GEOGRAPHY AS DUE PROCESS IN IMMIGRATION COURT

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Even when limited by the plenary power doctrine, noncitizen respondents in removal proceedings are entitled to due process before immigration courts. At its core, due process in immigration court requires fundamental fairness—the opportunity to be heard and to mount a defense to deportation. Implicit in this right is the ability to access the tribunal adjudicating a respondent's claim. Yet, the geographic distribution of immigration courts in the United States, which in some cases requires that respondents travel five hundred miles or more for hearings, often makes access to immigration courts nearly impossible.

Using the procedural due process framework set forth by the Supreme Court in *Mathews v. Eldridge*, I argue that the current geographic distribution of immigration courts violates respondents' rights to procedural due process by inhibiting their ability to appear, present evidence, and secure counsel. In so doing, I highlight the detrimental effects that geography has on remote communities, such as their ability to build pipelines towards access to counsel. Finally, I weigh and propose alternative solutions that balance the government's interests in efficiency with the respondents' interests in having a meaningful opportunity to avoid the harsh consequences of deportation.

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INTRODUCTION

Esperanza[1] is a fourteen-year-old girl who entered the United States without a visa as an unaccompanied minor and reunited with her single mother in Sevier County, Tennessee. She was called to respond to charges of removability at the Memphis Immigration Court, the immigration court that hears cases for all respondents residing in Tennessee. Because Esperanza challenged the propriety of how Immigration and Customs Enforcement (ICE) served her charging document, the assigned immigration judge to her case denied her request to appear telephonically and required Esperanza, her mother, and her attorney to appear in person for Esperanza's 8:30 AM master calendar hearing. The drive from Esperanza's home to the Memphis Immigration Court would take about seven hours, though the hearing itself would likely last less than ten minutes.

Because Esperanza's mother was undocumented and did not have access to a credit or bank card, she was unable to book a hotel to stay the night before the early morning hearing. There is no train service between Esperanza's home and Memphis, and the bus trip, which would take about eight-and-a-half hours, would drop Esperanza and her mother on the outskirts of the city and about a twenty-minute drive from the immigration court's location, risking tardiness.

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1. "Esperanza" is a client that I represented when I was a pro bono attorney with Volunteer Immigrant Defense Advocates in East Tennessee. For client confidentiality purposes, I have changed the respondent's name, but the experience described matches the real client's experience.

An hourly worker, Esperanza's mother lost two days of wages to bring her child to court. And because she had trouble securing childcare for such a long period of time, both Esperanza and her younger siblings missed two days of school. To make the hearing, Esperanza's mother began her drive at 1:00 AM and drove through the night without a driver's license through jurisdictions that have cooperative immigration enforcement agreements with ICE. Luckily, Esperanza arrived at her hearing on time without encountering adverse weather, traffic delays, or detours. When the immigration judge called Esperanza's case, however, she was informed that the hearing would have to be postponed. ICE failed to come to court with Esperanza's file and could not proceed with the hearing.

The United States immigration court system is in a state of crisis. Though the immigration courts' dysfunction received renewed attention during the Trump Administration, scholars,[2] advocates,[3] and even judges[4] have long highlighted the ways that immigration courts

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2. *See, e.g.*, David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823 (2016) (using empirical data to argue that immigration court scheduling practices significantly interfere with respondents' abilities to secure counsel and violate due process rights); Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1572–73 (2014) (arguing that the lack of discovery in immigration court and the information disparity between government trial attorneys and respondents amounts to a violation of procedural due process).

3. *See, e.g.*, *DOJ Ignores Set of Recommendations to Strengthen Immigration Court System Efficiency and Effectiveness,* AM. IMMIGR. LAWS. ASS'N (Apr. 23, 2018), https://www.aila.org/infonet/doj-ignores-recommendations-imm-court-system [https://perma.cc/3VU5-9V5V] (reporting on FOIA request results that revealed that the EOIR commissioned, and then ignored, an investigative report meant to enhance efficiency and due process); LAURA ABEL, BRENNAN CTR. FOR JUST., LANGUAGE ACCESS IN IMMIGRATION COURTS (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf [https://perma.cc/3S3Z-ZFQZ] (identifying ways in which immigration court procedures fail those with limited English proficiency).

4. *See, e.g.*, *Bouras v. Holder*, 779 F.3d 665, 681 (7th Cir. 2015) (Posner, J., dissenting) ("Judicial activism is deplored but there is such a thing as excessive judicial passivity, which has been present at all levels of adjudication of [the respondent's] case.") (concluding that the immigration judge abused his discretion by refusing to continue a hearing to accommodate a material witness); *Wang v. Att'y. Gen. of U.S.*, 423 F.3d 260, 269 (3d Cir. 2005) (remanding an immigration judge's asylum denial and recommending the recusal of an immigration judge that the court found "attack[ed] [the respondent's] moral character rather than conduct a fair and impartial inquiry into his asylum claims" and gave substantial weight to issues irrelevant to the claims); *Reyes-Melendez v. I.N.S.*, 342 F.3d 1001, 1007 (9th Cir. 2003) (holding that an immigration judge violated a noncitizen's due process rights by abandoning her role as a neutral factfinder); *see also* Tal Kopan, *Outgoing SF Immigration Judge Blasts Courts as 'Soul-Crushing,' Too Close to ICE*, S.F. CHRON., https://www.sfchronicle.com/politics/article/Exclusive-Outgoing-SF-immigration-judge-blasts-16183235.php [https://perma.cc/KJ4C-LW8Q] (May 18, 2021, 4:42 PM).

continuously fail to provide noncitizen respondents with a fair opportunity to present claims for deportation relief and to hold the government accountable to its obligations. Notwithstanding the myriad structural and procedural shortcomings that impede noncitizen respondents' ability to advocate for themselves, observers have largely failed to consider the effect that the geographic distribution of immigration courts, and the distance some respondents must travel to appear, has on the ability of a person to meaningfully participate in removal proceedings. To the extent that distance and geography in immigration settings has been addressed as a due process issue, the focus has largely been on the effects of immigration detention centers, which are commonly located in remote areas far from urban centers, transportation hubs, detainees' families, and retained counsel.[5]

Though the Supreme Court has come to recognize that deportation can be as severe a punishment as a criminal conviction, the Court-created plenary power doctrine has continued limiting the constitutional safeguards available to noncitizens in immigration proceedings, particularly as it compares to those afforded to criminal defendants.[6] Nonetheless, the Court has recognized that noncitizen respondents in removal proceedings are entitled to due process before immigration courts. Courts interpret the right to due process in removal proceedings as a right to "fundamental fairness."[7] At its core, fundamental fairness entails the right to meaningfully contest the government's charges of removability and fully and fairly raise any applications for relief from removal that may be available to an individual.[8]

Implicit in the right to meaningfully participate in proceedings is the ability to access the tribunal adjudicating a claim. Yet, the geographic distribution of immigration courts in the United States, which in some cases requires that respondents travel five hundred miles or more for hearings, can make access to the immigration courts nearly impossible for respondents. This is the situation faced by individuals in removal proceedings living in Johnson City, Tennessee, for example, who are

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5. *See, e.g.*, César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17 (2011); Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1156 (2015); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 6–12 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/XEN6-GSBL].

6. *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982).

7. *Valenzuela-Bernal*, 458 U.S. at 872.

8. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (holding that due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner").

called to appear for removal proceedings at the immigration court in Memphis, Tennessee, a city that is just under five hundred miles away.[9] A person in Johnson City must drive seven-and-a-half hours (one-way)—almost an entire work day—for all immigration court appearances, including master calendar hearings that typically last no longer than five minutes. Failing to appear or arriving late to a hearing most often leads to the severe consequence of having an *in absentia* order of removal entered, an outcome that can permanently separate a person from their family and home, and for which opportunities for appeal or recourse are limited as a matter of law.[10]

The burden that this geographic problem imposes goes well beyond mere inconvenience and raises serious barriers to justice for those availing themselves of the immigration courts. This is especially the case for indigent and other particularly vulnerable immigrant populations. For those located far from the courts, attendance may require taking long absences from work or school, or may be impossible due to the inability to secure transportation for the long trek. Driving long distances may expose immigrants to safety risks inherent to driving long distances and pose an additional risk of arrest and detention, particularly for those who live in states that do not offer drivers' licenses to undocumented drivers or for those who drive through jurisdictions who have entered cooperative agreements with ICE. Key witnesses may find it cost-prohibitive to travel long distances to provide material testimony. To the extent that court accommodations, like telephonic appearances, could alleviate these burdens, they are generally reserved for represented respondents (and are subject to the discretion of presiding immigration judges, who routinely deny such requests).[11]

In this Article, I propose a novel consideration in the field of due process in immigration law—to provide due process and fundamental fairness in removal proceedings, the government must tailor the

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9. *See Driving Directions from Johnson City to Memphis, TN*, GOOGLE MAPS, http://maps.google.com; *Administrative Control List*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/immigration-court-administrative-control-list#Memphis [https://perma.cc/8JH4-FN8Y] (last visited Feb. 18, 2023).

10. *See* SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY 108–10 (2003); *see also infra* Section III.B.2.

11. *Memphis Immigration Court Telephonic Hearing Policy*, MUCKROCK, https://www.muckrock.com/foi/united-states-of-america-10/memphis-immigration-court-telephonic-hearing-policy-61720/ [https://perma.cc/9CZY-APSW] (last visited Feb. 18, 2023) [hereinafter MUCKROCK] (showing government emails produced pursuant to a FOIA request for the Memphis Immigration Court's telephonic appearance policy, which reveal that the Executive Office for Immigration Review was aware that immigration judges were routinely denying motions for telephonic appearances to respondents located far from the immigration courts).

geographic distribution of its immigration courts in a way that ensures that immigrants have fair access to the tribunals, not just for detained respondents but for all called to defend a charge of removability. I argue that the geographic distribution of immigration courts does not comport with the government's constitutional obligation to ensure fundamental fairness for respondents in removal proceedings and has troubling consequences not just for the individuals ensnared in the immigration enforcement apparatus but for the community as a whole.

Part I introduces the administrative agencies involved in removal proceedings, explains the rules and guidance that govern venue in immigration court proceedings, and describes the geographic distribution of immigration courts in the United States. Part II explores modern due process jurisprudence for immigration-related proceedings and the varying degrees to which noncitizens are considered to have a property or liberty interest in immigration-related proceedings. Applying the framework set forth by the Supreme Court in *Mathews v. Eldridge*[12] for determining the constitutional sufficiency of administrative procedures, Part III of this Article weighs the interests of the government and noncitizen respondents, highlighting the considerable legal and economic injuries resulting from the uneven geographic distribution of immigration courts. Part IV explores the extent to which immigration courts can meet their constitutional obligations by adopting procedural accommodations. In proposing solutions, I weigh the costs and benefits of using increased video-conferencing technology, immigration judge circuit rides, and the addition of new immigration courts to facilitate meaningful participation for the most burdened regions of the United States. I conclude by recognizing that by facilitating access to the immigration courts, the Biden Administration can demonstrate its commitment to preserving the legitimacy of the United States immigration system and delivering on its promise to make the immigration system more just and humane.

I. PROCEDURE AND VENUE IN REMOVAL PROCEEDINGS

A web of intertwining agencies administers the immigration laws of the United States, a complex system that noncitizens must navigate to gain admission, regularize their immigration status, and avoid deportation. The Immigration and Nationality Act (INA), implementing regulations, and agency guidance set forth the procedural requirements that govern procedure in removal proceedings. These requirements, ostensibly established to ensure both fairness and efficiency in removal proceedings, requires strict adherence from all parties. The failure to

12. 424 U.S. 319 (1976).

adhere to the procedural rules can lead to detrimental consequences for noncitizens, particularly those who are unrepresented.

A. Removal Proceedings, Generally

Removal proceedings[13] are the administrative process by which the federal government determines whether individuals have violated United States immigration laws, and, if so, whether they are entitled to any form of relief from removal.[14] The Immigration and Nationality Act (INA) charges the Department of Homeland Security (DHS) with the administration and enforcement of immigration laws, which includes the authority to initiate removal proceedings against individuals it suspects of being in the United States in violation of immigration laws.[15] When a DHS officer has prima facie evidence that an individual is present in the United States in violation of immigration law, the officer refers the case to the immigration court for further inquiry as to whether the individual is removable.[16] To initiate that process, the DHS officer will issue a charging document, known as the notice to appear, to the individual suspected of being in violation of immigration law.[17]

Removal proceedings commence when DHS files a notice to appear with an immigration court,[18] which is the moment the immigration court's jurisdiction vests over noncitizens.[19] Once removal proceedings are initiated against an individual, the individual is referred to as a

13. Before 1996, the INA distinguished between "exclusion," a process by which the government would prevent the admission of a person seeking entry into the United States, and "deportation," the proceeding through which the government would seek to expel someone who had already entered into the United States and sought to remain. After Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, both of these determinations took place in a legal process called "removal proceedings." *See* 8 U.S.C. § 1229a(e)(2). In this Article, I will use the terms "deportation" and "removal" interchangeably to refer to the expulsion of someone who is already located in the United States.

14. 8 C.F.R. § 1240.1(a)(ii) (2022).

15. 8 U.S.C. § 1103(a)(1).

16. 8 C.F.R. § 287.3(b) (2022). The removal process is different for those subject to expedited removal, that is, those encountered at or near border without proof of authorization to be in the United States, who do not establish a credible or reasonable fear of persecution or torture in their home countries. *See* 8 U.S.C. § 1225(b). The government's control of venue in expedited removal and for those subject to the Remain in Mexico and Title 42 policies pose serious due process concerns and is worth critical study, but it is outside the scope of this Article. *See*, *e.g.*, Anita Kumar, *Biden Mulls 'Lite' Version of Trump's 'Remain in Mexico' Policy*, POLITICO (Sept. 6, 2021, 4:31 AM), https://www.politico.com/news/2021/09/06/biden-remain-in-mexico-policy-509436 [https://perma.cc/JAA8-8STG].

17. 8 C.F.R. § 1239.1(a).

18. *Id.*

19. 8 C.F.R. § 1003.14(a).

"respondent."[20] Removal proceedings are adversarial in nature. After the notice to appear is filed, attorneys with ICE's Office of the Principal Legal Advisor (OPLA) serve as prosecutors in the proceedings.[21]

Immigration courts[22] are administered by the Executive Office for Immigration Review (EOIR)—an agency within the Department of Justice—and are subject to the direction and regulation of the Attorney General.[23] The Attorney General appoints attorneys as immigration judges to conduct proceedings that determine the removability of a noncitizen from the United States.[24] Federal regulations outline the powers and duties of immigration judges, whose tasks are to "exercise their independent judgment and discretion" and to take any actions authorized by the INA and federal regulations that are appropriate and necessary for the disposition of removal proceedings.[25] Such powers include determining whether an individual is removable, issuing orders that specify the country of removal, adjudicating applications for relief from removal (such as applications for asylum or cancellation of removal), and ordering the withholding or deferral of a removal for those who can prove persecution or torture in the country of removal.[26] During removal proceedings, immigration judges are empowered to consider any relevant evidence, rule on objections, "and otherwise regulate the course of the hearing."[27]

Once removal proceedings commence, the immigration court issues a hearing notice, which calls upon the respondent (and their attorney, if any),[28] to appear at an initial hearing called a master calendar hearing.[29] Much like in an arraignment hearing in criminal proceedings, during the master calendar hearing, immigration judges notify parties about the

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20. *See generally* 8 C.F.R. pt. 1240.

