mandatory retirement age for Florida Supreme Court justices from seventy to seventy-five years old.\(^6\) The amendment passed with 61.6% in favor and 38.4% opposing.\(^6\)
- **Michigan**: In 2017, the Michigan House Judiciary Committee reintroduced and passed a measure to repeal the mandatory retirement age of seventy years old for state judges.\(^6\) This measure was first introduced in 2007 and has since been re-introduced three additional times: in 2011, 2013, and 2015.\(^6\) However, this most recent attempt represents the first successful approval from the Michigan House Judiciary Committee.\(^6\)
- **Alabama**: In 2019, during discussion of an amendment to the State Constitution in the House of Representatives, a proposed amendment to

\(^{60}\) Id.
\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
raise the judicial retirement age to seventy-five from seventy was struck down (18 in favor, 73 against).\textsuperscript{67}

- **New York:** In 2013, the New York Mandatory Judicial Retirement Age Amendment (Proposition 6), which would have raised the mandatory judicial retirement age from seventy years old to eighty years old for Supreme Court justices and Court of Appeals judges, was defeated (39% supporting, 61% opposed).\textsuperscript{68} In addition, leaders of the New York Reform Party sued to remove the New York judicial age limit in 2017.\textsuperscript{69} Though a filed paper indicates that a trial court in New York accepted the filing,\textsuperscript{70} as of 2019, the New York judicial age limit of seventy years has not been removed.\textsuperscript{71}

- **Oregon:** In 2016, the Oregon Elimination of Mandatory Judicial Retirement Age Amendment (Measure 94), a measure that would remove the constitutional amendment requiring mandatory retirement of judges once they turn seventy-five years old and prevent future legislatures from re-establishing a retirement age for judges, was defeated (63% opposed, 37% in favor).\textsuperscript{72}

- **Pennsylvania:** In 2016, a constitutional amendment to raise the mandatory retirement age for Pennsylvania judges from seventy to seventy-five years old was narrowly passed (50.6% in favor, 49.4%}

\begin{thebibliography}{99}


\bibitem{68} James C. McKinley, Jr., *Plan to Raise Judges' Retirement Age to 80 Is Rejected*, N.Y. TIMES (Nov. 6, 2013), https://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html [https://perma.cc/2HP8-6U9E]. Controversy surrounded the proposition because it would have severely curtailed the ability of Governor Andrew Cuomo, a member of the Democratic party, from “shaping the state’s highest court,” as passage of the measure would have allowed two Republican judges to serve longer terms. \emph{Id}. The governor “quietly opposed the measure in the Legislature and lobbied editorial boards to urge people to vote no.” \emph{Id}.


\bibitem{71} N.Y. CONST. art. VI, § 25.


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opposing), despite controversy over the question’s ambiguous wording.\(^{73}\)

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The federal judiciary is older than ever before. The state judiciary, while younger, still has 25% of its judges at ages between sixty-five and seventy-five. Moreover, there is some momentum in the states to raise age levels for judges. But are these trends toward an older judiciary a problem? To begin answering this question, Part III reviews the science of age-related cognitive decline.

### III. AGE, COGNITIVE DECLINE, AND THE EMERGENCE OF BRAIN BIOMARKERS OF DEMENTIA

This Part provides an overview of the known effects of aging on cognitive function, particularly the changes in cognition that may adversely affect a judge’s ability to effectively carry out all the duties of the office.\(^{74}\) Part A examines average population trends in aging and cognition, and Part B explores individual differences in aging trajectories. Part C provides discussion of the brain basis for age-related changes in mental function.

Since ancient times, it has been recognized that with age comes cognitive decline.\(^{75}\) Virgil, for instance, lamented that, “Time robs us all, even of memory.”\(^{76}\) What is novel about contemporary understanding of age-related mental decline is our increasing ability to pinpoint and even predict that decline in brain circuitry.\(^{77}\)

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\(^{74}\) Aging judges may be problematic for reasons unrelated to cognitive health. My primary focus here, however, is on the potential for cognitive decline.


\(^{77}\) Denise C. Park & Patricia Reuter-Lorenz, *The Adaptive Brain: Aging and Neurocognitive Scaffolding*, 60 ANN. REV. PSYCHOL. 173, 174 (2009) (“For the past 25 years, our understanding of the behavioral changes that occur in cognition with age has increased tremendously, and in the past 10 years, the advent of neuroimaging tools has ushered a truly stunning increase in what we know about the aging mind.”).
The brain is made up of circuits of cells.78 In the developing brain, even in
the womb, cells are forming connections and pathways that may last for much
of one’s life.79 But over time these pathways can deteriorate; as brain circuits
lose the ability to communicate, some cognitive functioning may become
affected.80 Exactly how these circuits change—and what can be done to reverse
or mitigate the effects—is the subject of much research.81

In 2018, the National Institutes of Aging and the Alzheimer’s Association
formally called for a research framework that defines Alzheimer’s disease (AD)
based on neurobiology instead of symptoms.82 Part C discusses why brain
biomarkers for AD are ushering in a paradigm shift for AD definition and
detection.

A. Group Averaged Cognitive Decline

Age-related cognitive decline is traditionally thought to begin in the later
stages of life, between the ages of fifty and sixty, with exacerbated rates of
decline noted for individuals over the age of seventy.83 Yet recent longitudinal
research suggests that cognitive decline can begin as early as age thirty, with
different rates of decline noted for different skills like memory, reasoning,
spatial visualization, and processing speed.84

Age-related trajectories vary according to cognitive domain. One distinction
made in the literature, and relevant to judicial function, is the difference between
“fluid intelligence” and “crystallized intelligence.”85 Fluid intelligence might be
thought of as processing speed and the ability to learn new tasks.86 Crystallized
intelligence is something more akin to wisdom.87

78 Esteban Real et al., Neural Circuit Inference from Function to Structure, 27 CURRENT
BIOL 189, 189 (2017) (noting that “neuroscience seeks to explain brain function in terms
of the dynamics in circuits of nerve cells”).
79 Moriah E. Thomason, Structured Spontaneity: Building Circuits in the Human
Prenatal Brain, 41 TRENDS NEUROSCIENCES 1, 1 (2018).
80 John H. Morrison & Patrick R. Hof, Life and Death of Neurons in the Aging Brain,
278 SCIENCE 412, 417 (1997); Rachel D. Samson & Carol A. Barnes, Impact of Aging Brain
81 See, e.g., Patrick R. Hof & John H. Morrison, The Aging Brain: Morphomolecular
82 Clifford R. Jack, Jr. et al., NIA-AA Research Framework: Toward a Biological
83 Timothy A. Salthouse, When Does Age-Related Cognitive Decline Begin?, 30
NEUROBIOLOGY AGING 507, 508 (2009).
84 Id. at 511.
85 John L. Horn & Raymond B. Cattell, Age Differences in Fluid and Crystallized
Intelligence, 26 ACTA PSYCHOLOGICA 107, 107–11 (1967).
86 See John L. Horn, The Theory of Fluid and Crystallized Intelligence in Relation to
Concepts of Cognitive Psychology and Aging in Adulthood, in 8 ADVANCES IN THE STUDY
OF COMMUNICATION AND AFFECTION: AGING AND COGNITIVE PROCESSES 237, 240 (F. I. M.
Craik & Sandra Trehub eds., 1982).
87 Id.
In an oft-cited study, psychologist Alan Kaufman sampled 1500 men and women to determine how fluid intelligence and crystallized intelligence change over time, from adolescence to late adulthood.\textsuperscript{88} Kaufman found that fluid intelligence increases until late adolescence, but then begins to decline in early adulthood, with a faster rate of decline in late adulthood (around fifty-five years of age).\textsuperscript{89} In contrast, crystallized intelligence remained stagnant until late adulthood (around sixty years of age), and then begins to slowly decline.\textsuperscript{90} Other studies have come to similar findings using various intelligence scales, and some studies suggest that crystallized intelligence may actually continue to increase across the lifespan.\textsuperscript{91}

Given these different trajectories of fluid and crystallized intelligence, it is possible that crystallized intelligence might “attenuate the effects” of age-related declines in fluid intelligence, allowing older adults to call upon their extensive life experiences to “offset the declining ability to process and manipulate new information.”\textsuperscript{92} Whether fluid or crystallized intelligence dominates the decision-making process depends on the nature of the decision itself; some situations rely more heavily on one form of decision-making over the other, and some situations require both types equally.\textsuperscript{93}

Of importance to judging, research suggests that “executive function” and, in particular, memory may become impaired in older age.\textsuperscript{94} Executive function consists of “control processes responsible for planning, assembling, coordinating, sequencing, and monitoring other cognitive operations,” essentially existing as a mediator of brain behavior.\textsuperscript{95} With regard to memory, “long-term memory and working memory are commonly impaired while rote retrieval of word meaning (vocabulary) and priming remain relatively intact.”\textsuperscript{96}

\textsuperscript{88} Alan S. Kaufman & John L. Horn, \textit{Age Changes on Tests of Fluid and Crystallized Ability for Women and Men on the Kaufman Adolescent and Adult Intelligence Test (KAIT) at Ages 17–94 Years}, 11 Archives Clinical Neuropsychology 97, 97 (1996). Kaufman used the Kaufman Adolescent and Adult Intelligence Test (KAIT), which consists of four tests for each intelligence domain. \textit{Id.}

\textsuperscript{89} \textit{Id.} at 106.

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} Lisa Zaval et al., \textit{Complementary Contributions of Fluid and Crystallized Intelligence to Decision Making Across the Life Span, in Aging and Decision Making: Empirical and Applied Perspectives} 149, 150 (Thomas Hess et al. eds., 2015).

\textsuperscript{92} \textit{Id.} at 154.

\textsuperscript{93} \textit{Id.} at 154–55.


\textsuperscript{95} Timothy A. Salthouse et al., \textit{Executive Functioning as a Potential Mediator of Age-Related Cognitive Decline in Normal Adults}, 132 J. Experimental Psychol. 566, 566 (2003).

\textsuperscript{96} Buckner, \textit{supra} note 94, at 195.
Given the judge’s role vis-à-vis litigants and staff in the courtroom, it is also important to note that age-related brain changes affect one’s ability to interact socially.97 Healthy social behavior heavily relies on a capacity often labeled as “theory of mind.”98 Theory of Mind (TOM) is “the capacity to infer the likely thoughts and intentions of others.”99 TOM capacity is involved in everyday social skills, including “detect[ing] . . . deception, faux pas and cheating.”100 Both affective decision-making and TOM may be impaired in individuals with dementia.101

B. Individual Differences in Aging Trajectories

While, on average, older adults experience impairment in a variety of cognitive functions, there is considerable individual variation in the nature and extent of those changes.102 In the context of memory ability, for instance, some individuals start forgetting early, but “[s]ome individuals show high functioning into their ninth and tenth decades.”103 Indeed, available data suggests that there are roughly four trajectories of cognition change over time.104 Compared to baseline performance at thirty-five years old, humans may experience:105

- **Super aging**, in which there is little to no cognitive decline, and mental faculties remain highly functioning even in later ages;
- **Normal aging**, in which there is some decline in cognitive performance, but not so much that it affects daily activity;

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100 Id. (citations omitted).
101 Id. at 347 (finding that the dementia group strategized “disadvantageously” over the course of a gambling task, which resulted in an increase in risky decision-making relative to the age-matched control group).
103 Buckner, supra note 94, at 195.
• *Mild cognitive impairment*, in which there is accelerated cognitive decline, but not rising to the level of significantly affecting daily life; and

• *Pathologic aging or dementia*, in which there is accelerated cognitive decline that does impair daily functioning.

Why some individuals follow one path or another remains poorly understood.\textsuperscript{106} Super Agers, for instance, retain their intellectual abilities late into their lives, without significant declines in memory, attention, language, or executive function tests.\textsuperscript{107} Researchers have begun to identify anatomic and genetic factors that distinguish Super Agers.\textsuperscript{108} But the mechanistic causes of these changes, whether they result from a higher baseline intelligence or from a genetic or environmental resistance to age-related decline, remain yet to be determined.\textsuperscript{109}

There is strong evidence that diet and exercise are protective factors for avoiding dementia,\textsuperscript{110} but researchers and pharmaceutical companies have been attempting to identify other protective factors or mechanisms that slow the rate of impairment or halt its progression altogether.\textsuperscript{111} Such factors include: recruitment of a “cognitive reserve,” which allows adults to utilize different cognitive skills to accommodate for their diminishing capacity in other skills; mentally stimulating activity; and physical exercise.\textsuperscript{112}

The construct of “cognitive reserve” was developed to help explain why “in the face of neurodegenerative changes that are similar in nature and extent,
individuals vary considerably in the severity of cognitive aging.”\textsuperscript{113} The cognitively capable adult brain can withstand age-related decline much better than individuals with less cognitive capabilities.\textsuperscript{114}

Because judges are highly educated, it is relevant to note research finding that environmental factors such as higher childhood intelligence and higher educational attainment are protective against later-life cognitive decline.\textsuperscript{115} Mentally stimulating activity may also protect against cognitive decline.\textsuperscript{116}

C. The Neurobiology of Aging

Research has emerged on age-related changes in both the normal and diseased state. In this Section, I first review brain changes in normal aging, and then turn to the pathology of Alzheimer’s disease (AD).

1. The Aging Brain

Advances in neuroimaging techniques have made it easier to identify age-related structural and functional changes in the brain.\textsuperscript{117} Changes over time include:

- A reduction in regional brain volume, with certain areas of the brain appearing to be more susceptible to volume loss, including the frontal and parietal lobes.\textsuperscript{118}

\textsuperscript{113}Whalley et al., supra note 112, at 369.
\textsuperscript{114}See id. at 374.
\textsuperscript{115}See id. at 370, 375; see also Michael J. Valenzuela & Perminder Sachdev, Brain Reserve and Dementia: A Systematic Review, 36 PSYCHOL. MED. 441, 442 (2005). A physically active lifestyle is also a protective factor, but it is unclear whether judges are disproportionally more physically active than the general public. The Louisiana Judges and Lawyers Assistance Program, for instance, notes that “[o]ften times we [lawyers and judges] give up nutrition, sleep, and physical activity and place our energies on life’s demands.” Wellness, LA. JUDGES & LAWYERS ASSISTANCE PROGRAM, INC., http://louisianajlap.com/issues-concerns/wellness/ [https://perma.cc/T3Z6-VAAZ].
\textsuperscript{116}Robert S. Wilson et al., Cognitive Activity and the Cognitive Morbidity of Alzheimer Disease, 75 NEUROLOGY 990, 994 (2010) (reporting on a study in which researchers longitudinally analyzed activity patterns and cognitive decline for about six years, finding that mentally stimulating activity in older age significantly slowed the rate of cognitive decline in patients with Alzheimer’s disease).
\textsuperscript{117}Timothy A. Salthouse, Neuroanatomical Substrates of Age-Related Cognitive Decline, 137 PSYCHOL. BULL. 753, 759 (2011).
\textsuperscript{118}Id. at 761. Reduction in brain volume is likely due to a reduction in the number of connections a neuron has with other neurons through their dendrites (also referred to as dendritic arborization) and loss of synapses between neurons, not through the loss of neurons. Id. This measure serves as a “crude” indicator of cognitive performance, and the causal relationship between reduced brain volume and cognitive functioning are not well supported. Id.
Disruptions in brain network connectivity, described as a reduction in white matter integrity, with the largest effects being observed in the frontal regions of the brain, which are important for planning and decision-making.\textsuperscript{119}

Some evidence suggests that older adults recruit different brain networks to solve the same problems as younger adults.\textsuperscript{120} The aging brain may be organized differently than the younger brain, but it may still be able to accomplish many of the same tasks.\textsuperscript{121}

Within the prefrontal cortex, age-related changes to the dorsolateral prefrontal cortex may be of particular importance.\textsuperscript{122} This region is primarily thought to be involved in executive function and complex reasoning.\textsuperscript{123} By comparison, few age-related changes occur in the ventromedial prefrontal cortex, which is thought to be involved in emotion detection.\textsuperscript{124} Age-related impairment in the function of the prefrontal cortex may be mediated through dysfunction of the dopaminergic system in the brain.\textsuperscript{125} Dopamine is the primary neurotransmitter in the prefrontal cortex and striatal systems, and disruptions to the dopaminergic system mediate age-related declines in cognition, including executive function, episodic memory, and processing speed.\textsuperscript{126}

\textsuperscript{119} M. O’Sullivan et al., Evidence for Cortical “Disconnection” as a Mechanism of Age-Related Cognitive Decline, 57 Neurology 632, 632, 635 (2001); see also Carl Engelking, Brain Area for Decision-Making and Planning Is “Uniquely Human,” DISCOVER (Jan. 30, 2014), https://www.discovermagazine.com/mind/brain-area-for-decision-making-and-planning-is-uniquely-human [https://perma.cc/UT55-R69J]. Another review conducted by Dr. John Morrison in 2012 further supported the correlation between cognitive impairment and “synaptic alterations” between neurons in certain areas of the brain instead of the outright loss of neurons. John H. Morrison & Mark G. Baxter, The Ageing Cortical Synapse: Hallmarks and Implications for Cognitive Decline, 13 Nature Reviews Neuroscience 240, 240 (2012). Regional connections between brain structures appear to mediate specific cognitive skills, with fractional anisotropy (measure of tract integrity) in the anterior, posterior, and mediotemporal regions associated with speed and working memory, executive function, and memory respectively. See O’Sullivan et al., supra note 119, at 635. This conclusion supports the cortical disconnection hypothesis, which is a hypothesis that suggests that as humans age, the white matter tracts that connect various regions of the brain degrade, resulting in a “loss of functional integration of neurocognitive networks.” Id. at 632.

\textsuperscript{120} Kirk R. Daffner & Kim C. Willment, Executive Control, the Regulation of Goal-Directed Behaviors, and the Impact of Dementing Illness, in DEMENTIA: COMPREHENSIVE PRINCIPLES AND PRACTICE, supra note 13, at 71, 89–90.

\textsuperscript{121} See Roser Sala-Llonch et al., Reorganization of Brain Networks in Aging: A Review of Functional Connectivity Studies, 6 Frontiers Psychol. 1, 5 (2015).

\textsuperscript{122} See MacPherson et al., supra note 94, at 598.

\textsuperscript{123} Id.

\textsuperscript{124} Id. at 607.

\textsuperscript{125} Lars Bäckman et al., Linking Cognitive Aging to Alterations in Dopamine Neurotransmitter Functioning: Recent Data and Future Avenues, 34 Neuroscience & Biobehavioral Reviews 670, 675 (2010).

\textsuperscript{126} Id. at 670, 675.
2. Neurobiology of Alzheimer’s Disease

In 2010, an estimated 4.7 million Americans aged sixty-five and older suffered from Alzheimer’s disease (AD); by 2050, this number is projected to reach 13.8 million.\textsuperscript{127} Although there is currently no cure for AD,\textsuperscript{128} new neuroimaging techniques are being developed to detect biomarkers for Alzheimer’s in its earliest stages.\textsuperscript{129} Such biomarkers can identify atrophying neural tissue in people with AD before they manifest observable behavioral changes.\textsuperscript{130} In 2004, the Alzheimer’s Disease Neuroimaging Initiative (ADNI) was formed to develop a range of biomarkers—including imaging, genetic, and biochemical markers—for the early detection and monitoring of AD.\textsuperscript{131} For clinicians, this early detection can help facilitate prevention or help slow the disease’s progression.\textsuperscript{132}

New diagnostic options for clinical use are emerging.\textsuperscript{133} In 2012, the Food and Drug Administration (FDA) approved an imaging technique that uses positron emission tomography (PET) scanning with the radioactive tracing compound Florbetapir F-18 to identify the accumulation of amyloid-β (Aβ) plaques, which are believed to play a central role in AD.\textsuperscript{134}

In addition, the National Institute of Aging and the Alzheimer’s Association have worked over the past decade to better define and identify the preclinical (i.e., without symptoms) stages of AD.\textsuperscript{135} In 2011, the working group “created separate diagnostic recommendations for the preclinical, mild cognitive impairment, and dementia stages of Alzheimer’s disease.”\textsuperscript{136} In 2018, on the

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\textsuperscript{128} See John R. Hodges, A Decade of Discovery and Disappointment in Dementia Research, 11 NATURE REVIEWS NEUROLOGY 613, 614 (2015).


\textsuperscript{130} See Fiandaca et al., supra note 129, at S197; Risacher & Saykin, supra note 129, at 637.

\textsuperscript{131} Michael W. Weiner et al., 2014 Update of the Alzheimer’s Disease Neuroimaging Initiative: A Review of Papers Published Since Its Inception, 11 ALZHEIMER’S & DEMENTIA e1, e1–e2 (2015).

\textsuperscript{132} See Fiandaca et al., supra note 129, at S197.

\textsuperscript{133} See, e.g., Lucie Yang et al., Brain Amyloid Imaging—FDA Approval of Florbetapir F18 Injection, 367 NEW ENG. J. MED. 885, 885 (2012).

\textsuperscript{134} Id.

\textsuperscript{135} See Reisa A. Sperling et al., Toward Defining the Preclinical Stages of Alzheimer’s Disease: Recommendations from the National Institute on Aging–Alzheimer’s Association Workgroups on Diagnostic Guidelines for Alzheimer’s Disease, 7 ALZHEIMER’S & DEMENTIA 280, 280 (2011).

\textsuperscript{136} Jack et al., supra note 82, at 535.
basis of ongoing neuroscience research, the same working group published a landmark paper in which it proposed a diagnosis of AD that was “not based on the clinical consequences of the disease (i.e., symptoms/signs),” but which “shifts the definition of AD in living people from a syndromal to a biological construct.”137 The proposed “research framework focuses on the diagnosis of AD with biomarkers in living persons.”138 Specifically, AD would require a finding of both Aβ plaques and pathologic tau deposits.139

More broadly, the framework introduced an “Alzheimer’s continuum,” which would include both those with Alzheimer’s disease (i.e., those with the established biomarkers) and those in the category of “Alzheimer’s pathologic change,” an “early stage of Alzheimer’s continuum, defined in vivo by an abnormal Aβ biomarker with normal pathologic tau biomarker.”140 Notably, and important for the analysis to follow in the judicial context, under this framework an individual (such as a judicial nominee) could be both symptom-free and diagnosed as being on the Alzheimer’s continuum.141

Under the new framework, for many individuals there will be a lengthy period (fifteen to twenty years) of brain change without symptoms.142 As lead author Clifford Jack observed: “In every other area where biomarkers exist—hypertension, diabetes, cancer—the disease identified in an asymptomatic individual is still the disease. If cancer is detected on a screening colonoscopy, it’s still cancer, even if the person doesn’t have symptoms.”143

The transition from symptom-based to biologically based detection of AD offers clinicians an opportunity to intervene earlier in the progression of the disease.144 The proposed framework would fundamentally change the definition of AD; not surprisingly, it has been heavily debated.145 Chief amongst the

137 Id. (emphasis added).
138 Id.
139 See id. at 536.
140 Id. at 539, 541 (emphasis added).
141 Id. at 548.
142 Nina Silverberg et al., NIA Commentary on the NIA-AA Research Framework: Towards a Biological Definition of Alzheimer’s Disease, 14 ALZHEIMER’S & DEMENTIA 576, 576 (2018). “Postulated Disease Continuum. The current recognized biomarkers are positive 20–30 years prior to symptoms. Risk factors that can impact symptoms are present throughout the lifecourse. Prospective biomarkers will emerge more closely in time with symptoms.” Id. at 577.
144 See Sperling et al., supra note 135, at 181.
145 See generally, e.g., Mario D. Garrett & Ramón Valle, A Methodological Critique of the National Institute of Aging and Alzheimer’s Association Guidelines for Alzheimer’s Disease, Dementia, and Mild Cognitive Impairments, 15 DEMENTIA 239 (2016) (questioning the validity of certain biomarkers and their ultimate progression to AD).
critiques is that it is too early to use biomarkers because the “extent and quality of diagnostic biomarker data currently available is still in its infancy.”\textsuperscript{146}

For purposes of evaluating judicial cognitive function, the availability of new biomarkers—even if they were to be used for assessing risk, not diagnosis—raises both promise and peril. I discuss this further in Part V.

IV. JUDICIAL COGNITIVE IMPAIRMENT: THE SCOPE OF THE PROBLEM

Part II established that America’s judiciary is aging.\textsuperscript{147} Part III established that, on average, age is associated with cognitive decline in domains of cognitive function that are relevant to judging.\textsuperscript{148} But it does not necessarily follow that a sufficiently large number of sitting judges are, or will become, cognitively impaired to the point that they cannot execute their duties. This is because judges may be a subgroup with particularly strong cognitive reserve; because judges may effectively self-policing and leave the bench before significant decline; and/or because the existing system adequately intervenes when needed.

Part IV explores these possibilities, in particular whether self-policing and existing policies for addressing judicial cognitive decline are adequate as presently designed. Section A argues that there is reason for concern about age-related cognitive decline in judges. Section B then considers at length whether the current federal system is adequate to address instances of judicial cognitive decline.

A. Concerns About Judicial Age-Related Cognitive Decline

Although the thrust of my argument is that we should be empowering aging judges, it is important to clarify that I am \textit{not} arguing there is no cause for concern. Although there is no direct evidence available to estimate the prevalence of cognitive decline in state and federal judges, there is some empirical data suggesting this is the case,\textsuperscript{149} and a strong circumstantial case can be made that commentators’ concerns are not unreasonable. At the outset, though, because childhood intelligence and education levels are protective factors against dementia,\textsuperscript{150} it seems plausible that judges as a group might have lower incidence rates of mild cognitive impairment and Alzheimer’s disease.\textsuperscript{151}

\textsuperscript{146} Id. at 241.
\textsuperscript{147} See supra Part II.
\textsuperscript{148} See supra Part III.
\textsuperscript{149} See, e.g., David L. Schwartz, \textit{Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases}, 107 Mich. L. Rev. 223, 258 (2008). (suggesting in Figure 7 that “there may be a relationship between age of the district court judge and the quality of a district court judge’s patent decision-making (as measured by Federal Circuit claim construction reversal)).
\textsuperscript{150} Valenzuela & Sachdev, supra note 115, at 442.
\textsuperscript{151} See, e.g., Xiangfei Meng & Carl D’Arcy, \textit{Education and Dementia in the Context of the Cognitive Reserve Hypothesis: A Systematic Review with Meta-Analyses and Qualitative}
But even if we assume that judges have a lower rate of AD than the general public, it leaves open the question of whether that rate is still high enough to warrant concern, and whether the deficits that attach to normal cognitive aging—which might not affect daily living activities—are of concern when carrying out the judicial function.

Put another way: does the judicial nomination and selection process select only for Super Ager s? If all judges were Super Agers, there would be little cause for concern with aging judges from the perspective of mental decline on the bench.

Without direct evidence, it is impossible to rule out the possibility. If 10% of the population are Super Ager s, then it is mathematically possible that all of the 30,000 state judges and 1700 Article III judges are Super Ager s. However, this seems highly unlikely.

First, despite the fantasy on airport bookshelves that we can “All Become ‘Super Ager,s’,” Super Ager s comprise only 10–20% of the population. Second, although possible, it seems implausible that the legal system would be selecting for Super Ager s as judges when scientists do not yet know the factors that distinguish those who will age normally versus those who will be high functioning outliers.

