
TIME TO GO *AUER* SEPARATE WAYS: WHY THE BIA SHOULD NOT SAY WHAT THE LAW IS

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INTRODUCTION

Neither fully legislative nor fully judicial, federal administrative agencies are tasked with “policing the minutiae.”¹ They codify and enforce the details of the regulatory scheme set out by Congress.² Simply put, administrative agencies administer the law. Agency regulations, however, like other legal sources, can be ambiguous.³ Thus, interpretation is inevitably necessary either to confront a novel circumstance or to resolve an inherent semantic ambiguity. This then raises the question: Who should be called upon to resolve such ambiguities? The Supreme Court’s solution is to put agencies in charge. *Auer* deference says an agency’s interpretation of its own rule controls so long as it is not “plainly erroneous or inconsistent with the regulation.”⁴ In effect, after an agency promulgates a regulation, it then maintains the latitude to fill in the gaps by interpreting its own regulation.

The Court has offered no good reason why *Auer*, while reasonable in some situations, should be applied indiscriminately to all agencies. A multitude of federal agencies exist to effectuate policies touching on everything under the sun—including housing, education, social benefits, food, agriculture, commerce, health, and the environment—but there is one agency in particular whose special attributes suggest that it should not be treated the same as all the others. That is the agency in charge of immigration appeals. One might reasonably think deference, for example, to the Food and Drug Administration’s expert interpretation of what constitutes an “active moiety,” promotes a robust and efficient government necessary for modern complexities. It follows that such agencies deserve deference from a court that is less well versed in the expertise involved in rendering such a judgment. However, immigration presents an entirely different set of policy concerns.

1. FRANK E. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 14 (Hessel E. Yntema ed., 1951).

2. See Richard J. McKinney, *Federal Administrative Law: A Brief Overview*, L. LIBRS.’ SOC’Y WASH., D.C. (Sept. 5, 2019), <https://www.llsdc.org/federal-administrative-law-a-brief-overview> [<https://perma.cc/T7P7-RQ72>]. For a basic breakdown of administrative law, see WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW (4th ed. 2000).

3. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 365 (2012) (noting that “regulations are not unique among legal sources for their lack of ambiguity or the obviousness of their interpretation”).

4. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

This is because deference to the Board of Immigration Appeals (“BIA”) under *Auer* risks political manipulation at the expense of immigrants’ liberty and freedom. Nested under the Department of Justice (“DOJ”), and more specifically the Executive Office of Immigration Review (“EOIR”), the BIA and lower immigration courts operate as quasi-judicial bodies, specifically “prone to political manipulation because of their unique combination of structure, history, and function.”⁵ In essence, personal interests are at their highest, and politics is at its most divisive. A “clarifying” interpretation by the BIA can dictate the scheme by which people are welcomed into or rejected from the United States. The BIA is the unsuspecting gatekeeper, capable of molding the rules by interpretation to advance an anti-immigrant political agenda. *Auer*, therefore, acts as another tool in the political toolbox to restrict immigration in what is already a labyrinth of proceedings, paperwork, and fear.

This Note argues that *Auer* deference, even in light of the Supreme Court’s recent clarification of the doctrine, is an inappropriate approach for courts to take when they review the BIA’s rulings. Because the BIA lacks political accountability while simultaneously commingling government powers, deference to the BIA undermines key constitutional principles, such as separation of powers and democracy. Such principles must be enhanced, rather than undermined, more than ever when there is a heightened threat to liberty. Therefore, a close look is needed to determine whether *Auer* deference is warranted for an agency in which the very freedoms of immigrants are at stake.

The problem actually goes even further. Even if federal courts decided to eschew deference to BIA interpretations, the courts’ own interpretations would still not be an adequate mechanism to protect immigrants from unjust results. With ever-growing caseloads, Article III judges are not equipped with the requisite resources, time, and experience with immigration laws to adjudicate thousands more life-altering decisions in a timely, just manner.⁶ Immigration matters deserve to be adjudicated with proper accountability and more formalistic separations of power than those that currently stand. To

5. Jeffrey S. Chase, *The Immigration Court: Issues and Solutions*, OPINIONS/ANALYSIS ON IMMIGR. L. (Mar. 28, 2019), <https://www.jeffreyschase.com/blog/2019/3/28/i6el1do615p443u1nkf8vwr28dv9qi> [<https://perma.cc/4DKV-FC3R>].

6. See, e.g., Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, ‘Desperation’ Hits the Bench*, LAW360 (Mar. 19, 2019), https://www.law360.com/in-depth/articles/1140100?nl_pk=faeaff15-7fd2-43eb-80d0-2f50ceb33109&utm_source=newsletter&utm_medium=email&utm_campaign=in-depth [<https://perma.cc/P9YA-S8RT>]; Cara Bayles, *These Are the Nation’s 27 Most Overworked District Courts*, LAW360 (Mar. 18, 2019, 8:48 PM), https://www.law360.com/in-depth/articles/1139833?nl_pk=faeaff15-7fd2-43eb-80d0-2f50ceb33109&utm_source=newsletter&utm_medium=email&utm_campaign=in-depth [<https://perma.cc/S6F8-9WVS>].

achieve this, immigration courts and the BIA should, as many others have suggested before, be reformulated as Article I legislative courts to best serve democratic and separation of powers purposes. Liberty for immigrants can be salvaged through fairer adjudications and independent interpretations that are more insulated from political manipulation and the polarized ideologies that waft in and out of power.

This Note proceeds as follows: Part I briefly details a background of the BIA, and a current understanding of *Auer* deference. This discussion includes *Auer*'s political implications, and how the Supreme Court chose not to overrule the doctrine in *Kisor v. Wilkie*. This Section then explores the relationship between *Auer* and the BIA, including why the BIA's political vulnerability makes the agency particularly unfit for *Auer* deference. Certain appointees to this agency have been rewarded with a position as a board member by openly declaring their hostility to the very people who are the object of the agency's mission, and whose fragile life prospects are in their hands. Ironically, this flips the partisan commitments normally seen in the world of administrative law as follows: Those who would classically support increasing agency discretion by according *Auer* deference should be worried about giving heightened power to the self-declared, anti-immigrant agenda pervading the BIA, while those who would classically resist excessive delegation and deference to agencies, because of their limited accountability, seek to endow the BIA with vast independence and partisan manipulation. Part II argues that even in the wake of *Kisor v. Wilkie*, deference to the BIA's interpretations of immigration regulations presents a heightened threat to constitutional principles of separation of powers and democracy. Part III then provides a potential solution to the inadequacy of *Auer* deference and the judicial role in the realm of regulatory gap filling for immigration laws.

I. THE BIA

A. WHAT IS THE BIA?

The BIA is comprised of twenty-three board members appointed by the Attorney General. Board members interpret and apply immigration laws to cases on appeal, generally without courtroom proceedings.⁷ Either a single board member, or sometimes a panel of three board members, reviews immigration judge ("IJ") decisions and certain Department of

7. For an overview of the Board of Immigration Appeals, see *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Dec. 7, 2020), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/XVT3-HRNG>].

Homeland Security (“DHS”) decisions.⁸ As civil proceedings that are adversarial in nature, a constitutional right to counsel is absent.⁹ For the most part, the BIA conducts a “paper review” of cases that non-exhaustively touch on the following: orders of removal, applications for relief from removal, exclusion from admission to the United States, petitions to classify the status of relatives for preference immigrant visas, fines for violating immigration laws, and motions for reopening and reconsideration of decisions.¹⁰ In other words, board members affirm or deny the life-altering decisions of IJs with the most minimal due process protections.¹¹ As IJ Dana Leigh Marks paints it, “[W]e’re doing death penalty cases in a traffic court setting.”¹² What is more, the impacts of these decisions are not confined to the case at hand. The BIA can unilaterally make a published matter precedential,¹³ binding themselves, immigration courts, and the DHS in future adjudications—the BIA’s jurisdiction is abounding. For example, the BIA received 58,926 new appeals in 2020 alone, creating a pending list of 90,994 cases.¹⁴

In addition to structural infirmities, the BIA also demonstrates an unprecedented defiance of the judiciary. Recently, the Seventh Circuit, which had “*never* before encountered defiance of a remand order,” was forced to chastise the BIA’s refusal to comply with the court’s explicit

8. William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 GEO. L.J. 515, 540–41 (2018). Immigration judges (“IJ”), located at fifty-eight immigration courts nationwide and overseen by the Office of the Chief Immigration Judge, preside over cases regarding removability and eligibility for relief. Immigration courts are the lowest level tribunal for immigration proceedings. After an IJ issues a decision, the case may be appealed to the BIA. *Fact Sheet: Immigration Courts*, NAT’L IMMIG. FORUM (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/#:~:text=The%20immigration%20court%20system%20is,power%20of%20the%20Attorney%20General> [https://perma.cc/7ADA-2T63].

9. Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWSHOUR (June 25, 2018, 5:08 PM), <https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have> [https://perma.cc/7FDA-CF5C].

10. *Board of Immigration Appeals*, *supra* note 7.

11. Yeatman, *supra* note 8, at 540–51; see Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31463, 31470–71 (July 2, 2019) (to be codified at C.F.R. pts. 1003, 1292).

12. Mark A. Drummond, “Death Penalty Cases in a Traffic Court Setting”: *Lessons from the Front Lines of Today’s Immigration Courts*, A.B.A. (Jan. 15, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/death-penalty-cases-traffic-court-setting-lessons-front-lines-immigration-courts> [https://perma.cc/28GK-AKCN].