21. 8 C.F.R. § 1240.2(a)–(b).

22. Federal regulations define immigration courts as "the local sites . . . where proceedings are held before immigration judges and where the records of those proceedings are created and maintained." 8 C.F.R. § 1003.9(d).

23. 6 U.S.C. § 521; 8 U.S.C. § 1103(g)(1)–(2); 8 C.F.R. § 1003.0.

24. 8 U.S.C. § 1229a(a)(1) & (b)(1); 8 C.F.R. § 1003.10(a). Immigration judges also preside over custody redetermination (bond) hearings for eligible detained noncitizens. 8 C.F.R § 1003.19. Custody redetermination hearings are separate proceedings and are not considered removal proceedings. *Id.*

25. *Id.* § 1003.10(b).

26. *Id.* § 1240.1(a).

27. *Id.* § 1240.1(c).

28. *See infra* Section III.B.4.

29. *See* DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL, ch. 4.15(c) (2022), https://www.justice.gov/eoir/book/file/1528921/download [https://perma.cc/D7WN-QULY] [hereinafter IMMIGRATION COURT PRACTICE MANUAL]; MARIA BALDINI-POTERMIN, CONDUCT OF INITIAL MASTER CALENDAR HEARING, IMMIGRATION TRIAL HANDBOOK § 5:3 (2019).

substance and nature of certain rights. In the same hearings, immigration judges solicit the respondents' response to the factual allegations and charges of removability, determine whether the respondent will pursue any forms of deportation relief (such as asylum or cancellation of removal), and designate a country for removal in the event the respondent is ordered removed.[30] Generally, these master calendar hearings are short and are completed in a matter of minutes.[31] Where a respondent contests certain charges or allegations, pursues a form of deportation relief, or identifies other issues that merit further attention, an immigration judge will schedule a continued master calendar hearing or an individual merits hearing, where the respondent can establish eligibility for a form of relief from removal.[32]

B. Procedural Standards in Removal Proceedings

The INA[33] and federal regulations[34] provide procedural rules and obligations for removal proceedings. At the outset, the INA requires that notices to appear issued to presumed noncitizens provide notice of the following: (1) the nature of the proceedings being instituted against the noncitizen; (2) the legal authority under which the government is conducting removal proceedings; (3) the acts or conduct the government alleges to be in violation of immigration law; (4) the charges against the noncitizen and the statutory provisions that the noncitizen is alleged to have violated; (5) that the noncitizen may be represented by counsel and will provided with time to secure representation[35] and a list of representatives who have indicated their availability to provide pro bono counsel; (6) the noncitizen's obligation to provide and keep current an address and phone number; (7) the consequences of failing to appear for a hearing; and (8) the time and place at which proceedings will be held.[36]

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30. *See* 8 C.F.R. § 1240.10.

31. *Cf.* BALDINI-POTERMIN, *supra* note 29 (describing the events that take place during removal proceedings).

32. *Id.*

33. 8 U.S.C. § 1229a.

34. 8 C.F.R. §§ 1003.12–1003.47; *id.* § 1240.3–1003.16.

35. *See* 8 U.S.C. § 1229(a)(1). To promote the retention of counsel, the Immigration and Nationality Act forbids the government from scheduling the first hearing earlier than ten days after the service of the notice to appear. *See id.* § 1229(b)(1).

36. 8 U.S.C. § 1229(a)(1)(F)–(G). In two recent decisions addressing the stop-time clock in cancellation of removal cases, the Supreme Court held that DHS's practice of drafting notices to appear with "TBD" in place of the time and place of proceedings, done in reliance that immigration courts would later specify the time and place of the proceeding in a subsequent hearing notice, did not provide the notice required by statute. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2118 (2018) (holding a putative "notice to appear" that failed to designate the specific time and place of removal proceedings was not a "notice to appear" under the INA and was therefore insufficient to trigger the stop-

The statute also sets forth the respondent's rights once removal proceedings have commenced, which include: (1) the right to be represented by counsel of their choosing, at no expense to the government; (2) a reasonable opportunity to examine the evidence advanced against the respondent and cross-examine witnesses presented by the government, except for any evidence that might contain sensitive national security information; and (3) the creation of a complete record that contains all testimony and evidence admitted in the proceedings.[37] Federal regulations set forth more specific rules of procedure, which are promulgated "to assist in the expeditious, fair, and proper resolution" of cases.[38] The regulations address issues like the scope of an immigration judge's jurisdiction;[39] how the immigration court should schedule and notify respondents of hearings;[40] the conditions under which an immigration judge can conduct a hearing via telephone or video conference[41] or in the absence of a respondent who fails to appear;[42] document filing requirements;[43] the manner in which decisions can be

time rule for purposes of cancellation of removal); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485–86 (2021) (holding that the INA requires notice of the time and place of proceedings must be provided in a single notice to appear, and concluding that government's practice of providing notice of the time and place of proceedings over a number of written notices would not trigger the stop-time rule for purposes of cancellation of removal). In response to the *Pereira* holding, DHS began issuing notices to appear with fake dates. *See* Alia Malik, *More than 100 Show Up at San Antonio Immigration Court for Artificial Hearing Date*, SAN ANTONIO EXPRESS-NEWS (Nov. 30, 2019, 12:39 PM), https://www.expressnews.com/news/local/amp/More-than-100-show-at-San-Antonio-immigration-14870967.php. Although respondents and their advocates subsequently relied on these Supreme Court decisions to argue that all removal proceedings commenced by faulty notices to appear should be terminated for failure to comply with the minimum statutory procedural requirements, the Board of Immigration Appeals interpreted these holdings narrowly, declining to extend the rulings beyond the context of determining eligibility for cancellation of removal and voluntary departure. *See Bermudez-Cota*, 27 I. & N. Dec. 441, 447 (B.I.A. 2018) (interim decision) (distinguishing *Pereira* and holding that a notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of the Act, so long as a notice of hearing specifying this information is later sent to the alien); *Arambula-Bravo*, 28 I. & N. Dec. 388, 392 (B.I.A. 2021) (interim decision) (holding that *Niz-Chavez* does not overrule *Bermudez-Cota*); *M-F-O-*, 28 I. & N. Dec. 408, 415–16 (B.I.A. 2021) (interim decision) (extending the reasoning in *Arambula-Bravo* to cases involving voluntary departure).

37. 8 U.S.C. § 1229a(b)(4).
38. 8 C.F.R. § 1003.12 (2022).
39. *Id.* § 1003.14(b)–(d).
40. *Id.* § 1003.18.
41. *Id.* § 1003.25(c).
42. *Id.* § 1003.26.
43. *Id.* § 1003.31–1003.33.

reconsidered, revisited, or appealed;[44] and the procedure for changing venue.[45]

The Office of the Chief Immigration Judge (OCIJ), which establishes operating policies and oversees policy implementation for the immigration courts under the authority of the Director of the Executive Office for Immigration Review, has promulgated even more specific procedures and requirements for practice before the immigration courts in the Immigration Court Practice Manual.[46] The Immigration Court Practice Manual, which was published without any notice or period for comment,[47] addresses procedural minutiae like the required contents and deadlines associated with motions, briefs, and other filings; pagination, tabbing, and hole-punching requirements; and the order in which parties must compile certain submissions.[48] Immigration courts are authorized to reject filings or deem certain matters waived for failure to comply with the requirements of the Immigration Court Practice Manual.[49]

II. THE EVOLVING ROLE OF DUE PROCESS IN IMMIGRATION PROCEEDINGS

To quote Professor Stephen Legomsky, "[i]mmigration law is a constitutional oddity."[50] Because deportation is not considered punishment for a crime,[51] constitutional safeguards that attach to criminal proceedings, like the right to appointed counsel for indigent defendants and the exclusionary rule for Fourth Amendment violations, do not apply in removal proceedings.[52] When it comes to laws concerning the

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44. *See id.* § 1003.23 (procedure for filing motions to reopen or reconsider); *id.* § 1003.38 (procedure for appealing immigration judge decisions).