In addition, multiple interviews with physicians who diagnose dementia suggest that they are regularly (albeit not frequently) contacted by concerned colleagues and friends of judges. Notably, it is often not the judge s themselves who reach out, but someone who is concerned about the judge. While my limited number of interviews does not constitute a representative sample, it is worth noting that these care providers agree with the general

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154 Price, supra note 104.

155 Rogalski et al., supra note 107, at 30.

156 Id. at 35.

157 Interviews with care providers in psychology, psychiatry, and neurology (Aug.–Nov. 2018) [on file with author].

158 Id. This is consistent with a more general pattern, in which the affected individual is not the one who first sees the symptoms of possible dementia. See David Knopman et al., PATTERNS OF CARE IN THE EARLY STAGES OF ALZHEIMER’S DISEASE: IMPEDEMENTS TO TIMELY DIAGNOSIS, 48 J. AM. GERIATRICS SOC’Y 300, 302 (2000).
proposition that there is reason to be concerned about undiagnosed cognitive decline on the bench.\textsuperscript{159} This is in part, as discussed above, because decline is often subtle and hard to detect.\textsuperscript{160}

For these reasons, as well as the extensive record (reviewed below) of documented instances of judicial cognitive decline,\textsuperscript{161} I will proceed on what I take to be a reasonable assumption that all judges are not Super Agers, that some judges will experience normal cognitive aging, and that some judges will experience either mild cognitive impairment or some form of more progressive dementia.

B. Responding to Judicial Cognitive Decline

Concerns over mentally incompetent judges have been recognized since the time of the country’s founding,\textsuperscript{162} and a variety of solutions have been implemented to address these concerns.\textsuperscript{163} As legal scholar Charles Geyh has observed, “As the sheer number of attempts at legislation imply, judicial disability has posed a chronic problem for Congress.”\textsuperscript{164}

Public allegations of the mental incompetence of judges are rare,\textsuperscript{165} but this “reveal[s] little about the true extent of the problem”\textsuperscript{166} because there has traditionally been a taboo on openly discussing the issue of declining capacity.

\textsuperscript{159} Interviews with care providers in psychology, psychiatry, and neurology (Aug.–Nov. 2018) [on file with author].

\textsuperscript{160}GLENN E. SMITH & MARK W. BONDI, MILD COGNITIVE IMPAIRMENT AND DEMENTIA: DEFINITIONS, DIAGNOSIS, AND TREATMENT 15–16 (2013).

\textsuperscript{161} See infra Part IV.B.

\textsuperscript{162} See John S. Goff, Old Age and the Supreme Court, in SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL 30–31 (Glenn R. Winters ed., 1973). One historical moment of note is a letter by Justice William Johnson (the “First Dissenter”) to Thomas Jefferson on Dec. 10, 1822. Mark R. Killenbeck, No Bed of Roses: William Johnson, Thomas Jefferson and the Supreme Court, 1822–23, 37 J. SUP. CT. HIST. 95, 95 (2012). The twenty-page letter contained many points, but most relevant for my purposes was his observation that several of his colleagues on the bench were mentally unfit for service: “Cushing was incompetent . . . Patterson was a slow man & willingly declined the trouble . . . .” Id. at 104.

\textsuperscript{163} See, e.g., Emily Field Van Tassel, Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992, 142 U. PA. L. REV. 333, 395 (1993) (“Congress has occasionally acted over the years to deal with these problems by giving aging judges incentives to retire.”).


\textsuperscript{165} See Jackson Hobbs, “So Delicate a Subject”: Maintaining an Independent and Self-Regulated Judiciary in the Face of Judicial Aging and Disability, 85 UMKC L. REV. 805, 813 (2017) (“The statistics illustrate that of the 5,277 allegations investigated, merely 190, or 3.6%, of the allegations involved mental or physical disability.”).

\textsuperscript{166} Geyh, supra note 164, at 275.
of fellow judges. Indeed, in 1971, the Supreme Court chided a circuit court for broaching “so delicate a subject” when the circuit court raised concerns about the mental competence of a state court judge in a published opinion. However, judges have since noted that “[w]e have come a long way from the day when discussion of a judge’s mental state was considered a breach of decorum.”

Here, I review several (non-mutually exclusive) avenues by which the challenge of cognitively impaired judges can be addressed within the current system: (1) create incentives for the judge to voluntarily choose retirement, (2) involuntarily remove the judge on the basis of disability pursuant to 28 U.S.C. § 372; (3) file a formal complaint under the Judicial Conduct and Disability Act; (4) pursue post-hoc relief via a due process claim; and (5) apply informal pressures to encourage the judge to retire. The available evidence suggests that the last option, informal mechanisms, remains the primary method by which most issues are resolved.

1. Creating Incentives for Judicial Retirement

A straightforward way to address the issue of aging judges is to create stronger incentives for retirement. This was the first response from Congress, in 1869, when it passed a law to allow judges to retire at age seventy and receive the same salary as when active. The Act spurred a number of retirements. However, the introduction of senior status in 1919, however, changed the nature of retirement. Judges were now able to continue to serve on a reduced caseload.

Emily Field Van Tassel’s extensive study on judicial retirement

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167 See United States v. Washington, 98 F.3d 1159, 1166 (9th Cir. 1996) (Kozinski, J., concurring) (referencing an earlier time “when discussion of a judge’s mental state was considered a breach of decorum”).
169 See id.
at 397.
170 Act of Apr. 10, 1869, ch. 22, § 5, Pub. L. No. 41-22, 16 Stat. 44, 45 (“[A]ny judge of any court of the United States, who . . . having attained to the age of seventy years, [shall] resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.”).
171 Van Tassel, supra note 163, at 395–97 (noting that before this Act, and “[l]acking any provision for retirement, many judges remained on the bench after becoming incapable of serving adequately”).
172 See id. at 397.
173 Id. at 397–98.
finds that senior status, as opposed to full resignation of duties, is by far the more attractive option.\textsuperscript{174} Van Tassel finds that “[f]rom 1980 to 1989, at least 197 judges retired from regular active service (took ‘senior status’),” while only “fourteen ‘retired from the office.’”\textsuperscript{175} In the period 1990 to 1992, 86% of judges elected senior status over outright retirement.\textsuperscript{176}

If moving to senior status required a cognitive assessment, we could have more confidence that there was a correlation between taking senior status and likelihood of remaining mentally sharp. But as present, to move to senior status, a “judge simply writes a letter to the President stating that on a particular date the judge intends to retire from regular active service, having met the requisite age and service requirements, and that the judge intends to continue to render substantial judicial service as a senior judge.”\textsuperscript{177}

Historically, there has been concern that retirement alone would not be enough to account for disabled judges.\textsuperscript{178} In 1809, Congress passed a law “requiring the Supreme Court justice assigned to the circuit in which there was a disabled district judge to issue certiorari to the clerk of the district court to certify all pending matters to the next circuit court.”\textsuperscript{179} In 1850, further Congressional action required that a district judge from another district be brought in to carry out the work of the disabled judge.\textsuperscript{180}

\textbf{2. Involuntary Removal for Disability}

In 1919, Congress first gave to the President the power to appoint a new, temporary judge in a district where a disabled judge sits.\textsuperscript{181} The current statute reads:

\begin{quote}
(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of International Trade, or by the chief judge of his court in the case of a judge of
\end{quote}

\textsuperscript{174} See id. at 399.
\textsuperscript{175} Id. at 399.
\textsuperscript{176} Id. Though Van Tassel notes that the retirements may be a conduit to return to lucrative private practice, Van Tassel cautions that more research is required: “[F]urther study should be done of both senior judges and judges who have retired from the office in the twentieth century.” Id. at 400; see also Mary L. Clark, Judicial Retirement and Return to Practice, 60 Cath. U. L. Rev. 841, 896 (2011).
\textsuperscript{177} Block, supra note 27, at 536.
\textsuperscript{178} Van Tassel, supra note 163, at 400 (“Retirement provisions did not solve all the problems of incapacity on the bench.”).
\textsuperscript{179} Id. at 400–01.
\textsuperscript{180} Id. at 401.
\textsuperscript{181} Act of Feb. 25, 1919, ch. 29, § 6, Pub. L. No. 65-265, 40 Stat. 1156, 1158; see also Van Tassel, supra note 163, at 397 n.301.
the Court of International Trade, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate.\textsuperscript{182}

Under this provision, the President’s appointment is temporary,\textsuperscript{183} and the disabled judge will be treated as a junior colleague to the temporarily appointed judge.\textsuperscript{184}

Although the potential for involuntary removal exists, it has rarely been used.\textsuperscript{185} The available historical record suggests that this involuntary disability provision has been invoked six times.\textsuperscript{186} It is rarely invoked because, as discussed below, informal application of pressure to retire is the primary mechanism by which the system responds to problem judges.\textsuperscript{187}

3. Due Process Claims on Grounds of Judges’ Mental Competence

The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that no person shall be deprived of “life, liberty, or property, without due process of law.”\textsuperscript{188} Courts typically “presume . . . that constitutional due process requires an impartial and mentally competent judicial officer.”\textsuperscript{189} However, the Supreme Court has never explicitly so held.\textsuperscript{190} It has held that, with respect to jurors, “a defendant has a right to ‘a tribunal both impartial and mentally

\textsuperscript{183}  Id. (Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled.”).
\textsuperscript{184}  Id. (“Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court.”).
\textsuperscript{185}  See Geyh, supra note 164, at 275.
\textsuperscript{186}  Id.
\textsuperscript{187}  See infra Part IV.B.4.
\textsuperscript{188}  U.S. CONST. amend. V; U.S. CONST. amend. XIV.
\textsuperscript{189}  Petition for Writ of Certiorari at 14, Bisno v. N. Beverly Park Homeowners Ass’n, 552 U.S. 950 (2007) (No. 07-1631), 2007 WL 2261607; see also Smith v. Cox, 435 F.2d 453, 460 (4th Cir. 1970) (“We have no doubt that the due process clause of the fourteenth amendment guarantees that the determination of sentence be made by a judicial officer mentally competent to carry out his duties.”).
\textsuperscript{190}  See Petition for Writ of Certiorari, supra note 189, at 14.
competent to afford a hearing.”191 The Court has had the opportunity to extend this holding explicitly to judges but declined to do so.192

Regardless of the constitutional status of claims about the mental capacity of a presiding judge, courts may be skeptical of such claims’ factual merits.193 In Slayton v. Smith, a per curiam Supreme Court chastised as procedurally irregular the Fourth Circuit’s paean to the due process requirement of a mentally competent judiciary where the state judge in question had resigned within nine months of the defendant’s conviction allegedly after a complaint to the governor regarding his competence.194 Moreover, courts have been skeptical of allegations of mental incompetence in judges in other contexts of review.195

In United States v. Washington,196 three Indian Tribes sought relief under Federal Rule of Civil Procedure 60(b)(6)197 after a newspaper article reported that the relevant judge had Alzheimer’s disease when he ruled against them.198 The article was published several years after the judge’s death and many years after the proceeding.199 In rejecting the Tribes’ motion for relief, the Ninth Circuit expressed skepticism about the evidence.200 The court pointed to the high abuse of discretion standard under which it was reviewing the case, as well as the fact that the judge’s son said his father had been competent at the time of the ruling,201 and that the judge was open about his medical problems during the

191 Tanner v. United States, 483 U.S. 107, 126 (1987) (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)). Note that in both Tanner and Jordan the Supreme Court rejected the challenge to the jurors’ competence. Id.; Jordan, 225 U.S. at 177.
192 See, e.g., N. Beverly Park Homeowners Ass’n v. Bisno, 54 Cal. Rptr. 3d 644 (2007), cert. denied, 552 U.S. 950 (2007). It is, of course, entirely possible that, given the highly contested factual records in these kinds of cases, the Court is either (1) skeptical of the factual merits in the cases that it has been presented with thus far, or (2) waiting for an adequately clear factual record to avoid ruling on facts, or both.
194 See id.; see also Cox, 435 F.2d at 459.
195 See, e.g., Deere v. Cullen, 718 F.3d 1124 (9th Cir. 2013) (federal habeas relief); United States v. Washington, 98 F.3d 1159 (9th Cir. 1996) (review under Federal Rule of Civil Procedure 60(b)(6)).
196 See generally Washington, 98 F.3d 1159.
197 Fed. R. Civ. P. 60(b)(6) (“On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief.”).
198 See Washington, 98 F.3d at 1162.
199 See id.
200 See id. at 1163 (“This is not one of those rare cases where ‘extraordinary circumstances’ warrant vacating an ‘erroneous judgment.’ The Three Tribes offer only Judge Boldt’s death certificate and the Seattle Post-Intelligencer Article to support their contention that Judge Boldt may have suffered some mental impairment in 1979.” (emphasis added)).
201 See id. at 1162–63 (“Judge Boldt’s son also stated in the article that he believed his father to have been mentally competent when he ruled against the tribes in 1979: ‘He loved the law.’ ‘He would not do anything to violate his duties as a judge.’ ”).
proceedings and the appellate court had affirmed his ruling on the merits. Judge Kozinski filed an energetic concurrence in which he argued that the tribes’ evidence would have been sufficient, but that Rule 60(b)(6) does not permit relief on grounds of the judge’s mental incompetence.

Also illustrative is *Deere v. Cullen.* Judge Fred Metheny was appointed to California’s Riverside County Superior Court in 1971. In 1986, at age 64, he sentenced convicted murderer Ronald Deere to death. In 1993, Deere filed a federal habeas corpus petition to challenge his death sentence. While Deere sought federal habeas relief for traditional claims, such as whether he was competent to plead guilty, he also argued that Judge Metheny was mentally incompetent due to dementia at the time of the sentencing.

To support his claim, Deere offered four affidavits from attorneys. These attorneys observed, amongst other things, that there were rumors that Judge Metheny was suffering from Alzheimer’s at the time; that Judge Metheny’s “faculties seemed to have deteriorated over the years;” and that he made “strange rulings and off-hand remarks.” When Deere’s attorney attempted to contact Judge Metheny in 1993, Judge Metheny’s wife told her that he was ill, could not remember his cases, and had an “Alzheimer’s-type condition.”

In light of this, Deere requested additional discovery and an evidentiary hearing on Judge Metheny’s mental competence at the time of sentencing. A Ninth Circuit Court of Appeals panel, however, upheld the district court’s decision to deny Deere’s request. In the Ninth Circuit’s analysis, the central consideration was that Deere’s evidence consisted primarily of anecdotes that, in the Court’s view, “reveal[ed] no more than eccentricity as distinguished from dementia.” Moreover, the opinion emphasized that Deere “furnished

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202 See id. at 1161–62 (“This court affirmed Judge Boldt because ‘the district court correctly resolved this question despite its failure to apply the proper standard.’”).
203 See id. at 1164 (Kozinski, J., concurring).
204 Deere v. Cullen, 718 F.3d 1124 (9th Cir. 2013).
206 Deere, 718 F.3d at 1152.
207 Id. at 1139.
208 Id.
209 Id. at 1140, 1148.
210 Id. at 1148.
211 Id. at 1149.
212 Id. at 1149.
213 Id.
214 Id.
215 Id. at 1140.
216 Id. at 1152.
217 Id. at 1127 (alteration added).
nothing—zero—from any mental health professional opining that any of the stories about Judge Metheny might be indicative of mental impairment.”

In a lengthy dissent, Judge William Fletcher challenged the majority: “The majority holds that a judge suffering from dementia may sentence a man to death. I disagree.” Fletcher provided a detailed review of the record, which suggested many instances of concerning behavior from Judge Metheny around the time of sentencing. For instance, in a local newspaper story in 1987, one anonymous attorney noted that Judge Metheny “appear[ed] to have little grasp of what’s going on.”

Looking backward, we will never know whether Judge Metheny was or was not mentally competent when he sentenced Ronald Deere to death. But looking forward, I argue in this Article that by expanding the use of cognitive health assessment tools in the judicial system, the system and the judges themselves will have more than speculation and anecdotes on which to base their decisions about judicial competence.

4. The Judicial Conduct and Disability Act of 1980

A formal option to address judicial mental incapacity is the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (“the 1980 Act”). Before the 1980 Act, Congressional debate centered around two primary modes of promoting judicial accountability: “[T]he primary alternatives considered by Congress were (1) establishing a central body of judges with broad powers to discipline and even remove federal judges and (2) formalizing or augmenting the system of decentralized self-regulation already in place by virtue of the general powers of the judicial councils of the respective circuits.” During these debates, the Judicial Conference advocated for the decentralized system and argued that its informal mechanisms were already effective. Ultimately, the 1980 Act retained the decentralized self-regulation structure, but provided new procedural avenues for complaints.

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218 Deere, 718 F.3d at 1127.
219 Id. at 1152.
220 Id. at 1156.
223 In re Complaint of Judicial Misconduct, 570 F.3d 1144, 1148 (9th Cir. 2009), as corrected (June 26, 2009).
224 See id. at 1153. The Council “pointed out to Congress that the circuit council, acting solely under the administrative authority conferred upon them by section 332, and without outside intervention, had established administrative procedures for handling complaints of judicial misconduct, and had for many years dealt quietly, informally, and effectively with ‘problem judges’—disabled judges, alcoholic judges, senile judges, procrastinators.” Id. at 1148.
The 1980 Act established an administrative procedure to handle complaints against federal judges for mental disability. Under the procedure, any person can file a complaint “alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability.”

When the chief judge receives a complaint, he or she determines whether the facts warrant forming an investigatory committee and may conduct a limited inquiry to do so. If the chief judge believes there are sufficient grounds, he or she forms a special committee including themselves and equal numbers of circuit and district judges of the circuit. This special committee conducts an investigation and files a comprehensive written report with the circuit council, with recommendations for action. The council can either dismiss the complaint or take a range of actions including: (1) temporary halting case assignments; (2) private or public censure; (3) certifying the judge’s disability pursuant to 28 U.S.C. § 372(b); (4) requesting such judge’s voluntary retirement; or (5) ordering the removal from office of term-limited judges. The council may also petition the Judicial Conference to take action, including advising the House of Representatives that impeachment may be warranted.

The complaint to the judicial council is not a request for judicial recusal, but rather “a separate action from the court case itself.” This means that the original proceeding can continue, and indeed could be resolved before the judicial council reaches the complaint. One open question in applying the Judicial Conduct and Disability Act is whether normal, age-related cognitive decline would constitute either a physical or mental “disability.” However defined, since the Act’s enactment, there have been few instances of formal complaints based on judicial disability.

The most extensive study of the Judicial Conduct and Disability Act of 1980 was carried out by a study committee led by Associate Justice Stephen  

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227 Id. §§ 352, 353(a).
228 Id. § 353(a).
229 Id. § 353(c).
230 Id. § 354(a)(2)–(3).
232 Hobbs, supra note 165, at 810.
233 Id.
234 Id. at 816–17 (“Neither the Breyer Report nor the Amended Guide to Judiciary Policy make a distinction between mental disability and age related cognitive decline.”).
235 Geyh, supra note 164, at 276 (finding that the data “does not translate into an excessive number of disabled judges active in the judiciary”).
Breyer.\textsuperscript{236} Published in 2006, the major conclusion of the report was that the Act was being properly implemented.\textsuperscript{237} Notably for the analysis in this Article, “[a]lmost all complaints allege misconduct rather than disability.”\textsuperscript{238}

Consistent with the intent of the Act’s sponsors, “informal efforts to resolve problems remain . . . the principal means by which the judicial branch deals with problems of judicial misconduct and disability.”\textsuperscript{239} Informal efforts are primarily directed at resolving issues of decisional delay, mental and physical disability, and complaints about the judge’s temperament.\textsuperscript{240} I turn now to an examination of those informal mechanisms.

5. Informal Mechanisms

Although the formal mechanisms discussed above are available, in practice it is informal approaches by which most judicial disability issues are addressed.\textsuperscript{241} This use of informal mechanisms is grounded in historical practice.\textsuperscript{242} As described in one study, these informal methods can require significant effort:

Chief Judge Charles Clark [on the Fifth Circuit] used an assortment of techniques to induce three chief district judges then in their mid-80s to step down from their administrative posts. He applied pressure on one judge’s secretary, while in another case he made “use of a sort of high-grade blackmail,” by threatening “that the Bar Association was going to take the matter to the newspapers.” The entire proceeding is tortuous. One chief judge recalled it as being “rather unpleasant, both for the person who goes to see the aged judge and . . . for the aged judge himself.” So the Sixth Circuit Council had discovered in the Underwood affair. But, the chief judge declared: “We kept after him, and the largest newspaper in Ohio with statewide circulation published some accounts concerning the way he was handling his work, and


\textsuperscript{237} Id. at 5 (“[T]he chief circuit judges and judicial councils have properly implemented the Act in respect to the vast majority of the complaints filed . . . .”).

\textsuperscript{238} Id. at 6. Only 3.6\% of the complaints were for physical or mental disability. Id. at 25.

\textsuperscript{239} Id. at 7.

\textsuperscript{240} Id. at 101. “Barr and Willging’s 1991–1992 study for the National Commission pointed to three examples of problems dealt with by informal actions. Disability allegations were the most frequent—‘a host of physical and mental symptoms ranging from a memory afflicted by Alzheimer’s disease to an inability to speak as a result of a stroke.’” Id. (quoting Barr & Willging, supra note 222, at 139–40).

\textsuperscript{241} Geyh, supra note 164, at 276 (finding that “informal actions by the chief circuit and district judges appear to be used with the most frequency and to the greatest effect” when handling cases of disabled judges).

\textsuperscript{242} Id. at 279 (“[D]erivation of informal action by chief circuit judges in response to episodes of judicial misbehavior may be more firmly rooted in tradition than a formal grant of statutory authority.”).
he finally called me up and said his name had been ‘dragged down in the mud far enough,’ and that he would retire, and he did retire.”

There is a legitimate debate about the effectiveness of these informal mechanisms. For instance, when the issue of mandatory retirement ages for federal judges was debated several decades ago, Judge Irving Kaufman wrote in the Yale Law Journal that the problem of failing judicial health “can almost always be managed effectively in a personal and informal manner. On occasion, close colleagues of an afflicted judge suggest that he retire. If necessary, other judges, attorneys, and even family members may approach the ailing jurist. Almost invariably he will acquiesce.”

My review that follows is not meant to evaluate the effectiveness of these informal policing methods as compared to the formal methods, but rather to evaluate whether the existing, informal system can be further improved. The informal policing system relies on individual judges to (1) recognize their own impairments and (2) take appropriate steps to leave the bench. But in the general population, individuals often underestimate their cognitive decline, and this happens to judges as well. Absent concrete evidence clearly showing the decline, the chief judge, family, and friends must often rely on arm-twisting.

a. How Informal Persuasion Works in Practice

Concerns about mental decline on the Supreme Court are longstanding. Historically, this challenge has been handled collegially. As political scientist David Atkinson observes, “The chief justices have traditionally borne the principal burden of dealing with incapacitated colleagues, which has all too frequently proved to be trying.”

A complicating factor for Supreme Court retirements is politics. Even when a judge recognizes his/her cognitive impairment, political commitments may motivate him/her. Justice William O. Douglas, for instance, once told a former law clerk, “‘Even if I’m only half alive . . . I can still cast a liberal

243 Id. at 284 (alteration added) (quoting PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 416 (1973)).
245 David J. Garrow, Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment, 67 U. CHI. L. REV. 995, 998 (2000) (“Questions of mental incompetency have confronted the United States Supreme Court as far back as its very first decade of existence.”).
247 See, e.g., Geyh, supra note 164, at 304.
248 See Garrow, supra note 245, at 995.
249 See ATKINSON, supra note 246, at 3.
250 Id.
251 See, e.g., id. at 8.
252 See, e.g., id.
vote.”253 Chief Justice William Howard Taft expressed a similar sentiment in 1929 in a letter to his brother:

I am older and slower and less acute and more confused. However . . . I must stay on the court in order to prevent the Bolsheviki from getting control . . . the only hope we have of keeping a consistent declaration of constitutional law is for us to live as long as we can.254

Whether it is because the judge doesn’t recognize his/her own decline, because he/she wishes to stay despite the impairments, or for some other reason, there are examples of judges who continued to serve even though their cognition had significantly declined.255 The most extensive evidence comes from David Garrow’s treatment, in which he concludes that “the history of the Court is replete with repeated instances of justices casting decisive votes or otherwise participating actively in the Court’s work when their colleagues and/or families had serious doubts about their mental capacities.”256 Episodes of note include the following:

- Justice Nathan Clifford (1858–1881) suffered from mental illness at the end of his tenure but could not be persuaded to resign in part because of his political commitments.257
- Justice Stephen Field’s (1863–1897) “mental condition was in noticeable decline . . . [and] the other justices decided Field should be urged to resign.”258 But even with the urging of Justice John Marshall Harlan, Justice Field refused to resign until 1897.259
- Justice Joseph McKenna’s (1898–1925) “mental alertness began to decline,” but he did not resign.260 As a result, in 1924, the remaining members of the Court decided “that no case would be decided because of McKenna’s vote.”261
- Justice Oliver Wendell Holmes retired only after Justice Hughes brought to his attention that his colleagues thought it best that he retire.262 David Garrow rightly observes that “even what may have been the single most distinguished career in the entire history of the United

253 Id.
254 Id. at 96.
255 For more extensive discussion, see Garrow, supra note 245, at 1011–12.
256 Id. at 995.
257 ATKINSON, supra note 246, at 59–60.
258 Id. at 69, 71.
259 Id.; Garrow, supra note 245, at 1009. Garrow observes that “little doubt exists that Justice Field remained on the Court for at least two years beyond when his mental incapacity should have prompted his retirement.” Id. at 1011.
260 ATKINSON, supra note 246, at 93.
261 Id. at 94.
262 Garrow, supra note 245, at 1018.
States Supreme Court ended in an explicitly requested retirement because of increasing mental decrepitude."263

- Justice Marshall’s final years included embarrassing mistakes during an oral argument that gained national attention.264
- Justice William O. Douglas experienced a stroke on December 31, 1974 and did not fully recover.265 Douglas “repeatedly addressed people at the Court by their wrong names, often uttered nonsequiturs [sic] in conversation or simply stopped speaking altogether.”266 But rather than leave the Court, he stayed, and the rest of the Court (with the exception of Byron White) agreed that they would not allow Douglas to render votes.267

Examples such as these have led some commentators to call for reform in judicial terms and retirement.268 In their argument in favor of introducing Supreme Court term limits, Steven Calabresi and James Lindgren observed:

Of the twenty-three Justices who served longer than eighteen years and who retired since 1897, fully eight (35%) were mentally or seriously physically decrepit. Perhaps most stark is that nearly half of the last eleven Justices to

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263 Id.
264 See Tony Mauro, Rehnquist Rumbles as Marshall Stumbles, LEGAL TIMES (Nov. 6, 1989).
265 Garrow, supra note 245, at 1052.
266 Id. at 1053.
267 Id. at 1054. Chief Justice Burger “was able to secure agreement to suspend the usual certiorari procedure, which requires four votes to hear a case, when the fourth vote cast was by Justice Douglas. Also, Justice Douglas’s vote was not allowed be decisive on any important issue.” ATKINSON, supra note 246, at 174. Garrow further notes Justice White’s displeasure with the decision of his colleagues to essentially (if informally) remove Douglas from the court:

Justice White conspicuously declared that “I am convinced that it would have been better had retirement been required at a specified age” by the Constitution and he volunteered that “a constitutional amendment to that effect should be proposed and adopted.” But in the absence of any such provision, White believed that

“[i]f the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action. If it is an impeachable offense for an incompetent Justice to purport to sit as a judge, is it not the task of Congress, rather than of this Court, to undertake proceedings to determine the issue of competence? If it is not an impeachable offense, may the Court nevertheless conclude that a Justice is incompetent and forbid him to perform his duties?”