13. *EOIR Policy Manual: 1.4 - Jurisdiction, Authority, and Priorities*, U.S. DEP’T OF JUST. (Feb. 3, 2021), <https://www.justice.gov/eoir/eoir-policy-manual/i/1/4> [https://perma.cc/9QE7-VF9D].

14. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: ALL APPEALS FILED, COMPLETED, AND PENDING (Jan. 8, 2021), <https://www.justice.gov/eoir/page/file/1248506/download> [https://perma.cc/R7DY-WS3E].

order.¹⁵ The BIA labeled the remand order as “incorrect,” and instead acted pursuant to a footnote in a letter written by then-acting Attorney General after the order was given.¹⁶ Judge Frank H. Easterbrook, who is notably conservative, wrote for the court. He denounced the BIA’s insolent behavior, and only spared the government from being held in contempt of court at the request of the challenging party. With this behavior, the already powerful appeals agency challenges the legitimacy of the judiciary, and simultaneously threatens the very foundation of the government.

B. THE BIA’S POLITICAL VULNERABILITY

As mentioned above, the BIA is particularly vulnerable to political manipulation because of its “unique structure, history, and function.”¹⁷ Starting in 1983, immigration adjudicators, including the BIA, were relocated to an independent agency known as the Executive Office for Immigration Review (“EOIR”).¹⁸ In fact, IJs and board members are technically “government attorneys,” an unsettling title, which does not represent the implications of their adjudicating role, but more appropriately represents their vulnerability to be swayed by political agenda and lack of impartiality.¹⁹ Under the EOIR, the IJs and the BIA answer to the Attorney General, who retains the ultimate authority to oversee agency decisions and to reserve cases for their own review. The BIA, through the Attorney General’s authorization, sets forth guidance on the proper administration of immigration law for other immigration related departments, the IJs, and the public.²⁰ Retired IJ Paul Schmidt explained that under this structure, each new administration brings new priorities.²¹ To that end, cases outside the scope of the new priorities “never get heard

15. *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035 (7th Cir. 2020) (emphasis added).

16. *Id.*; Kimberly Wehle, *A Conservative Judge Draws a Line in the Sand with the Trump Administration*, POLITICO (Feb. 12, 2020, 11:40 AM), <https://www.politico.com/news/magazine/2020/02/12/a-conservative-judge-draws-a-line-in-the-sand-with-trump-administration-114185> [<https://perma.cc/MN4K-BVRX>].

17. Chase, *supra* note 5.

18. *Id.*

19. Letter from Am. Bar Ass’n, Am. Immigr. Laws. Ass’n, Fed. Bar Ass’n, and Nat’l Ass’n of Immigr. JJ. to Cong., Congress Should Establish An Independent Immigration Court (July 11, 2019) (on file with author); see 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.10 (2021).

20. 8 C.F.R. § 1003.10(d) (2021); U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIG. REV., AGENCY DEFERENCE & BRAND X, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/agency-deference.pdf> [<https://perma.cc/G4GF-RWZG>].

21. Weekend Edition Sunday, *A Former Immigration Judge on the Current Situation*, NPR (June 23, 2018, 7:55 AM), <https://www.npr.org/2018/06/23/622795409/a-former-immigration-judge-on-the-current-situation> [<https://perma.cc/ARZ6-8HC3>].

because they just keep getting displaced by new priorities.”²² Various structural components are in place to further attain political control, the most concerning of which are: (1) the Attorney General’s ability to self-certify any decision and create precedent in individual adjudications,²³ (2) the performance plan quota structure, and (3) the political motives behind selecting and firing board members.

The Attorney General’s self-certification powers epitomize the troublesome political influence on immigration decisions. Despite peddling a facade of independent adjudications akin to the federal courts, immigration laws allow the Attorney General to self-certify BIA cases. Therefore, in practice, the Attorney General retains the power to self-certify any decision, thereby single-handedly issuing precedential decisions. This is not a power that goes unused. Throughout the Bush administration, three of the President’s Attorney Generals used the self-certification power for fifteen different cases.²⁴ During the Clinton and the Obama administrations, the Attorney Generals self-certified an average of three to four cases. Jeff Sessions self-certified four BIA decisions in just a few months, and a total of six cases in less than two years.²⁵ While the mere practice of self-certification is alarming, exercise of this power is almost boundless. An Attorney General under Obama, Eric Holder, self-certified a few late-term decisions by his predecessor to pursue his own political priorities.²⁶ What is more, one of the cases Holder self-certified blatantly contradicted five separate U.S. circuit courts of appeal. Such political interference lacks sufficient justification and injects politically charged decision-making at the expense of immigrants’ opportunities for fair review.²⁷ Attorney General Merrick Garland used the same self-certification power to vacate a few of Sessions’ decisions, directly benefitting asylum seekers.²⁸ While such action rolls back severely

22. *Id.*

23. Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 677 (2006).

24. Chase, *supra* note 5.

25. David Hausman, *How Jeff Sessions is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018, 2:00PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges> [<https://perma.cc/32VS-A6UL>].

26. *Id.*

27. For an analysis on why the Attorney General’s self-certified immigration decisions should not receive *Chevron* deference, see generally Richard Frankel, *Deporting Chevron: Why the Attorney General’s Immigration Decisions Should Not Receive Chevron Deference*, 54 U.C. DAVIS L. REV. 547 (2020).

28. Matter of A-B- III, 28 I&N Dec. 307 (AG 2021); Matter of L-E-A- III, 28 I&N Dec. 304 (AG 2021).

restrictionist precedent, it also more broadly cements the unpredictability and unilateral nature of this certification policy, such that a new Attorney General could flip the law easily.

Further, the current quota structure only makes the BIA's power and political influence that much more problematic. Under the guise of a "Performance Plan," the EOIR implemented a quota structure in 2018 for IJs' adjudicatory behavior.²⁹ To comply, IJs should complete 700 cases per year, more than fifteen percent of their decisions should not be remanded or reversed by the BIA or circuit courts, and ninety-five percent must be completed at their first scheduled individual hearing.³⁰ Per ABA calculations, an IJ must complete three cases per day to comply, which makes it nearly impossible to fairly consider such cases while also carrying out other demanding tasks such as preparing for hearings, reviewing motions, and authoring decisions. Thus, the quotas are more likely than not designed to have an anti-immigration impact—the more completions, the more denials.³¹ Leaders of the judges' union accused the DOJ of effectively transforming immigration courts into "deportation machine[s]."³² The New York City Bar Association said it best: "What the attorney general calls 'efficiency' can never be a substitute for fundamental rights."³³ This assessment system does not apply to other administrative law judges ("ALJ"), where instead of being rated on their performance, ALJs have benchmarks for self-assessing productivity.³⁴

Of further concern are the Attorney General's politicized hiring and firing practices. While it is technically against the law to hire IJs or BIA

29. See DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES, http://www.abajournal.com/images/main_images/03-30-2018_EOIR_-_PWP_Element_3_new.pdf [<https://perma.cc/6U6E-VBCZ>].

30. *Id.* For an account of some of New York's immigration judges' experiences under the quota system, see Beth Fertig, *Presiding Under Pressure*, WNYC (May 21, 2019), <https://www.wnyc.org/story/presiding-under-pressure> [<https://perma.cc/GBE3-HH7B>].

31. See Chase, *supra* note 5.

32. Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. TIMES (Sep. 13, 2019), <https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html> [<https://perma.cc/LSG6-8AYG>].

33. John S. Kiernan & Victoria Neilson, *Case Completion Quotas for Immigration Judges Will Erode Fundamental Rights*, N.Y.C. BAR (Apr. 4, 2018), <https://www.nycbar.org/media-listing/media/detail/case-completion-quotas-for-immigration-judges-will-erode-fundamental-rights-new-york-law-journal> [<https://perma.cc/J8MU-KL9J>].

34. U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 136 (2017), <https://www.gao.gov/assets/gao-17-438.pdf> [<https://perma.cc/EW7H-HYCM>].

members based on political preference, the reality says differently.³⁵ For example, in a 2008 report investigating DOJ allegations of politicized hiring and firing, the Attorney General positively noted a candidate's conservative views on "god, guns + gays."³⁶ The report also revealed that a political appointee of DHS who recommended an IJ candidate assured White House Liaison and Senior Counsel to the Attorney General to not "be dissuaded by his ACLU work on voting matters from years ago. This is a very different man, and particularly on immigration issues, he is a true member of the team."³⁷ More recently, in May 2018, whistleblowers within the EOIR vocalized concerns about similar politicized hiring practices. Eight members of Congress requested the DOJ Inspector General to investigate new reports, suggesting a return of such politicized hiring under the Trump administration. A significant portion of these newly hired judges had zero immigration experience before assuming their roles.³⁸ Further, then-acting Attorney General William Barr was accused of promoting BIA members with a track record of exorbitant asylum denial rates.³⁹ Two of Barr's picks on the roster, William Cassidy and Earle Wilson, had respective asylum denial rates averaging 95.8% and 98.1%.⁴⁰ Even further, Wilson and Keith Hunsucker, another Barr appointee, did not grant a single asylum case in 2019. In total, Barr appointed six out of twenty-three BIA judges, all of which had grant rates below 10% in 2019.⁴¹

In addition to these hiring practices, in 2003, the BIA was "purged" of its liberal judges.⁴² Mike Krikorian, the executive director of the self-proclaimed "low-immigration vision" of the Center of Immigration Studies,

35. See Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, S.F. CHRON. (Aug. 23, 2019, 8:09 PM), <https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php> [<https://perma.cc/2DL9-LAZC>].