45. *Id.* § 1003.20.

46. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 1.1–1.3; *see also* 8 C.F.R. § 1003.10(b) (setting forth the duties of the Chief Immigration Judge).

47. *See* Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 92 (2008).

48. *See id.*; *see also* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 3.3(c)(3)–(4), (8).

49. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 3.1(d).

50. Stephen H. Legomsky, *Immigration Law and the Principal of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

51. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

52. *See Lopez-Mendoza*, 468 U.S. at 1039, 1050–51 (summarizing a number of constitutional safeguards in criminal proceedings that do not extend to deportation cases and holding that the exclusionary rule does not apply in deportation proceedings where Fourth Amendment violations are not egregious); *see also* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1605 & n.211 (2010) (noting that the right against self-incrimination does not apply in removal proceedings); 8 U.S.C. §

admission and expulsion of noncitizens,[53] the Supreme Court has traditionally taken the view that the authority to establish and enforce immigration law and procedure lies exclusively with Congress, and by extension, the Executive.[54] This judicially created "plenary power" doctrine has had the effect of foreclosing or severely limiting judicial review of constitutional challenges to laws and procedures.[55]

Judicial views on the applicability of due process in removal proceedings have evolved with time, however, particularly as it relates to procedural due rights in cases involving expulsion or deportation cases.[56] By recognizing that deportation results in a severe deprivation of liberty, federal courts have carved procedural due process as an exception to the plenary power doctrine, inviting judicial inquiry as to what degree of process is due in removal proceedings.[57]

A. The Plenary Power Doctrine and the Limited Constitutional Protections in Immigration-Related Proceedings

The Supreme Court has traditionally refused or otherwise resisted engaging in constitutional review of immigration laws and regulations under its own plenary power doctrine. Relying on concepts of sovereignty, including a nation's right and obligation to protect the country from foreign enemies,[58] the general rule from early cases that applied the doctrine has been that federal courts treat agency actions

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1229a(b)(4)(A) (providing that a respondent has the right to be represented at no expense to the government).

53. Legomsky, *supra* note 50, at 256 (referring to immigration law as the body of law concerning the admission and expulsion of immigrants and distinguishing it from general laws and policies concerning noncitizens' rights and obligations in the United States); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (same).

54. *See* Legomsky, *supra* note 50, at 257 ("In the typical case, the governmental organ whose power is held to be plenary is Congress. Occasionally, however, the doctrine has effectively been extended to cover action of the Immigration and Nationality (INS) as well.") (cleaned up).

55. *See id.* at 255.

56. *Id.* at 259 (noting that procedural due process is a partial exception to the absolute character of Congress's power over immigration law); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1629 (1992) (observing that courts have used the procedural due process challenges to get around the plenary power doctrine to address the substantive rights of noncitizens in deportation proceedings).

57. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–98 (1953) ("Although Congress may prescribe the conditions for [the respondent's] expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.").

58. *See, e.g.*, *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

regarding the entry or expulsion of noncitizens as exceptional and deserving of extraordinary deference.

The plenary power doctrine developed during a period of intense anti-Chinese sentiment in cases dealing with the notoriously racist Chinese Exclusion Act.[59] In *Chae Chan Ping v. United States*,[60] the case that is widely considered to have birthed the doctrine, the Court declared an inherent constitutional sovereign power to regulate immigration.[61] *Chae Chan Ping* involved a Chinese immigrant who was excluded from the United States when a certificate that had once been required for re-entry to the United States was no longer deemed valid for entry as a matter of law, rendering the noncitizen inadmissible.[62] Noting that the government had the inherent right to exclude foreign individuals at any time that the interest of the country required, the Court stated that this authority "cannot be granted away or restrained on behalf of anyone."[63]

Chae Chan Ping dealt with the exclusion of an individual seeking entry into the country, but shortly thereafter, this extraordinary deference to the "political departments"[64] was extended to the deportation of an individual who was already present in the United States. In *Fong Yue Ting v. United States*,[65] the Court considered a challenge to a law that required Chinese noncitizens to present a certificate of residence containing an attestation from a white witness that the noncitizen had previously resided in the United States and presented good moral character.[66] The Court upheld the certificate law, once again relying on concepts of sovereignty and territoriality, and opining that the right to exclude foreigners was a right "incident of every independent nation."[67]

Over time, the plenary power doctrine developed cracks, as the Court began recognizing that certain noncitizens had a right to procedural due process. In *Yamataya v. Fisher (The Japanese Immigrant Case)*,[68] the Court intervened in a noncitizen's deportation, recognizing that,

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59. *See* Legomsky, *supra* note 50, at 289 ("It was during this era of public hostility to Asians that the Supreme Court adopted and solidified the plenary power doctrine. In many cases, the Asian ancestry of the particular aliens prompted judicial tirades about their negative influences.") (cleaned up). One could question the continued legitimacy of a judicial doctrine founded and justified by such explicitly racist stereotypes, particularly one that has effectively suspended due process rights of people otherwise protected by the Constitution. *See Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886).

60. 130 U.S. 581 (1889).

61. *Id.* at 609.

62. *Id.* at 599.

63. *Id.* at 609.

64. *Id.* at 602.

65. 149 U.S. 698 (1893).

66. *Id.* at 727.

67. *Id.* at 705.

68. 189 U.S. 86 (1903).

having developed ties to the nation due to the length of time she had resided within the United States, she was entitled to notice and an opportunity to contest her deportation.[69]

The Court's recognition of a right to procedural due process, and its willingness to review agency enforcement actions, did not ever truly extend to noncitizens who sought entry as an initial matter. In *United States ex rel. Knauff v. Shaughnessy*,[70] and its progeny,[71] the Court emphasized that noncitizens who were not permanent residents[72] did not have a right to enter the United States or sufficient ties to justify deviation from the plenary power doctrine.[73] As such, the Court found that initial entrants had no right to due process. In a now infamous line, the *Knauff* Court held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[74]

B. Due Process in Modern Immigration Courts

As the decisions above demonstrate, whether federal courts defer to the political branches or entertain due process challenges depends largely on two factors: (1) where the noncitizen is located; and (2) the type of constitutional challenge the noncitizen raises.[75] As it relates to an individual's physical location, it is by now readily accepted that individuals in the United States who are subject to deportation are entitled to more constitutional safeguards than those outside of the country

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69. *Id.* at 101. As explained in further detail in Section II.B, *infra*, this recognition of procedural due process rights in immigration proceedings did not ever develop into a recognition of substantive due process rights. *See Fiallo v. Bell*, 430 U.S. 787, 788–89, 792 (1977) (finding a law that conferred citizenship rights differently on children of U.S. citizens on the basis of gender and legitimacy, which plaintiffs had challenged on equal protection laws, to be "largely immune from judicial control"). In essence, this means that the government can often get away with suspect-class-based discrimination in immigration-related proceedings that would never pass muster in other domestic settings. *See Graham v. Richardson*, 403 U.S. 365, 375–76 (1971) (holding, in a case addressing alienage-based discrimination in the provision of state welfare benefits, that classifications based on alienage are "inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired").