Garrow, supra note 245, at 1055–56 (alteration in original) (quoting Letter from Byron R. White, Justice, to Warren E. Burger, Justice (Oct. 20, 1975) 1, in THE LEWIS F. POWELL, JR. PAPERS (on file with the Washington & Lee University School of Law Library)).
leave office (45%) were mentally decrepit and half of the last six Justices to leave office were mentally decrepit in their last years on the Court.269

Moreover, Garrow found that “a thorough survey of Supreme Court historiography reveals that mental decrepitude has been an even more frequent problem on the twentieth-century Court than it was during the nineteenth,”270 One of the additional enabling factors in the modern era is the advent of more law clerks for federal judges.271 These clerks may be taking on duties that their old, ailing judge should be. David Lat, writing for Above the Law, recounts just such an experience he observed with a fellow clerk:

When I clerked on the Ninth Circuit years ago, one of the judges on the court at the time was extremely old—and didn’t seem very “with it.” His law clerks seemed to take on a large amount of responsibility. One of his clerks that year, a law school classmate of mine I’ll call “Mary,” would negotiate over the phone with Ninth Circuit judges over how particular cases should come out—a responsibility well beyond the legal research and opinion drafting done by most clerks.

On one occasion, a vote on whether to rehear a case en banc emanated not from the judge’s chambers account, but from Mary’s personal email account. Even more embarrassingly, it was written not on behalf of the judge or the chambers, but in the first person: “I vote YES to rehearing en banc.” A law school classmate of mine who was also clerking for the Ninth that year remarked, “I thought only judges did that. When did Mary get her presidential commission?”272

To function, the modern system of informal checks requires a referee such as Chief Judge Frank Easterbrook (7th Cir.), who has taken the lead in asking colleagues to see neurologists when they show symptoms of memory loss.273 But such safeguards can fail. For example, a joint Slate/ProPublica investigation found that Judge John Shabaz (Madison, WI) “had trouble reading things out loud, such as plea agreements,” and that “[i]n August 2006, before announcing a 20-year sentence, Shabaz forgot to offer a convicted drug dealer

269 Id. at 817.
270 Garrow, supra note 245, at 995.
271 See Trenton H. Norris, The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform, 81 CALIF. L. REV. 765, 768 (1993) (“Since . . . the first law clerk was hired . . . clerking has grown to the status of an institution. As the practice has gradually gained approval among federal judges, . . . clerks have assumed increasingly influential roles.”).
273 Life Tenure for Federal Judges, supra note 4.
the chance to ask for mercy.” The appellate court described this mistake as “the kind of error that undermines the fairness of the judicial process.”

These instances are of the sort that draw attention: memory loss, difficulty speaking, noticeable lapse in concentration. But some symptoms of cognitive decline are subtler and perhaps more pernicious. For instance, trial judges must make hundreds of quick decisions about evidentiary objections, motions, and courtroom order. At the trial court level, where a number of discretionary decisions are made and never reviewed, it would be problematic if judges are not as sharp as we want them to be.

Yet systemic data about judicial cognitive decline does not exist, and there are many examples where informal policing of judicial decline works. The Breyer report noted the following report from a chief judge:

I did face problems of the aging process, that’s the most difficult by far to deal with . . . . In most cases, the judge recognized it and got off the bench. But not in all cases. I talked to family members. I got them to approach the judge. You can’t slap a formal complaint at the end of his career on an 83-year old judge who has rendered distinguished service . . . . I tried to approach that with great delicacy, through family members.

The anecdotal evidence suggests that informal methods can work, but not always, and that there is much variation from judge to judge. It seems likely that informal conversations are often hampered by a lack of objective data with which to present to the allegedly incompetent judge.

b. Judicial Wellness

Some courts have recently begun to promote judicial wellness and make readily available to judges resources for brain health. The Ninth Circuit was the first to establish procedures for providing education and counseling to judges

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274 Id.
275 United States v. Luepke, 495 F.3d 443, 451 (7th Cir. 2007).
278 Id.
279 See, e.g., JUDICIAL CONDUCT DISABILITY, supra note 236, at 102. On the other hand, another said, “If using the family is a possibility, then you want to try that, but that’s a mixed bag.” Id.
280 Id.
281 See id.
282 See FIX THE COURT, JUDICIAL WELLNESS AND BROADCAST MEDIA POLICIES IN FEDERAL APPEALS COURTS (Feb. 2018) [hereinafter JUDICIAL WELLNESS].
on the possibility of mental decline and other matters. Similar Wellness Committees have now been established in the First, Third, Fifth, and Tenth Circuits. In response to inquiries from the non-profit advocacy organization, Fix the Court, many of these circuits noted that they are specifically focused on issues related to aging judges.

In describing the rationale for the Wellness Committee, Ninth Circuit Chief Judge Phyllis Hamilton observed: “We’re an organization that is required to police ourselves... If we wish to retain the goodwill and confidence of the public in our ability to render justice by judges who are unimpaired... we have to take steps.”

The Wellness Committee provides assistance and resources to struggling jurists. The Wellness Committee has also made a Wellness Guide, now in its fourth edition, accessible to the entire federal judiciary.

The Wellness Guide has a recommended list of steps for jurists to take when they begin to suspect potential issues in a colleague’s ability to perform his/her duties due to mental and/or physical impairment. These steps, broadly, are divided into Recognition, Evaluation, Response, Case Management, and Communications and Public Relations. The guide also provides a dedicated section on aging and problems associated with it (e.g., Alzheimer’s), as well as articles and resources on aging.

There is limited evidence to suggest that judges have used Wellness Committee resources. Calls to the Ninth Circuit’s judicial counseling hotline were reported to fall into three categories:

Most are from chief judges seeking advice on how to deal with a judge or staff member whose behavior has been problematic or whose health threatens...
performance. A second group of calls are from senior judges or their families, seeking either information on dealing with chronic illness or, as to judges still able to perform useful judicial work, on alternative living arrangements because they can no longer live in their homes without assistance. A third group of calls come from judges seeking some sort of treatment program to help deal with a family or personal problem, such as marital conflict.293

In sum, Wellness Committees could be a useful advance in addressing judicial cognitive health.294 But, like other informal mechanisms, they ultimately rely upon the judge’s own initiative and self-awareness to be effective. As Atkinson observes based on his historical survey, “there is really nothing the Court collectively can do to remove a colleague who is not amenable to peer group pressure.”295

* * *

The federal judiciary has put in place several formal mechanisms to address the issue of judicial cognitive decline.296 But the system still primarily relies on informal mechanisms, now bolstered by wellness committees in many circuits.297 The available evidence is incomplete, but it suggests that informal approaches are not always successful in effectively identifying and removing judges whose mental faculties are declining.298 This raises the question of whether another system would be better in its place. The alternative often suggested by commentators, and adopted by a majority of the states, is to implement a mandatory judicial retirement age.299 In the next Part, I argue that the mandatory retirement age is an inefficient and inequitable solution.

293 Id.
294 See id.
295 Atkinson, supra note 246, at 72.
296 See Judicial Conduct Disability, supra note 236, at 6 (discussing the typical process by which courts process formal complaints).
297 See id. at 7 (noting that informal efforts are the “principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability”).
298 See Atkinson, supra note 246, at 72 (noting that “there is really nothing the Court collectively can do to remove a colleague who is not amenable to peer group pressure”).
Longstanding debates continue about the value of mandatory judicial retirement, at both the federal and state levels. Many of the critiques and justifications are not directly related to the cognitive ability of the judges. Older judges are different from younger judges in many ways other than cognitive ability. For instance: older judges grew up in a different culture, and may judge with different cultural sensitivities than younger judges; older judges are more distant in age from more youthful parties appearing in court; and older judges, as a cohort, are less diverse along a variety of dimensions than cohorts of younger judges. Here, I set aside those justifications for mandatory retirement and focus narrowly on evaluating mandatory retirement ages with respect to ensuring brain health in the judiciary.

Thirty-two states and the District of Columbia have implemented mandatory retirement ages for their judges, with eighteen states lacking mandatory retirement ages. Appendix Table A1 provides a state-by-state listing of the mandated judicial retirement age. Mandatory retirement ages generally range from 70 to 75 years of age.

Part A briefly summarizes the Age Discrimination in Employment Act and constitutional challenges to state judicial mandatory retirement provisions. Part B describes efforts to introduce mandatory retirement ages at the federal level.

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300 See, e.g., id. (summarizing both sides of the debate on mandatory judicial retirement). These debates often overlap with debates over judicial term limits. See, e.g., Judith Resnick, Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure, 26 CARDOZO L. REV. 579, 580 (2005).

301 See, e.g., Christopher R. McFadden, Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges, 52 S.C. L. REV. 81, 111 (2000) (noting that many support mandatory retirement because it might make the bench younger and more diverse).

302 See id. (arguing that removing elderly judges could result in less ideological diversity on the bench).

303 See Theresa M. Beiner, The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium, 36 U.C. DAVIS L. REV. 597, 598–99 (2002) (arguing that racial and gender diversity on the bench helps to challenge the status quo); McFadden, supra note 301, at 111–12 (noting that census data suggests “that mandatory retirement ages will likely remove seasoned minority and women judges from the bench prematurely”); Malia Reddick et al., Racial and Gender Diversity on State Courts: An AJS Study, 48 JUDGES’ J. 28, 29 (2009) (arguing that mandatory retirement ages disadvantage female and minority judges).

304 Raftery, supra note 299.

305 Most States Require Judges to Step Down After 70, NAT’L CTR. FOR ST.CTS., https://www.ncsc.org/Newsroom/Backgrounder/2010/Mandatory-Retirement.aspx [https://perma.cc/8XQ3-93NB]. These states are Arkansas, California, Delaware, Georgia, Idaho, Illinois, Kentucky, Maine, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, Tennessee, and West Virginia. Id.

306 See SHEN, APPENDIX, supra note 57.

307 Id.
Part C critiques mandatory judicial retirement ages as out of step with current scientific understanding of the aging brain.

A. Legal Challenges to State Mandated Judicial Retirement Age

Mandatory retirement became prominent in American society in late nineteenth and early twentieth centuries.\(^\text{308}\) The question of mandatory retirement in the United States continued to be debated in the 1950s,\(^\text{309}\) but by the 1960s and 1970s, many older adults worked in industries with mandatory retirement ages.\(^\text{310}\)

In response, Congress, through the Civil Rights Act of 1964, directed the Secretary of Labor to “make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and the individuals affected.”\(^\text{311}\) In 1967, Congress passed the Age Discrimination in Employment Act, in which “individuals who [were] between 40 and 65 years of age [were to be protected] from discrimination in employment.”\(^\text{312}\) By 1978, Congress had “outlawed mandatory retirement before the age of 70” through the Age Discrimination in Employment Act Amendments of 1978 (ADEA).\(^\text{313}\) Through the ADEA, Congress also “rais[ed] the private-sector age of coverage from 65 to 70 and remove[d] the age cap for federal employees to cover individuals age 40 and older.”\(^\text{314}\) Eventually, the age of coverage cap at 70 was also removed with the Age Discrimination in Employment Amendments of 1986,\(^\text{315}\) “abolish[ing] [mandatory retirement] altogether.”\(^\text{316}\)

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\(^\text{308}\) Carole Haber, Mandatory Retirement in Nineteenth-Century America: The Conceptual Basis for a New Work Cycle, 12 J. SOC. HIST. 77, 81 (1978). According to historian Carole Haber, “retirement is a relatively new development in American society,” with the period of the late nineteenth century to the mid-twentieth century representing a turning point in the “prescribed roles for the old.” Id. at 77.

\(^\text{309}\) See generally Stanley C. Hope, Should There Be a Fixed Retirement Age? Some Managements Say Yes, 279 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1952) (listing the advantages of mandatory retirement from the perspective of employees, management, and other 1950s stakeholders).

\(^\text{310}\) See Till Von Wachter, The End of Mandatory Retirement in the US: Effects on Retirement and Implicit Contracts 1 (Univ. of Cal., Berkeley Ctr. for Labor Econ., Working Paper No. 49, 2002) (noting that in the 1960s and 1970s, 40% to 50% of the population worked in industries with mandatory retirement ages).


\(^\text{312}\) Id. (alteration added).

\(^\text{313}\) Von Wachter, supra note 310, at 1.

\(^\text{314}\) ADEA and Amendments, supra note 311 (alterations added).

\(^\text{315}\) Id.

\(^\text{316}\) Von Wachter, supra note 310, at 1. The 1986 ADEA “provide[d] an exemption through 1993 for state and local governments using maximum hiring or mandatory
Until the Supreme Court ruled on the issue in 1991, there was considerable debate about whether a state’s imposition of a mandatory retirement age for judges violated the ADEA. But in *Gregory v. Ashcroft*, the U.S. Supreme Court held that Missouri’s mandatory judicial retirement age of 70 violated neither the ADEA nor the Equal Protection Clause of the Fourteenth Amendment.

In *Gregory*, Justice O’Connor recognized the “authority of the people of the States to determine the qualifications of their most important government officials.” Since older adults are not a “suspect class” of individuals, the heightened standard of “strict scrutiny” was not required.

Since *Gregory v. Ashcroft*, there have been periodic calls for raising the mandatory retirement age for judges, and in recent years, some states have explored raising the age. There have also been renewed attempts to challenge state mandatory retirement laws. In 2016, Minnesota Judge Galen Vaa challenged the constitutionality of Minnesota’s mandatory judicial retirement ages for firefighters or law enforcement officials.” *ADEA and Amendments, supra* note 311 (also providing an exemption for colleges and universities “who may involuntarily retire professors at age 70, if the professor is serving under a contract of unlimited tenure”).

Over a decade later, the Higher Education Amendments of 1998 amended Section 4 of the Age Discrimination in Employment Act in order to “permit colleges and universities to offer special age-based retirement incentives for tenured faculty members at institutions of higher education.” *Id.*


319 *Id.* at 463, 472 (“The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary.”).

320 *Id.* at 470.


age of 70, but the State’s motion to dismiss was granted and his appeal denied.

In 2018, Michigan Judge Michael Theile argued that Michigan’s constitutional requirement that judges not be elected after age 70 violated the Equal Protection Clause of the United States Constitution.

The district court, despite finding against him, was sympathetic: “In his complaint and in the brief filed in support of his motion for summary judgment, plaintiff argues eloquently that age-based classifications such as this are irrational.” A three-judge panel on the Sixth Circuit was also sympathetic to Theile’s argument, stating: “One may well sympathize with Theile’s assertions that the age 70 limit is ‘archaic,’ and that ‘it is wrong indiscriminately to put people to pasture.’” But the court went on to note that “[r]ational basis review does not assess the wisdom of the challenged regulation.”

A Sixth Circuit decision eighteen years earlier had previously found Michigan’s judicial age limit rationally related to many purposes, including “preserving the competency of the judiciary” and “promoting judicial efficiency and reducing partisan appointments of judges.” The Sixth Circuit did not agree with Theile’s argument that “the laws and facts have changed so significantly in the decades since” that the previous reasoning was now unsound.

B. Efforts to Implement a Mandatory Retirement Age for Federal Judges

Although unsuccessful, there have been multiple attempts to legislate mandatory retirement ages for federal judges. As former Chief Justice of

See Garrow, supra note 245, at 996 (noting that there have been “three different occasions over the past sixty-five years” on which members of Congress have attempted to institute mandatory judicial retirement ages); see also Robert Kramer & Jerome A. Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of “During Good Behavior,” 35 GEO. WASH. L. REV. 455, 467–71 (1967) (discussing the constitutionality of mandatory retirement for federal judges). Many have also proposed reforms that would eliminate life tenure and replace it with term limits. See, e.g., Paul D. Carrington & Roger C. Cramton, Reforming the Supreme Court: An Introduction, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 11 (Roger C. Cramton & Paul D. Carrington eds., 2006) (providing an overview of various arguments); see also Calabresi & Lindgren, supra note 268, at 772 (proposing an eighteen-
Texas Robert W. Calvert once noted, “[T]here is no sound basis for concluding that state judges age, become tired and grow out-of-touch, but that federal judges do not.”

David Garrow provides a detailed history of these efforts at imposing a federal mandatory retirement age, noting that “on three different occasions over the past sixty-five years, members of Congress have surmounted conventional wisdom and confronted the danger of mental decrepitude[.]

In the late 1940s, the American Bar Association (ABA) led an effort to galvanize support for mandatory judicial retirement at age 75. In 1954, through the sponsorship of Maryland Senator John Marshall Butler, the issue was debated on the Senate Floor. Butler explained that ‘[i]t is the consensus of authoritative opinion that some limit should be placed on service and that the age of 75 strikes the happy medium between experience and senility.’ The amendment passed the Senate but died in the House Judiciary Committee.

In 1965, the ABA again offered recommendations to explore “compulsory retirement of judges with permanent physical or mental disabilities.” The ABA worked with Maryland Democratic Senator Joseph D. Tydings in 1968 and 1969 to advance legislation. The issue arose again in the mid-1970s when Georgia Senator Sam Nunn took up the mantle and proposed legislation that would have provided mandatory retirement ages for all federal judges, including the Supreme Court. Notably:

...
Nunn’s bill specifically proposed that for any federal judge or justice who was eligible for retirement . . . if a majority of the Judicial Conference found “that such Justice or judge is unable to discharge efficiently one or more of the critical duties of his office by reason of a permanent mental or physical disability, the Conference shall certify the disability of such Justice or judge and issue an order removing such Justice or judge from active service . . . . Such Justice or judge shall then be involuntarily retired from regular active service.”

But Senator Nunn’s efforts ultimately failed as well.

C. Mandatory Judicial Retirement Ages and Cognitive Decline

With regard to cognitive decline, the fundamental arguments against mandatory judicial retirement ages, both of which were made by Judge Theile in his 2018 Michigan challenge, are that (1) some of the judges younger than the retirement age may be in decline, and there is little protection against cognitive decline prior to the retirement age; and (2) some of the judges older than the retirement age are not experiencing cognitive decline and have no opportunity to rebut the presumption that they are mentally unfit to serve.

There is no access to systematic judicial health data, so analysis remains necessarily speculative.

It is also important to note that there is some evidence suggesting that experience on the bench improves judging outcomes, and that “judges who last longer on the job tend to be better than those who retire earlier.”

Conference announced their support for a somewhat narrower approach that would police “mental disability” and other shortcomings among lower federal court judges but would not cover justices of the Supreme Court.” (footnotes omitted).

Id. at 1059–60 (quoting 121 Cong. Rec. 5609, 5721 (1975)).

Id. at 1065 (“From the perspective of the Supreme Court’s extensive history with mentally decrepit justices, Senator Nunn’s well intentioned but constitutionally questionable initiative in the end brought forth no reform or protection whatsoever.”).

See “Corrected” Brief of Plaintiff-Appellant at *23–28, Theile v. Michigan, 891 F.3d 240 (6th Cir. 2018) (No. 17-2275), 2017 WL 6210343. Theile phrased his argument as follows:

The current laws are capricious, unjustified and irrational for these indisputable material facts . . . . For every judge who should be removed due to some age-related disability or problem, there are many qualified judges who should not be removed . . . . These arguments for mandatory retirement fail to consider the value of a judge’s accumulated wisdom and experience on the bench, and that each person ages differently.

Id.

See Benjamin Iverson et al., Learning by Doing: Judge Experience and Bankruptcy Outcomes 7 (Nov. 14, 2018) (unpublished manuscript) (on file with author) (noting that judicial experience “play[s] an important role in determining large Chapter 11 [bankruptcy] outcomes”).

Elliot Ash & Bentley MacLeod, Aging, Retirement, and High-Skill Work Performance: The Case of State Supreme Court Judges 41 (Dec. 18, 2017) (unpublished
To start, there is no published neuroscientific research suggesting that a particular age (sixty, sixty-five, seventy-five, and so on) should serve as the bright line cutoff for cognitive decline. In fact, the literature is clear that at older ages there is wider individual variation in cognitive abilities. Notably, there are some fifty-year-olds who perform worse than some eighty-year-olds (and vice versa). Bright line age rules are not sensitive to such variation.

An additional concern is that the correlation between age and the judicial functional capacity is not clear, even at a group average level. Atkinson is right that “whether a justice should retire at age sixty-five or seventy or seventy-five does not satisfactorily resolve the basic issue of competence.” Certainly, as I discussed above, there are many anecdotes of older judges displaying worrisome cognitive decline. But we could also fill pages with anecdotes of older judges performing their duties wonderfully.

One example is legendary U.S. District Judge Jack Weinstein. At age ninety-six, Judge Weinstein is still productive and writing notable opinions. He annually undergoes a neurological evaluation and observes that “[m]y memory is not as acute as it was, [but] principles, I know, and my judgment is the same—it may be better.” A bright line rule of mandatory retirement at age seventy-five would have deprived the country of the past twenty years of Judge Weinstein’s opinions.

Another way in which mandatory retirement ages are at odds with neuroscience research is the gender-uniformity of the age cut-offs. There is
growing evidence that female brains age at a different rate than male brains.\textsuperscript{357} Although it is not yet entirely clear what explains these differences, the evidence suggest that “throughout the adult life span the typical female brain is more youthful.”\textsuperscript{358} Mandatory retirement is perhaps not only ageist, but also sexist in its lack of recognition that older female judges may, on average, have more youthful brains than their male colleagues.\textsuperscript{359}

Finally, in addition to concerns that a bright-line rule excludes older judges who would still perform very well on the bench, there is a parallel concern that the bright-line approach doesn’t solve the issue of cognitive decline before the mandatory retirement age. Consider the following anecdote.

In Chicago in 2016, fifty-nine-year-old Cook County Judge Valarie Turner made local headlines for erratic behavior in her courtroom.\textsuperscript{360} Judge Turner had a tremendous legal pedigree: she was a graduate of the University of Chicago and worked at Kirkland & Ellis before joining the bench in 2002.\textsuperscript{361} But in the summer of 2016, she exhibited erratic behavior in chambers.\textsuperscript{362} Most notably, she allowed an attorney to wear the judicial robe and preside over cases.\textsuperscript{363} Immediately after this incident, the chief judge in the county removed her from the bench.\textsuperscript{364} She subsequently underwent medical evaluations, and was diagnosed with Alzheimer’s disease.\textsuperscript{365} Mandatory retirement ages do little to address situations such as Judge Turner’s, when cognitive decline happens before the mandatory retirement age.

Moreover, this case raises an important point about the need for dignified procedures. The Illinois Judicial Inquiry Board found Judge Turner “mentally unable” to do her work, and when the Board filed a formal complaint to the Illinois Courts Commission, her attorney was critical.\textsuperscript{366} In the attorney’s view:

Ms. Turner is charged with no misconduct. She therefore has done nothing that would justify any sanction that could be imposed by the commission. In

\textsuperscript{357} See Manu S. Goyal et al., Persistent Metabolic Youth in the Aging Female Brain, 116 Proc. Nat’l Acad. Sci. U.S.A. 3251, 3251 (2019) (“Prior work has identified many sex differences in the brain, including during brain aging and in neurodegenerative diseases.”).
\textsuperscript{358} Id. at 3253.
\textsuperscript{359} See id. at 3251 (noting that “in terms of brain metabolism, the adult female brain is on average a few years younger than the male brain”).
\textsuperscript{361} Id.
\textsuperscript{362} Id.
\textsuperscript{364} Id.
\textsuperscript{365} Mills & Lighty, supra note 360.
\textsuperscript{366} Id.
essence, the Judicial Inquiry Board has charged her only with having Alzheimer’s disease. This sets a terrible precedent for any judge who, like Ms. Turner, has an illness that she did not cause and cannot control.  

The attorney’s critique highlights the lack of support structures and procedures for handling cognitive decline and raises fundamental questions about the fairness of using judicial misconduct mechanisms to address age-related cognitive decline in judges.

* * *

Mandatory retirement ages for judges may serve other useful purposes, but they are a suboptimal solution for responding to age-related cognitive decline. The nature and rate of change in cognitive abilities vary significantly across individuals, and this variation is not accounted for in systems that rely entirely on mandatory retirement ages as the bulwark against dementia on the bench. As I will discuss in the next Part, the introduction of individualized cognitive assessment offers a more promising alternative.

VI. A PATH FORWARD: TOWARD INDIVIDUALIZED ASSESSMENT OF JUDICIAL COGNITIVE CAPACITY

This Part lays out a vision for the development of a judicial cognitive assessment toolbox for judges. Before making my affirmative proposal, I emphasize three things that I am not proposing.

First, I am not arguing that the federal system should adopt the proposed cognitive assessment as a screening device. Indeed, I emphasize that the results of the assessment should not be shared with anyone other than the judge. My proposal is that the cognitive assessment be integrated into the existing federal system. Second, and relatedly, I am not arguing that a single brain scan should be dispositive of a judge’s future on the bench. Neuroimaging should be included in the toolbox of assessment tools, but the translation of biomarkers into judicial functional capacity requires careful consideration of many behavioral data points in addition to the brain imaging. Third, I am not suggesting that implementation of these tools should happen immediately. I suggest instead that the development of a judicial capacity evaluation system must be carried out with great care. The most immediate next step should be the development of an interdisciplinary research group to produce a consensus report on best practices and best tools to employ for assessing judicial cognitive health.

Part A frames the discussion by gleaning lessons from the development of regulations for cognitive testing for commercial airline pilots and for aging physicians. Part B then transitions to law, laying out some basic principles that the testing should accomplish. Part C reviews a variety of neuropsychological

367 Id.
tests that may be of use. Part D discusses emerging neuroscientific biomarkers for Alzheimer’s. Part E presents a plan for development and implementation of a judicial capacity toolbox. I emphasize the need for input across disciplines and stakeholders in developing this toolbox.

A. Learning from Similar Contexts in Other Professions

Judges are not the only professionals who are aging and confronting the possibility of cognitive testing. In crafting a solution for judges, I start by reviewing what can be learned from the experiences of airline pilots and physicians. What can be seen in both instances is that resistance to an individualized testing regime is rooted in a concern that the proper testing tool/technology for individualized assessment does not exist.

1. Aging Airline Pilots

My proposed solution below draws upon wisdom generated by the airline pilot screening program implemented via federal law. In 1958, Congress passed the “Federal Aviation Act,” directing the Federal Aviation Administration (FAA) to (amongst other things) consider “the duty of an air carrier to provide service with the highest possible degree of safety” when issuing an airman certificate, air carrier certificate, or other certificate.\(^{368}\) In 1959, the FAA subsequently set the “Age 60 Rule,”\(^{369}\) which stated that “an airline pilot, at the age of 60, must discontinue flying aircraft used to carry passengers in airline operations.”\(^{370}\) This meant that “an airline pilot who reaches the age of 60 must retire without regard to his or her excellent health and continued ability to fly.”\(^{371}\) In generating the rule, the FAA noted that “available medical studies show that sudden incapacitation due to heart attacks or strokes becomes more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks.”\(^{372}\) The age restriction was quickly challenged, with the plaintiff pilots arguing that “the age sixty limitation is arbitrary and discriminatory and without relation to any requirements of safety.”\(^{373}\) But the Second Circuit found that the age of 60 was reasonable, given the available evidence.\(^{374}\)

\(^{371}\) Id.
\(^{372}\) Air Line Pilots Ass’n, Int’l v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960).
\(^{373}\) Id.
\(^{374}\) Id.
The Age 60 Rule has been challenged on other occasions. In 1970, the Air Line Pilots Association (ALPA) requested that the FAA revoke the Age 60 Rule, and instead replace it with individualized tests of performance. The FAA decided to retain the Age 60 Rule, and again a court challenge failed because the FAA’s rulemaking was deemed reasonable given the available evidence.