36. U.S. DEP'T OF JUST., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 104 (2008), <https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf> [<https://perma.cc/4LZZ-KGRU>].

37. *Id.* at 106.

38. See Paul Kiel, *From Brooks Brother Rioter to Judge*, TALKING POINTS MEMO (May 25, 2007, 12:34 PM), <https://talkingpointsmemo.com/muckraker/img-src-http-talkingpointsmemo-com-images-monica-jpg-vspace-5-hspace-5-align-left-from-brooks-brother-rioter-to-judge> [<https://perma.cc/Y2P7-EW9N>].

39. Kopan, *supra* note 35.

40. *Id.* (percentages are based on a study by Syracuse University from 2013–2018).

41. Bryan Johnson, *Immigration Judges Asylum Grants & Denials in FY 2018–2019*, AMOACHI & JOHNSON, PLLC (Dec. 24, 2019), <https://amjlaw.com/2019/12/24/immigration-judges-asylum-grants-denials-in-fy-2018-2019> [<https://perma.cc/DV6E-MX2P>].

42. For the full biographies of the BIA as of the writing of this Note, see *Board of Immigration Appeals*, U.S. DEP'T OF JUST. (Feb. 1, 2021), <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> [<https://perma.cc/RS6J-2ZGE>].

defended such practices.⁴³ Krikorian denounced use of the word “purge,” continuing on to claim that there is “nothing wrong” with removing “particular officials because of their pattern of decisions” given that they are merely civil servants who should “clearly represent the attorney general’s views, since they are carrying out his responsibility.”⁴⁴ There was no correction of this practice under the Obama administration, and, President Biden’s immigration plan immediately preceding his inauguration lacked explicit mention of correcting these practices.⁴⁵

Therefore, after this liberal “purge” combined with the failure to correct such practices and following Trump’s inauguration, the BIA shifted even more so to the right. For example, board member Ed Grant served as a staff member to Rep. Lamar Smith, a Texas Republican with anti-immigrant views who also chaired the House Immigration Subcommittee. Further, the BIA’s “most prolific judge under the Trump Administration,”⁴⁶ Garry Malphrus, made clear his preference for Republican leaders and their accompanying ideology. Malphrus, for example, rioted outside the Miami-Dade Elections Department, chanting and pounding on windows to stop the recount of ballots in the 2000 Bush versus Gore presidential election.⁴⁷ Malphrus’s unwavering loyalty to the conservative agenda did not go unnoticed. In October 2019, Attorney General William Barr promoted Malphrus to the acting chairman of the BIA, nixing David Neal along the way. While Neal is also unsurprisingly conservative, what was more alarming was Neal’s abrupt retirement amongst his pushback against Trump’s immigration agenda.⁴⁸ By May 2020, Barr replaced Malphrus with David Wetmore, whose resume includes advising the White House Domestic Policy Council, specifically contributing to Trump’s key immigration policies like the travel ban and family separation.⁴⁹ Further, the DOJ has also been accused of blatantly

43. *About the Center for Immigration Studies*, CTR. FOR IMMIG. STUD., <https://cis.org/Center-For-Immigration-Studies-Background> [<https://perma.cc/YTH5-NP3X>].

44. Ricardo Alonso-Zaldivar & Jonathan Peterson, 5 *on Immigration Board Asked to Leave; Critics Call It a ‘Purge,’* L.A. TIMES (Mar. 12, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-12-na-immig12-story.html> [<https://perma.cc/RKD8-JFGQ>].

45. *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOEBIDEN.COM, <https://joebiden.com/immigration> [<https://perma.cc/S7CE-2KEC>].

46. Chase, *supra* note 5.

47. *Id.*; Kiel, *supra* note 38.

48. Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. TIMES (Sep. 13, 2019), <https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html> [<https://perma.cc/LSG6-8AYG>].

49. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ANNOUNCES NEW BOARD OF IMMIGRATION APPEALS CHAIRMAN (May 29, 2020), <https://www.justice.gov/eoir/page/file/1281596/download> [<https://perma.cc/ES9F-454E>]; Felipe de la

racist acts, even attacking its own IJs through racist and anti-Semitic mentions in its newsletters.⁵⁰ It seems obvious that the DOJ should “enforce [the] nation’s laws against ethnic, racial and religious discrimination, not fan the flames of such hatred.”⁵¹

The BIA’s susceptibility to partisan conventions is not new. Conservative influence and ideology have permeated the agency for upwards of sixteen years, creating a deep-rooted problem not attributable to just one person. Nevertheless, the Trump administration presented a heightened threat. It is no secret that anti-immigrant rhetoric pumped through the veins of his administration.⁵² For example, just based on conservative media’s coverage, the mentions of immigration surged starting at the time of Trump’s campaign launch in June 2015. Specifically, Fox News mentioned immigration within the context of “illegality” over 1,800 times in six months. Trump sent both the figurative and literal message himself, that “[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”⁵³ It is therefore easy to imagine how this rhetoric only gained potency amongst agency officials specifically dedicated to policing the very area which he sought to restrict.⁵⁴ The IJs and BIA members are at the mercy of the Attorney General who in turn can be fired at will by the President. The requisite leverage was there to advance an agenda “of particular

Hoz, *The Shadow Court Cementing Trump’s Immigration Policy*, NATION (June 30, 2020), <https://www.thenation.com/article/society/trump-immigration-bia> [https://perma.cc/P28A-YB2G].

50. Christine Hauser, *Justice Department Newsletter Included Extremist Blog Post*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/justice-department-vdare-anti-semitic.html?module=inline> [https://perma.cc/E5KP-3VYA]; Sonam Sheth, *The DOJ Sent Immigration Court Employees a Link to a Racist and Anti-Semitic Blog Post Attacking Immigration Judges*, INSIDER (Aug. 22, 2019, 2:44 PM), <https://www.businessinsider.com/doj-sent-immigration-judges-racist-article-vdare-2019-8> [https://perma.cc/5KXG-BZZX]; Jack Rodgers, *Judges Balk at Anti-Semitic Post Promoted by Justice Department*, COURTHOUSE NEWS SERV. (Aug. 23, 2019), <https://www.courthousenews.com/judges-balk-at-anti-semitic-post-promoted-by-justice-department> [https://perma.cc/RZ35-UDGM].

51. Hauser, *supra* note 50.

52. See generally, e.g., Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (stating that the Trump administration can use \$2.5 million in Pentagon money to build a barrier wall along the U.S. border with Mexico); Press Release, U.S. Dep’t of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (April 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [https://perma.cc/LS9E-VTPP]; Jason Zengerle, *How America Got to ‘Zero Tolerance’ on Immigration: The Inside Story*, N.Y. TIMES MAG. (July 16, 2019), <https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html> [https://perma.cc/B4RX-6KTB].

53. Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX (Jan. 9, 2021, 11:04 AM), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech> [https://perma.cc/K58B-P5S9].

54. See, e.g., *President Trump’s Executive Orders on Immigration and Refugees*, CTR. FOR MIGRATION STUD., <https://cmsny.org/trumps-executive-orders-immigration-refugees> [https://perma.cc/EYK3-8Z5K] (citing multiple executive orders from Trump regarding immigration).

importance to [Trump's] administration.”⁵⁵

C. DEVELOPMENT OF *AUER*

“*Seminole Rock-Auer* deference” or just “*Auer* deference” came to fruition in *Bowles v. Seminole Rock & Sand Co.* in 1945 and was later built upon in *Auer v. Robbins* in 1997.⁵⁶ Since then, courts have deferred to an agency’s reasonable interpretation of a genuinely ambiguous regulation.⁵⁷ This deferential standard therefore bolsters agencies’ capacities by entrusting, and therefore empowering, them with the role of interpretation.⁵⁸ Based on empirical findings, the courts’ use of *Auer* deference often tips the scale in favor of the government. From 1993 to 2013, the government maintained an overall win rate of 74.36% when *Auer* was employed by U.S. courts of appeals cases.⁵⁹ Notably, the government won 76.39% of cases when the source of interpretation was an agency’s own prior adjudication. The doctrine faced an overall increase in applicability from 2006 to 2016, especially in more historically conservative circuits.⁶⁰ The courts that withheld deference straightforwardly reasoned that the agency’s interpretation was plainly erroneous, inconsistent with the regulation, or not the product of the agency’s fair and considered judgment. Therefore, barring any unreasonable interpretations, the government could most likely expect a reviewing court to more readily defer to the agency’s interpretation when *Auer* is at play. With that being said, the doctrine has not come without major backlash. The ultimate fear is that agencies will purposely promulgate opaque rules, leaving improper flexibility in rulemaking devoid of procedural protections.⁶¹

1. A Brief Examination of *Kisor v. Wilkie*

In 2019, the Supreme Court had the opportunity to jettison *Auer* deference once and for all, but declined to do so.⁶² In *Kisor v. Wilkie*, James Kisor found fault in *Auer* after failing to secure retroactive benefits for his post-traumatic stress disorder (“PTSD”) based on the Department of Veteran

55. Chase, *supra* note 5 (“[T]he BIA for the past 16 years and counting has been devoid of any liberal members.”).

56. See generally *Auer v. Robbins*, 519 U.S. 452 (1997).

57. *Id.*

58. *Id.*

59. Yeatman, *supra* note 8, at 545.

60. Cynthia Barmore, Note, *Auer in Action: Deference After Talk America*, 76 OHIO ST. L.J. 813, 816–17 (2015); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85, 102 (2019).