70. 338 U.S. 537 (1950).

71. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952) ("Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."); *see also Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 214–15 (1953).

72. The plenary power doctrine also carved out procedural due process exceptions for lawful permanent residents seeking re-entry into the country after a brief exit. *See* Motomura, *supra* note 53, at 560.

73. *Knauff*, 338 U.S. at 544.

74. *Id.*

75. *See* Motomura, *supra* note 53, at 560.

seeking entry.[76] While those inside the United States have a recognized right to be heard on the question of whether they are entitled to remain in the country,[77] the plenary power doctrine still largely forecloses due process review for individuals who are not yet inside the country.[78] Further, while those already inside the country may successfully bring challenges to certain policies or actions on procedural due process grounds, challenges based on substantive due process still generally fail.[79] In other words, whether the plenary power doctrine forecloses due process review depends on the remedy sought. Those seeking a ruling that a government action is not justified or is violating a fundamental right are more likely to fail,[80] while those who challenge a lack of safeguards sufficient to ensure a meaningful opportunity contest their deportation have a higher likelihood of success.

In 1982, the Supreme Court established a clearer framework for assessing procedural due process challenges in exclusion, deportation (and now removal)[81] proceedings.[82] Maria Antonieta Plasencia, the respondent, had resided in the United States for five years as a lawful permanent resident. Before the proceeding in question, she had lived with

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76. *Id.*

77. *See Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 101 (1903).

78. *See Knauff*, 388 U.S. at 544; *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) (recognizing that noncitizens "who have passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law," but reiterating that noncitizens "on the threshold of initial entry" are only entitled to whatever procedure is authorized by Congress). Lawful permanent residents who only briefly leave the United States and find themselves contesting inadmissibility are the exception and are considered to have due process rights. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98 (1953*); Landon v. Plasencia*, 459 U.S. 21, 32 (1985).

79. *See* Motomura, *supra* note 53, at 560; *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (finding that a statute requiring deportation of former communist party members was not invalid under the Due Process Clause); *Fiallo v. Bell*, 430 U.S. 787, 788–89, 792 (1977) (finding a law that conferred citizenship rights differently on children of U.S. citizens on the basis of gender and legitimacy, which plaintiffs had challenged on equal protection laws, to be "largely immune from judicial control"). For a rare exception, see *Ms. L. v. U.S. Immigr. & Customs Enf't*, 302 F. Supp. 3d 1149, 1165–67 (S.D. Cal. 2018) (finding that the 2018 family separations carried out by DHS at the U.S.-Mexico border, if carried out as alleged, would "shock[] the conscience," violating the plaintiff parents' substantive due process rights).

80. Claims that federal immigration laws, policies, or actions violate a substantive constitutional right are "subject only to limited judicial review," *Fiallo*, 430 U.S. at 796 n.6 (1977), which courts interpret to mean rational basis review, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018) (holding that when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen, courts apply rational basis review, and noting that "it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny").

81. *See supra* note 14.

82. *Plasencia*, 459 U.S. at 34.

her U.S.-citizen husband and their minor children. Returning from a brief visit to Mexico, she was detained by INS after an officer found she had tried to smuggle six undocumented people into the United States. She was scheduled to an exclusion hearing eleven hours later. Plasencia claimed that her status as a lawful permanent resident and the fact that her departure had been brief entitled her to stronger procedural safeguards than those that were afforded to her in the exclusion proceedings.

As an initial matter, the Court confirmed that, while Plasencia was a person seeking re-admission to the United States, she was distinguishable from the noncitizens who sought to enter the United States for the first time, holding that as a returning resident who had only briefly left the United States, she was entitled to procedural due process during her exclusion proceedings.[83] Citing the procedural due process test set forth in *Mathews v. Eldridge*,[84] the Court held that when evaluating the constitutional sufficiency of procedures in an exclusion or deportation proceeding,

> courts must consider the interest at stake for the individual, the risk of erroneous deprivation of the interest through the procedures used, . . . the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than the additional proposed safeguards.[85]

Applying the *Eldridge* test, the Court characterized Plasencia's interests as unquestionably weighty, as she stood to lose the right to stay, live, and work in the United States and the right to rejoin her children in the United States, "a right that ranks high among the interests of the individual."[86] The Court weighed these against the government's interest in the efficient administration of immigration laws at the border, a consideration that "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."[87]

To this day, the *Eldridge* test continues to be the means through which courts determine the procedural sufficiency of removal proceedings. While many lamented *Mathews v. Eldridge* as a step

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83. *Id.* at 32–33.

84. 424 U.S. 319, 334–35 (1976).

85. *Plasencia*, 459 U.S. at 34.

86. *Id.* (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 503–04 (1997)).

87. *Id.* (first citing *Fiallo v. Bell*, 430 U.S. 787, 792–93 (1977); then citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43; and then citing *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 97 (1903)).

backwards in what some coin the "due process revolution,"[88] other scholars have observed that *Eldridge*, with its explicit consideration of private interests and cost-benefit analysis, shifted courts' inquiries "from group-based assessments of sovereignty, citizenship, and territoriality to more particularized interpretations of circumstances of discrete cases."[89] Indeed, recent calls for increased rights in removal proceedings and immigration detention practices often employ the *Eldridge* framework to demonstrate the constitutional infirmity of current procedures.[90]

III. REASONABLE GEOGRAPHIC PROXIMITY AS DUE PROCESS

To quote the *Eldridge* Court, "the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."[91] At its essence, due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[92] When courts consider a procedural due process challenge under *Eldridge*, the obvious first step involves identifying and understanding the procedural action at issue.

Identifying and understanding the immigration courts' rules of venue is no small feat, however. As the Section below demonstrates, venue rules in removal proceedings are simultaneously minimal and labyrinthine, establishing no safeguards to ensure that immigration courts are within a reasonable distance of the respondents called to appear before them. As a result, certain respondents must travel extraordinary distances to appear for a day in court. As the application of the *Eldridge* test shows below, this geographic distribution amounts to a violation of due process. The immigration court system, in dire need of reform and modernization, is poised to address this problem.

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88. *See* Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 882 (2015).

89. *See id.*; *see also* Motomura, *supra* note 56, at 1626–31 (arguing that courts have used the procedural due process challenges to get around the plenary power doctrine to address the substantive rights of noncitizens in deportation proceedings).

90. *See, e.g.*, Hausman & Srikantiah, *supra* note 2, at 1840–43 (incorporating empirical data to the *Mathews* test to assess the constitutionality of immigration judges' practice of scheduling short continuances for the retention of counsel); Heeren, *supra* note 2, at 1607–20 (arguing that the lack of discovery in immigration court and the information disparity between government and respondents amounts to a violation of procedural due process); García Hernández, *supra* note 5, at 49–55 (arguing that transferring immigrant detainees to remote detention centers violates due process and interferes with their right to retain counsel).

91. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

92. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

A. Immigration Court Venue and the Standards that Govern It

Unlike federal district courts in civil[93] or criminal proceedings,[94] where statutes and rules of procedure set forth a standard of parameter for determining the locations to which defendants can be called to appear in civil suits or criminal proceedings, immigration courts do not have a set of codified standards for determining where a noncitizen respondent can be called to appear in removal proceedings. This lack of guidance suggests that immigration courts have apparent unlimited authority in demanding that a noncitizen appear at a particular venue, regardless of where the noncitizen resides.