There were two justifications for the Age 60 Rule. The first was that pilots might be more likely to die suddenly while controlling the plane in flight. That is not relevant to the judiciary concern—a judge who dies in the middle of a trial may cause trauma to those who witness it, but the legal machinery is in place to readily keep proceedings moving at a future date. The second concern for pilots, however, is closely tied to the judicial concern: through an “increased probability of subtle incapacitation that would lead to errors or slowing in perceptual, cognitive, and psychomotor function, and thus compromise safe pilot performance.”

The Age 60 Rule was again scrutinized in 1979, when Congress directed the National Institutes of Health (NIH), and in turn the National Academies, to examine whether age 60 was an appropriate cut-off age. I offer a close examination of this National Academies Report because it serves as a useful model for the careful, interdisciplinary research required to develop a new toolbox on judicial cognitive aging. The preface to the National Academies Report frames the issue well:

In the 21 years since the regulation was adopted, it has been repeatedly challenged as unjustified. Those in favor of the rule, however, contend that persons whose jobs directly involve the public safety, such as airline pilots, bus drivers, firemen, and air traffic controllers bear the burden of proving that increasing their retirement age will not jeopardize the public safety.

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375 See Geneve DuBois, The Age 60 Rule–It Is Time to Defeat It!, 70 J. AIR L. & COM. 319, 321 (2005) (discussing attempts to challenge the Age 60 Rule in court or remove it through legislation).
377 Id. at 60.
380 DIV. OF HEALTH SCI. POLICY, supra note 378, at 128.
381 Id. at 2 (“The NIH, through the National Institute on Aging, requested that the National Academy of Sciences/Institute of Medicine establish a committee to provide an objective examination, summary, and assessment of scientific knowledge on medical and behavioral aspects of aging and pilot performance and to indicate the extent to which valid conclusions can be reached for the questions of PL 96-171.”).
382 Id. at xiii.
The National Academies report found that “[f]or significant acute events (such as cardiovascular events and stroke), age 60 does not mark the beginning of a special risk or a special increase in risk,”\(^{383}\) but also that “[a]vailable evidence suggests that on the average at least some of the skills necessary for the highest level of safety deteriorate with age” and that “there is great variation among individuals in any age group.”\(^{384}\)

In the end, the National Academies took a middle position. On one hand, it was clear that “[i]n its assessment of relevant biomedical and behavioral research, the committee found that variability within an age group is often nearly as great as variability among age groups, and that usually no single age emerges as a point of sharp decline in function.”\(^{385}\) On the other hand, however, it recognized that individual tests to determine functional capacity were not readily available.\(^{386}\) Ultimately the report concluded that a new test was needed, and that an optimal test would examine functional capacity, in order to “detect changes in performance that are operationally significant and may be more likely to occur among older pilots[.]”\(^{387}\)

The issue of individualized testing arose again in the early 1980s.\(^{388}\) At that time, the FAA considered a temporary modification to the Rule, in which pilots over age sixty would be allowed to fly in order that the FAA could collect data on this new cohort—and thus determine if risks increased after age sixty.\(^{389}\) The FAA decided not to pursue this modified rule, however, largely based on the perceived inability to conduct accurate individual-level assessment of functional capacity.\(^{390}\) The FAA wrote that:

> There simply are insufficient means of accurately testing whether individual pilots will become incapacitated to gather data sufficient to support a determination on the age 60 rule. As the Medical Director of a large aerospace firm states: “Until more precise methods of detecting physiological changes brought on by aging are developed, no program of data gathering or physical examination will provide meaningful information.”\(^{391}\)

In the early 1990s, the same cycle repeated itself. This time, a new study found that there was “no hint of an increase in the accident rate for pilots of

\(^{383}\) Id. at 3 (emphasis added).
\(^{384}\) Id. at 4. The report also concluded that “[a]ttention, memory, and ability to solve problems and make decisions alter with age. There may be changes in speed, capacity, or accuracy. However, variations among individuals are great, and performance decrements are not readily apparent for well-practiced skills.” Id. at 9.
\(^{385}\) Id. at 128 (emphasis added).
\(^{386}\) DIV. OF HEALTH SCI. POLICY, supra note 378, at 135.
\(^{387}\) Id. at 9 (emphasis added).
\(^{389}\) Id. at 14,692.
\(^{390}\) Id.
\(^{391}\) Id.
scheduled air carriers as they near their 60th birthday.” The FAA held public hearings, but in 1995 decided to stick with the Age 60 Rule, concluding that “[a]fter considering all comments and known studies, FAA concludes that concerns regarding aging pilots and underlying the original rule have not been shown to be invalid or misplaced.” Subsequent further legal challenges, on the basis of the Age Discrimination in Employment Act (ADEA) and the Administrative Procedure Act (APA) also failed.

Failing to generate change via agency rulemaking and the courts, lobbyists and interest groups turned their attention to Congress. In 2007, Congress passed the Fair Treatment for Experienced Pilots Act, which stated that “a pilot may serve in multicrew covered operations until attaining 65 years of age.”

While advocates applauded the change, it didn’t address the lingering question of individual capacity. As one commenter on the Act remarked, a retirement age of sixty-five is “just as arbitrary as age sixty.” Thus, although the age was raised for airline pilots, the idea of assessing functional capacity on an individual level was tabled.

2. Aging Physicians

Similar to judges, doctors in America are getting older, and many are no longer retiring at the traditional age of sixty-five. There is also evidence

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394 Prof’l Pilots Fed’n v. FAA, 118 F.3d 758, 760 (D.C. Cir. 1997).
396 See O’Conner, supra note 395, at 375. Moreover, the National Academies also emphasized the need to improve cognitive testing in the FAA program, reporting that “[t]esting of cognitive function (information processing and intellectual functioning) does not fall within the domain of the aviation medical examiner, but it should be addressed in the determination of whether the FAA-mandated examination is adequate to detect decrements in functioning past age 60.” DIV. OF HEALTH SCI. POLICY, supra note 378, at 134. However, psychological evaluations are not mandatory for airline pilots. Paul Hoversten, How Are Airline Pilots Tested for Mental Health?, AIR & SPACE MAG. (Mar. 27, 2012), https://www.airspacemag.com/need-to-know/how-are-airline-pilots-tested-for-mental-health-167046164/ [https://perma.cc/CRK5-T53E].
398 Krista L. Kaups, Competence Not Age Determines Ability to Practice: Ethical Considerations about Sensorimotor Agility, Dexterity, and Cognitive Capacity, 18 AMA J. ETHICS 1017, 1017 (2016).
suggesting that cognitive impairment is likely for some older physicians. Thus, physicians find themselves in a similar situation as judges; no mandatory retirement for a growing number of older physicians—some of whom very likely are experiencing cognitive decline that may affect their performance.

The medical community is actively debating whether informal mechanisms of policing are sufficient. It has been found that “adaptive thinking and critical reasoning,” “processing speed,” “episodic memory,” “hearing, visual acuity, depth perception, colour discrimination and manual dexterity” are all “age-related sensory and cognitive changes” that affect the aging process, and work, of doctors. “Skill, ability to discern and memory” are crucial tools for surgeons throughout their careers, but they all tend to deteriorate with age. One of the concerns is that the evidence suggests that physicians’ self-evaluations of their skills may overestimate their competence as compared to objective testing.

In June 2018, a group of physicians published an article that drew considerable attention: Cognitively Impaired Physicians: How Do We Detect Them? How Do We Assist Them? The authors made a series of observations similar to those made about judges:

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403 Bhatt et al., supra note 401, at 35.


There are more older physicians: “Many physicians continue to practice into their 70s and 80s as a consequence of professional satisfaction, increased life expectancy, concerns regarding financial security, and reluctance to retire.”

There are benefits from experience: “[A] physician’s effectiveness can be enhanced through acquisition and refinement of experience, knowledge, patient management skills, and clinical judgment.”

There are also, on average, age-related deficits: “In physicians as in all adults, cognitive decline is acknowledged to be a consequence of aging. Extensive evidence documents age-associated neuropathologic brain changes that are manifested in cognitive changes... Aging affects multiple domains of cognitive functioning relevant to physicians’ professional performance.”

Faced with this new landscape, a number of physicians are now advocating for more regular competence testing. The American College of Emergency Physicians (ACEP) has pursued the “concept of senior career development.” In 2009, the ACEP Board of Directors approved a set of guidelines that were developed to “enhance and prolong the careers of emergency physicians in the latter stages of their professional lives, to ensure patient safety, to promote continued membership and participation in the College, and to facilitate the transition of emergency physicians from active practice to semi- or full retirement.”

The American College of Surgeons in 2016 issued a “Statement on the Aging Surgeon,” and in that statement “recommended that, starting at age 65 to 70, surgeons undergo voluntary and confidential baseline physical examination and visual testing by their personal physician for overall health assessment.”

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406 Id. at 632.
407 Id.
408 Id.
410 Skowronski & Peisah, supra note 402, at 505, 507 n.5.
Some hospital systems have even implemented such testing for the physicians within their system.413 In 2012, Stanford University Medical Center rolled out a “compulsory . . . physical examination [every two years], cognitive screening and peer assessment of clinical performance for all physicians aged 75 years.”414 The inclusion of the peer assessment component in the examination is significant for the cultural and professional precedents it was based on; peer assessments have been common in medicine since the second half of the twentieth century, with proven feasibility and efficacy.415 As physicians’ and surgeons’ colleagues are those who understand the nature of their work best, their opinions on the quality of other doctors’ work, while subjective, is an important factor to include in a cognitive assessment. Similarly, the University of Virginia has “intermittent assessments of doctors after 70 years of age.”416 Beginning in 2014, the Sinai Hospital of Baltimore introduced a program to more closely align cognitive evaluations with a discussion on retirement; this plan, known as the “Aging Surgeon Program,” is a “2-day confidential evaluation of physical and cognitive function for surgeons” which can be administered to surgeons other than Sinai Hospital employees, as well.417 Performing poorly on the program’s evaluations does not lead to mandatory retirement, however; it leads to a discussion between the surgeon and their hospital, “at which stage the decision to retire would still be with the surgeon, unless there has been gross negligence.”418

It remains to be seen how the regulation of older physicians will develop, but the trend is clear: many physicians and the institutions they serve recognize that relying upon individual doctors—even with the nudging of their colleagues and friends—may not be sufficient. The same can also be said for aging judges.

B. Judicial Functional Capacity—What’s Required?

What cognitive abilities are required to discharge efficiently all the duties of a judicial office? The answer to this question requires a sustained conversation amongst legal stakeholders and experts in science and medicine.

413 John Sanford, New Policy to Require Evaluations for Late-Career Practitioners, STAN. MED. NEWS CTR. (July 16, 2012), http://med.stanford.edu/news/all-news/2012/07/new-policy-to-require-evaluations-for-late-career-practitioners.html [https://perma.cc/49TQ-KWKZ] (“[P]hysicians age 75 or older who practice at Stanford Hospital & Clinics or Lucile Packard Children’s Hospital will be required to undergo a series of evaluations to confirm that they are able to continue performing their clinical responsibilities effectively.”).

414 Bhatt et al., supra note 401, at 40.


416 Bhatt et al., supra note 401, at 40.

417 Id.

418 Id.
Such a working group would need to acknowledge at the outset that this is a difficult problem.

As Charles Geyh has observed from his historical treatment of the topic:

What to do with an allegedly senile, mentally ill, or otherwise disabled judge is an understandably difficult issue that requires . . . [us] to balance the conflicting interests of protecting the judicial system from the disabled judge, insulating the nondisabled judge from politically motivated efforts at neutralization, and preserving the dignity of the now-disabled judge who may have served the judiciary long and well.419

At the heart of the challenge is the translation of a medical diagnosis to a legal function. Other areas of policymaking around dementia illustrate how difficult this translation can be. For instance, should a diagnosis of early-onset Alzheimer’s result in immediate revocation of one’s driver’s license?420

We know that a disability in and of itself is not disqualifying. There are, for instance, judges who are legally blind. In 2014, blind Judge Richard Bernstein joined the Michigan Supreme Court.421 Judge David Tatel, on the U.S. Court of Appeals for the District of Columbia, is also blind.422 Just as blind justices can, with accommodations, execute their duties faithfully, we need to think carefully about how judges exhibiting cognitive decline might still be able to serve on the bench.

To develop an effective tool for assessing capacity in the judicial brain, we need to first wrestle with the question: Capacity to do what? It is not enough to say that the system cares about something vague such as “how well the judge’s brain processes information.” This is because on one hand, older judicial brains may process some information less well due to age-related cognitive decline (a loss in fluid intelligence).423 But on the other hand, older judicial brains may process some information better due to accumulated legal wisdom (a gain in crystallized intelligence).424

Second, the toolbox should allow stakeholders to be proactive and not simply reactive. Both the formal and informal mechanisms currently in use rely upon the development of symptoms so significant that others in the courthouse

419 Geyh, supra note 164, at 271–72.
420 When I ask my students this in my law and neuroscience course, the class is almost always split in their response. For a challenging case, see generally R. C. Hamdy, Driving and Patients with Dementia, 4 GERONTOLOGY & GERIATRIC MED. 1 (2018).
423 See supra text accompanying notes 85–92.
424 Id.
notice them. The use of sensitive neuropsychological tests and brain biomarkers offers the system an opportunity to identify risks in advance.

Third, a corollary of an emphasis on prevention is that implementation of the system must ensure privacy and dignity for all judges. One way to accomplish this is to move away from an all-or-nothing (retire or not) approach, in which a judge’s duties can be aligned with their cognitive abilities. For instance, a judge might continue to be an excellent resource for certain types of cases, but no longer effective as a trial judge.

With those guiding principles established, we can turn to the specific health information and cognitive functions to test. A useful place to start is to ask: What health information is already requested from judges, at the nomination stage?

In the federal system, the form provided to judicial nominees begins with the introductory text: “The physical and mental requirements for Judiciary appointments are in principle that the appointee is currently capable, and for the foreseeable future will be capable of efficient service without evidence of mental or emotional instability.”

The form later asks the nominee about “progressive neurological disorders,” “current emotional or mental instability,” and “any other condition that is disabling or potentially disabling in the foreseeable future.” Later in the form, the medical provider is instructed to check either “Yes” or “No” in answer to the question: “Do you find any abnormal condition or disease of . . . [the] brain & nervous system?” This information is important at the nomination stage because it is reasonable to assume that legislators would be hesitant about nominating a judge whose cognitive machinery is potentially faulty. If this information is relevant at the start of a judge’s career, surely it remains relevant later.

At the state level, judicial nominee questionnaires suggest that health information is of paramount importance. Of the twenty-five states who had judicial nominee questionnaires available online, eighty percent required some form of health or capacity information. Most states ask a version of this question: “Are you physically and mentally able to perform the essential duties of a judge in the court for which you are applying?” Some states, such as Delaware, ask more probing questions. Delaware’s text reads:

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425 See supra Part III (exploring the formal and informal mechanisms by which the federal system identifies and responds to judges experiencing cognitive decline).

426 See supra note 13.


428 Id.

429 Id.

430 Memorandum from Sydney Diekmann to Shen Neurolaw Lab on Judge Nomination Committee Health-Related Questions (Nov. 13, 2018) (on file with Ohio State Law Journal).

431 This is the formulation as used in Arizona. OFFICE OF THE GOVERNOR, ARIZ., APPLICATION FOR SELECTION TO SUPERIOR COURT JUDGE, https://bc.azgovernor.gov/file/2104/download?token=PdqxhWg_ [on file with Ohio State Law Journal].
Ability to perform the essential functions of a judge means:

(i) The ability to analyze legal issues to reach reasoned legal judgments;
(ii) The ability to evaluate the credibility of witnesses;
(iii) The ability to make factual determinations from competing presentations;
(iv) The ability to make decisions in a timely fashion;
(v) The ability to serve in a fair, impartial, and unbiased manner;
(vi) The ability to communicate orally and in writing, in an articulate and logical manner;
(vii) The ability to demonstrate honesty, integrity, patience, open-mindedness, courtesy, tact, compassion, and humility in performing judicial functions;
(viii) The ability to exercise control over court proceedings; and
(ix) The ability to perform the above functions for a minimum of eight hours per day, five days per week (or such other times as Court may be in session), on a consistent basis.

... Do you currently possess the physical and mental ability to perform the essential functions of a judge, with or without a reasonable accommodation? ... 

... Are you currently using illegal drugs, or do you habitually use illegal drugs on a recreational basis or otherwise? ... 

... Do you frequently fail to take any lawful medications which enable you to perform the essential functions of a judge? ... 

... Do you typically consume alcoholic beverages to such an extent that your ability to perform the essential functions of a judge is impaired? ... 

... Are you a compulsive gambler, or have you ever been diagnosed or received treatment, therapy, or counseling for compulsive gambling? 432

Just as the Delaware questions are grounded in the essential functions of the judiciary, so too should the proposed cognitive testing system align with judicial function.

One way to identify the core judicial functions is to examine the jurisdiction’s judicial code of conduct. 433 Codes of conduct form the basis of our expectations for ethical and effective judicial behavior. 434 The ABA

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433 In this Section, I make reference only to the federal Code of Conduct for United States Judges, but state codes of judicial conduct are roughly equivalent for purposes of the points I am making. See Shen, Appendix, supra note 57.
434 See Cynthia Gray, Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility, 28 U. Ark. Little Rock L. Rev. 63, 64 (2005) (“To hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is informed and thoughtful . . . .”).
produced a canon of ethics in 1924, and, in the federal system, relevant canons from the Code of Conduct for United States Judges include:

- Canon 1: “A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.”
- Canon 2: “A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment.”
- Canon 3(A)(1): “A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.”
- Canon 3(A)(3): “A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”

In sum, these codes and our own intuition tell us that a judge must think and feel with great integrity, competence, and sensitivity. These abilities—to think, to feel, and to interact socially with others—are all a part of what the mind sciences refer to as “cognition.”

How a judge interprets these canons, of course, is open to much flexibility. Temperament varies. Some judges are quieter, some louder, some harsher, some more lenient. These and many other variations in judicial temperament are typically deemed acceptable. For instance, as Terry Maroney has argued, we are often split as to whether we want “angry judges” on the bench. While the legal community is willing to accept variation in judicial personality, there are limits to acceptable variation in cognitive ability. The toolbox then must be flexible enough to allow for acceptable variation in temperament and intellect.

In developing the toolbox, the following non-exhaustive list of considerations are of import:

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435 CANONS OF JUDICIAL ETHICS (AM. BAR ASS’N 1924).
437 Id. at Canon 2 (emphasis added).
438 Id. at Canon 3(A)(1) (emphasis added).
439 Id. at Canon 3(A)(3) (emphasis added).
• What areas of cognition should be the focus of the exam? Existing tools are well equipped to be adapted to the legal context, and to explore several relevant cognitive areas, including the following:
  o **Executive functioning:** Judges need to use their executive function capabilities extensively, and assessment of executive function must thus be a central component of the toolbox.  
  o **Memory:** Judges need to remember significant amounts of information and need to be able to access that information regularly.
  o **Emotional Regulation:** Judges need to engage with litigants and courtroom staff in a professional, respectful manner. To the extent that aging affects this ability, emotional capacity should be explored.

• How will we know if a judge has sufficient capacity on selected cognitive dimensions? Even if we were to agree on the areas of cognition, the system would need to develop thresholds to determine judicial capacity. For instance, does a slight decrease in working memory speed mean that the chief judge must be alerted? These line-drawing questions will no doubt be thorny. But it is not impossible to arrive at a reasonable, widely accepted solution. As discussed above, health care systems are already solving this problem in the context of aging physicians.

• What is the menu of options available for declining judges? Much of the literature on judicial retirement has framed the discussion as offering a dichotomy: serve on the bench or retire. However, there are a range of services that judges can provide, and the cognitive skill sets required for these services vary across these judges. The system should consider, as is being done in the physician context, how skill sets (even if in decline) can be matched to meaningful work.

• Who will administer the system?
  o While the Judicial Conference seems a natural home for the administration of this testing regime, it would have to coordinate with regional health care providers to implement the assessments.
  o To what extent will other agencies be involved in the funding and/or administration of the system?
  o Questions of regulatory oversight, agency independence, appeals processes, and the like would need to be considered.

• How can the system ensure privacy and dignity for judges?

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443 See supra text accompanying note 95.
444 See supra text accompanying note 96.
445 See supra Part VI.A.2.
446 Compare, e.g., Hemel, supra note 5, with Segall, supra note 5.
Mandatory assessment of judges introduces many questions of information privacy and compliance with relevant privacy laws. In addition, a dignified pathway to retirement must be ensured. For instance, judges could be phased out in ways that would allow them to keep their health record private.

- **Which stakeholders should play a role in the design of this system?**
  
  Stakeholders whose voices should be heard include:
  - Judges and their families, in both state and federal judiciary systems
  - Judicial Council and state equivalents
  - Litigants
  - Professional associations, e.g., American Bar Association
  - Citizens

- **How often should the assessment be administered?** There are a variety of options for the timing of the assessment, and discussion can draw on relevant medical research related to optimal screening intervals by age.

  These design features would, of course, need to be further worked out. Likewise, funding for the program would need to be obtained. But because at least some of the costs would be covered by the existing health care plan, cost should not be a major stumbling block. Once developed, the system would consist of the following components:

  - Specific examination protocols for the initial baseline assessment during the nomination process, with clearly established processes for communicating incidental findings and possible identification of neuropathology to the candidate;
  - Specific examination protocols for follow-up visits (which may vary by age and availability of experts);
  - Specific protocols for maintaining privacy of health data;
  - Educational programs, similar to the wellness committees, in each jurisdiction to explain the nature and importance of the brain health assessment; and
  - System-wide administration to ensure communication and compliance with the cognitive health assessment requirement.

  These components can be compiled into a uniform judicial cognitive health assessment program that (1) collects baseline neuroimaging and neuropsychology data at the nomination stage, and follow-up neuroimaging and neuropsychology data in regular five-year intervals thereafter; and (2) requires that the results of the testing remain private, with no exceptions unless expressly authorized by the judge evaluated.

  Designed this way, the system is more about judicial empowerment than it is about judicial reprimand. It mandates the testing, but also mandates the privacy of that testing data. The requirements to operate the system are attainable: access to experts in relevant fields, and a central administrative office to ensure that judges do follow-up testing at the appropriate times and with the
appropriate specialists. The toolbox could be readily added to both the federal and state systems.

C. Existing Assessment Tools

It is premature to select the specific tools that would be used for judicial cognitive assessment, but I review a number of potential options in this Section.

Cognitive testing and screening for dementia are conducted regularly in a variety of contexts. To facilitate this screening, there are a number of cognitive tests for older adults. A public health challenge is implementing the proper screening tools, and these challenges might similarly arise in the judicial screening context. For the public, a fear of stigmatization, a lack of awareness of dementia, and a lack of resources (such as cost and time) hinder the widespread acceptance of population screening for dementia. Another hindrance to screening is the lack of a standardized assessment tool to assess cognitive functioning and impairment, or the inaccuracy of currently available screening tools.

Currently, practice guidelines published by the American Academy of Neurology (AAN) in 2001 recommend that cognitive impairment be assessed using screening instruments and neuropsychology testing batteries, and that such assessments may be supplemented with specific cognitive instruments that “focus on limited aspects of cognitive function” (such as executive function) and informant interviews with individuals close to the patient. While the AAN mentions specific tools that may be used for screening purposes, such as

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448 See Henry Brodaty et al., What Is the Best Dementia Screening Instrument for General Practitioners to Use?, 14 AM. J. GERIATRIC PSYCHIATRY 391, 391 (2006) (“The detection and early diagnosis of dementia are becoming increasingly important as our population ages. . . . Early diagnosis may enable patients to plan for the future while still competent, initiate enduring power of attorney and guardianship, address safety concerns such as driving ability, and enable caregivers to seek education sooner.”); Jennifer R. Harvan & Valerie T. Cotter, An Evaluation of Dementia Screening in the Primary Care Setting, 18 J. AM. ACAD. NURSE PRACTITIONERS 351, 351–52 (2006) (describing the need for routine screening for dementia in elderly populations).


450 See Steven Martin et al., Attitudes and Preferences Towards Screening for Dementia: A Systematic Review of the Literature, 15 BMC GERIATRICS 1, 10 (2015) (“Attitudes and preferences [toward wide-spread dementia screening] are complex and multi-factorial and our findings suggest that population screening for dementia may be acceptable neither to the general public nor to health care professionals.”).

451 Id. at 8.

the Mini-Mental State Examination (MMSE), a multitude of screening tools are being used and developed.

After its initial development and introduction in 1975, the MMSE has become one of the most frequently used cognitive tests for assessing cognitive impairment across the world. The instrument has been translated and empirically validated for use in many different languages and countries, and certain versions have even been made available for those with disabilities, including impaired vision. The MMSE consists of “19 individual tests of 11 domains covering orientation, registration, attention or calculation (serial sevens or spelling), recall, naming, repetition, comprehension (verbal and written), writing, and construction.” The MMSE has historically been used to detect whether or not patients have dementia, although in recent years, the test has been applied to identify patients with mild cognitive impairment (MCI) as well.

Many attempts have been made to empirically validate the diagnostic sensitivity (the ability of the instrument to diagnose those with dementia as having dementia) and specificity (the ability of the instrument to diagnose those without dementia as not having dementia) of the MMSE.

One reason why the MMSE may be so widely used is because the score results are relatively easy for healthcare professionals to interpret. The MMSE is championed as the user-friendly test for patients, administrators, and evaluators. Cut-off scores (or “thresholds”) exist that denote boundaries between “normal” cognition and impaired cognition. The MMSE is

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453 Id. at 1138.
455 See J. Olazarán Rodríguez & F. Bermejo Pareja, There Is No Scientific Basis for Retiring the MMSE, 30 NEUROLOGÍA 589, 590 (2015) (noting that the MMSE’s availability in “so many languages and countries” is a reason for its widespread popularity).
456 See generally Anja Busse et al., Adaptation of Dementia Screening for Vision-Impaired Older Persons: Administration of the Mini-Mental State Examination (MMSE), 55 J. CLINICAL EPIDEMIOLOGY 909 (2002) (analyzing the adaption of the MMSE to visually impaired individuals).
457 Mitchell, supra note 454, at 411.
458 Id. at 412.
459 See generally Alex J. Mitchell et al., The Mini-Mental State Examination as a Diagnostic and Screening Test for Delirium: Systematic Review and Meta-Analysis, 36 GEN. HOSP. PSYCHIATRY 627 (2014) (compiling MMSE sensitivity and specificity data).
460 Mitchell, supra note 454, at 412 (describing MMSE scores as “fairly well understood by health professionals”).
461 See C. Carnero-Pardo, Should the Mini-Mental State Examination Be Retired?, 29 NEUROLOGÍA 473, 475 (2014) (touting the MMSE as a “user-friendly instrument that can be administered and evaluated by non-qualified personnel”).
462 Generally, the most accepted cut-off score is around 24. See Patrizio Pezotti et al., The Accuracy of the MMSE in Detecting Cognitive Impairment when Administered by General Practitioners: A Prospective Observational Study, 9 BMC FAM. PRAC. 1, 3 (2008)
deceptively simple, however, because the cut-off thresholds are not necessarily clinically significant. These and other limitations have resulted in some experts calling for the retirement of the MMSE in place of more freely available and effective screening tools, while other experts argue that it would be more efficient to improve the existing scale. Support for the use of the MMSE as the sole diagnostic criterion is weak. In the context of judicial cognitive screening, it would be a mistake to simplify a judge’s entire mental capacity into a single number or even a single test.