61. Walters, *supra* note 60, at 91.

62. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

Affairs’ (“VA”) interpretation of its own ambiguous regulation. The regulation at issue allowed the VA to grant benefits retroactively so long as “relevant” records of Kisor’s PTSD existed, though were not considered, at the time of the initial denial.⁶³ A single administrative judge on the Board of Veterans’ Appeals agreed with the VA that Kisor’s records were not “relevant” because they did not mention the reasoning for the denial—that Kisor did not have PTSD. Upon review, the Court of Appeals for the Federal Circuit decided *Auer* deference was warranted. The Federal Circuit sided with the VA’s interpretation, leaving Kisor defenseless against the agency’s unfavorable interpretation. Citing “intolerable unpredictability” and separation of powers concerns, Kisor called on the Supreme Court to kill *Auer* once and for all.⁶⁴ The Court, however, withheld from overruling *Auer*, and instead chipped away at the doctrine’s applicability by clarifying the preconditions that will warrant deference.

Kisor argued primarily that *Auer* undermines the safeguards of the Administrative Procedure Act (“APA”), incentivizes inconsistent agency action, and violates separation of powers principles.⁶⁵ The Court did not entertain Kisor’s statutory concerns with respect to the APA because the standard of judicial review is not specified.⁶⁶ Focusing on Kisor’s constitutional and policy arguments against *Auer*, the Court rejected Kisor’s contention that *Auer* incentivizes agencies to circumscribe formal procedures through vague rulemaking.⁶⁷ The Court refuted Kisor’s separation of powers concerns and went on to clarify *Auer*’s proper role and applicability.⁶⁸

Justice Elena Kagan, delivering the majority opinion for the Court, reinforced the notion that *Auer* deference “is potent in its place, but cabined in its scope.”⁶⁹ Justice Kagan emphasized that *Auer* is worth keeping, especially considering the rebuttable presumption that, when Congress delegated lawmaking powers to agencies, Congress also implicitly intended that agencies interpret their own regulations.⁷⁰ The premise follows that if a regulation is unclear, go straight to the originating source. Justice Kagan highlighted this idea through a relatable analogy: “[I]f you don’t know what

63. See 38 C.F.R. § 3.156(c)(1) (2021).

64. Brief for Petitioner at 36, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

65. *Id.* at 21–23. Kisor also addressed stare decisis concerns by arguing that overruling precedent is warranted in this situation. Kisor further argued that *Auer* is inconsistent with the APA because deferring to an agency’s interpretation impedes the APA’s judicial review provision.

66. *Kisor*, 139 S. Ct. at 2407.

67. *Id.* at 2421.

68. *Id.* at 2422–23.

69. *Id.* at 2408.

70. *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 151 (1991).

some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor).⁷¹ Justice Stephen Breyer voiced this same concern, his main point being that judges are neither suited nor equipped to interpret highly technical, regulatory nuance. Breyer pointed to an FDA regulation that was clarified by the FDA to mean “a particular compound should be treated as a single new active moiety, which consists of a previously approved moiety, joined by a non-ester covalent bond to a lysine group.”⁷² Breyer point-blank asked the petitioner at oral argument, “Do you know how much I know about that?”⁷³

To effectuate this principle, the Court set out what is essentially a five-part test to determine whether *Auer* deference is warranted:⁷⁴

(1) A regulation must be “genuinely ambiguous,” even after the reviewing body employs “all [the] ‘traditional tools’ of interpretation.”⁷⁵

(2) The agency’s interpretation of the regulation must be reasonable.⁷⁶

(3) A court must make “an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.”⁷⁷ The “ ‘agency’s interpretation must in some way implicate its substantive expertise.’ That is because, Kagan explains, ‘[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.’ ”⁷⁸

(4) The agency’s interpretation must be “authoritative” or from an “official position,” rather than an “ad hoc statement not reflecting the agency’s views. . . . The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context.”⁷⁹

(5) “The agency’s regulatory interpretation must reflect ‘fair and

71. *Kisor*, 139 S. Ct. at 2412.

72. Transcript of Oral Argument at 10, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

73. *Id.*; see Amy Howe, *Opinion Analysis: Justices Leave Agency Deference Doctrine in Place – with Limits (Updated)*, SCOTUSBLOG (June 26, 2019, 1:20 PM), <https://www.scotusblog.com/2019/06/opinion-analysis-justices-leave-agency-deference-doctrine-in-place> [https://perma.cc/JS35-599Y].

74. See Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG. (June 26, 2019), <http://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine> [https://perma.cc/R38K-K4KF] (“[T]he first two steps [are] functionally the same as the two *Chevron* deference steps . . .”).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

considered judgment’—not an *ad hoc* litigating position or otherwise an interpretation that causes regulated entities unfair surprise”⁸⁰

Applying this test to the facts of *Kisor*, the Court remanded the case in part because “the Federal Circuit jumped the gun in declaring the regulation ambiguous,” thus violating the first step of determining whether *Auer* deference is appropriate.⁸¹

Writing in concurrence, Justice John Roberts made a concerted effort to reconcile the majority and the concurring opinions. Although a partisan split would not be considered particularly unusual in the current political climate, he claimed that “the distance between the majority and Justice Gorsuch is not as great as it may initially appear.”⁸²

At the other end of the partisan gulf, Justice Neil Gorsuch delivered a concurrence but penned what felt like a dissent due to his stark disagreement with the “maim[ing]” of *Auer*.⁸³ He responded to Justice Kagan’s public policy considerations and concerns about separation of powers. Justice Gorsuch predicted that this “zombified” version of *Auer* will force future “litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve.”⁸⁴ Gorsuch makes clear that the judiciary is the better suited interpreter. Justice Brett Kavanaugh briefly concurred, primarily citing Justice Gorsuch’s critique of the majority’s decision and rationale. Adding to the disdain for *Auer*, Justice Kavanaugh analogized the deferential doctrine to baseball, claiming that “[u]mpires in games at Wrigley Field do not defer to the Cubs manager’s in-game interpretation of Wrigley’s ground rules,” and “[s]o too here.”⁸⁵

2. Where Does *Auer* Stand Now?

Shortly before *Kisor*, an administrative law scholar posed the question: “Why doesn’t the *Auer* doctrine provide the same sorts of procedural assurances as the *Chevron* doctrine given that the two principles share a common justification and effect?”⁸⁶ Looking to make sense of this new decision, some now argue that the Court responded to this call for the “Chevronization of *Auer*.” Set out in the 1984 case *Chevron U.S.A. Inc. v.*

80. *Id.* Unfair surprise is an existing exception to *Auer* deference. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156–58 (2012).

81. Walker, *supra* note 74.

82. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, J., concurring).

83. *Id.* at 2425 (Gorsuch, J., concurring).

84. *Id.*

85. *Id.* at 2448 (Kavanaugh, J., concurring).

86. Yeatman, *supra* note 8, at 528.

Natural Resources Defense Council, Inc., Chevron deference requires a two-step test to defer to an administrative agency's interpretation of an ambiguous statute.⁸⁷ An agency is granted *Chevron* deference if the court concludes that Congress "left space [ambiguity] for the agency to promulgate binding policy and the agency's determination is not unreasonable."⁸⁸ This bears strong resemblance to steps one and two set forth in *Kisor*. Under *Auer*, courts are now similarly instructed to evaluate (1) the level of ambiguity, and (2) the reasonableness of the interpretation. Sensing the Court's historical preference to defer to the government, Justice Kagan cautioned step two "is a requirement an agency can fail."⁸⁹

The Court referred to administrative agencies homogeneously, failing to recognize their diverse purposes and associated implications. Thus, any differentiation, such as whether *Kisor* was a *Chevronization* of *Auer* or merely a restatement of preexisting case law, was left to another day. To illustrate when *Auer* deference "works," Justice Kagan cited to different agencies, but failed to single out the BIA. Although broad regulatory powers afforded by *Auer* can potentially provide agencies with the requisite "flexibility to deal with all of the permutations that confront them," this flexibility is not necessarily desirable for all agencies.⁹⁰ In fact, *Auer*'s passing of "the laboring oar" to the BIA in interpreting its own regulations improperly swaps procedural safeguards for the sake of practical need.⁹¹ Administrative law scholar Jack M. Beermann argues that the "dismissal of necessity as an adequate justification for the administrative state is simply unconvincing to anyone whose eyes are open to the realities of the modern world."⁹² However, he too overgeneralizes. Even if you believe *Auer*'s abolition deprives other agencies of a tool that facilitates judicial review, increases predictability, and ensures political accountability, this does not ring true for immigration.⁹³ The Court's formulation of a five-part test blatantly ignores the distinct problem of deference to a politically motivated group.

87. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

88. Brief of Professors of Administrative Law & Federal Regulation as Amici Curiae in Support of Neither Party at 3–4, *Kisor*, 139 S. Ct. 2400 (No. 18-15).

89. *Kisor*, 139 S. Ct. at 2416.

90. Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1651 (2018).

91. *See Kisor*, 139 S. Ct. at 2413.

92. Beermann, *supra* note 90, at 1651.

93. *See Barmore, supra* note 60, at 816–17.