The Subsection below endeavors to explain the labyrinthine guidelines through which the immigration courts assign venue. In Subsection 1, this Article describes and depicts the current placement of immigration courts, revealing the spatial disparities in immigration court distribution that leaves noncitizens in certain parts of the United States, including the West, Midwest, and Southeast, geographically isolated from the concentration of immigration courts. Subsection 2 explains the current criteria used for determining the geographic areas of responsibility for existing immigration courts. Specifically, the Article reveals the confusing web of guidelines that dictate where a noncitizen must appear in removal proceedings and file pleadings and evidence. As explained in further detail below, these "areas of responsibility" are often defined by arbitrary political boundaries, such as state borders or the capacity of prosecuting ICE OPLA offices, rather than by the accessibility to noncitizens called to answer to charges of removability.

1. THE GEOGRAPHIC DISTRIBUTION OF IMMIGRATION COURTS IN THE UNITED STATES

Currently, there are approximately six hundred immigration judges conducting removal proceedings in sixty-eight immigration courts and three adjudication centers across the United States.[95] These courts are not evenly distributed and are concentrated in the Northeast, the Southwest, and areas near the border, as the map of operational immigration courts below illustrates.[96]

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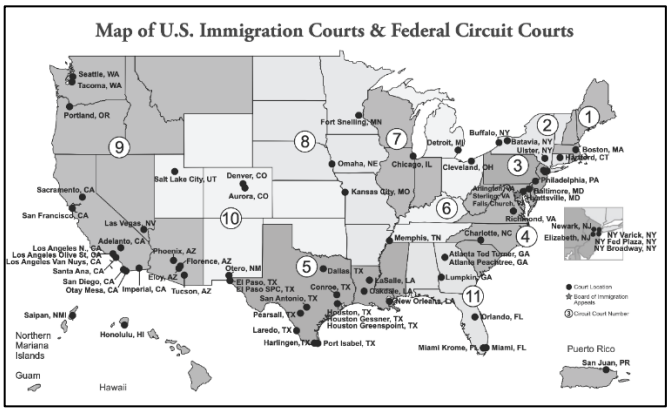
93. *See* 28 U.S.C. § 1391.

94. *See* FED. R. CRIM. P. 18.

95. *See Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/PN6R-QDPZ] (Feb. 18, 2023).

96. Map by Austin Kocher, Asst. Research Professor, Syracuse University.



While the map aptly demonstrates the sparse distribution of immigration courts in the West, Midwest, and Southeast, it does not distinguish between immigration courts to which non-detained respondents must travel and those that exclusively hear the detained respondents' cases. This absence renders the depicted concentration of immigration courts in certain regions somewhat misleading. For example, while the map shows a sizable concentration of immigration courts in Louisiana, only one immigration court conducts non-detained hearings;[97] all other immigration courts in the state conduct removal proceedings for respondents detained in Louisiana, which has seen a proliferation of immigration detention centers in recent years.[98] Similarly, the immigration court in Lumpkin, Georgia could significantly shorten the travel path for those living in Mississippi and Alabama, but it only hears cases for those detained at the Stewart Detention Center.[99]

2. THE STANDARDS FOR VENUE IN REMOVAL PROCEEDINGS

Where a noncitizen may be called to appear is not addressed in the INA. Federal regulations only briefly address the matter, stating simply that venue "shall lie at the Immigration Court where jurisdiction vests. . . ."[100] In other words, the appropriate venue for any given respondent lies wherever DHS decides to file the notice to appear. Once a notice to

97. *See Administrative Control List*, *supra* note 9 (explained in further detail *infra* Subsection I.C.2.).

98. Nomaan Merchant, *Louisiana Becomes New Hub in Immigrant Detention Under Trump*, AP NEWS (Oct. 9, 2019), https://apnews.com/article/donald-trump-us-news-ap-top-news-ar-state-wire-immigration-c72d49a100224cb5854ec8baea095044 [https://perma.cc/3QA7-3DAC] (noting that in the last year from the date of publication, DHS contracted with eight new facilities to detain noncitizens awaiting resolution of their removal proceedings).

99. *See Administrative Control List*, *supra* note 9.

100. 8 C.F.R. § 1003.20(a) (2022).

appear is filed with an immigration court, an immigration judge can only transfer a case if a party files a motion to change venue and establishes "good cause" for the change.[101] Because removal proceedings are formal adversarial proceedings, any motions filed by a party, regardless of whether that party is represented, must comport with the strict filing requirements outlined in the Immigration Court Practice Manual.[102]

Confusingly, the hearing location where a respondent is required to *appear* is not necessarily the location where the respondent is required to *file* documents like motions, applications for relief, or change of address forms.[103] While the filing location is often the same as the hearing location, for some hearing locations, respondents must file documents at a separate "administrative control court."[104]

"An administrative control immigration court" is a court "that creates and maintains" a respondent's record of proceedings—that is, the court file—for immigration courts within an assigned geographic area.[105] The regulations and policies related to administrative control courts are the only occasions where venue is defined in geographic terms.[106] As alluded to above, all filings related to the noncitizen's proceedings must be filed with the immigration court of administrative control, regardless of whether a non-administrative control immigration court is nearer to a particular respondent.[107]

The number and location of these administrative control courts are not set forth by statute or regulation and are subject to change at the Department of Justice's discretion. The regulations require all immigration courts to have a publicly available complete list of

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101. *Id.* § 1003.20(b); Jennifer Lee Koh, *Removal in the Shadows of the Immigration Court*, 90 S. CAL. L. REV. 181, 217 (2017) (noting that noncitizen respondents are not entitled to a change of venue as a matter of right, rendering many respondents hundreds of miles from the immigration court to which they are called to appear).

102. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 1.1(b). In addition to the Immigration Court Practice Manual's generally strict formatting requirements (with specific rules as to hole-punching, pagination, document compilation, and service), the manual has enumerated specific standards for a number of motions. *See id.* ch. 3 (Filing Requirements); *id.* ch. 5 (Motions before the Immigration Court).

103. "The hearing location is identified on the notice to appear (Form I-862) or hearing notice. . . . Parties should note that documents are not necessarily filed at the location where the hearing is held." *Id.* ch. 4.5.

104. *See id.* ch. 3.1. Respondents can also file documents in open court during a hearing so long as documents comport with the filing requirements set forth in Chapter Three of the Immigration Court Practice Manual. *Id.* ch. 3.

105. *See* 8 C.F.R. § 1003.11.

106. *See id.*; IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 3.1(a)(1).

107. 8 C.F.R. § 1003.11.

administrative control courts and the geographic areas over which they have control.[108] The list is also posted on the EOIR's website.[109]

The EOIR Administrative Control Court list provides the address and area of responsibility for immigration courts of administrative control and notes whether other hearing locations operate within the area of responsibility.[110] As such, this list is the document that dictates both where a respondent must appear (the hearing location) and where a respondent must file documents (the administrative control court, if it is different than the hearing location). The list also notes the location and address of the ICE OPLA offices where respondents must submit service copies of all filings.[111]

Although the Immigration Court Practice Manual references an administrative control court's area of responsibility as an "assigned geographical area,"[112] in reality, the EOIR's Administrative Control Court list describes a court's area of responsibility in a variety of ways, which increases the likelihood that a layperson will not understand where they must file documents or show up to court. For example, the list may describe a court's area of responsibility in jurisdictional terms, stating that certain administrative control courts have jurisdiction over charging documents filed by particular ICE OPLA offices or sub-offices, or over charging documents pertaining to individuals detained in certain immigration detention or correctional facilities. This means that venue here is tied to an ICE OPLA office's own filing policies. For other administrative control courts, the website provides a geographic area over which the court has responsibility. Still, for others, the areas of responsibility are described as a combination of the two.[113] As such, the degree to which an immigration court can call non-detained individuals to appear may depend on the geographical breakdown of ICE OPLA

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108. *Id.*

109. *See Administrative Control List*, *supra* note 9. The EOIR also maintains a general list of all operating immigration courts, which includes non-administrative control courts, on its website. *See Find an Immigration Court (and Access Internet-Based Hearings)*, EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings [https://perma.cc/LQ4U-SNYP] (Jan. 31, 2023). For each immigration court, the list provides the court's address and phone number, the names of the immigration judges that preside in proceedings in the court, and the name of the court administrator. The list does not provide boundaries to the geographic area that each immigration court covers.