Developed after the MMSE, the Montreal Cognitive Assessment (MoCA) is a ten-minute cognitive test that consists of eleven tasks designed to address the major efficacy limitations of the MMSE. Completion of these tasks awards the participants points, which are aggregated to produce a score on a thirty-point scale. A score of at least twenty-six points indicates normal cognitive functioning; likewise, a score below twenty-six points indicates some degree of cognitive impairment, with lower scores indicating more severe impairment.

While the MoCA takes slightly longer to administer than the MMSE, the MoCA covers more cognitive domains, including additional items that measure executive and visuospatial function. As such, the MoCA can identify changes that are typically not identified by the MMSE. For example, the MoCA is significantly better at distinguishing MCI from normal age-related decline.

(“The total score for the MMSE ranges from 0 to 30; scores > 24 indicate basically no cognitive impairment; scores < 18 indicate severe cognitive impairment.”); Kelvin K. F. Tsoi et al., Cognitive Tests to Detect Dementia: A Systematic Review and Meta-Analysis, 175 JAMA INTERNAL MED. 1450, 1456–57 (2015) (“[T]he most common cutoff scores for the MMSE for dementia were 23 and 24 . . .”).

See Tsoi et al., supra note 462, at 1456–57 (noting “considerable variation on the definitions of cutoff thresholds” among the MMSE and other cognitive exams).

See, e.g., id. at 1457 (“Although the MMSE is a proprietary instrument for dementia screening, the other screening tests are comparably effective but easier to perform and freely available.”).

See Rodríguez & Pareja, supra note 455, at 590 (advocating for changes to the existing MMSE in lieu of its retirement).

Id.


Nasreddine et al., supra note 467, at 697.

See id. at 698 (describing the cut-off score of twenty-six for the MoCA as yielding the best balance between sensitivity and specificity).

Roalf et al., supra note 467, at 948.

See id. at 948.

Id.
Moreover, MoCA and MMSE scores are highly correlated, which allows the conversion of one score into the other to allow for direct comparison of cognitive performance through different screening tools.\footnote{Id. at 949.} The usefulness of each tool relative to each other depends on the nature of the brain disturbance.\footnote{See Arun Aggarwal \& Emma Kean, Comparison of the Folstein Mini Mental State Examination (MMSE) to the Montreal Cognitive Assessment (MoCA) as a Cognitive Screening Tool in an Inpatient Rehabilitation Setting, 1 NEUROSCIENCE & MED. 39, 41 (2010) (“[C]ompared to the MoCA[,] the MMSE does not perform well as a screening instrument for [MCI] . . . .”); YanHong Dong et al., The Montreal Cognitive Assessment (MoCA) Is Superior to the Mini-Mental State Examination (MMSE) for the Detection of Vascular Cognitive Impairment After Acute Stroke, 299 J. NEUROLOGICAL SCI. 15, 17 (2010) (discussing the “poorer performance of the MMSE at detecting [vascular cognitive impairment]”); Alex J. Mitchell \& Srinivasa Malladi, Screening and Case Finding Tools for the Detection of Dementia. Part I: Evidence-Based Meta-Analysis of Multidomain Tests, 18 AM. J. GERIATRIC PSYCHIATRY 759, 760 (2010) (“[T]he MMSE seems to be a reasonably accurate method of detecting dementia . . . .”); Emad Salib \& Justin McCarthy, Mental Alternation Test (MAT): A Rapid and Valid Screening Tool for Dementia in Primary Care, 17 INT’L J. GERIATRIC PSYCHIATRY 1157, 1160 (2002) (noting the difficulties in administrating the MMSE to visually impaired, deaf, or otherwise physically disabled individuals).} The MMSE and MoCA are not the only dementia screening tools available.\footnote{See Carnero-Pardo, supra note 461, at 477–78 (listing the basic characteristics of other “short cognitive tests” in addition to the MMSE and MoCA). For example, other short cognitive tests include the Addenbrooke’s Cognitive Examination (ACE), the Memory Impairment Screen (MIS), and the Seven Minute Screen (7MT). Id. at 478.} A systematic review and meta-analysis of 149 studies that covered eleven different screening tests, including the MMSE and MoCA, found that many other tools, including the Mini-Cog test and the Addenbrooke’s Cognitive Examination-Revised, exhibit similar (sometimes better) rates of diagnostic accuracy for dementia than the MMSE.\footnote{See Tsoi et al., supra note 462, at 1452, 1455 (finding similar or better specificity and sensitivity for both the ACE-R and Mini-Cog over the MMSE).} Furthermore, using multiple screening methods instead of just one is likely to significantly improve diagnostic accuracy.\footnote{See Nasreddine et al., supra note 467, at 698 (suggesting a patient to first undergo the MoCA if they complain of cognitive impairment but show no functional impairment).} As such, researchers have been attempting to determine if certain combinations of assessment tools yield higher sensitivity and specificity.\footnote{See, e.g., Harvan \& Cotter, supra note 448, at 355 (noting higher sensitivities and specificities when the MMSE is combined with the Clock Drawing Test). Such attempts have produced mixed results.} The legal system is not unfamiliar with utilizing a battery of neuropsychological tests, as a number of different tests are being used together to determine cognitive faculties in former NFL players under the terms of the NFL Concussion Settlement.\footnote{See Amended Class Action Settlement Agreement, Exhibit A-2, In re Nat’l Football League Players’ Concussion Injury Litig., No. 14-cv-0029 (E.D. Penn. Feb. 13, 2015).}
Additional tests that may be of potential use for judicial assessment include the following:

- **Test of Premorbid Functioning (TOPF):** The TOPF is a brief test estimating premorbid (i.e., before symptoms from the disease or disorder arise) cognitive and memory function. Participants are asked to pronounce phonetically irregular words, a process generally resistant to neurological decline.

- **Wechsler Adult Intelligence Scale IV (WAIS IV):** The WAIS IV measures overall intellectual ability, assessing cognitive performance across four domains: verbal comprehension (verbal reasoning and communication); perceptual reasoning (fluid reasoning and perceptual organization); working memory (attention, concentration, and working memory), and processing speed (mental processing and efficient use of other cognitive abilities). Each domain is assessed using multiple subtests that measure additional processes, such as crystallized intelligence and cognitive flexibility.

- **Wechsler Memory Scale IV (WMS IV):** The WMS IV measures memory function using subtests assessing auditory memory, visual memory, and visual working memory. Each of these components of memory are assessed in immediate and delayed conditions.

(Setting forth the “Baseline Neuropsychological Test Battery” to which each qualified former NFL player is entitled). This list is meant to be illustrative, not exhaustive. Additional tests to rule out response bias or poor effort might include the California Verbal Learning Test or the Validity Indicator Profile. See Sun et al., supra note 106.


481 James A. Holdnack et al., *Predicting Premorbid Ability for WAIS–IV, WMS–IV and WASI–II, in* WAIS-IV, WMS-IV, AND ACS: ADVANCED CLINICAL INTERPRETATION 217, 226 (James A. Holdnack et al. eds., 2013). Performance on the reading task can be combined with various demographic factors (e.g., sex, race/ethnicity, education, developmental factors) to estimate premorbid intellectual function. Lisa Whipple Drozdick et al., *Overview of the WAIS–IV/WMS–IV/ACS, in* WAIS-IV, WMS-IV, AND ACS: ADVANCED CLINICAL INTERPRETATION, supra note 482, at 1, 55. Using the TOPF scores, clinicians can estimate expected performance on the WAIS IV and WMS IV to determine if the participant has experienced a decline. Id.

482 Drozdick et al., supra note 482, at 2.

483 Diane L. Coalson et al., *WAIS-IV: Advances in the Assessment of Intelligence, in* WAIS-IV CLINICAL USE AND INTERPRETATION 3, 7–8 (Lawrence G. Weiss et al. eds., 2010). For example, a subtest assessing working memory asks participants to recall a list of numbers, and a subtest assessing verbal comprehension provides participants with two concepts and asks them to describe how they are similar. Id. at 8.


485 Drozdick et al., supra note 482, at 20. This means that participants are presented with information or stimuli that they must reproduce immediately and then after a delay. Id. at 11.
• **Delis-Kaplan Executive Function System (D-KEFS):** The D-KEFS measures executive functioning: the cognitive processes required to mentally assess ideas, resist temptations, and remain focused. The D-KEFS subtests are standalone measures tapping into various facets of executive functioning, such as self-control, working memory, and cognitive flexibility.

  o The *Trail Making Test* measures flexibility of thinking. Participants must draw a trail through letters and numbers.

  o The *Verbal Fluency Test* measures fluency by asking participants to generate lists of words based on characteristics such as first letter (“F”) or category (“animals”).

  o The *Design Fluency Test* measures problem-solving behavior, nonverbal productive and creativity, rule following, and visual-perceptual speed. Participants draw novel patterns while abiding by specific rules.

  o The *Color-Word Interference Test* measures inhibition. Participants report the color of color words (e.g., “green”) written in another color (e.g., red ink).

  o The *Tower Test* measures spatial planning, rule learning, and inhibition. Participants must, in the fewest possible moves, manipulate variably sized discs across pegs to an end spot designated by the examiner.

• **Wisconsin Card Sorting Task:** The Wisconsin Card Sorting Task is a measure of cognitive flexibility, a component of executive function.

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488 *Id.* at 136.

489 Christopher R. Bowie & Philip D. Harvey, *Administration and Interpretation of the Trail Making Test*, 1 NATURE PROTOCOLS 2277, 2277 (2006).


492 *Id.*


494 Diamond, *supra* note 487, at 139.

495 In this context, the “Tower Test” refers to the Delis-Kaplan Executive Function System (D-KEFS), a test of executive functioning. See Anne-Claire Larochette et al., *Executive Functioning: A Comparison of the Tower of London* and the D-KEFS Tower Test, 16 APPLIED NEUROPSYCHOLOGY 275, 275–76 (2009) (“[Executive functioning] includes five general domains of functioning: fluency, planning, working memory, inhibition, and set shifting . . . . One of the most widely used tests of [executive functioning] is the Tower of London . . . . Recently, a new battery of tests called the [D-KEFS] was introduced, which included a new version of the tower test.” (citations omitted)).

496 *Id.* at 276.

497 See Diamond, *supra* note 487, at 149 (“Cognitive flexibility is often investigated using any of a wide array of task-switching and set-shifting tasks. The oldest of these is
Participants must deduce the correct sorting criteria for a deck of cards based solely on feedback of correct or incorrect from the examiner, switching their rules when the examiner indicates the criteria has changed.498

- **Booklet Category Test:** The Booklet Category Test measures concept formation and abstraction.499 Participants must match various stimuli, such as letters, numbers or shapes, to possible responses during seven subtests.500 Participants are only provided with feedback of correct and incorrect.501 During each subtest, the rule is different, and participants must abstract each of the seven rules or concepts.502

- **California Verbal Learning Test (CVLT):** The CVLT assesses verbal learning and memory.503 The examiner reads a list of nouns aloud, and participants must recall them immediately and then after a delay.504 There is also an additional recognition phase available, which can be used as a test of the participant’s effort.505

- **Validity Indicator Profile:** The Validity Indicator Profile was designed to detect malingered cognitive impairment.506 Participants must select one of two choices, with difficulty increasing throughout the test.507 Participants providing good effort would demonstrate decreasing performance over the test, while those providing variable

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498 Id.
499 Id. at 340.
500 Id. at 340.
501 Id.
502 Id.
504 Id. at 174.
507 Id.
effort or malingering would not demonstrate a pattern of decreasing performance.\textsuperscript{508}

The bottom line for judicial screening is that no single tool will provide accurate assessment of judicial capacity, but also that the development of a judicial assessment tool should build on the extensive work in these areas.

D. Emerging Neuroscientific Technologies

The future of psychiatric medicine is increasingly moving toward the integration of biomarkers in diagnosis and treatment.\textsuperscript{509} In the area of dementia, new neuroimaging techniques are being developed to detect biomarkers for Alzheimer’s disease (AD) in its earliest stages.\textsuperscript{510} Such biomarkers can identify atrophying neural tissue in people with AD before they manifest observable behavioral changes.\textsuperscript{511} Because early detection is seen as so important, in 2004 the Alzheimer’s Disease Neuroimaging Initiative (ADNI) was formed to develop a range of biomarkers—including imaging, genetic, and biochemical—for the early detection and monitoring of AD.\textsuperscript{512} Moreover, these developments

\textsuperscript{508} Id.

\textsuperscript{509} See Francis X. Shen, \textit{Law and Neuroscience 2.0}, 48 ARIZ. ST. L.J. 1043, 1063 (2016) (“Psychiatrist Matthew Baum’s recent book on the neuroethics of biomarkers is an important contribution to this dialogue. Baum points out that “biomarker discovery and assembly into bio-actuarial tools are poised to proceed at an unprecedented pace.””).

\textsuperscript{510} See STEVEN D. PEARSON ET AL., INST. FOR CLINICAL & ECON. REVIEW, DIAGNOSTIC TESTS FOR ALZHEIMER’S DISEASE: GENERATING AND EVALUATING EVIDENCE TO INFORM INSURANCE COVERAGE POLICY 43 (2012) (“[P]rospective cohort studies (e.g., Alzheimer’s Disease Neuroimaging Initiative) that have recruited convenience samples of patients are ongoing to evaluate the performance of multiple biomarkers . . . .”); Fiandaca et al., \textit{supra} note 129, at 201 (“The capability of the neuroimaging modalities continues to improve, and their role in defining the preclinical state of AD is evolving.”); Risacher & Saykin, \textit{supra} note 129, at 625 (describing neuroimaging as an “excellent noninvasive set of methods” for measuring AD progression).

\textsuperscript{511} Risacher & Saykin, \textit{supra} note 129, at 625–26 (“Sensitive and specific biomarkers of AD are needed to detect patients in the early and preclinical stages of AD, to effectively monitor and predict disease progression, and to provide differential diagnostic information for an accurate diagnosis. . . . Neuroimaging [can] . . . measur[e] in vivo AD pathophysiology and brain atrophy associated with MCI and AD, as well as for predicting disease progression, even in patients with relatively minor or no cognitive impairments.” (citations omitted)).

are no longer confined to research labs. In 2018, the Alzheimer’s Association called for the redefinition of AD based on biomarkers.

There are many legal and ethical questions that follow from the introduction of biomarkers. At present, brain biomarkers are not routinely used to diagnose psychiatric disorders. But some are optimistic about both present and near-future abilities. Psychiatrist Matthew Baum similarly observes that “biomarker discovery and assembly into bio-actuarial tools are poised to proceed at an unprecedented pace.”

The implication of these trends for judicial screening is that the screening is likely to include neuroimaging. The screening tool should harness the potentially powerful information that brain data can provide but must also be carefully crafted to guard against inappropriate uses. Particularly challenging will be the cases where the neuroimaging diverges from the judge’s behavior. As my lab has explored elsewhere: “Is a neurological indicator of increased risk for [cognitive decline] a legally relevant brain state before there are outward behavioral manifestations [of that decline]?"

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514 Id.

515 See Ilina Singh & Walter P. Sinnott-Armstrong, Introduction: Deviance, Classification, and Bioprediction, in BIOPREDICTION, BIOMARKERS, AND BAD BEHAVIOR 10, 11 (Ilina Singh et al. eds., 2013). (“Much scientific work remains to be done in the area of predictive biomarkers, but this is not a reason to be complacent about its impact on and translation into the public domain.”).

516 Steven E. Hyman, Can Neuroscience Be Integrated into the DSM-V?, NATURE REV. NEUROSCIENCE 725, 725 (2007).

517 See Alex Fornito & Edward T. Bullmore, Does fMRI Have a Role in Personalized Health Care for Psychiatric Patients?, in INTEGRATIVE NEUROSCIENCE AND PERSONALIZED MEDICINE 55, 55 (Evian Gordon & Stephen H. Koslow eds., 2011) (“[R]ecent conceptual and methodological advances provide a sufficient basis for cautious optimism concerning the future clinical applicability of fMRI [a biomarker imaging technique] . . . in three key clinical domains: clinical diagnosis, prediction of illness, and treatment monitoring.”).


519 For a discussion of possible inappropriate uses, see Owen D. Jones et al., Law and Neuroscience, 33 J. NEUROSCIENCE 17,624, 17,628–29 (2014) (raising the ethical issues of new techniques in neuroscience as they may be applied in legal settings).

520 Joshua Preston et al., The Legal Implications of Detecting Alzheimer’s Disease Earlier, 18 AMA J. ETHICS 1207, 1208 (2016).
E. The Neuroethics of Detecting Probabilistic Biomarkers in Judges

The legal implications of using biomarkers to detect Alzheimer’s and other forms of dementia remain relatively unknown.\(^\text{521}\) It is therefore of paramount importance to map out the ethical, legal, and social implications of collecting brain data from judges. Most bodies of law—including tort, contracts, and criminal law—have traditionally demanded outwardly manifested behavior as a prerequisite for legal recognition of physical injury.\(^\text{522}\) The advent of AD biomarkers thus poses a conundrum: How should the law treat a person who does not exhibit behavioral symptoms but whose brain is documented to have already changed in such a way as to suggest a higher likelihood of AD? In the language of the National Institutes of Aging research framework, how will we treat someone who is in the pre-symptomatic phase, wherein they are on the Alzheimer’s continuum but still symptom free?\(^\text{523}\) The question might be particularly difficult at the time of judicial confirmation.

While the full legal implications of AD biomarkers are under-explored in the literature, what is clear is that they pose unique ethical issues for clinicians and researchers. The current nondiscrimination legal landscape does not accommodate individuals with these biomarkers.\(^\text{524}\)

Historically, the disclosure of a patient’s AD diagnosis has posed a pervasive ethical challenge for clinicians.\(^\text{525}\) The asymptomatic and non-treatable nature of AD biomarkers complicates this further, and clinicians need to consider the benefits, risks, and limitations of disclosing amyloid neuroimaging results to the judicial nominee (and to the judicial nominating committee) when the nominee is otherwise cognitively normal.\(^\text{526}\) This will not

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\(^{521}\) See id. at 1207 (noting that there is little research on the legal issues surrounding the use of biomarkers as a detection method for AD).

\(^{522}\) See Francis X. Shen, Mind, Body, and the Criminal Law, 97 MINN. L. REV. 2036, 2044 (2013) (“In a variety of criminal and quasi-criminal contexts, . . . legislative line drawing between criminal and non-criminal behavior invokes the concept of ‘bodily’ (or ‘physical’) injury.”).

\(^{523}\) Clifford R. Jack, Jr. et al., Hypothetical Model of Dynamic Biomarkers of the Alzheimer’s Pathological Cascade, 9 LANCET NEUROLOGY 119 (2010) (“The clinical disease stages of AD have been divided into three phases. First is a pre-symptomatic phase in which individuals are cognitively normal but some have AD pathological changes.”).


\(^{525}\) See generally S. Gauthier et al., Diagnosis and Management of Alzheimer’s Disease: Past, Present and Future Ethical Issues, 110 PROGRESS NEUROBIOLOGY 102 (2013).

only require clinicians to prepare new counseling aids but also to reconsider the
risks subjects face in neuroimaging research and how they seek informed
consent.\(^{527}\) States and the federal government will also have to revisit the
medical disclosure waivers they require nominees to sign.\(^{528}\)

Additional consideration needs to be placed on the impact this information
can have on judges and their family members.\(^{529}\) Despite the lack of treatment
options, stakeholders report the benefit of clinical management of the disease,
making lifestyle changes, and preparing for eventual cognitive impairment.\(^{530}\)
Even so, studies report fears of social harm, such as stigmatization, adverse life
decisions, and psychological harm.\(^{531}\)

Despite the presence of nondiscrimination laws like the Americans with
Disabilities Act (ADA), the Genetic Information Nondiscrimination Act
(GINA), and others, these legal frameworks do not address asymptomatic health
information like AD biomarkers.\(^{532}\) One fifty-state survey of nondiscrimination
laws found that many emphasized “genetic information,” which by definition
amyloid and tau biomarkers are not.\(^{533}\) Another fifty-state survey found that
only half of all states have long-term care insurance regulations that prohibit
discrimination based on pre-existing conditions.\(^{534}\) Forty-three states do not
prohibit long-term care insurers from using health information in their
underwriting decisions, which makes these laws inadequate in “protect[ing]
individuals from discrimination based on biomarker status in the context of
[long-term care] insurance.”\(^{535}\) Such a “failure to address and mitigate
discrimination risks will prevent individuals who are biomarker positive from
accessing critical resources to prepare for financial burden of [long-term service
and support] costs.”\(^{536}\)

\(^{527}\) See Roberts et al., supra note 526; see also Julio C. Rojas et al., Presentation on
Uncertainties and Ethical Considerations for Decision-Making Regarding Amyloid-Related
Imaging Abnormalities in Clinical Trials for Alzheimer’s Disease (July 19, 2017) (on file with
Ohio State Law Journal) (noting that in research involving amyloid-related imaging
abnormalities (ARIA), the likelihood of identifying biomarkers with probabilistic risk
requires informed consent that should “emphasize acknowledgment and communication of
the limitations of data availability”).

\(^{528}\) See, e.g., DEL. COURTS, supra note 432.

\(^{529}\) Jalayne J. Arias et al., Stakeholders’ Perspectives on Preclinical Testing for
Alzheimer’s Disease, 26 J. CLINICAL ETHICS 297, 301–02 (2015).

\(^{530}\) Id. at 300.

\(^{531}\) See id. at 301 (noting reported adverse life decisions and psychological harm from
testing); Jalayne J. Arias, Presentation on Distinguishing Legal Consequences in At-Risk
Testing for Alzheimer’s Disease: Genetics Versus Non-Genetic Biomarkers (July 19, 2017)
(on file with Ohio State Law Journal) (stating that stigma can result from disclosure of
biomarkers for Alzheimer’s).

\(^{532}\) Arias et al., supra note 524, at 485.

\(^{533}\) See Arias, supra note 531.

\(^{534}\) See Arias et al., supra note 524, at 495.

\(^{535}\) Id.

\(^{536}\) Id.
If the legal system were to introduce a system in which judges were required to obtain brain scans, it could place the judge in an ethical quandary: If she has no symptoms, but the brain scan reveals the progression of neuropathology, must she report it to the chief judge? To the insurance company? How will return of results be developed? Moreover, careful attention must be paid to diseases other than AD. While much of the literature focuses on AD, it is only one of many forms of dementia, including dementia with Lewy bodies, vascular dementia, and frontotemporal dementia. There are considerable—and under-explored—implications of early AD detection for estate law, end-of-life care, and family law. This Article has focused primarily on the implications of judicial brain health for the legal system. But the judge must also be recognized as a patient.

VII. DISCUSSION

This Part discusses several possible implications of, and extensions to, the system proposed in Part V. I discuss (A) constitutionality, (B) feasibility, and (C) legitimacy.


539 See generally Jalayne J. Arias & Jason Karlawish, Confidentiality in Preclinical Alzheimer Disease Studies: When Research and Medical Records Meet, 82 NEUROLOGY 725 (2014) (describing the shortcomings in regulation and possible adverse consequences of the loss of confidentiality for those with test results indicative of Alzheimer’s disease pathology).

540 See Craig W. Ritchie et al., Dementia Trials and Dementia Tribulations: Methodological and Analytical Challenges in Dementia Research, 7 ALZHEIMER’S RES. & THERAPY 1, 2 (2015) (“The commonest cause of dementia in community dwelling older adults is Alzheimer’s disease (AD). AD research has accordingly tended to dominate the dementia landscape.”).


542 For example, the possibility that an individual may have a probabilistic risk for developing a disease may even force broader reconsiderations of competency determinations. See generally Jalayne J. Arias, A Time to Step In: Legal Mechanisms for Protecting Those with Declining Capacity, 39 AM. J.L. & MED. 134 (2013) (presenting a comprehensive overview of competency and clinical capacity determination procedures while highlighting the gap of legal protections for those within the competency-incompetency gap).
A. Constitutional Implications

Debates over the proper balance of congressional oversight and judicial independence with regard to removal of judges are extensive. There is scholarly debate about the extent to which the Constitution permits anything other than impeachment as a permissible means of judicial discipline. Further analysis beyond the discussion here is warranted, but to guide that analysis, I offer the following observations.

In relevant part, the Constitution reads:

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 ordinance 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.

As others have observed, “the Constitution contains few requirements regarding the structure of the federal courts,” and “[a]lthough Article III provides for a Supreme Court headed by the Chief Justice of the United States, nothing else about its structure and its operation is specified, so the size and composition of the Court is left to Congress.”

The constitutionality of my proposal depends on where it falls along two dimensions: (1) Is it required or just recommended? and (2) Will the data collected remain purely private, or will the data be discoverable and actionable?

Under my proposal, the judge would not have to share their data with anyone. They might be strongly encouraged to share their data with the Chief Judge under certain conditions, but they could not be compelled to do so. This is not to say that there are not constitutional concerns that need further attention—it is simply to point out that the system can be designed in ways that are less (or more) offensive to judicial independence.

There is also a state-level constitutional question of a different sort: Would the introduction of individual-level judicial cognitive assessment tools lead to

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544 Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. Pa. L. Rev. 209, 223 (1993) (“A number of commentators assert that the arguments demonstrating the exclusivity of impeachment as a political device for judicial discipline exclude any possibility of judicial discipline through judiciary-dependent devices such as prosecution or judicial self-regulation.”).

545 U.S. Const. art. III, § 1.

the conclusion that, even under a rational basis test, state mandatory judicial 
retirement ages are a violation of the Equal Protection Clause?547

Additional analysis would be required, but in brief, it is interesting to 
consider that Judge Theile (the Michigan judge who in 2018 challenged the 
Michigan judicial retirement age statute on Equal Protection grounds) argued 
that the law should not survive a rational basis test because rational, 
nondiscriminatory options are available: “Legislature, judicial tenure 
commission and/or the Michigan Supreme Court can make laws, rules or 
administrative orders requiring judges and judicial candidates to pass certain 
mental and physical capability tests. The Michigan State Court Administrator 
could develop performance evaluations similar to those in the private sector.”548 
Theile’s excellent argument anticipated the proposal made in this Article.

B. Feasibility

A judicial capacity screening tool sounds appealing in theory. But to move 
from theory to an actual toolbox requires a lot of work and the resolution of 
many difficult challenges. Beyond the scope of the Article, but necessary too, 
would be consideration of the layers of politics surrounding judicial regulation. 
The politics are so problematic that one scholar of judicial mandatory retirement 
is resigned to the fact that no reform will ever happen:

[T]he . . . likely course is that five decades hence, some future scholar will 
[add] . . . another half-dozen mentally decrepit justices to the sad and poignant 
roster our history already offers of jurists who harmed their Court and hurt their 
own reputations by remaining on the bench too long.549

Must we resign ourselves to such a dismal future?
The political feasibility rests on a decoupling of assessments of cognitive 
capacity from political impetus to shape the courts based on ideology. Such 
decoupling should happen under my proposal, given the emphasis on complete 
privacy for the medical records. Moreover, the mandated assessments could be 
implemented only for new judges with current judges having the option to opt 
in or not. This would alleviate the concern that whichever political party has 
power when the program is implemented would gain a large number of new 
judgeships.