D. THE BIA & AUER

1. *Auer*'s Application

On appeal, board members rely on the application of various immigration regulations to individual cases. Therefore, if driven by an anti-immigration agenda, a self-serving interpretation of an ambiguous regulation can go a long way in expanding the preexisting power to restrict immigration through denials. Cue *Auer* deference. According to a 2015 study of the relationship between *Auer* deference and administrative agencies, the Department of Labor and the BIA requested *Auer* deference more than any other agency.⁹⁴ While once considered a “super deference” doctrine, its overall power has since diminished slightly.⁹⁵ Nevertheless, the stain of the Trump administration’s aggressive, anti-immigrant agenda coupled with the BIA’s continued reliance on *Auer* directly threatens immigrants’ fair chance at liberty “super deference” or not.

Auer's application plays out differently depending on the circuit. In historically conservative circuits, such as the Fifth, Eighth, and Eleventh, *Auer* deference is granted more often than in the Ninth and D.C. Circuits.⁹⁶ In less deferential circuits, judicial interference has provided somewhat of a backstop to inconsistent interpretations. For example, in *Gomez v. Lynch*, the court denied deference to the BIA.⁹⁷ The court opted to review the relevant regulation de novo because “contradictory interpretations show that [the BIA’s] current litigation position does not represent the agency’s considered and expertise-driven judgment as to the correct reading”⁹⁸ Unfortunately, these interceptions are few and far between. Courts that fail to interfere mostly invoke *Auer* as a “shortcut to avoid lengthy regulatory analysis or conclude that the agency’s position is a reasonable exercise of discretion to decide an unanswered policy question.”⁹⁹ To this end, some courts will even warrant *Auer* deference to a single-member, nonprecedential BIA decision.¹⁰⁰ As seen in *Mansour v. Holder*, the Eighth Circuit extended

94. *Id.* at 830. Despite the magnitude of these requests, not every circuit defers to agencies under *Auer* when requested. *See Gourzong v. Att’y Gen. U.S.*, 826 F.3d 132, 136 n.2 (3d Cir. 2016) (describing split of authority and collecting cases).

95. Yeatman, *supra* note 8, at 547.

96. Barmore, *supra* note 60, at 830.

97. *Gomez v. Lynch*, 831 F.3d 652, 656 (5th Cir. 2016).

98. *Id.* at 658; *see also Morales v. Barr*, No. 19-1999 (7th Cir. 2020) (declining to grant *Auer* deference to Attorney General Sessions’s self-certified precedential decision because the plain text of the regulation at issue was not ambiguous).

99. Barmore, *supra* note 60, at 816.

100. *Gomez*, 831 F.3d at 655 n.1; *cf. Lezama-Garcia v. Holder*, 666 F.3d 518, 532 (9th Cir. 2011) (denying deference to a single-member BIA panel’s interpretation of BIA regulations).

Auer deference to a regulatory interpretation in an unpublished BIA decision.¹⁰¹ Further, in *Zhang v. Holder*, the Second Circuit deferred to the BIA to interpret the BIA's scope of jurisdiction to grant a motion to reopen where the movant has already been removed from the U.S.¹⁰² Thus, under *Auer*, the BIA's precedential adjudication controlled. Despite recognizing its flaws, the court was operating within the confines of *Auer* and could not find the BIA's construction plainly erroneous.¹⁰³ In effect, immigrants who could normally appeal to the BIA involuntarily forfeit this right upon removal to their home country. The court dabbled in the hypothetical that without *Auer*, it might reach a different conclusion than that of the BIA. And as circuit courts commonly warrant deference to BIA decisions, "humane interpretations of the immigration laws have become harder to come by."¹⁰⁴

2. Partisan Upside Down

While perhaps not as plainly contentious as issues surrounding gun reform and reproductive rights, the mere existence of administrative agencies lies at the center of a long-standing, structural debate amongst liberals and conservatives.¹⁰⁵ Proponents, usually liberal, believe administrative agencies serve a pragmatic role in developing a robust government—one that is required to navigate the unforeseen complexities associated with modern life. In other words, proponents believe federal agencies lie "at the very core" of the mechanisms dedicated to advancing "our nation closer to the more perfect union envisioned by the Constitution."¹⁰⁶ Thus, from this perspective, *Auer*'s existence is underpinned by the primary purpose of administrative agencies—efficient and effective enforcement of legislative acts. Under *Auer*, agencies can clarify preexisting regulations without the formal, arguably debilitating

101. *Mansour v. Holder*, 739 F.3d 412, 414, 417 (8th Cir. 2014).

102. *Xue Yong Zhang v. Holder*, 617 F.3d 650, 652 (2d Cir. 2010) (citing 8 C.F.R. § 1003.2(d)).

103. *Id.* at 660.

104. Chase, *supra* note 5. Further, an analysis of *Auer*'s application after *Kisor* demonstrates that the circuit courts' interpretations of the five part test have been inconsistent, and even contradictory. See Daniel Lutfy, *Auer 2.0: The Disuniform Application of Auer Deference After Kisor v. Wilkie*, 88 *FORDHAM L. REV.* 2011 (2020).

105. See Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 *GEO. WASH. L. REV.* 975, 975 (2010) ("[E]ven in 1887, the notion that the federal government was inert and that *laissez faire* was dominant was under attack.").

106. Nelson L. Barrette, *In Defense of the Administrative State*, *HARV. CRIMSON* (Mar. 6, 2017), <https://www.thecrimson.com/column/nelsons-rum/article/2017/3/6/barrette-in-defense-of-the-administrative-state> [<https://perma.cc/9EFB-335D>]; see *Administrative Agency Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/a/administrative-agency> [<https://perma.cc/7BQ8-WDNZ>]; COOPER, *supra* note 1, at 18 ("It is fairer to say that administrative tribunals have been availed of as a valuable assistance to hard-pressed and overburdened legislatures and judiciaries.").

procedures required for rulemaking.¹⁰⁷ Despite these practical benefits, critics of the doctrine strongly call for *Auer*'s demise. These typically conservative, antiregulatory theorists argue that administrative agencies exceed the confines of power laid out by the Founding Fathers.¹⁰⁸ For these critics, "deconstruction" of the administrative state is necessary to dismantle the "soft tyranny" threatening our constitutional structure.¹⁰⁹ Put differently, these critics believe "lawmaking and law-exposition must be distinct."¹¹⁰ Perhaps such disdain is self-evident in the appellation: the "headless fourth branch of government."¹¹¹

No matter which side you land on, the debate must be viewed in light of the larger battle between powerful influencers looking to orchestrate government policy and the people dependent on the government's protection from said orchestrators.¹¹² If a President cannot advance their policy through presidential power or a lame-duck Congress, administrative agencies present an alternative route. While Congress generally attempts to insulate agencies from presidential control, for example by restricting the power to direct and discharge agency heads, Congress continues to delegate authority to agencies.¹¹³ This explains why administrative agencies were essential in implementing "innovative social programs" during Reconstruction, the New Deal, and the Great Society, arguably the "three most important spurts of political and economic imagination in American history."¹¹⁴ Therefore, for purposes of effectiveness, Congress delegates the quasi-legislative and quasi-judicial authority to effectuate the policy governing our daily lives. Ideally, agencies would be packed with experts in their respective fields to

107. Walters, *supra* note 60, at 87. However, "most American academic students of administrative law have been overly enamored of the formal beauty of the notice-and-comment process' and have 'reiterated unanimously over the years that agencies are free to choose between rulemaking and other forms of agency action for making policy.'" *Id.* at 87 n.2 (quoting E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491-92 (1992)).

108. Beermann, *supra* note 90, at 1634; *see, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017) (Reducing Regulation and Controlling Regulatory Costs).

109. Beermann, *supra* note 90, at 1626; Chuck DeVore, *The Administrative State Is Under Assault and That's a Good Thing*, FORBES (Nov 27, 2017, 1:53 PM), <https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#3bd78e3a393c> [https://perma.cc/F8CT-C2PT].

110. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996).

111. Beermann, *supra* note 90, at 1599.

112. Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent at 3, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15).

113. Beermann, *supra* note 90, at 1626 (noting that Congress has tried to restrict "the President's power to direct and discharge agency heads, but successes in these efforts have been few and far between").

114. Barrette, *supra* note 106.

ease legislative and enforcement burdens, while also ensuring those regulations achieve maximum potential with the oversight of those most knowledgeable of them.

Senator Sheldon Whitehouse specifically called out the conservatives' war on *Auer* deference as a "larger strategy to disable public interest regulation."¹¹⁵ With that being said, pushing a political agenda through administrative agencies is not exclusive to conservatives. The Obama administration, for example, promulgated regulations which entrusted the Environmental Protection Agency with carrying out his climate agenda of reducing carbon dioxide emissions irrespective of Congress's inaction. While Trump's lower federal court and U.S. Supreme Court appointees share a disdain for the administrative state, Trump utilized federal agencies to advance his policies as well. Justice Gorsuch, for example, believes that the regulatory state "poses a grave threat to our values of personal liberty," and Justice Kavanaugh also criticizes the empowerment of the executive branch's unelected employees.¹¹⁶ Despite this anti-regulatory rhetoric, the Trump administration chose to invoke regulatory powers to implement restrictionist, anti-immigration policies.¹¹⁷

Nevertheless, an unsuspecting political alliance occurs when immigration and administrative agency deference collide. Immigration advocates who are typically pro-regulatory find common ground with anti-regulatory theorists who are typically anti-immigration. This is because there is a very real concern that agencies can change course midstream in the immigration context¹¹⁸ and present an inconsistency that is inherently dangerous to the regulated public. The conservative argument against *Auer* deference in general posits that if agencies know that they will win most cases involving their interpretations of preexisting rules, then they have

115. Tucker Higgins, *This Big Supreme Court Case Has United Business, Labor and Immigration Groups. But Some See a Right Wing Attack on Government Regulation*, CNBC (Mar. 21, 2019, 2:16 PM), <https://www.cnbc.com/2019/03/21/supreme-court-case-set-for-argument-unites-unusual-coalition.html> [<https://perma.cc/U4UL-CKDV>].

116. Lisa Needham, *How a Brand-New Executive Order Could Seat Judges Who Are Eager to Deny Immigrants Rights*, REWIRE NEWS GROUP (July 11, 2018, 1:18 PM), <https://rewire.news/article/2018/07/11/how-a-brand-new-executive-order-could-seat-judges-who-are-eager-to-deny-immigrants-rights> [<https://perma.cc/BE4Z-2EGV>].

117. *Id.*; Robert J. Samuelson, *The Administrative State Is Huge, and It's Only Getting Bigger*, WASH. POST (Mar. 5, 2017), https://www.washingtonpost.com/opinions/the-administrative-state-is-huge-and-its-only-getting-bigger/2017/03/05/bb388e28-003a-11e7-99b4-9e613afeb09f_story.html [<https://perma.cc/5VLQ-P36T>].

118. Brief for Amici Curiae the National Immigrant Justice Center & the American Immigration Lawyers Ass'n in Support of Petitioner at 12, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15) [hereinafter NIJC Brief].

strong incentives to write vague rules in the first instance.¹¹⁹ This uniquely aligns with the conservative ideology that (1) agencies should not be given this power in the first place, and (2) when they are illegitimately given this authority, agencies create inconsistency by deliberately writing vague regulations.

What further lays the foundation to this twilight zone, however, is that an anti-immigrant agenda and an anti-regulatory agenda are at odds. The idea is that expanding regulatory power, including a more deferential standard, allowed for Trump and his appointees, for example, in the executive branch to carry out restrictive immigration policies with limited judicial pushback. But, as mentioned before, conservatives strongly condemn the administrative state. Further, one could also imagine immigration rights advocates almost never siding with conservative ideology. Yet, in an amicus brief in support of the *Kisor* petitioner, the National Immigrant Justice Center and the American Immigration Lawyers Association (“NIJC brief”) cite Justice Clarence Thomas’s and Justice Antonin Scalia’s concurrences and dissents ten times in thirty-two pages.¹²⁰ The brief relies on the Justices’ classically conservative ideas to overturn *Auer* or significantly limit its applicability. Just as Justices Scalia and Thomas noted that administrative agencies should be required to go through formal rulemaking processes rather than receiving deference to their own interpretations, the NIJC brief suggested quasi-judicial agencies, like the BIA, should receive deference for only carefully reasoned, long-held positions, according to the care and logical power of their decisions.¹²¹ Moreover, the BIA should not simply receive deference because of its status as a quasi-judicial adjudicator. This conflict speaks to the heart of the need for consistency in agency adjudications.¹²²

119. Walters, *supra* note 60, at 88; see *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (“[F]or an agency to issue vague regulations . . . maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.”).

120. See NIJC Brief, *supra* note 118, at 12, 13, 17, 20, 21, 26, 27, 30.

121. *Id.* at 31.

122. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1698 (1975) (suggesting that a “possible response to the problems created by broad legislative delegation is to acknowledge the large discretion enjoyed by agencies and to require that it be exercised in accordance with *consistently applied general rules*” (emphasis added)).

II. ANALYSIS: THE BIA SHOULD NOT SAY WHAT THE LAW IS

A. *AUER*'S THREAT TO SEPARATION OF POWERS AND DEMOCRACY

While the broader debate on administrative agencies invariably invokes separation of powers and democracy concerns, immigration agencies present another layer of concern that must be addressed separately. Because political agenda and manipulation predominates immigration agencies, ensuring justice for immigrants becomes an afterthought, merely a collateral problem for another day. Thus, deference to the BIA under *Auer* acts as a tool to advance a political agenda, threatening separation of powers principles and diminishing political accountability along the way. Even with a more “pro-immigration” administration, consistency and fairness are naturally cast aside by such a drastic change, and the stains of the prior restrictionist administration will not so easily be removed. Moreover, to understand why post-*Kisor*, *Auer* deference is insufficient to protect immigrants from potential political agendas, one must ask: To what end will we sacrifice democratic and separation of powers principles when deferring to the BIA under *Auer*?¹²³ Is an independent federal judge better suited to more fairly interpret these regulations? Because individuals who face the BIA are at the mercy of political influence with inadequate checks on power, *Auer* deference is clearly neither the best nor the proper method of filling regulatory gaps in the context of immigration.

1. Separation of Powers

Separation of powers, and the “checks” afforded by such separation, are principles rooted in the Constitution. Although there is no explicit clause outlining such an equilibrium of authority, the structural balance between each branch becomes increasingly necessary when individual liberties can easily be sacrificed for political manipulation. This is the case with immigration proceedings, especially those on appeal.

In general, critics of the administrative state find the combination of executive, legislative, and judicial functions within a single agency to be one of “the most corrosive aspects of the administrative state.”¹²⁴ When *Auer* deference is warranted, the agency’s role arguably bleeds into all three functions of government. The agency, rather than the legislature,

123. While *Auer* deference has been established as constitutional, this Note focuses not on its constitutionality; rather it explores the constitutional principles we value. *City of Arlington v. FCC*, 569 U.S. 290, 304–05 n.4 (2013) (“These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’” (quoting U.S. CONST. art. II, § 1, cl. 1)).

124. Beer mann, *supra* note 90, at 1606.

promulgates a regulation, then interprets that regulation in place of the judiciary, and finally enforces that regulation acting as the executive.¹²⁵ *Auer* deference, therefore, blurs the formal divisions of power and places the distinct governmental roles all in one basket. While this may be something we are willing to sacrifice for the sake of efficiency and effectiveness in other policy domains, the stakes in immigration are just too high. *Auer* deference disregards the separate roles that distribute power by equipping the BIA with the commingling authority of the judiciary, the legislature, and the executive. The combination of the three allows the BIA to manipulate the freedoms of immigrants through interpretations that increasingly restrict access to this country and creates a system that precludes fair review of individual cases.

When *Auer* is not warranted, an independent Article III circuit court judge takes on the interpretive role, thereby aligning with the judiciary's purpose, as birthed in *Marbury v. Madison*, "to say what the law is."¹²⁶ This interpretive role ideally serves as an independent "check" on the executive and the legislative branches. However, the BIA inherits these adjudicatory powers through deference and steps in to "say what the law is" in the case of an adequately ambiguous regulation—in other words, when *Auer* is warranted. This leaves the power scales tipped to the BIA, quasi-judicial in nature, but lacking the more robust constitutional protections afforded with the judiciary. Liberty, especially in proceedings that are quasi-judicial in character, must be "protected by the rudimentary requirements of fair play."¹²⁷ Therefore, in the case where *Auer* is applied, federal court judges are then "all-but-powerless to 'serve as a check' on those who administer and enforce the immigration laws."¹²⁸

2. Democracy

In addition to separation of powers, our Constitution is premised on a functioning democracy, with political accountability lying at its core. Without an accountable body, oppression finds no bounds.¹²⁹ Some constitutional theorists, like Alexander Bickel, pursue the notion that pure democracy is best achieved by "effectuat[ing] [a] majority will," which has been widely presumed to be the correct framework for democracy.¹³⁰ Despite this, constitutional law professor Rebecca Brown's understanding of

125. Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047, 1067 (2017).

126. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

127. *Morgan v. United States*, 304 U.S. 1, 14–15 (1938).

128. NIJC Brief, *supra* note 118, at 30.

129. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998) (referring to *New York v. United States*, 505 U.S. 144, 168 (1992)).

130. *Id.* at 534, 542.

political accountability is a better fit in the realm of immigration agencies. Rather than Bickel's emphasis on the democratic commitment to achieve "maximum satisfaction of popular preferences," Brown posits that in light of modern times, political accountability can be better understood as a "structural feature of the constitutional architecture, the goal of which is to protect *liberty*."¹³¹

Administrative agencies have specifically been characterized as "deviant" due to their insulation from such political accountability.¹³² At one point in time, it was true that the "loss of accountability was not even mourned, but rather hailed as the key to improved government action."¹³³ However, the *Kisor* Court reminded us that agencies in general are, in fact, "accountable" because they operate under the supervision of the President, who in turn answers to the public.¹³⁴ But, with the BIA, this is not the case. The BIA operates under the EOIR which is supervised by the Attorney General, who in turn is supervised by the President. Further, those most affected by BIA decisions are voteless. Even with a vote, immigration regulations with significant consequences can be changed, sometimes radically, without public participation or elections when a court defers to the BIA's interpretation. This nontransparent activity is sometimes referred to as the "subregulatory world,"¹³⁵ which is especially threatening to the liberties of immigrants. The BIA, operating in this subregulatory world, "eclipses fundamental fairness," which in turn causes "rights [to] often rise and fall with the quality of counsel—not the merits of a case."¹³⁶ With fewer than half of individuals assisted by counsel in immigration proceedings,¹³⁷ political accountability is necessary to protect liberty. And if not, oppression will in fact find no bounds.