To be sure, ensuring complete privacy—without even judicial councils or 
chief judges aware of individual judge capacity assessments—ultimately relies 
upon the judge themselves to make an appropriate decision about when to

547 See generally Nina A. Kohn, Rethinking the Constitutionality of Age Discrimination: 
A Challenge to a Decades-Old Consensus, 44 U.C. DAVIS L. REV. 213 (2010) (detailing 
debates among courts regarding whether age discrimination is covered under rational basis 
review).
549 Garrow, supra note 245, at 1087.
retire.\textsuperscript{550} That is, under my proposed system, even if a doctor recommends that a judge retire due to cognitive impairment, the judge could ignore that advice. It is an untested assumption, but I believe a plausible one, that judges will do the right thing\textit{ if} those judges are provided regular cognitive assessment data.

I am optimistic that, despite the many acknowledged challenges, there is a path forward for the successful development of a judicial capacity assessment toolbox. It would surely require a working group to carefully review relevant findings in law, medicine, and science. But such committees are organized regularly, and funding might be available from a variety of sources.\textsuperscript{551}

There is already momentum in the policy sphere. In September 2018, Representative Darrell Issa (R-OH) proposed the Judiciary Reforms, Organization and Operational Modernization Act of 2018.\textsuperscript{552} In the Act, Rep. Issa proposed regular medical exams for all federal judges:

\textbf{SEC. 203. MEDICAL EXAMINATIONS FOR FEDERAL JUDGES.}

(a) \textit{In general.} Chapter 21 of title 28, United States Code, is amended by adding at the end the following:

\textbf{§ 464. Medical examinations for justices and judges}

(a) \textit{In general.—}Each justice or judge of the United States shall, at no expense to the judge or justice, undergo a medical examination by a physician—

1. in the case of a judge or justice who is 70 years of age or younger, every 5 years;
2. in the case of a judge or justice who is older than 70 years of age and younger than 81 years of age, every 2 years; and
3. in the case of a judge or justice who is 81 years of age or older, every year.

(b) \textit{Confidentiality.—}Except as provided in subsection (c), the results of a medical examination described in subsection (a) shall be confidential.

(c) \textit{Exception.—}Notwithstanding any other provision of law, in the case that a physician conducting a medical examination described in subsection (a) identifies a condition that may impact the ability of the judge or justice to carry out the duties of judge or justice’s position, the physician shall submit such finding to the appropriate chief judge or justice. In the case that the condition described in the previous sentence relates to a chief


judge, the physician shall submit the finding to the chief judge of the court with appellate jurisdiction over the court on which the judge sits.\textsuperscript{553}

Rep. Issa’s bill, although it did not advance out of the Committee on the Judiciary,\textsuperscript{554} is indicative of congressional interest in pursuing new solutions for screening older judges. My primary critiques of the bill are that it provides no definition of “medical examination,” does not collect baseline data at nomination, and is too vague in section 3(c) as to when a physician must submit his health findings.\textsuperscript{555} The ambiguity is in the phrase “a condition that may impact the ability of the judge.”\textsuperscript{556} There is no timeline suggested, e.g., may impact ability in the next month, the next five years, etc.\textsuperscript{557} But, critiques aside, the fact that congressional time is already being spent on this issue speaks to its importance.

At the state level, there is activity of a different sort suggesting there would be interest in this toolbox. Many states already offer Lawyer and Judge Assistance Programs through their state bar associations.\textsuperscript{558} These programs often offer confidential support regarding personal problems like substance abuse and/or mental health.\textsuperscript{559} Such programs are in place in Arizona,\textsuperscript{560} Hawaii,\textsuperscript{561} Indiana,\textsuperscript{562} Louisiana,\textsuperscript{563} Michigan,\textsuperscript{564} Mississippi,\textsuperscript{565} New

\begin{itemize}
\item \textsuperscript{553} Id. § 203 (emphasis in original).
\item \textsuperscript{554} See Bills in the 115th Congress: H.R. 6755, C-SPAN, https://www.c-span.org/congress/bills/bill/?115/hr6755 [https://perma.cc/9S47-T96B].
\item \textsuperscript{555} H.R. 6755 § 203.
\item \textsuperscript{556} Id.
\item \textsuperscript{557} See id.
\item \textsuperscript{558} See infra notes 559–78.
\item \textsuperscript{559} Id.
\item \textsuperscript{560} Member Assistance Program, St. B. ARIZ., https://www.azbar.org/professional development/map/ [https://perma.cc/8V5P-BXJQ].
\item \textsuperscript{561} The Attorneys and Judges Assistance Program, HAW. ATT’Y ASSISTANCE PROGRAM, https://hawaiiaap.com/ [https://perma.cc/9JX2-MVRC].
\item \textsuperscript{562} Indiana Judges and Lawyer Assistance Program, IND. LAW., https://www.the indianalawyer.com/topics/2339-judges-lawyers-assistance-program [https://perma.cc/23Q4-5RHK].
\item \textsuperscript{564} Lawyers and Judges Assistance Program, St. B. MICH., https://www.michbar.org/generalinfo/ljap/home [https://perma.cc/TWB9-7XJJ].
\end{itemize}
Jersey, New Mexico, New York, and Pennsylvania. Notably, the Louisiana Judges and Lawyers Assistance Program specifically mentions aging and age-related dementia as an impairment that judges and lawyers should consider. The Program aims to “reach the aging lawyer before their condition becomes a discipline issue.” The State Bar of Michigan also provides resources related to aging on their website, as does Indiana and Arkansas. Although most of these programs focus at present only on aging lawyers, they provide a foundation on which to reach out to judges as well.

One Pennsylvania program, a judge-specific subset of Lawyers Concerned for Lawyers (aptly called Judges Concerned for Judges, JCJ), provides confidential support and resources for judges struggling with a variety of ailments, but mostly focuses on mental disorders (anxiety, bipolar disorder, depression, eating disorders) and addiction (drugs, alcohol, gambling). JCJ offers a “peer assistance program” to “restore the health and professional competence” of judges through “confidential helpline services, volunteer support and education.” JCJ offers education, referral to a medical provider for a consultation, personalized treatment plans, and peer support for judges who seek their assistance. A legal culture that already recognizes the need for improved mental health should be open to a conversation about the toolbox I propose in this Article.

567 New Mexico Lawyers and Judges Assistance Program, St. B. N.M., https://www.nmbar.org/Nmstatebar/For_Members/Lawyers_Judges_Assistance/Lawyers_Judges_Assistance.aspx [https://perma.cc/93YA-N7U8]
571 Id.
576 Confidential Services, Support & Information, Judges Concerned for Judges Pa., https://www.jcjpa.org/ [https://perma.cc/55E7-2QLW]
577 About Us, Judges Concerned for Judges Pa., https://www.jcjpa.org/about/ [https://perma.cc/DTD4-DK3C]
C. Legitimacy

A system of aging judges raises not only substantive concerns but concerns about perception as well. Amidst concerns about judges’ brain health, it could be the case that the public will be reassured knowing that judges undergo regular brain health checkups. In a separate set of studies, I have started to pilot some empirical work to test this proposition.579

I ran experiments looking at public confidence in the functional capacity of (1) a judge and (2) a law professor at ages fifty-two, sixty-two, seventy-two, eighty-two, ninety-two, and one-hundred and two. I also examined how the introduction of cognitive health data affects subjects’ legitimacy ratings. The bottom line of the results are: (1) the public is slightly more confident in older academics than they are in older judges, but; (2) even at baseline for judges there is great confidence in seventy-five-year-old judges, and; (3) for judges and academics, healthy cognitive testing leads to high levels of confidence regardless of age.

VII. CONCLUSION

America is getting older, and so too are its judges. At present, most commentators on the topic of aging judges have expressed concern and made proposals for mandatory retirement or term limits. This Article has advocated for a different approach: empowering aging judges through the implementation of private, individual cognitive health assessments. If carefully developed through interdisciplinary collaboration, advances in the neuroscience of aging and dementia can provide to our nation’s judges actionable information about their brain health. System-wide data collection as proposed here will require careful study and design before implementation, but it has the transformative potential to improve the efficiency and legitimacy of the judicial branch.

579 Data and preliminary studies on file with author.
Building Legal Walls: Limiting Attorney General Referral Authority Over Immigration Cases

BRITTANY STEVENSON*

I. INTRODUCTION

President Trump has yet to make good on his campaign promise to build a border wall along the United States-Mexico border. In the meantime, though,  

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his administration has been building legal walls.\textsuperscript{2} Stalled negotiations over the fate of Deferred Action for Childhood Arrivals (DACA), the lift of Temporary Protected Status (TPS) for natives of certain countries, Attorney General case certification in twelve cases, and the now-rescinded “child separation policy” have all contributed to President Trump’s campaign-promised overhaul of United States immigration law.\textsuperscript{3} While public backlash has stalled some of these measures,\textsuperscript{4} the executive branch has nevertheless employed its authority to shape policy in a variety of ways.\textsuperscript{5} One way includes the creation of binding precedent in immigration law by the Attorney General under the referral authority, which permits the Attorney General to adjudicate individual immigration cases and set policy unilaterally.\textsuperscript{6}

The Attorney General’s use of the referral authority historically has been the subject of much controversy, and this holds true in the present context.\textsuperscript{7} When an Attorney General uses the referral authority, criticism generally follows and stems from the significant potential for an Attorney General’s abuse of this authority.\textsuperscript{8} Specifically, critics argue that the Attorney General sets executive policy through a process that lacks procedural safeguards protecting that President Trump capitulated to ending the government shutdown without receiving funding for the border wall at issue).

\textsuperscript{2} David Bier, Trump Builds His Wall Against Legal Immigrants, HILL (July 19, 2018), http://thehill.com/blogs/congress-blog/homeland-security/397873-trump-builds-his-wall-against-legal-immigrants [https://perma.cc/AN7Q-3TFN] (compiling the immigration polices the Trump Administration has used to curb both legal and illegal immigration).


\textsuperscript{5} See Bier, supra note 2.

\textsuperscript{6} See 8 C.F.R. § 1003.1(g)–(h) (2018). See generally Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy through the Attorney General’s Review Authority, 101 IOWA L. REV. 841 (2016) (providing a foundational view of the referral authority written by former U.S. Attorney General Alberto Gonzales and Office of Immigration Litigation Attorney Patrick Glen). For clarity, the Attorney General’s referral authority is also often referred to as “case certification.”

\textsuperscript{7} See, e.g., Gonzales & Glen, supra note 6, at 847 (acknowledging “that the referral authority is not without its critics, who have . . . focused on the lack of guidelines or clearly established processes utilized by the Department of Justice when a case is referred to and decided by the Attorney General”).

due process and provides for inadequate neutrality and transparency in the adjudicatory context.\textsuperscript{9} Generally, administrations rarely use the referral authority as a tool to implement policy.\textsuperscript{10} The Trump Administration, though, has already used the referral authority twelve times.\textsuperscript{11} The prevalence of its use is striking when compared with its use under the Obama Administration, which used the referral authority only four times throughout its eight years.\textsuperscript{12} Also divergent is the nature of the cases referred under the Trump Administration and the issues decided.\textsuperscript{13} Unlike many of his predecessors, after referring the case to himself, Attorney General Sessions essentially altered the issue originally on appeal to the Board of Immigration Appeals (Board).\textsuperscript{14} Attorney General Sessions not only used the referral authority more often, but also garnered attention for the way that he used the referral authority.\textsuperscript{15}

To be sure, as a means for effectuating policy, the referral authority is both statutorily based and arguably effective.\textsuperscript{16} The Immigration and Nationality Act (INA) grants wide-ranging authority to the Attorney General by allowing him to direct the administration, interpretation, and enforcement of immigration policy.\textsuperscript{17} Immigration judges (IJ s) usually first adjudicate removal proceedings and the Board reviews their decisions, but the Attorney General can also

\textsuperscript{9} Id. at 1768; see Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (affirming that noncitizens present in the United States are entitled to due process whether having a “lawful, unlawful, temporary, or permanent” presence).

\textsuperscript{10} See Sanchez-Penumi v. Longshore, 7 F. Supp. 3d 1136, 1149 (D. Colo. 2013) (“[A]lthough he rarely uses this power, the Attorney General is the final arbiter of the immigration agency’s interpretation of a statute . . . .”); see infra Part II.


\textsuperscript{12} Gonzales & Glen, supra note 6, at 858.


\textsuperscript{14} See id. (collecting examples of cases in which Sessions has altered the issue on appeal).


\textsuperscript{16} Gonzales & Glen, supra note 6, at 897 (arguing that Attorney General referral authority is an effective means of setting executive federal immigration policy).

\textsuperscript{17} See 8 U.S.C. § 1103(g) (2009); Gonzales & Glen, supra note 6, at 850 (“It is the Attorney General who was statutorily charged, and remains charged together with the Secretary of the Department of Homeland Security, with the administration and enforcement of the immigration laws.”).
The Board, the Department of Homeland Security (DHS) Secretary, or the Attorney General himself can refer a case for Attorney General review. This process allows an Attorney General to become the decision maker and further federal immigration policy as envisioned by the executive branch. This authority also provides an Attorney General with the opportunity to resolve wide-ranging issues and affect cases beyond the particular case certified. Still, the Attorney General, a political appointee charged to enforce executive policies, can hardly be expected to play the role of a neutral adjudicator. Thus, despite an Attorney General’s statutory charge to enforce immigration law, there exists an inherent and severe lack of neutrality and procedural safeguards which ultimately demonstrate that the referral authority is an inappropriate method to adjudicate individual immigration cases.

This Note addresses the Attorney General’s referral authority over immigration cases and its use under the Trump Administration. To illustrate and understand the referral authority, Part II of this Note considers the statutory background of the INA that grants an Attorney General the ability to adjudicate cases through the referral authority, as well as its use throughout history. Part III examines the use of the referral authority under the Trump Administration, along with the nature of the cases selected for review. Finally, Part IV suggests amending the INA by relegating immigration policymaking by an Attorney General to notice-and-comment rulemaking only, thus ensuring that the adjudications of individual immigration cases are fair.

II. BACKGROUND ON THE REFERRAL AUTHORITY AND ITS USE

In order to understand the drastic shift in the Trump Administration’s use of the referral authority, it is first necessary to understand the statutory basis for the referral authority, its use by previous administrations, and its well-established criticisms. This Part provides this overview of the referral authority by beginning with its creation leading up to its use under the Obama

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18 C.F.R. § 1003.1(b), (h) (2018).
19 Id. § 1003.1(h)(1)(i)–(iii).
20 Gonzales & Glen, supra note 6, at 846 (considering the referral authority to be within “the executive branch’s scope of action in advancing its conception of immigration policy in the face of a recalcitrant Congress”).
21 See id. at 860.
22 See Chase, supra note 13 (arguing that the DOJ is “enforcement-minded” and “has never really grasped the concept of independent decision makers existing under its jurisdiction”); Ted Hesson, Sessions Signals Immigration Crackdown: ‘This Is the Trump Era,’ POLITICO (Apr. 11, 2017), https://www.politico.com/story/2017/04/jeff-sessions-immigration-crackdown-237109 [https://perma.cc/9Y58-K5NS] (noting that the policies of the Trump Administration represent an “aggressive approach [that] could help lock down the border, but it could also lead to the arrest of valid asylum seekers, depending on how the new plans are implemented”).
Administration. Consideration of the referral authority’s use under the Trump Administration is analyzed in the following Part.23

A. The Statutory Basis for the Attorney General’s Referral Authority

The INA gives broad authority to the Attorney General to implement the statute.24 The statute enables the Attorney General to direct the administration, interpretation, and enforcement of immigration policy through the INA.25 Pursuant to this authority, the Board of Immigration Appeals (Board) was created by regulation in 1940.26 The Board serves as an appellate body charged with reviewing appeals of individual immigration decisions made by IJs over “removal determinations, requests for discretionary relief, and asylum applications.”27 Through its review, the Board can issue precedential decisions over issues that bind the administration and adjudication of immigration law.28

Still, the Board has no statutory authority of its own, and it serves as a delegate of the Attorney General.29 Although a delegate of the Attorney General, by regulation the Board is granted as much authority over discretionary decisions as the Attorney General.30 Therefore, as long as the regulations remain, the Board has a degree of independence in decision making.31 Indeed, members of the Board “shall exercise their independent judgment and discretion in considering and determining . . . cases.”32 Essentially, this regulation attempts to prevent the Attorney General from “sidestep[ping] the Board.”33

However, aside from adjudication by the Board, the Attorney General can directly adjudicate individual immigration cases through use of the referral authority.34 As for the cases referred to the Attorney General, the statute does not mandate any criteria for a case to be reviewed by the Attorney General; it

23 See infra Part III.
25 Gonzales & Glen, supra note 6, at 841, 850.
28 8 C.F.R. § 1003.1(d) (2018); see Eyer, supra note 27, at 670 (quoting 8 C.F.R. § 1003.1(g) (2007)).
29 Eyer, supra note 27, at 669. Despite being created by regulation, the Board has remained a relatively “stable” body for more than seven decades. Id.
30 United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) (“In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General’s discretion became the yardstick of the Board’s.”).
33 Shaughnessy, 347 U.S. at 267.
34 8 C.F.R. § 1003.1(h)(1)(i) (2018) (“The Board shall refer to the Attorney General for review of its decisions all cases that . . . [t]he Attorney General directs the Board to refer to him.”).
merely specifies who may refer a case. The Board, the DHS Secretary, or the Attorney General himself can refer cases for review. Attorney General review is performed de novo and review is not limited by the decisions in the underlying proceedings. This process allows the Attorney General to become the decision maker and further the Administration’s immigration policy.

B. Use of the Referral Authority by Prior Administrations

Generally, since its inception, referral authority use by attorneys general has decreased in number, and the substance of its use has changed as well. The following table provides data on the total number of times the referral authority has been used under each administration.

Table 1. Referral Authority’s Use by Prior Administrations (continuing on to the next page)

<table>
<thead>
<tr>
<th>Year Range (Administration)</th>
<th>Total Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>1942–1945 (Franklin D. Roosevelt)</td>
<td>111</td>
</tr>
<tr>
<td>1945–1953 (Harry S. Truman)</td>
<td>296</td>
</tr>
<tr>
<td>1953–1961 (Dwight D. Eisenhower)</td>
<td>10</td>
</tr>
<tr>
<td>1961–1963 (John F. Kennedy)</td>
<td>11</td>
</tr>
<tr>
<td>1963–1969 (Lyndon B. Johnson)</td>
<td>5</td>
</tr>
<tr>
<td>1969–1974 (Richard M. Nixon)</td>
<td>3</td>
</tr>
<tr>
<td>1974–1977 (Gerald R. Ford)</td>
<td>1</td>
</tr>
</tbody>
</table>

35 Id.; see also Margaret H. Taylor, Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication, 60 STAN. L. REV. 475, 484 n.35 (2007) (“The regulation does not specify any substantive criteria for referral. Rather, it delineates those who have authority to invoke this mechanism of policy control.”).


37 INS v. Doherty, 502 U.S. 314, 327 (1992) (holding that the Attorney General is not limited by the underlying decision of the Board but can instead find an independent basis for his decision); A-H-, 23 I. & N. Dec. 774, 779 n.4 (A.G. 2005). Indeed, the referral authority grants the Attorney General very broad authority. Trice, supra note 8, at 1773. “[T]he Attorney General [has] discretion to review any of the 30,000 [Board] cases decided annually,” and, “when he does so, he views his review power as plenary, extending to de novo review of law and facts and unconstrained by regulations that bind the [Board].” Id.

38 Gonzales & Glen, supra note 6, at 847. But see Trice, supra note 8, at 1773–74 (arguing that “politically driven decisionmaking” leaves those individuals filing asylum or withholding claims ultimately vulnerable).

39 Gonzales & Glen, supra note 6, at 857.

40 Id. at 857–58; The Presidents Timeline, WHITE HOUSE HIST. ASS’N, https://www.whitehousehistory.org/the-presidents-timeline [https://perma.cc/8RLU-CC5F].


The shift in use is largely attributable to a difference in use by particular presidential administrations, a change in the type of substantive review over each case by the Attorney General, and who is referring the case to the Attorney General. First, a change in the type of review by attorneys general may have also contributed to the overall downward trend in the number of cases reviewed. Early decisions often attached little reasoning, and thus could be performed quickly. However, beginning in the 1950s, the Attorneys General’s decisions on referred cases became increasingly more “independently reasoned” and they tended to serve more significant ends than mere summary review.

46 Under the Clinton Administration, in addition to the three issued decisions, fourteen orders were given by the Attorney General. Gonzales & Glen, supra note 6, at 858.
47 Gonzales & Glen, supra note 6, at 858. However, some commentators argue that, though the referral authority was not often used under the Obama Administration, it instead used other tools to advance its immigration policies, such as executive orders or executive branch memorandum. See id. at 846. Particularly, President Obama issued DACA as an executive branch memorandum and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) by an executive action. See 2014 Executive Actions on Immigration, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/archive/2014-executive-actions-immigration [https://perma.cc/4L44-64AC] (listing a series of executive actions announced by President Obama on November 20, 2014).
49 Gonzales & Glen, supra note 6, at 857–59.
50 Id. at 858 (“[T]he quality of the Attorney General’s decisions have been greater in recent years, even if those decisions have been less frequent, tending towards independently reasoned, articulated, and published opinions on the merits of the case.”).
51 Harry N. Rosenfield, Necessary Administrative Reforms in the Immigration and Nationality Act of 1952, 27 FORDHAM L. REV. 145, 157 (1958) (“Often the Attorney General’s action is a peremptory ‘disapproved’ or ‘approved,’ without any clue to the alien as to the ‘why’s’ and ‘wherefores.’ And sometimes the Attorney General will first approve or disapprove the Board’s decision and then withdraw his action or reverse himself, in both instances without any reason assigned.”).
52 Gonzales & Glen, supra note 6, at 859.
fact, these decisions resolved larger legal issues, they created policy or established new standards for future cases, they involved issues of foreign policy, and, in some instances, the rejection of a referral effectively acted as acceptance or a stay on certain issues.\textsuperscript{53} The focus, then, has been on cases “whose resolution would have continuing importance—the decision of a legal question that would potentially affect many cases or the setting of policy that would likewise have significant effects beyond the case at issue.”\textsuperscript{54} This type of review necessarily is more time consuming, and thus limits the number of cases that can be reviewed under the referral authority by an Attorney General.

Second, in addition to the more substantive review slowing the number of referred cases, the source of referred cases has also changed.\textsuperscript{55} Early decisions were mostly referred to the Attorney General by the Board.\textsuperscript{56} The Immigration and Nationality Service (INS), though referring less than the Board, still referred a significant amount of cases to the Attorney General also.\textsuperscript{57} Cases certified directly by the Attorney General lagged behind both the Board’s and the INS’s referrals.\textsuperscript{58} However, recently, most cases are self-certified by the Attorney General, with DHS providing some and the Board providing very few.\textsuperscript{59} The downward trend mirrors the overall decrease in the use of the referral authority by the Attorney General.\textsuperscript{60} Though, this may also be partly attributable to a regulatory change that made mandatory referral in certain instances merely discretionary.\textsuperscript{61} While a variety of sources may have contributed to a decrease in the use of referral authority—the inclinations of a particular administration, the type of review, or the source of referral—the number of cases reviewed by the Attorney General under the referral authority has generally decreased over time.

\textsuperscript{53} Id. at 861, 886.
\textsuperscript{54} Id. at 860.
\textsuperscript{55} Id. at 859.
\textsuperscript{56} Id.
\textsuperscript{57} Id.; see Did You Know?: The INS No Longer Exists, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 13, 2011), https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists [https://perma.cc/6NAT-PQ7R] (“[S]ince March 1, 2003 . . . most INS functions were transferred from the Department of Justice to three new components within the newly formed Department of Homeland Security. USCIS is one of those three components. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) are the other two.”).
\textsuperscript{58} Gonzales & Glen, supra note 6, at 859.
\textsuperscript{59} Id. (noting that, as of 2016, fourteen cases were self-certified by the Attorney General, eleven were referred by DHS, and only one case was referred to the Attorney General by the Board).
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 859–60; see 8 C.F.R. § 90.12 (1940) (mandating referral to the Attorney General over cases with a “question of difficulty” and “in any case in which a dissent has been recorded”).
C. Common Criticisms of the Referral Authority

Despite the decreasing use of the referral authority, this process is routinely criticized when it is used.62 Three of the most prevalent critiques include (1) the threatened lack of neutrality by a politically appointed adjudicator; (2) the removal of a decision from what might be considered a neutral adjudicative body with subject matter expertise to instead be decided by a political appointee;63 and (3) the absence of statutory or regulatory provisions safeguarding the due process of noncitizens under use of the referral authority.64

First, as stated above, the Attorney General is a political appointee.65 The Attorney General serves under the executive branch and is thus charged with carrying out the policy directives of the administration.66 While the obvious function of an administrative agency is to carry out the political agenda of the executive branch, the perception of political policy in adjudication raises the question of fairness in the decision-making.67 Indeed, when the Attorney General carries out adjudications, it may “be seen as objectionable because it conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome.”68 Finally, when an Attorney General or administration is on their way out, they often issue many significant decisions as a last-ditch effort to put their policy in place.69 Thus, this concern that the Attorney General lacks neutrality is not unfounded.

Second, when an Attorney General certifies a case, he takes the decision from the Board and leaves it with little decisional independence.70 Many agency adjudicators are “specialists” and “selected because their background and

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62 See Chase, supra note 13.
63 See id.
64 Trice, supra note 8, at 1768; see Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (affirming that noncitizens present in the United States are entitled to due process whether having a “lawful, unlawful, temporary, or permanent” presence).
65 Chase, supra note 13.
66 See id.
67 Margaret H. Taylor, Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions, 102 IOWA L. REV. ONLINE 18, 19 (2016); Elise Foley, Jeff Sessions Has Power to Shape Asylum Policy. He Could Be Gearing Up to Use it to Deny Relief to Domestic Violence Victims., HUFFPOST (Mar. 16, 2018), https://www.huffingtonpost.com/entry/sessions-asylum-deportations_us_5aa9729fe4b0600b82ff93b4 [https://perma.cc/MP3A-UY7Q] (“‘Even apart from Jeff Sessions, I’ve never liked the idea that the attorney general can review a decision of the [Board] at all,’” said Stephen Legomsky, a former lead counsel for U.S. Citizenship and Immigration Services under the Obama administration. ‘When the attorney general substitutes his decision for that of the [Board], it would be analogous to a prosecutor in a criminal case deciding the case.’”).
68 Taylor, supra note 67, at 19.
69 Id. at 20 (referring to this process as “midnight agency adjudications,” in which “an agency head . . . refers a controversial issue to himself and renders a decision upending agency precedent on his way out the door”).
70 See Taylor, supra note 35, at 480.
expertise suits them to hear a particular type of case.”\textsuperscript{71} Indeed, in the immigration context, IJs and the Board possess “subject matter expertise.”\textsuperscript{72} Still, as employees of the DOJ, an agency tasked with carrying out executive policy, a similar concern over their neutrality arises.\textsuperscript{73} Board members are appointed by the Attorney General but do not have a fixed tenure and serve at the pleasure of the Attorney General.\textsuperscript{74}

Finally, both the lack of neutrality by the Attorney General and the Board’s lack of independence create serious due process concerns for those individuals whose cases are being heard.\textsuperscript{75} Under the Fifth Amendment to the United States Constitution, the Due Process Clause does not just apply to citizens, but all noncitizens in the country “whether their presence here is lawful, unlawful, temporary, or permanent,” as well.\textsuperscript{76} Currently, though, Attorney General review under referral authority is not subject to any “particular process,” or even the minimal requirement of giving the parties “notice and an opportunity for meaningful participation in the review process.”\textsuperscript{77} Without even minimal process, decision-making lacks neutrality and transparency, thus endangering a noncitizen’s due process rights.\textsuperscript{78}

III. THE REFERRAL AUTHORITY’S USE UNDER THE TRUMP ADMINISTRATION

Under the Trump Administration, the Attorneys General have certified twelve cases for review by referral authority.\textsuperscript{79} This section will consider the

\textsuperscript{71} Id. at 481.

\textsuperscript{72} Chase, supra note 13. For instance, the author, Jeffrey S. Chase, himself demonstrates that many adjudicators employed by the Board have expertise in United States immigration law. Id. Chase is presently an immigration lawyer and was formerly an “Immigration Judge and Senior Legal Advisor at the Board of Immigration Appeals.” Id.

\textsuperscript{73} See Taylor, supra note 35, at 480–81 (noting that agency adjudication of cases may be carried out by “agency adjudicators” subject to oversight by “agency heads”).


\textsuperscript{75} Trice, supra note 8, at 1768.

\textsuperscript{76} Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

\textsuperscript{77} Trice, supra note 8, at 1773.

\textsuperscript{78} Id. at 1775 (stating that, in some cases, “the Attorney General has failed to provide adequate opportunities for interested parties to brief or argue the issues under consideration and at times has failed even to inform the parties to the case of the issues to be considered upon review”). Though not required by regulation, the Attorney General may still “invite” the parties or amici to submit briefs on the matter. L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018).

cases selected for review under the Trump Administration in thematic groupings, rather than chronological order of certification. Generally, though with some overlap, the cases certified fall into three broad categories: decisions limiting the discretion and authority of IJs and the Board, decisions intended to streamline the immigration adjudication process and promote efficiency, as well as decisions generally restricting the eligibility requirements for asylum and withholding of removal applicants.

A. Decisions Limiting the Authority of Immigration Judges and the Board of Immigration Appeals

The first theme of decisions under the Trump Administration involves holdings that limit the discretion and authority of IJs and the Board. Certain judges, or even courts, have gained a perception that the judgments they deliver will be based on their own political ideologies, and this is certainly the perception held by the Trump Administration. In the absence of binding precedent or regulatory norms regarding a certain issue, the political ideologies of individual IJs indeed appear to have had a role in immigration law. For example, whether domestic violence victims fleeing their persecutors were eligible for asylum had been relatively unclear for decades. Without clear legal guidance, a particular IJ’s interpretation and use of discretion controlled whether he or she granted a domestic violence victim asylum—thus, some IJs granted

2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018). However, the authority of an Acting Attorney General to refer to himself a case has been challenged by commentators as violating the Appointments Clause of the Constitution, as well as statutorily violating a law that governs the succession between Attorneys General and the Federal Vacancies Reform Act. Amicus Briefs: Matter of Negusie, AM. IMMIGR. COUNCIL (Dec. 3, 2018), http://www.americanimmigrationcouncil.org/amicus_brief/matter-negusie [https://perma.cc/ME6B-J6JQ]. Finally, Attorney General Barr certified two cases in his first few months in office, which were consolidated into one decision. See Thomas & Thompson, 27 I. & N. Dec. 556 (A.G. 2019).

80 See Political Scientist Weighs In on Trump’s Criticism of 9th Circuit Court of Appeals, NPR (Nov. 22, 2018), https://www.npr.org/2018/11/22/670313813/political-scientist-weighs-in-on-trumps-criticism-of-9th-circuit-court-of-appeal [https://perma.cc/QGF4-WKXJ]. Responding to a decision from the 9th Circuit, President Trump stated, “This was an Obama judge. And I’ll tell you what, it’s not going to happen like this anymore.” Id. But see Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 CALIF. L. REV. 1457, 1515 (2003) (concluding that, although judicial preferences may play a small role, decision-making according to the law “is the most powerful determinant”).


domestic violence based asylum and others did not. Inconsistencies exist elsewhere in immigration law, and one method to ensure consistent application is by limiting the discretionary authority of IJs and the Board.

Previously, IJs and the Board had the discretion to administratively close cases, which was a useful tool to manage dockets. In certifying Matter of Castro-Tum, though, Attorney General Sessions sought to review the authority of IJs and the Board to administratively close cases. He concluded that IJs and the Board have no general authority to administratively close cases but only have authority in certain instances provided for expressly by the regulations or by a settlement. Therefore, this decision necessarily limits IJ and Board authority. Moreover, because the court was unsure if Castro-Tum received the


85 When an IJ or the Board administratively closes a case, “the proceedings are halted, the case is removed from the active docket, and the respondent has no future hearing dates scheduled.” Am. Immigration Council & ACLU, Administrative Closure Post-Castro-Tum: Practice Advisory 2 (Oct. 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [https://perma.cc/HUF8-7WPM]. The proceedings are not re-calendared unless one party moves to continue. Id. Notably, “[a]dministrative closure does not terminate or dismiss the case and it ‘does not provide [a noncitizen] with any immigration status’; the individual remains ‘in’ removal proceedings.” Id. (alteration in original) (citations omitted). IJs or the Board previously could administratively close cases in a few different situations: for example, if a noncitizen has been granted deferred action, if a noncitizen is awaiting adjudication elsewhere, such as from the USCIS, or if a noncitizen is not considered competent. See W-Y-U., 27 I. & N. Dec. 17, 18 (B.I.A. 2017) (citing Avetisyan, 25 I. & N. Dec. 688, 691–92 (B.I.A. 2012)).


87 Castro-Tum, 27 I. & N. Dec. at 271, 278 (“[T]hese regulations limit administrative closure authority to specific categories of cases, but do not delegate the general authority to authorize administrative closure.”).

88 Id. at 271. Not only will IJs and the Board no longer be able to use administrative closure as a tool to manage their dockets, but past administratively closed cases may be required to be re-calendared if either party requests. See id. at 272 (explaining the process of re-calendaring an administratively closed case).
notices to appear, it initially closed the case for due process concerns.\textsuperscript{89} Thus, by denying IJs and the Board the discretion to administratively close cases, the decision also risks the due process rights of noncitizens during removal proceedings. Ultimately, in \textit{Romero v. Barr}, the Fourth Circuit abrogated Attorney General Sessions’s decision by finding that regulations implementing the INA “unambiguously confer upon IJs and the [Board] the general authority to administratively close cases.”\textsuperscript{90}

Attorney General Sessions also reviewed the procedure used by IJs for granting a noncitizen’s motion for a continuance in \textit{Matter of L-A-B-R-}.\textsuperscript{91} By regulation, IJs are permitted to grant motions for continuances for good cause shown by a noncitizen awaiting the outcome of other pending “collateral matter.”\textsuperscript{92} The regulations do not provide a clear definition of “good cause,” and this led the Board to create a balancing test to aid in the determination.\textsuperscript{93} However, Attorney General Sessions used the opportunity to set forth a good cause standard limiting the discretion of IJs to grant continuances for, what he deemed, “any reason or no reason at all.”\textsuperscript{94} According to him, “the good-cause requirement is an important check on immigration judges’ authority that reflects the public interest in expeditious enforcement of the immigration laws, as well as the tendency of unjustified continuances to undermine the proper functioning of our immigration system.”\textsuperscript{95} This decision, too, limits IJs’ discretion and prevents them from controlling their dockets as they see fit. Moreover, it requires an IJ, who may have 10–15 motions for a continuance per day, “to write


\textsuperscript{90} Romero v. Barr, 937 F.3d 282, 294 (4th Cir. 2019) (citing 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii)).

\textsuperscript{91} L-A-B-R-, 27 I. & N. Dec. 405, 405 (A.G. 2018). A motion for continuance allows an IJ to “move an upcoming hearing from one scheduled date to another or to pause an ongoing hearing and move it to a future date.” \textsc{Am. Immigration Council, Practice Advisory: Motions for a Continuance 1} (Sept. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_for_a_continuance_practice_advisory.pdf [https://perma.cc/BF6N-Y3GD]. Generally, an IJ may authorize a continuance for good cause shown. 8 C.F.R. § 1003.29 (1994). Additionally, an IJ may authorize “a reasonable adjournment either at his or her own instance” or for good cause shown. \textsc{See 8 C.F.R. § 1240.6} (2019). However, the regulations fail to define “good cause.”

\textsuperscript{92} \textsc{See L-A-B-R-}, 27 I. & N. Dec. at 405 (“For example, an alien may move for a continuance because he is the subject of a family- or employment-based visa petition that, if approved by United States Citizenship and Immigration Services . . . would enable him to apply for adjustment of status in the immigration court and become a lawful permanent resident.”); 8 C.F.R. § 1003.29 (1994) (“The Immigration Judge may grant a motion for continuance for good cause shown.”).

\textsuperscript{93} \textsc{See L-A-B-R-}, 27 I. & N. Dec. at 405.

\textsuperscript{94} \textsc{Id.}

\textsuperscript{95} \textsc{Id. at 406}.
lengthy, highly detailed decisions for each of these while still trying to complete three or more full hearings a day.”

In Matter of S-O-G- & F-D-B-, on the other hand, Attorney General Sessions reviewed IJ authority to terminate or dismiss removal proceedings. He determined that, pursuant to Matter of Castro-Tum, IJs “have no inherent authority to terminate or dismiss removal proceedings.” Indeed, IJs can only terminate proceedings when expressly provided for by regulation or when charges of removability are not sustained. Attorney General Sessions made mention that “the authority to dismiss or terminate proceedings is not a free-floating power an immigration judge may invoke whenever he or she believes that a case no longer merits space on the docket.” Instead, an IJ must continue with removal proceedings if the claims in the Notice to Appear can be sustained by the DHS. This decision, like Matter of Castro-Tum, limits IJ discretion to independently terminate proceedings. However, IJs can still terminate in other certain permitted contexts or when required by regulation.

Finally, in Matter of Thomas & Thompson, Attorney General Barr considered the extent of IJ discretion when a noncitizen’s criminal conviction is altered by state court orders. Attorney General Barr referred the case to consider specifically “whether, and under what circumstances, judicial alteration of a criminal conviction or sentence—whether labeled ‘vacatur,’ ‘modification,’ ‘clarification,’ or some other term—should be taken into consideration in determining the immigration consequences of the

98 Id.
99 Id.; see 8 C.F.R. §§ 1239.2(c), (f) (2004) (permitting government counsel or an officer to move for dismissal under certain circumstances or IJ to terminate the removal proceedings if the alien has an application for naturalization pending that is likely to be granted); see also S-O-G- & F-D-B-, 27 I. & N. Dec. at 462 (permitting an IJ to dismiss “where the Department of Homeland Security fails to sustain the charges of removability against a respondent”).
101 Id. at 467–68.
103 See, e.g., 8 C.F.R. § 1216.4(a)(6) (1996) (providing for termination following the approval of conditional lawful permanent resident status); id. §§ 1235.3(b), 1235.6 (a)(iv) (2009) (providing for termination for noncitizens whose status has not been terminated in expedited removal proceedings).
Under the INA, certain criminal convictions also result in immigration consequences, such as inadmissibility or deportation. However, in some instances a noncitizen may have a criminal conviction, through some form of post-conviction relief, vacated, modified, or clarified to avoid the conviction’s immigration consequences. An IJ could then take the conviction’s alteration into consideration and provide discretionary relief based on immigration hardships. In Matter of Thomas & Thompson, though, Attorney General Barr held that state court orders modifying, clarifying, or otherwise altering a conviction will only be given legal effect when the alteration is based on procedural or substantive defects in the underlying criminal proceedings. Therefore, conviction alterations will no longer have legal effect on immigration proceedings if the alteration has nothing to do with the merits of the underlying conviction, and it was intended, for example, for rehabilitation or to ease immigration hardships. Attorney General Barr’s decision, therefore, further restricts IJ discretion by limiting their ability to consider the effect of conviction alterations.

B. Decisions Streamlining the Immigration Adjudication Process

The second theme of decisions under the Trump Administration aim to streamline the immigration adjudication process for efficiency purposes. Without a doubt, immigration courts, like many other court systems, suffer from a heavy backlog of cases; as of 2015, there were more than 700,000 active
cases. In this speech he remarked, “The fact is we have a backlog of about 700,000 immigration cases, and it’s still growing . . . . This is not acceptable. We cannot allow it to continue.” The focus of his speech urged IJs to adhere to the rule of law and to “use [their] best efforts and proper policies to enhance [their] effectiveness.” Attorney General Sessions seemed to take up the issue himself with the certification of Matter of E-F-H-L, Matter of M-G-G-, Matter of M-S-.116

After certifying the case, Attorney General Sessions vacated the decision four years after the case had closed. During the initial removal proceedings in Matter of E-F-H-L-, the respondent conceded removability and sought relief from removal by applying for asylum and withholding of removal. Without an evidentiary hearing, the IJ determined that the respondent “failed as a matter of law to make a prima facie case” of eligibility.

112 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 20 (2017) (“[T]he immigration courts’ overall annual caseload grew from approximately 517,000 cases in fiscal year 2006 to about 747,000 cases in fiscal year 2015 . . . .”).
114 Id.
115 Id.
117 See E-F-H-L-, 26 I. & N. Dec. 319, 324 (B.I.A. 2014) (holding that during “removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief”); see also E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018) (vacating the 2014 decision of the Board and holding that an asylum applicant is not entitled to an evidentiary hearing).
119 Id. The INA’s deportability provisions are broad; if a noncitizen falls into one of these categories, he or she would be considered removable. See 8 U.S.C. § 1227 (2008). The most common classifications include: “inadmissible aliens,” for obtaining admission through fraud or misrepresentation; aliens “present in violation of law,” applying to noncitizens who enter without inspection or remain after their status has expired; aliens who have “violated nonimmigrant status or condition[s] of entry,” covering noncitizens who have failed to comply with the terms of their status, such as obtaining unauthorized employment; or for certain “criminal offenses.” See id. If found removable, a noncitizen may apply for relief from removal, such as asylum or withholding of removal. 8 U.S.C. § 1229(a) (2006). For further discussion on removal proceedings, see generally Jennifer Lee Koh, Removal in the Shadows of Immigration Court, 90 S. CAL. L. REV. 181 (2017).
and denied his application.\textsuperscript{120} After appealing to the Board, the Board remanded the respondent’s case finding that ordinarily, an applicant is entitled to an evidentiary hearing when applying for asylum and withholding of removal.\textsuperscript{121} Upon remand, though, the defendant withdrew his application with prejudice and applied through an alternative method.\textsuperscript{122} Despite this, Attorney General Sessions vacated the Board’s decision entitling an applicant to an evidentiary hearing.\textsuperscript{123}

The holding in \textit{Matter of E-F-F-L-} brings forth a variety of practical consequences. First, this vacatur may mean that asylum and withholding of removal applications will be summarily dismissed if an applicant does not establish a prima facie case at the outset, rather than affording an applicant the opportunity to a full hearing.\textsuperscript{124} It also demonstrates that no seemingly established precedent is immune from Attorney General review.\textsuperscript{125} Still, the decision does streamline the removal process.\textsuperscript{126} In doing so, though, it may prematurely dismiss valid applications for asylum or withholding of removal.

In another attempt to streamline immigration adjudications, Attorney General Sessions certified \textit{Matter of M-G-G-} to himself on September 18, 2018.\textsuperscript{127} In \textit{Matter of M-G-G-}, he sought to address whether noncitizens detained and screened for expedited removal proceedings were entitled to a bond hearing.\textsuperscript{128} However, on October 12, 2018, Attorney General Sessions

\begin{itemize}
\item \textsuperscript{120} E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} After the IJ administratively closed the applicant’s case, he sought status through a “Petition for Alien Relative (Form I-130).” \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{125} Indeed, Attorney General Sessions offered no explanation for certifying this specific case four years after the case had closed. \textit{See id.}
\item \textsuperscript{126} Andrew R. Arthur, \textit{Attorney General Moves to Streamline Immigration Adjudications}, CTR. FOR IMMIGR. STUD. (Mar. 6, 2018), https://cis.org/Arthur/Attorney-General-Moves-Streamline-Immigration-Adjudications [https://perma.cc/5NJ7-9TQM] (arguing that the decision will “streamline the adjudication of immigration applications, give immigration judges the authority to summarily dismiss deficient asylum applications, and cut down on the filing of frivolous applications to delay removal”).
\item \textsuperscript{127} M-G-G-, 27 I. & N. Dec. 469, 469 (A.G. 2018).
\item \textsuperscript{128} \textit{Id.} The “expedited removal” proceeding allows an immigration officer to summarily order the removal of noncitizens “who are present in the U.S. without having been admitted or paroled by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter.” Designating Aliens for Expedited Removal, 69 Fed. Reg.
announced that he would no longer review the Board’s decision, because the respondent had been removed to his home country, Guatemala, since being certified.\footnote{129} On the very same day, though, Attorney General Sessions certified Matter of M-S- to himself, to answer the exact question posed in Matter of M-G-G-.\footnote{130} Upon taking office, Attorney General Barr issued a decision in Matter of M-S- eliminating bond hearings for individuals detained for expedited removal proceedings, despite having established a credible fear of persecution.\footnote{131} This decision overturned Matter of X-K-, in which the Board held that once a noncitizen is screened from expedited removal, for example by establishing a credible fear of persecution, and can proceed with an application for asylum or withholding of removal, he or she is entitled to a bond hearing.\footnote{132} The decision has yet to fully take effect, though, because a class of asylum applicants challenged the decision in Padilla.\footnote{133} The government has since appealed the Padilla decision to the Ninth Circuit.\footnote{134} Though the Ninth Circuit has yet to rule on the case, under Attorney General Barr’s holding, Matter of M-S- threatened to mandatorily detain a noncitizen in asylum proceedings, which can last months or even years.\footnote{135} While that decision, too, arguably attempted to streamline the adjudication process by eliminating individual bond hearings in this instance, it did so at the risk of a noncitizen’s indefinite detention.\footnote{136}

Finally, the third theme of decisions under the Trump Administration entail restricting the eligibility of applicants for asylum and withholding of removal. This theme seems to naturally correspond to the first two: in order to streamline the immigration adjudication process and indirectly limit the authority of IJs and the Board, the number of applicants must decrease. By constraining the eligibility criteria for asylum and withholding of removal, the number of applicants will likely decrease. While an Attorney General cannot restrict the statutory criteria, he can remind the IJs and the Board of their “responsibility . . . to ensure that our immigration system operates in a manner that is consistent with the laws enacted by Congress.”

First, in Matter of A-B- Attorney General Sessions reviewed the Board’s decision granting asylum to a domestic violence victim under a “particular social group” (PSG) based claim. The Board’s decision was supported by Matter of A-R-C-G-, which was the first case to hold that domestic violence victims can constitute a cognizable “particular social group” following decades-long uncertainty over the status of domestic violence victims for asylum purposes. However, in Matter of A-B-, the decision was overruled. Attorney General Sessions determined that “being a victim of private criminal activity [does not] constitute[] a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.” Under this ruling, immigration courts can only recognize domestic violence-based asylum

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138 Sessions, supra note 113.
139 A-B-, 27 I. & N. Dec. at 316. An applicant for asylum must demonstrate that she has either suffered past persecution or that she has a well-founded fear of future persecution on account of protected ground—that is, race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42) (2014). The fifth ground, “membership in a particular social group,” is notoriously indefinite. See, e.g., Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) (“Read in its broadest literal sense, the phrase is almost completely open-ended.”). As a means to limit the scope of the refugee definition, the Board “interpret[ed] the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic” and this “characteristic might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience such as military leadership or land ownership.” Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled on other grounds by Mogharrabi, I. & N. Dec. 439, 439 (B.I.A. 1987). Whether victims of domestic violence qualify for asylum had been an ongoing and, at times, contentious question within asylum law. Recent Adjudication, supra note 82, at 2090.
141 Recent Adjudication, supra note 82, at 2093.
143 Id. at 317.
claims in the most narrow circumstances.\textsuperscript{144} Moreover, by labeling domestic violence broadly as “private criminal conduct,” the decision calls into question other well established PSGs also comprised of victims of private criminal conduct.\textsuperscript{145}

Indeed, then-Acting Attorney General Matthew Whitaker questioned the validity of another PSG-based asylum claim when he certified \textit{Matter of L-E-A.-}.\textsuperscript{146} The Acting Attorney General certified the case to address whether a noncitizen can establish asylum eligibility based on membership in a “particular social group” on account of “membership in a family unit.”\textsuperscript{147} The Board first recognized the family unit as a cognizable PSG in 2017.\textsuperscript{148} On July 29, 2019, Attorney General Barr ultimately issued a decision in \textit{Matter of L-E-A.-}, holding that a family unit will now only be considered a PSG if “it has been shown to be socially distinct in the eyes of its society.”\textsuperscript{149} This added restriction comes at a time when many commentators already view the eligibility requirements for asylum as a family unit as too restrictive.\textsuperscript{150}

In certifying \textit{Matter of Negusie}, Attorney General Sessions sought to answer “[w]hether coercion and duress are relevant to the application of the [INA’s] persecutor bar” for a noncitizen applying for asylum or withholding of removal.\textsuperscript{151} The Supreme Court addressed the issue in \textit{Negusie v. Holder}, but ultimately remanded for the Board to determine whether the bar to asylum for applicants that have themselves persecuted others could claim an exception for duress.\textsuperscript{152} The Board issued its opinion on remand in 2018, five months prior to Attorney General Sessions’ certification, in which it held that an asylum applicant, who was otherwise barred from eligibility, could claim duress as a defense, albeit in a limited nature.\textsuperscript{153} The Attorney General has not yet issued a

\textsuperscript{144} See id. at 316 (requiring domestic violence-based asylum claims to be accompanied by a showing that the applicants home country is unwilling or unable to control the private criminal conduct).

\textsuperscript{145} See id. These groups include, among others, those comprised of family membership, members of the LGBTQ community, or former child soldiers—each subject to persecution at the hands of private actors. L-E-A.-, 27 I. & N. Dec. 40, 40 (B.I.A. 2017); Lukwago v. Ashcroft, 329 F.3d 157, 157 (3d Cir. 2003); Toboso-Alfonso, 20 I. & N. Dec. 819, 819 (B.I.A. 1990).


\textsuperscript{147} Id.

\textsuperscript{148} L-E-A., 27 I. & N. Dec. at 42, 47 (concluding that “an immediate family may constitute a particular social group,” but ultimately finding that the applicant failed to establish that his membership in his family unit was at least one central reason for his fear of future persecution).


\textsuperscript{151} Negusie, 27 I. & N. Dec. 481, 481 (A.G. 2018).

\textsuperscript{152} Negusie v. Holder, 555 U.S. 511, 514 (2009).

decision, but it is likely that any decision will follow the trend of restricting eligibility. Therefore, the Attorney General may decide to eliminate, or at least narrow, the exception.

Finally, Acting Attorney General Whitaker referred to himself Matter of Castillo-Perez, seeking to determine the correct “legal standard for determining when an individual lacks ‘good moral character’” regarding an application for cancellation of removal.\footnote{Castillo-Perez, 27 I. & N. Dec. 495, 495 (A.G. 2018).} Particularly, he sought to consider the effect of “multiple convictions for driving while intoxicated or driving under the influence” on good moral character.\footnote{Castillo-Perez, 27 I. & N. Dec. at 495.} Attorney General Barr ultimately decided the case, holding that “evidence of two or more convictions for driving under the influence during the relevant period establishes a rebuttable presumption that the [noncitizen] lacked good moral character during that time.”\footnote{Castillo-Perez, 27 I. & N. Dec. 664, 664 (A.G. 2019).} Moreover, because noncitizens must possess good moral character for ten years before being eligible for cancellation of removal, two or more convictions for driving under the influence also establishes that the noncitizen is not eligible for cancellation of removal.\footnote{Id.} The decision nevertheless further restricts a noncitizen’s immigration eligibility.

D. Criticisms of the Trump Administration’s Use of the Referral Authority

Many of the criticisms leveled at prior uses of the referral authority by Attorneys General of past administrations mirror the criticisms of the use of the referral authority under the Trump Administration.\footnote{See generally Trice, supra note 8 (calling to attention the controversial nature of the Attorney General’s referral authority, specifically regarding the lack of procedural safeguards to ensure due process, transparency, and legitimacy, in 2010, under the Obama Administration’s tenure).} However, because the Trump Administration has used the referral authority substantially more than other administrations, this criticism is amplified.\footnote{For example, “[i]n his first year, Sessions referred eight cases to himself.” Sarah Pierce, \textit{Sessions: The Trump Administration’s Once-Indispensable Man on Immigration}, MIGRATION POL’Y INST. (Nov. 8, 2018), https://www.migrationpolicy.org/article/sessions-trump-administrations-once-indispensable-man-immigration [https://perma.cc/95G8-EYEW]. Acting Attorney General Whitaker has referred two cases to himself, bringing the total number under the Trump Administration to ten. \textit{See} Castillo-Perez, 27 I. & N. Dec. 495, 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018). Again, the Obama Administration only used the referral authority four times in eight years, and the}
involves the lack of transparency under Attorney General decision-making and the lack of due process throughout the process.\textsuperscript{160}

First, as a tenet of our legal system, there is a strong expectation for claims to be adjudicated by an impartial and neutral adjudicator.\textsuperscript{161} Thus, when a politically appointed Attorney General serves as an adjudicator, questions of impartiality arise.\textsuperscript{162} This concern is heightened when an Attorney General has, for example, been known for his “hard-line immigration stance” while serving as a member of Congress.\textsuperscript{163} In fact, issues of impartiality arose in a recent decision by Attorney General Sessions, which prompted him to include a disclaimer of his impartiality in the opinion.\textsuperscript{164} The disclaimer was in response to many commentators alleging that Attorney General Sessions had “prejudge[d]” the case and generally “lack[ed] impartiality.”\textsuperscript{165} He claimed, however, that despite his previous comments regarding immigration policy, he had no “personal interest in the outcome of the proceedings” and never expressed any comments regarding the specific case before him.\textsuperscript{166} Still, his consistent, restrictive stance towards immigration\textsuperscript{167} and the curb on immigration that many of his decisions have set forth make his simple disclaimer asserting impartiality inadequate.

Second, the Supreme Court has held that the Due Process Clause of the Fifth Amendment applies to all individuals present in the United States, “whether their presence here is lawful, unlawful, temporary, or permanent.”\textsuperscript{168} However, Attorney General Sessions disregarded this guarantee of due process through the certification process and by using that process to set precedent that threatens the Bush Administration used the referral authority nine times in eight years. Pierce, supra note 159.

\textsuperscript{160}Hausman, supra note 15 (“And although the immigration courts have long been plagued by due process problems—including the lack of any right to an appointed lawyer, even for kids—those courts have at least held out the promise of neutrality: a neutral immigration judge hears the case, and the losing party may appeal to the Board of Immigration Appeals. But Jeff Sessions is aggressively working to make these courts instruments of the Trump administration’s immigration agenda.”).