This lack of accountability fuels the need for reason-giving. In recognition of this, "[m]uch of administrative law consists of an effort to ensure reason-giving by agencies, partly because of a fear that they lack sufficient political accountability and may be subject to factional

131. *Id.* at 535, 550 (emphasis added).

132. *Id.* at 540–41.

133. *Id.* at 547.

134. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019).

135. NIJC Brief, *supra* note 118, at 20.

136. *Id.*

137. AM. IMMIGR. LAWYERS ASS'N, THE IMPORTANCE OF INDEPENDENCE AND ACCOUNTABILITY IN OUR IMMIGRATION COURTS, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiMuvjI6-PvAhUJv54KHV48DscQFjAAegQIAhAD&url=https%3A%2F%2Fwww.aila.org%2Ffile%2FDownloadEmbeddedFile%2F40634&usg=AOvVaw2FUyFB-aageuBfQEIrjAb> [https://perma.cc/HF9E-263C].

influences.”¹³⁸ This is epitomized in the notice-and-comment procedures required for rulemaking set forth in the Administrative Procedure Act (“APA”).¹³⁹ It seems simple enough: if an agency is going to dictate the rights and freedoms of the regulated public, the agency owes the public at the very least a reason for such a rule, rather than an unsuspecting change in interpretation. This becomes problematic when the BIA is awarded the power to mold its own regulation to the political priority of the controlling administration, or even the prior administration that appointed them. And, while many judicially created doctrines are made “to ensure that decisions are based upon legitimate reasons,” *Auer* could not realistically supply this safeguard in the context of deferring to the BIA, an agency who will not be called upon to give reasons for anti-immigrant interpretations.¹⁴⁰ And, as mentioned in Part I.B, the BIA historically has received deference to its own unpublished decisions in some circuits. At the judicial review stage, the BIA’s rationale merely must be “reasonable,” which effectively sidesteps the more stringent notice-and-comment protections afforded under the APA.¹⁴¹

But, do federal courts fare any better in terms of supplying a more democratic solution? Justice Breyer reminds us “that democratically speaking, agencies aren’t very democratic, but there is some responsibility and there are [sic] one group of people who are still less democratic, and they’re called judges.”¹⁴² So perhaps, as he posits, “the best solution is, in our country, a democratic solution . . . [and] maybe the agency is the institution that’s closer to it.”¹⁴³ With that being said, what is left is a choice between the lesser of two evils, or more accurately, the lesser of the two undemocratic bodies. From the perspective of Justice Breyer, one might argue that deference to an agency furthers democratic accountability by allowing a *more* accountable institution the power of interpretation. But this cannot be so in the case of the BIA. Even with a seemingly minute regulatory gap, deference to a BIA interpretation can be life changing without enough accountability to safeguard liberty.

3. “But Which Is Best?”

This leads to the heart of the debate: Who is better suited to determine the “best” interpretation of an ambiguous regulation? This debate took center stage at oral argument for *Kisor*. There, the Court went back and forth

138. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 42 (1996).

139. 5 U.S.C. § 553(c).

140. Sunstein, *supra* note 138, at 42.

141. NIJC Brief, *supra* note 118, at 11.

142. Transcript of Oral Argument, *supra* note 72, at 49.

143. *Id.*

questioning the various principles and policies that may be served by deferring to an agency rather than a federal judge. Justice Breyer interrupted the questioning to resurface the main point: “But which is best?”¹⁴⁴ Perhaps this question strays from *Auer*’s seemingly low standard requiring an interpretation to only be *reasonable*. However, when interpreting regulations that change the very course of a person’s life, should the standard be reasonableness? Even in constructing the Constitution, Framers voiced the need for representative bodies that have “a level of wisdom, contemplation, and deliberation that would contribute to the formation of good—not just popular—law.”¹⁴⁵ Immigration law specifically needs the “best” law. Under *Auer* as it stands, federal judges will “subordinate their own views about what the law means to those of a political actor, one who may even be a party to the litigation before the court.”¹⁴⁶ This especially rings true when deferring to the BIA. Without more stringent constitutional protections, immigrants at least deserve the “best” and “fairest” interpretation, rather than a “reasonable” one.

Courts, on the one hand, may be able to supply the fairest interpretation if judicial review can catch and act on agency failings.¹⁴⁷ By way of analogy, “[a]dministrative officials may be responsible for making the trains run on time, but the courts are responsible for keeping those trains on their tracks.”¹⁴⁸ In Philip Hamburger’s notorious critique, *Is Administrative Law Unlawful?*, he argues that “only real judges, not Executive Branch officials conducting adjudications, are capable of providing due process under any circumstances.”¹⁴⁹ While this seems extreme, there is still room for appreciating a judicial role in interpreting ambiguous regulations. Without *Auer* for example, a court could conclude that a matter is ripe for judicial interpretation when “the negative attributes of political decision making (majority tyranny, unaccountable subjectivity, unprincipled willfulness) present serious risks of arbitrary, bad government.”¹⁵⁰ And because “legislative activity, administrative rule-making, the conceiving of treaties as municipal law, and the making of written constitutions have brought into being in highly developed form a second and seemingly quite different method [from precedent],” courts today may have the requisite capacity to

144. *Id.*

145. Brown, *supra* note 129, at 553.

146. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2429 (2019) (Gorsuch, J., concurring).

147. See CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 84 (1990).

148. Paul J. Larkin, Jr., *Agency Deference After Kisor v. Wilkie*, 18 GEO. J.L. & PUB. POL’Y 105, 111 (2020).

149. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 143–48 (2014).

150. EDLEY, JR., *supra* note 147.

search “the written text for its *meaning* in application to the presented case.”¹⁵¹

Judicial intervention absent deference to the agency is especially crucial when a private party and the government are adversaries, as is the case in immigration proceedings. Where administrative agencies double as a final interpreter and an adversary in a case, there is a heightened need to resist those who seek to manipulate our democratic institutions with such a power. A “neutral” arbiter, such as a federal court who will never be an adversary, can more fairly determine which interpretation is the correct one.¹⁵² Thus, perhaps the assurance of an independent judge deciding what the law is, rather than a political agency, is necessary for the “least and most vulnerable among us, like the immigrant . . . who may not be the most popular or able to capture an agency the way many regulated entities can today.”¹⁵³ When political processes are not functioning properly, judicial review is necessary.¹⁵⁴

On the other hand, agencies might be in a better position to fill interpretative gaps, rather than courts, as a *more* accountable institution in general. Agencies are technically held more accountable by elected officials and their appointees, thus creating a “line” that “runs directly to a majority.”¹⁵⁵ And, as Sunstein posits, “[w]hen a democracy is in moral flux, courts may not have the best or the final answers.”¹⁵⁶ This is because judges can be flat-out wrong, or counterproductive even if correct.¹⁵⁷ Agency interpretations account for expertise and efficiency. The argument follows: “[Agencies] had the time to devote to the minutiae of the public good that neither Congress nor the President—and certainly not the Court—could offer.”¹⁵⁸ Because of this, the administrative system has been considered “in essence,” an “answer to the inadequacy of the judicial and legislative processes.”¹⁵⁹ By leaving the decisions to agencies, courts can leave “the great questions of political morality” to “democratic politics, not the judiciary.”¹⁶⁰ Further, without deference to an agency, the regulated public

151. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 4–5 (1969).

152. Larkin, Jr., *supra* note 148.

153. Transcript of Oral Argument, *supra* note 72, at 56.

154. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 3–9, 135–36 (1980).

155. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 19 (1986).

156. Sunstein, *supra* note 138, at 101.

157. *Id.*

158. Brown, *supra* note 129, at 547.

159. *Id.*

160. Sunstein, *supra* note 138, at 101.

could only be afforded answers to ambiguity through the “expensive device of appeals.”¹⁶¹ If critics’ dissatisfaction with *Auer* lies at least in part with the practice of self-delegation without public accountability, “a world in which agencies avoid prospective rulemaking in favor of retrospective and often-piecemeal adjudication would be a decidedly worse one.”¹⁶²

Yet again, these arguments must be narrowed to the unique case of the BIA. As Judge Posner wrote, the tension between judicial and administrative adjudicators “is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁶³ The discussion is therefore better served by reframing the question to ask: Which institution will better serve *justice* in interpreting ambiguous regulations? Political accountability in the case of administrative agencies is attenuated. We must take multiple leaps from political participation to arrive at the sub-regulatory world of the BIA. In addition, Judge Posner acknowledged the heavy caseloads of the IJs and BIA board members alike but refused to let this heavy caseload supersede the right to a fair and reasoned review of a case. While to Judge Posner it is laughable to think that “busy judges should be excused from having to deliver reasoned judgments because they are too busy to think,”¹⁶⁴ this supports the inadequacy of applying *Auer* to the BIA’s interpretations. With a pending case load in the thousands plus “fiscal and operational constraints within the Executive Branch,” quasi-judicial agencies are not better equipped to interpret regulations.¹⁶⁵ The idealistic notion that an immigration agency, such as the BIA, is more effective and efficient no longer rings true, and the Court cannot turn a blind eye to such a reality.

B. REGULATORY GAP FILLING IS STUCK BETWEEN A ROCK & A HARD PLACE

While the modified *Auer* might be appropriate for other administrative agencies, it is inadequate in the case of the BIA for the reasons mentioned above. This is true regardless of how the modified *Auer* deference plays out in practice. For example, if courts continue to defer to the BIA under *Auer* at an exponential rate, immigrants will remain at the mercy of a politically charged agency who serves each administration’s agenda at the expense of liberty and fairness. Perhaps, courts will just choose to duck an interpretation due to their own fear of intervening in the realm of immigration. In the

161. Brown, *supra* note 129, at 544.

162. Walters, *supra* note 60, at 114.

163. Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005).

164. Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004).

165. NIJC Brief, *supra* note 118, at 22.

alternative, even if *Auer* becomes obsolete when requested by the BIA, immigrants remain at risk due to the unfitness for judicial review and the overall burgeoning right tilt of the federal courts. We are left with the metaphorical rock (deference to the BIA) and a hard place (judicial interpretation). *Auer* leaves immigrants' futures either in the hands of the Attorney General supervised by the acting President or in the hands of an appointed federal appellate judge, about one-third of which are Trump-appointed as of the writing of this Note.¹⁶⁶

In the event that the modified *Auer* puts the interpretive role in the hands of the federal courts, it is unlikely that immigrants will be more protected from the legacy of the Trump administration's anti-immigrant agenda. As of October 2020, Trump appointed fifty-three highly conservative Article III appellate judicial appointees with similar restrictionist immigration ideologies.¹⁶⁷ Trump's appointees include some of the "most extreme conservatives on the federal bench."¹⁶⁸ It has been predicted that, today and increasingly as new generations enter political discourse, judicial engagement is as likely to be advocated, a cause for concern for those who fear the ultimate impact of Trump's judicial nominees.¹⁶⁹ Therefore, in addition to the percolated anti-immigrant agenda in the executive branch, threats to immigrants are arguably heightened in the judicial branch as well. This in turn directly threatens "[w]hat has distinguished [the American Constitution], and indeed the United States itself" from other less democratic countries; that is, the focus on the "process of government, not a governing ideology."¹⁷⁰ Legitimate processes, rather than legitimate outcomes, stabilize and protect democracy. Deference to an agency or even a federal court fails to uphold this foundational principle in the context of immigration, and therefore runs afoul of the constitutional intent to protect vulnerable noncitizen interests through procedural protections despite changing ideologies.

166. *Factbox: Donald Trump's Legacy - Six Policy Takeaways*, REUTERS (Oct. 30, 2020, 3:33 AM), <https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK> [<https://perma.cc/2ZJX-8SCQ>] ("The appointments, all for life, have led to the ideological 'flip' of three of the country's 13 federal appeals courts, one level below the Supreme Court.").

167. *See id.*

168. Roger Pilon, *Engaged Trump Judges May Restore the Role of the Courts*, LAW360 (Sept. 12, 2019, 8:04 PM), <https://www-law360-com.libproxy1.usc.edu/articles/1195481/engaged-trump-judges-may-restore-the-role-of-the-courts> [<https://perma.cc/UC8H-5FHJ>].

169. *Id.*

170. ELY, *supra* note 155, at 101.

III. SOLUTIONS TO ADDRESS REGULATORY GAP FILLING IN IMMIGRATION

While the BIA's review of immigration matters unite and divide families or save victims of violence and persecution, the methods in which we effectuate the regulations that dictate these decisions are deeply flawed. Our options today stand as follows: (1) defer to an agency committed to restricting immigration, or (2) burden the federal courts with an interpretive role beyond their core competency. The flaws of the first option have been the focus of this Note. As for the latter scenario, when immigrants petition a federal court of appeal to review their adverse BIA decision, new flaws emerge.

Upon review in a federal court, the following main issues arise: the BIA is still a party to the litigation and the court is empowered to create immigration policy in piecemeal adjudications over time. First, in the case in which the BIA faces a noncitizen, the previous adjudicator transforms into the adversary. The government sends a representative from the Office of Immigration Litigation to litigate against the noncitizen.¹⁷¹ Impartiality and fairness are compromised along the way. And although issues with grave consequences are run-of-the-mill for federal courts, BIA decisions are exceptionally human and political. With fundamental freedoms at stake, being part of an enforcement culture seems inappropriate. Retired IJ Paul Schmidt recently shed light on these flaws when he wrote: “[W]hat real court acts as an adjunct to the prosecutor’s office?”¹⁷² Such a relationship in adjudications is common in authoritarian, refugee-producing countries, not a country hailed for pursuing a “more perfect union.”¹⁷³

So, what to do with these more than imperfect options? Change the process altogether. Immigration scholars and advocates, senators, and bar associations have all rallied together to suggest that the EOIR be completely removed from the DOJ and turned into an Article I legislative court.¹⁷⁴ An

171. See *Office of Immigration Litigation*, U.S. DEP'T OF JUST. (Sept. 9, 2020), <https://www.justice.gov/civil/office-immigration-litigation> [<https://perma.cc/AW43-CLQZ>].

172. Chase, *supra* note 5.

173. See *id.*

174. See generally AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [<https://perma.cc/3DMP-AY5C>]; S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [<https://perma.cc/K2GJ-4TBU>]; AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S

independent, Article I U.S. Immigration Court system with trial and appellate divisions possesses the potential protections necessary to insulate individual immigration matters from the direct political control of the Executive. This severance from the Executive has worked before in other areas of law. In fact, the current Article I courts—the United States Tax Court, the United States Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Armed Forces—were transformed from components of executive agencies into Article I courts by Congress.¹⁷⁵ With the legislature setting forth an independent adjudication process, rather than under the veil of a federal agency’s service to the acting President’s agenda, immigration courts and appellate bodies like the BIA would be more insulated from political manipulation and whiplash. If the quasi-judicial nature of the BIA under the supervision of the Attorney General is the problem, an Article I court presents the opportunity to pursue a purely judicial process with the added benefit of developing an expertise solely in interpreting and adjudicating laws in the immigration domain. The impartiality, fairness, and resources necessary for a properly functioning democracy can be restored. When these fundamental principles are assured, then “the public’s faith in the immigration court system will be restored.”¹⁷⁶

The American Bar Association (“ABA”) recommended in 2010 the creation of an Article I court. Without detailing the structure, if an Article I court was seriously considered, the ABA intends to work with “like-minded bar associations and organizations to develop recommendations on specific features.”¹⁷⁷ And since 2010, the ABA recognized as recently as 2019 that an independent agency in the executive branch would not constitute a sound second alternative. Further, the Federal Bar Association has supported the push for an Article I system by drafting and publishing proposed legislation.¹⁷⁸

While the formulation of this court deserves its own article, it is worth highlighting a few of the potential features that can be built into an Article I immigration court without detailing the entire system. For example, the

IMMIGRATION COURTS (2020), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts> [<https://perma.cc/V5QA-6ULP>].

175. S. POVERTY L. CTR., *supra* note 174, at 26.

176. AM. BAR ASS’N, *supra* note 174, at UD 2–4.

177. *Id.* at UD i–6.

178. See generally FED. BAR ASS’N, FBA MODEL LEGISLATION ESTABLISHING AN ARTICLE I IMMIGRATION COURT (2019), <https://www.fedbar.org/wp-content/uploads/2019/10/proposed-Article-I-immigration-ct-model-bill-07162019-pdf-1.pdf> [<https://perma.cc/7E5J-PFCQ>]; Christine Lockhart Poarch, *Immigration Update: The FBA’s Proposal for the Creation of a Federal Immigration Court*, FED. LAW., Apr. 2014, at 10.

Judicial Conference—the national policy-making body for the federal courts—assesses judgeship needs every two years based on weighted case metrics, number of cases, and the district court size, among other factors. Such an assessment could be applied to the Article I immigration system to streamline cases without compromising quality review. Currently, the EOIR calculates its IJ staffing needs by dividing its entire projected caseload for the upcoming fiscal year by the average number of cases completed per IJ in the previous year.¹⁷⁹ With the protections of the Judicial Conference alone, caseloads would be much more manageable. This structure would mitigate the policies that have the purpose and effect of “limit[ing] access to asylum, counsel, and the courts themselves.”¹⁸⁰ In addition, Article I judges can be appointed by the President of the United States and confirmed by the United States Senate. This checked and balanced appointment procedure could help bypass the more blatantly corrupt hiring and firing practices that have historically pervaded the current system. In short, creating an Article I judicial body provides the United States with ample opportunity to not only restore but also ensure the principles of fairness and due process that are so critically lacking from our current immigration infrastructure.

CONCLUSION

As *Auer* doctrine stands, the very fate and freedom of immigrants can be left to manipulation by a politicized board member’s interpretation of an ambiguous regulation. The only check on such an interpretation is a standard of reasonableness—insufficient to protect immigrants from an unaccountable body that is politically aligned with deep-rooted restrictionist principles, which were only further cemented by the Trump administration. Even a transition in power with a more liberal ideology is insufficient to truly secure and protect immigrants making their way through immigration proceedings. The more plausible and fairer solution is to resurface principles of accountability and separation of powers by reformulating the immigration adjudication system into an Article I court system. This may be enough to protect immigrants from the “irredeemably dysfunctional,” politicized BIA and unfit federal courts when their freedom is dependent on an interpretation of an ambiguous regulation.¹⁸¹

179. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 34, at 34.

180. AM. BAR ASS’N, *supra* note 174, at UD i–6.

181. *Id.* at UD 2–3.