\textsuperscript{161}Taylor, supra note 67, at 19 (describing the expectation for “impartial” adjudication in the American legal system).

\textsuperscript{162}See id.


\textsuperscript{165}Id.

\textsuperscript{166}Id. at 325 (citing Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995)).

\textsuperscript{167}For example, Attorney General Sessions was one of the “fiercest opponents” of a bipartisan push for comprehensive immigration reform in 2013. Kim & Gerstein, supra note 163.

\textsuperscript{168}Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (finding that a noncitizen held for longer than ninety days following a final order of removal violated the due process rights of the noncitizen, guaranteed to citizens and noncitizens alike).
the future due process rights of noncitizens.\textsuperscript{169} In Matter of S-O-G- & F-D-B-, for example, Attorney General Sessions did not provide advance notice to the parties that he was reviewing the case or allow for briefing by the parties.\textsuperscript{170} The Supreme Court has recognized meaningful notice and opportunity to be heard as an “elementary and fundamental requirement” of due process,\textsuperscript{171} which applies in the immigration context as well.\textsuperscript{172} Additionally, while many of Attorney General Sessions’ decisions sought to improve the efficiency of the immigration process, it was often at the expense of noncitizens’ due process rights. For example, in Matter of E-F-H-L-, Attorney General Sessions eliminated required hearings for applicants that provided them an opportunity to testify and present evidence of their eligibility before an IJ.\textsuperscript{173} Due process, though, guarantees noncitizens the opportunity to both present evidence and testify on their own behalf before an IJ.\textsuperscript{174} Therefore, while the immigration courts may move faster under Attorney General Sessions’ decisions, they most definitely are not more fair.

Thus, though critics have long condemned the referral authority for its lack of procedural safeguards and transparency,\textsuperscript{175} its use under the Trump Administration amplifies critics’ concerns.\textsuperscript{176} The Trump Administration’s use of the referral authority differs from prior administrations, which used it to resolve questions regarding larger legal issues, to establish new standards for


\textsuperscript{170} S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 462 (2018) (“I granted review of these two cases to provide guidance on the appropriate standard by which immigration judges and the Board should evaluate such motions. Because the relevant regulation is clear, I concluded that additional briefing was unnecessary.”). Generally, “there is no entitlement to briefing when a matter is certified for Attorney General review.” Mary Holper, \textit{The New Moral Turpitude Test: Failing Chevron Step Zero}, 76 BROOK. L. REV. 1241, 1253 (2011) (citation omitted).


\textsuperscript{172} Chike v. INS, 948 F.2d 961, 962 (5th Cir. 1991) (holding that a noncitizen’s due process rights were violated when the Board failed to provide the noncitizen the briefing schedule with sufficient time to prepare a brief). \textit{But see} 8 C.F.R. §§ 1003.1(d)(2), (e)(4) (2008) (permitting the Board authority, in certain instances, for summary dismissal of any appeal or portion of appeal or affirmance without providing an opinion).


\textsuperscript{174} Oshodi v. Holder, 729 F.3d 883, 889–93 (9th Cir. 2013) (en banc) (finding that an IJ who denied a noncitizen relief based only on an adverse credibility finding and denying the noncitizen a chance to testify violated the noncitizen’s Fifth Amendment due process right to a full and fair hearing).

\textsuperscript{175} See generally Trice, \textit{supra} note 8 (describing the lack of due process and transparency inherent in the use of the referral authority and calling for the creation of procedural safeguards by regulation).

\textsuperscript{176} See Hausman, \textit{supra} note 15 (describing some issues with the use of the referral authority under Attorney General Sessions).
future cases, or directly handle delicate issues of foreign policy. Instead, in the span of about three years, Attorneys General have used the referral authority to upset years of well-established precedent in a multitude of ways, and with little transparency or regard for the due process rights of noncitizens. As such, this area of immigration law needs reform.

IV. STATUTORY AMENDMENT LIMITING ATTORNEY GENERAL ADJUDICATORY POWER

Thus far this Note has provided a background and overview of the referral authority, considered its use throughout previous administrations, and surveyed its use under the Trump Administration. A comparison between the referral authority’s use in previous administrations and its use under the Trump Administration demonstrates many of the concerns long recognized by commentators. Below, I suggest curing the due process and transparency concerns by statutorily amending the INA. I also explain why this is the most practical option among the foregoing suggestions for reforming Attorney General use of the referral authority.

A. Eliminating the Referral Authority by a Statutory Amendment to the INA

The INA, by its terms, does not allow for the due process and transparency necessary in an adjudicatory context, whether for citizens or noncitizens. Therefore, this section suggests statutorily amending the INA to mandate Attorney General rulemaking exclusively through informal notice-and-comment rulemaking. This suggestion is in contrast to the current method, which allows an Attorney General to either review under the referral authority or exercise notice-and-comment rulemaking. Either form, rulemaking by

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177 See Gonzales & Glen, supra note 6, at 861 (describing the practices of past attorneys general in regard to foreign policy).
179 See 8 U.S.C. § 1103(g) (2009) (describing Attorney General review authority and regulatory reform powers, including notice and comment); Trice, supra note 8, at 1795 (“Of course, it is well settled that agencies have broad discretion to choose between rulemaking and adjudication as a means of establishing agency policy and articulating binding legal rules.”). On the other hand, some agencies do not have broad discretion to choose the type of rulemaking for a particular issue, but rather are limited by a statutory mandate directing the agency to use a particular type of rulemaking. See Michigan v. EPA, 268 F.3d 1075, 1088-89 (D.C. Cir. 2001) (holding that the EPA was statutorily mandated to determine
adjudication (by use of the referral authority) or informal rulemaking through notice-and-comment procedure, allows an Attorney General to set policy or address ambiguities within the INA.\textsuperscript{180} When Attorneys General have used notice-and-comment rulemaking in immigration law, they have typically used it for issues that, in their opinion, warrant cautious consideration and deserve the participation of all parties interested.\textsuperscript{181} These issues often relate to decisions that would significantly impact well-established precedent or involve a particularly sensitive topic.\textsuperscript{182}

Generally, under notice-and-comment rulemaking, a Notice of Proposed Rulemaking must be published by the agency in the Federal Register, which allows the public the opportunity to be a part of the process and provide comments.\textsuperscript{183} Following the comment period, the agency is required to consider the public’s comments and then publish the final version of the rule within thirty days before the rule takes effect.\textsuperscript{184} As a practical benefit, the process builds a record and allows an Attorney General to make a more informed decision, which is beneficial for judicial review.\textsuperscript{185} Moreover, many consider the notice-and-comment process to be more transparent than agency adjudication.\textsuperscript{186}

Adjudications necessarily involve less communication with the public and “share less information overall.”\textsuperscript{187} Indeed, “any process that is seen as a means certain jurisdictional issues under the Clean Air Act through notice-and-comment rulemaking, rather than adjudicating on a case-by-case basis).

\textsuperscript{180}See Administrative Procedure Act, 5 U.S.C. §§ 553–54 (2012) (providing the procedure for rulemaking). Aside from rulemaking and adjudication, there are a variety of other informal means available—for example, guidance, letters, advisory opinions, negotiations, or statements. See generally Andrew P. Morriss et al., Choosing How to Regulate, 29 Harv. Envtl. L. Rev. 179 (2005) (surveying the means by which an agency can create substantive regulations).

\textsuperscript{181}See Gonzales & Glen, supra note 6, at 911 (noting that notice-and-comment rulemaking is usually thoroughly conducted in order to create a record for judicial review).


\textsuperscript{183}5 U.S.C. § 553(b)–(c) (2012).

\textsuperscript{184}5 U.S.C. § 553(d); Trice, supra note 8, at 1795 (noting that notice-and-comment rulemaking allows for, and is enriched by, “experts, advocates, and affected individuals [making] their views and arguments known”).

\textsuperscript{185}Gonzales & Glen, supra note 6, at 911.

\textsuperscript{186}See Jill E. Family, Administrative Law Through the Lens of Immigration Law, 64 Admin. L. Rev. 565, 579 (2012) (stating the risk of reliance on “case-by-case adjudication[]” as a form of rulemaking because “[a]gency decisionmaking might become less transparent”).

\textsuperscript{187}Id.
of evading more transparent and participatory methods clearly presents concerns about the legitimacy and acceptability of [his decisions].”

This is not to say that formal notice-and-comment rulemaking is without its own shortcomings. Admittedly, rulemaking by adjudication is more efficient. The notice-and-comment process requires far more time and resources than a single, independent adjudication by an Attorney General, which allows an Attorney General to decide upon more issues more quickly. As described above, the process outlined by the Administrative Procedure Act (APA) involves soliciting public comments, reviewing those comments, and setting aside a certain amount of time to consider those comments, which leaves many agencies reluctant to turn to “full-scale notice-and-comment rulemaking.” Furthermore, notice-and-comment rulemaking does not guarantee neutrality. In fact, there is no requirement that an Attorney General genuinely consider comments—the APA only requires an Attorney General to adhere to the process. However, even the minimal requirement of process under notice-and-comment rulemaking offers more of a safeguard for due process and transparency than adjudication by an Attorney General using the referral authority, which requires no process.

In the context of immigration law, even marginal improvements to due process and transparency are warranted given the adjudicatory nature of asylum and withholding proceedings. As a nation, the expectation that adjudications

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188 Trice, supra note 8, at 1796.
189 See Gonzales & Glen, supra note 6, at 898 (describing the flexibility of the administrative process); Trice, supra note 8, at 1770 (“With retroactive effect and without cumbersome notice-and-comment process required for rulemaking, Attorney General review can be a particularly efficient means of reversing course and implementing a new administration’s policies.”). But cf. id. at 1770 (“However, it is this very efficiency—the Attorney General’s ability to swiftly and unilaterally reverse precedent and impose new legal standards—that makes the certification power a potentially dangerous tool and counsels in favor of strong procedural safeguards.”).
190 See Trice, supra note 8, at 1770 (arguing that Attorney General review under use of the referral authority is more flexible and efficient than the process of notice-and-comment rulemaking).
191 Gonzales & Glen, supra note 6, at 911 (citing E. Donald Elliott, Re-Inventing Rulemaking, 41 DUKE L.J. 1490, 1492 (1992)).
192 See 5 U.S.C. § 553 (2012) (requiring only that procedure be followed and the standards of review for the procedure, not that a substantive decision be reached); Gonzales & Glen, supra note 6, at 911–12 (arguing that the “due process and optics-based concerns” regarding an Attorney General’s use of referral authority would not meaningfully be cured by instead using notice-and-comment rulemaking).
193 See Gonzales & Glen, supra note 6, at 911 (describing how the notice-and-comment process is typically used only when “the proposed rule has ‘jelled’ into something fairly close to its final form”).
194 See Trice, supra note 8, at 1797 (noting the lack of procedural guidelines for the use of the referral authority and suggesting that the Attorney General “promulgate binding regulations that lay out in detail the procedures that must be followed when a case is certified for review”).
will be fair and impartial is deep-seated and constitutionally guaranteed.\textsuperscript{195} Therefore, statutorily amending the INA to no longer allow an Attorney General to adjudicate individual immigration cases through use of the referral authority is necessary to ensure that due process and transparency is a part of the rulemaking process.

1. Possible Approaches for Amending the INA

Statutorily amending the INA is no small feat, but it has been done before. For example, in 1996, Congress amended the INA under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and, among other changes, broadened the definition of “refugee” to include individuals who must endure an abortion and sterilization after violating their country’s one-child policy.\textsuperscript{196} This pro-immigrant area of the amendment offered Chinese nationals fleeing coercive family planning measures in China access to asylum.\textsuperscript{197} Still, Congress approved the amendment as part of an omnibus appropriations bill following bipartisan negotiations and alongside other more restrictive immigration measures, such as increased border patrol and increased penalties for illegal immigration.\textsuperscript{198} This history demonstrates that amending the INA in the way this Note suggests will not be simple, and, to an extent, will require the cooperation of both parties as well as cooperation across political branches.

Though not simple, an amendment to the INA could be successful even under the Trump Administration. There are at least two methods through which an amendment to the INA could be enacted into law. First, if President Trump wins a second term in 2020, and if there is at least a two-thirds majority of

\textsuperscript{195} See Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (holding that the Due Process Clause of the Fifth Amendment requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner); Jeffrey S. Chase, \textit{The Need for an Independent Immigration Court, Opinions/Analysis Immigr. L.} (Aug. 17, 2017), https://www.jeffreyschase.com/blog/2017/8/17/the-need-for-an-independent-immigration-court [https://perma.cc/FV7W-8FZT] (“It is a cornerstone of our justice system that judges not only be impartial, but that they also avoid the appearance of impartiality.”).

\textsuperscript{196} See \textit{Illegal Immigration Reform and Immigrant Responsibility Act of 1996}, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009–689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)). In addition to expanding the definition of “refugee,” the Act also amended other aspects of the INA such as expanding certain definitions relating to criminal terms, altering procedural aspects, and allowing for increased security along the border with Mexico. \textit{Id.} § 601–05.

\textsuperscript{197} See \textit{id.} § 601.

Congress that would approve of the amendment, it could still pass.\textsuperscript{199} If a bill including the amendment passed in both houses, a two-thirds vote from members in both the House and Senate would also override a presidential veto.\textsuperscript{200} On the other hand, an amendment might follow the method Congress used in 1996 to pass the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA): bipartisanship and compromise.\textsuperscript{201} Both sides of the political spectrum recognize the need for immigration law reform.\textsuperscript{202} Indeed, President Trump spoke of the need for bipartisan efforts in this area of the law in his State of the Union address on February 5, 2019.\textsuperscript{203} As with the IIRIRA in 1996, bipartisan efforts would be necessary to pass any type of immigration reform in the current divided Congress.\textsuperscript{204} For most bipartisan efforts, including IIRIRA, there would likely need to be other compromises in order to secure a statutory amendment terminating the use of Attorney General referral authority.\textsuperscript{205} Though specific compromises will depend on what is important to each side and what is actually put on the negotiating table.

\textsuperscript{199} At the time of this writing, the House is controlled by a Democratic majority following the 2018 midterm elections. Jonathan Martin & Alexander Burns, Democrats Capture Control of House; G.O.P. Holds Senate, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html [https://perma.cc/K8G4-43LN].

\textsuperscript{200} See ELIZABETH RYBICKI, CONG. RESEARCH SERV., RS22654, VETO OVERRIDE PROCEDURE IN THE HOUSE AND SENATE 1 (2015) (“A vetoed bill can become law if two-thirds of the Members voting in each chamber agree, by recorded vote, a quorum being present, to repass the bill and thereby override the veto of the President.”).


\textsuperscript{202} See Felicia Sonmez et al., Trump Uses State of the Union to Defiantly Defend His Immigration Agenda, Announce Date of Next Summit with North Korea’s Kim, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/powerpost/trumps-2019-state-of-the-union-address/2019/02/05/d2dd57f4-28a4-11e9-b2fc-721718903bfc_story.html?noredirect=on&utm_term=.5835c414fa73 [https://perma.cc/9PJP-94AB].

\textsuperscript{203} Admittedly, President Trump’s focus on immigration reform is largely his perceived need for funding to build a border wall. Id. (“President Trump called for more bipartisan cooperation in his State of the Union address Tuesday night as he stood before a Congress bitterly divided over his demand for border-wall funding that resulted in a 35-day partial government shutdown.”).

\textsuperscript{204} Robert Bach, The Progress of Immigration Reform, 21 DEF. ALIEN 7, 16 (1998) (“The implications for many communities in the United States, and especially for their countries of origin, led to a legislative correction last fall that drew widespread bipartisan support.”).

\textsuperscript{205} Alongside the provisions that opened asylum to Chinese nationals were provisions “cracking down” on illegal immigration. See Donald Kerwin, From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis, 6 J. MIGRATION & HUM. SECURITY 192, 192 (2018) (noting that President Clinton referred to IIRIRA as “cracking down” on illegal immigration).
2. The Implications of Amending the INA

Though there will be a variety of benefits from the proposed statutory amendment—specifically, preserved due process rights and increased transparency—there will also inevitably be certain drawbacks. First, by doing away with Attorney General referral authority, this will not just limit an Attorney General’s potential abuse of the authority, but also a future Attorney General’s ability to swiftly correct any past abuses.\(^\text{206}\) For instance, Attorney General Mukasey, two weeks before leaving office, restricted a noncitizen’s ability to allege ineffective assistance of counsel during removal proceedings.\(^\text{207}\) However, shortly after taking office the same year, Attorney General Holder used the referral authority to vacate Attorney General Mukasey’s decision.\(^\text{208}\) Though the referral authority is a quick means to reverse decisions not in line with an incoming administration, its overall efficiency is not that clear from this example; if Attorney General Mukasey had been required to set policy through notice-and-comment rulemaking, he would not have been able to issue an arguably cursory decision just two weeks prior to leaving office.\(^\text{209}\) It follows, then, that Attorney General Holder would not have needed to use the referral authority to vacate Attorney General Mukasey’s decision. Instead, Attorney General Mukasey could have used notice-and-comment rulemaking from the start, soliciting and considering public opinion, and Attorney General Holder could have followed the same approach after taking office.

As what might be considered another drawback, an Attorney General no longer would be able to use the referral authority to issue expedient policy over issues of national security. However, it is important to consider at what point in the process an Attorney General uses the referral authority—that is, when decisions are before the Board after a noncitizen or the government appeals an IJ decision.\(^\text{210}\) It is also important to consider that an Attorney General rarely uses the referral authority as a means to issue national security policy.\(^\text{211}\) Instead, national security issues are often addressed before the appellate stage.

\(^{206}\) See Compean, 25 I. & N. Dec. 1, 2 (A.G. 2009). Not only did Attorney General Holder vacate the decision of previous Attorney General Mukasey, but he reconsidered the case through notice-and-comment rulemaking after determining that the legal framework at issue would benefit from public consideration. Id.


\(^{208}\) See id. at 712.

\(^{209}\) At least one scholar has referred to this type of hasty decision as “Midnight Agency Adjudication,” a practice of an Attorney General “who refers a controversial issue to himself and renders a decision upending agency precedent on his way out the door.” Taylor, supra note 67, at 20.

\(^{210}\) See 8 C.F.R. § 1003.1(h)(1) (2018) (delineating who may refer cases before the Board to the Attorney General).

\(^{211}\) As former Attorney General Gonzales noted, most cases were referred to or by an Attorney General to resolve questions regarding larger legal issues, to establish new standards for future cases, or directly handle delicate issues of foreign policy. Gonzales & Glen, supra note 6, at 861.
and alongside other agencies and sometimes with direct input from the executive branch. For example, President Trump, the DHS, and the DOJ all recently collaborated to set national policy security. President Trump set forth specific policies, including prioritizing noncitizens for removal, but specifically those who “pose a risk to public safety or national security.” The U.S. Citizenship and Immigration Services (USCIS), an agency within DHS that is the first to encounter noncitizens crossing the border, then sent a Policy Memorandum to implement the President’s directive. This example demonstrates that the setting of national security policy is generally more collaborative and occurs before a noncitizen reaches the point in removal proceedings that an Attorney General could intervene through the use of referral authority. Moreover, aside from the referral authority, the Attorney General can still set policy through informal means of rulemaking—including, guidance, policy memorandums, or statements.

Therefore, even though there are certain drawbacks to eliminating the referral authority, the drawbacks are minimal and not outweighed by the risks of allowing an Attorney General to continue setting policy in this manner. Under Attorney General referral authority, serious due process concerns arise, which threatens transparency within the adjudication process. Because there are alternative means available for an Attorney General to set immigration policy—specifically, notice-and-comment rulemaking—an Attorney General should be limited to this form of rulemaking to ensure fairness throughout the immigration adjudication process.

B. Issues with Other Foregoing Suggestions for Reforming the Referral Authority

Above, I provided an argument for prohibiting an Attorney General from using the referral authority. Indeed, Congress should statutorily amend the INA to limit the Attorney General to notice-and-comment rulemaking. This approach, of course, is not the only possible option. Below, I consider other suggested approaches to reforming the Attorneys General use of the referral


214 Id. § 5.

215 U.S. CITIZENSHIP & IMMIGR. SERVS., supra note 212.

216 While these methods may also carry the potential for hasty decisions that do not involve public opinion, they benefit by affecting an entire class rather than individuals on a case-by-case basis that presents the due process and transparency concerns discussed. See Morriss et al., supra note 180, at 185–210 (detailing the different means of rulemaking by agency).
authority and explain why relegating an Attorney General to notice-and-comment rulemaking is the preferred solution.

First, the Supreme Court serves as an important check on immigration law and thus, a check on any Attorney General referral authority decisions. If, for example, an adverse decision from an immigration judge is appealed to the Board, a Board decision deemed a final agency action can be appealed to a court of appeals, and following a grant for a petition of certiorari, Supreme Court review is possible. The Supreme Court can review any Board or Attorney General decision; all noncitizens have a right to judicial review in some form following an order of removal, based on the weight of the interests at stake.

While the Court has not taken up the issue of Attorney General referral authority itself, it has considered decisions promulgated under the referral authority and Attorney General discretion under other provisions. Courts, however, have “long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” With this strong deference to the executive branch, the actual check the Court would place on the Attorney General seems limited.

Even if a case does not get reviewed by the Court or the Court shows strong deference, the federal circuit courts of appeals also place an imperfect check on the decisions of the Board and Attorneys General. Decisions by Attorneys General appealed to the circuit courts have in fact been rejected as failing the Chevron test. For example, in Matter of Silva-Trevino Attorney General Mukasey instituted a new test for moral turpitude upending a century old immigration law precedent. However, courts never uniformly accepted the

217 8 C.F.R. § 1003.3 (2002).
219 8 U.S.C. § 1252(a) (2005); see Bridges v. Wixon, 326 U.S. 135, 147 (1945) (highlighting that “deportation may result in the loss ‘of all that makes life worth living’” (citation omitted)).
220 See Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) (finding that an Attorney General has authority under 8 U.S.C. § 1231(a)(6) to detain a noncitizen “for as long as they are determined to be either a flight risk or a danger to the Nation”).
221 Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)). The holding in Trump v. Hawaii provides a more recent example, where the Court showed great deference to the executive branch under Section 1182(f) of the INA. Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).
222 See 8 C.F.R. § 1252(a) (detailing the procedure for appeal to circuit courts).
223 Gonzales & Glen, supra note 6, at 878; Holper, supra note 170, at 1243 (suggesting that courts should not apply Chevron deference to immigration adjudication decisions, but instead “apply Skidmore deference, a multifactor approach giving deference to the agency’s interpretation based on the thoroughness, consistency, and validity of its position”).
224 Silva-Trevino, 24 I. & N. Dec. 687, 688 (A.G. 2008). The term “moral turpitude” is term of art in immigration law. Pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), a crime of moral turpitude is one that a noncitizen was convicted of within five years and for which he could
new framework and in large part because of the role the circuit courts played.\textsuperscript{225} Two circuit courts cautiously accepted the framework set forth in \textit{Matter of Silva-Trevino}, but the majority found it to fail the \textit{Chevron} test and ultimately rejected the framework.\textsuperscript{226} However, the lack of uniformity also points to the shortcomings of this option for reform: while some courts may reject an Attorney General’s decision, others may accept.

Another option for reform comes by administration change and the possible regulations that a new administration could implement or decisions it could reopen. Pursuant to the INA, the Attorney General is “statutorily charged” with the “administration and enforcement of the immigration laws” and therefore can create regulations to reform the adjudication process.\textsuperscript{227} Furthermore, as evidenced by the Trump Administration, case certification serves as an opportunity to implement the administration’s immigration policy which may involve undoing the policy of administrations prior.\textsuperscript{228} This was also the case in \textit{Matter of Silva-Trevino}, a decision by Attorney General Mukasey under the Bush Administration, which Attorney General Holder ultimately vacated under the Obama Administration.\textsuperscript{229} Still, this option requires an interested executive administration which leaves this option fairly unpredictable.

Additionally, IJs and the Board remain formidable options for reform as an adjudicative body—even despite attempts to limit their authority. First, although their authority has indeed been limited as discussed above, they still retain much discretion in their decision-making.\textsuperscript{230} Second, the often-suggested option is to separate IJs and the Board from the Attorney General’s review to create a more independent adjudicatory process.\textsuperscript{231} For instance, the National Association of Immigration judges, a union of IJs, has advocated “for the creation of an independent Article I immigration court.”\textsuperscript{232} This approach “would make the

\footnotesize{have been sentenced to confinement one year or longer. The statute does not define a crime of moral turpitude precisely, but generally the crime “must offend the most fundamental moral values of society, or as some would say, shock the public conscience.” Hernandez-Gonzalez v. Holder, 778 F.3d 793, 801 (9th Cir. 2015).}

\textsuperscript{225} Gonzales & Glen, \textit{supra} note 6, at 878.

\textsuperscript{226} \textit{Id.} Attorney General Holder later vacated the decision stating “the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey’s opinion—which have created disagreement among the circuits and disuniformity in the Board’s application of immigration law—as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion” required vacatur. \textit{Id.}

\textsuperscript{227} Gonzales & Glen, \textit{supra} note 6, at 850; 8 U.S.C. § 1103(g) (2009).

\textsuperscript{228} 8 C.F.R. § 1003.1(c) (2018).


\textsuperscript{230} See Catherine Y. Kim, \textit{The President’s Immigration Courts}, 68 EMORY L.J. 1, 3 n.8 (2018).

\textsuperscript{231} See Kent Barnett, \textit{Resolving the ALJ Quandary}, 66 VAND. L. REV. 797, 817 (2013) (“Due process demands impartiality and fairness. Independence can further these values, but the amount of independence necessary will depend upon the interest at issue and the extent of the decisionmaker’s authority.”).

\textsuperscript{232} Chase, \textit{supra} note 195.
immigration courts independent of the Department of Justice and immune from possible political pressure from the Attorney General.”

Thus, this approach might better achieve impartiality from decision makers, or at least the appearance of impartiality. However, this requires Congress to separate immigration adjudication from the DOJ and transfer it to an Article I Legislative Court. As commentators have acknowledged, there seems to be little political initiative from Congress or the Attorney General to take this approach.

Thus, reform through the courts or a change in presidential administration is uncertain, and despite any indirect checks on the referral authority, the Trump Administration demonstrates the potential for abuse that remains. As a result, the most effective way to prevent Attorney General abuse is through a statutory amendment to the INA.

V. CONCLUSION

While the referral authority offers an Attorney General a flexible means of rulemaking to implement executive policy, it has the potential for serious abuse. As used by an Attorney General, a political appointee, adjudication under the referral authority lacks neutrality, and thus threatens the due process rights of noncitizens. Its use under the Trump Administration has established this abuse. The uptick in the referral authority’s use has been used to limit IJ and the Board’s discretion and authority, while it has also further restricted the eligibility criteria for asylum and withholding of removal applicants. Many others have offered suggestions for reform, but only a statutory amendment relegating an Attorney General to notice-and-comment rulemaking, as opposed to adjudication, seems feasible. Therefore, in order to protect the interests of noncitizens and foster transparency in immigration law, the Attorney General should no longer be permitted to preside over individual immigration adjudications.

234 Id. Judge Dana Leigh Marks, a former president of the National Association of Immigration Judges, said, “Not only is independence in decision making the hallmark of meaningful and effective review, it is also critical to the reality and perception of fair and impartial review.” Id.
235 See id.
236 Id. at 48.