110. *Administrative Control List*, *supra* note 9.

111. *See id.*

112. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 3.1(a)(1).

113. For example, the EOIR Administrative Control Court list indicates that the Immigration Court in Memphis, Tennessee has administrative control over: (1) all individuals whose charging documents are filed by the ICE OPLA Memphis Sub-Office; and (2) all individuals located in Tennessee, Arkansas, and the Mississippi region "north of Jackson." *See Administrative Control List*, *supra* note 9.

offices and sub-offices, the ICE OPLA offices' filing practices, or political boundaries, like state or county lines.

For administrative control courts, whose areas of responsibility are tied to the filing policies of corresponding ICE OPLA offices, defining the area of control may require additional knowledge about a particular ICE OPLA office's own practices. For example, the EOIR Administrative Control Court list does not mention Alabama or indicate where respondents located in Alabama would appear or file documents. It is, of course, not the case that Alabama respondents have no obligation to appear in any immigration court. Presumably, what this means is that the immigration court assigned to Alabama respondents has derived its scope of responsibility in relation to the ICE OPLA office, whose own area of responsibility covers those residing in Alabama at any given time. In turn, to learn which immigration court would have control over respondents in Alabama, one must visit a separate ICE OPLA web listing,[114] which indicates that Alabama falls within the area of responsibility of the ICE OPLA New Orleans Office. Only by then working backwards do we learn where Alabama respondents must appear—the EOIR immigration court list indicates that the immigration court with administrative control over charging documents filed by the New Orleans ICE OPLA Office is the New Orleans Immigration Court.[115] As such, respondents living in Alabama must appear and file documents with the New Orleans Immigration Court—a drive that, depending on where one is in the state, could take up to seven hours one-way.[116]

Most respondents are not tasked with calculating where their removal proceedings will take place, as their hearing notices will inform them about the time and location of their hearing. However, this lack of clarity about immigration courts' areas of responsibility has implications for any individuals who anticipate being called to respond to charges of removal (such as the thousands who have received notices to appear that list "TBD" for the place and time of proceedings) and who may want to start making plans for traveling to immigration court proceedings,

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114. *ICE Field Offices*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/contact/field-offices [https://perma.cc/YWQ5-PFH7] (last visited Feb. 18, 2023).

115. *See Administrative Control List*, *supra* note 9.

116. To confirm my conclusions with practitioners on the ground, I consulted with lawyers practicing removal defense in Alabama, who alerted me that some in Alabama may be called to the New Orleans Immigration Court, while others must appear at the Atlanta Immigration Court. While this arrangement may make more sense for residents living in northern Alabama, neither the EOIR Administrative Control Court list nor the ICE OPLA field office listing show Atlanta as a possible venue for those residing in Alabama, nor does there seem to be accessible criteria for determining when a respondent might be called to the Atlanta or New Orleans Immigration Court.

finding legal representation, and coordinating witnesses. This is particularly confusing for individuals whose assigned immigration courts are significantly farther than other immigration courts closer to their residence, as is the case for individuals located in or near Knoxville, Tennessee, who are assigned to the Memphis Immigration Court (a venue nearly four hundred miles away) when the Charlotte Immigration Court and Atlanta Immigration Court are nearer (approximately two hundred thirty miles and two hundred fifteen miles away, respectively).

B. Applying Eldridge*: Distance as a Procedural Due Process Violation*

The law is now clear that a person "who faces removal is entitled to a full and fair removal hearing under both the [Immigration and Nationality] Act and the Due Process Clause of the Fifth Amendment."[117] Even with the procedural rights set forth in the INA and federal regulations, however, respondents—particularly those who are unrepresented—face an uphill battle to contest charges of removability or establish eligibility for immigration relief. When not even unaccompanied children are entitled to appointed counsel, and without a right to discovery, respondents struggle to navigate complex statutes and meet burdens of corroboration and proof set forth in the statute.

Statutes, regulations, and precedent provide a minimal baseline of safeguards to promote a respondent's opportunity to participate in removal proceedings, but under current due process jurisprudence, the violation of these safeguards does not necessarily result in recourse for the respondent. To establish that their due process rights were violated, respondents must prove not only that that there was a deficiency or violation, but also that they were substantially prejudiced by it,[118] a calculation that is difficult for an immigration judge to assess in any case, but particularly when the respondent has not yet appeared in proceedings.[119]

The situation is particularly troubling given the strains under which the immigration courts function. The immigration courts' unprecedented backlog of over two million cases[120] requires immigration judges to

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117. *R-C-R-*, 28 I. & N. Dec. 74, 77 (B.I.A. 2020) (interim decision).

118. *See*, *e.g.*, *Aden v. Holder*, 589 F.3d 1040, 1046–47 (9th Cir. 2009) (no due process violation where petitioner failed to demonstrate prejudice from alleged translation errors).

119. *See* Hausman & Srikantiah, *supra* note 2, at 1841 ("To evaluate whether short continuances violate due process, courts should look to the aggregate evidence . . . rather than to prejudice in any individual case. The reason is simple: the prejudice determination requires a court to assemble a hypothetical counterfactual. . . . In any individual case, that is nearly impossible . . . .").

120. *Immigration Court Backlog Tool*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/

adjudicate cases expeditiously. Until recently, immigration judges managed this colossal case load while operating under Department of Justice-imposed case completion quotas.[121] As former immigration Judge Dana Leigh Marks harrowingly states, removal defense cases "amount to death penalty cases heard in traffic court settings."[122]

While the safeguards provided by statutes and federal regulations provide some a modicum of protection against these pressures, these safeguards are cursory and meaningless if a person cannot make use of them. As this piece describes above, entire regions of the United States are located so far from immigration courts that respondents, particularly those who are indigent or especially vulnerable, may never be able to avail themselves of their day in court. As I explain using the *Mathews v. Eldridge* balancing framework, having an unequal distribution of immigration courts leaves certain respondents, particularly those in the Southeast, hundreds of miles from their assigned venue, amounting to a procedural due process violation.

1. THE PRIVATE INTEREST

The Supreme Court has repeatedly recognized the dire consequences that deportation can bring, even in periods when plenary power deference was at its strongest. Acknowledging that "deportation is a drastic measure and at times the equivalent of banishment or exile,"[123] the Court has noted that the "intrinsic consequences of deportation are . . . close

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[https://perma.cc/HNL9-3N62] (last visited Feb. 18, 2023) [hereinafter "TRAC"] (noting that as of July 2022, the immigration courts' pending caseload was over 1.8 million and that the average days a case is pending is almost eight hundred days).

121. AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2-10–11 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/87RP-J472]. In October 2018, the Department of Justice imposed an "individual production quota of 700 removal proceedings annually, to receive a 'satisfactory' performance evaluation." To achieve a satisfactory performance rating, immigration judges had to "(1) complete 700 cases per year; (2) have a remand rate from both the [Board of Immigration Appeals] and Circuit Courts of less than 15%; and (3) meet at least half of six [productivity] benchmarks and not receive an 'unsatisfactory' rating in any of them." *Id.*

122. Dana Leigh Marks, Opinion, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html [https://perma.cc/PE38-YE6G].

123. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

to punishment for [a] crime."[124] Indeed, deportation may deprive a person "of all that makes life worth living."[125]

The *Plasencia* Court recognized one particularly harsh consequence of deportation: family separation.[126] Many, if not most, noncitizens find themselves in removal proceedings because the law provides no avenue for them to normalize their status. Because deportation triggers a ground of inadmissibility that forecloses a person from lawfully re-entering the country for several years, the practical effect is that a deportation will put the deported family member in an impossible predicament—be separated from family in the United States for years,[127] if not permanently,[128] or try returning to the country unlawfully. Returning to the United States after deportation, in turn, can lead to criminal prosecution for the federal crime of illegal re-entry, a crime that is punishable by up to twenty years of imprisonment.[129]

Children who lose a parent to deportation suffer immeasurably. Researchers estimate that approximately 4.4 million U.S.-citizen minors live with at least one undocumented parent; between 2011 and 2013, as many as half a million experienced the deportation of a parent.[130] Studies show that U.S.-citizen minors who have had a parent deported were "significantly more likely to show signs of depression, anxiety, aggression and conduct problems than children whose parents were not deported or whose parents were in the process of deportation."[131] In a recent study, researchers found that children in the Atlanta area who had

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124. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

125. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

126. *Landon v. Plasencia*, 459 U.S. 21, 34 (1985) ("[S]he may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual.").

127. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(B) (barring admission to the United States for five years for noncitizens that fail to appear to an immigration court hearing); *id.* §§ 1182(a)(9)(A)–(C) (barring admission for five, ten, or twenty years for noncitizens that are ordered removed).

128. *See id.* § 1182(a)(9)(C) (barring a noncitizen from admission to the United States permanently if they return to the United States without admission after having been previously ordered removed or previously unlawfully present for one year or more).

129. *Id.* § 1326.

130. AM. IMMIGR. COUNCIL, U.S.-CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT 1 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf [https://perma.cc/DTM7-4HW5].

131. Luis H. Zayas & Laurie Cook Heffron, *Disrupting Young Lives: How Detention and Deportation Affect US-Born Children of Immigrants*, AM. PSYCH. ASS'N (Nov. 2016) (citing Brian Allen, Erica M. Cisneros & Alexandra Tellez, *The Children Left Behind: The Impact of Parental Deportation on Mental Health*, 24 J. CHILD & FAM. STUD. 386, 387 (2015)), https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation [https://perma.cc/FKS9-NVTM].

a family member deported or detained had higher incidents of suicidal ideation, alcohol abuse, and clinical externalizing behaviors.[132]

To paraphrase Immigration Judge Dana Leigh Marks, for some, deportation can be a death sentence.[133] For those who have fled their countries of origin due to a fear of persecution, torture, or death, deportation is tantamount to serving a victim to their oppressor. Tragically, the media is replete with harrowing stories of deportees who have been brutally murdered after their attempts to secure asylum protections in the United States failed.[134]

2. THE RISK OF DEPRIVATION CAUSED BY AN EXCESSIVELY DISTANT IMMIGRATION COURT

The most obvious risk associated with the uneven distribution of immigration courts is the risk of failing to appear at a scheduled immigration court hearing. Because an immigration judge can, and very often does, enter an *in absentia* order against noncitizens who fail to appear at an immigration court hearing,[135] a person's inability to travel to a distant immigration court can easily trigger harsh deportation consequences described in Section III.B.1 above.

Given how difficult they are to overturn, *in absentia* orders of removal can be a death knell to a respondent's ability to contest the charges of removal or assert any defenses. Motions to reopen removal proceedings and rescind *in-absentia* removal orders are notoriously difficult to win because the evidentiary burden is high, and the statute places numerical and temporal limitations on their filing.[136] An immigration judge can only rescind an *in-absentia* removal order if the

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132. Kathleen M. Roche, Rebecca M. B. White, Sharon F. Lambert, John Schulenberg, Esther J. Calzada, Gabriel P. Kuperminc & Todd D. Little, *Association of Family Member Detention or Deportation with Latino or Latina Adolescents' Later Risks of Suicidal Ideation, Alcohol Use, and Externalizing Problems*, 174 JAMA PEDIATRICS 478, 482 (2020).

133. Marks, *supra* note 122.

134. *See* HUM. RTS. WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE 27–41 (2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf [https://perma.cc/N8SJ-X9GU]; Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST (Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/; Maria Sachetti, *'Death is Waiting for Him,'* WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/.

135. 8 U.S.C. § 1229a(b)(5)(A); *see also* Koh, *supra* note 101, at 218–20.

136. *See* 8 C.F.R. § 1003.23(b) (2022). These limitations do not exist for the Department of Homeland Security, as motions to reopen filed by the Department of Homeland Security or filed jointly by the respondent and the Department of Homeland Security are not subject to these temporal and numerical limitations. *See id.* § (b)(1), (4)(iv).

respondent can demonstrate that the failure to appear was related to an excusable failure to receive notice of the hearing or because of "exceptional circumstances" beyond the control of the respondent.[137] Exceptional circumstances enumerated in the INA include "serious illness of the [respondent] or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances."[138] Generally, issues like weather, traffic, and the inability to secure transportation will not meet the standard for exceptional circumstances, as the Board of Immigration Appeals noted in a precedential decision earlier this year:

> Adverse weather conditions, traffic congestion, and security checkpoints in Government buildings are common issues faced by travelers. Therefore, delays caused by these factors and similar commonplace delays will not ordinarily constitute sufficiently exceptional circumstances to excuse the late arrival of an alien to the courtroom. In cases . . . where the alien has been ordered removed in absentia following a failure to timely appear, the alien must demonstrate exceptional circumstances as required by the [INA].[139]

Stated another way, the types of delays that respondents are most likely to encounter when traveling five or more hours for a hearing are precisely the kinds of delays that immigration courts view as "common" circumstances that will not justify rescinding an *in absentia* removal order.[140] Unfortunately, there is little remedy for respondents whom the distance of an immigration court makes appearing for hearings impossible.

For those excessively far from their assigned immigration court, the distance may also interfere with their ability to present and corroborate

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137. 8 U.S.C. § 1229a(b)(5)(C).

138. *Id.* § 1229a(e)(1).

139. *S-L-H- & L-B-L-*, 28 I. & N. Dec. 318, 320–21 (B.I.A. 2021) (interim decision).

140. *See* Koh, *supra* note 101, at 219–20 (noting the Board of Immigration Appeals' and federal courts' narrow interpretation of "exceptional circumstances"); *S-L-H- & L-B-L-*, 28 I. & N. Dec. at 320–21. It bears noting that in *S-L-H- & L-B-L-*, the Board of Immigration Appeals sided with the respondent. *Id.* at 325. The respondent, who had hired a professional driver to get her to court on time, had been delayed by a massive snowstorm that had caused multiple accidents and severe traffic on the major thoroughfares near the immigration court. *Id.* at 319–20. The respondent submitted evidence in the form of several affidavits, evidence that the weather had been uncharacteristically cold for that time of year, and evidence of the unusual traffic conditions. *Id.* Influenced by the evidence and the fact that the respondent had made all of her previous hearings, the Board of Immigration Appeals found that the respondent had met her burden of establishing extraordinary circumstances and reopened her proceedings. *See id.* at 323.

their case. The respondent bears the burden of proof when charged with being inadmissible, applying for asylum, or other forms of deportation relief.[141] If the immigration judge determines that the respondent should provide evidence to corroborate their testimony, the respondent is expected to provide that evidence unless the respondent does not have the evidence and cannot reasonably obtain it.[142] Because immigration judges are not required to provide advanced notice of the specific evidence that would be necessary to meet this corroboration requirement,[143] respondents must proactively present as much corroborating evidence as they can reasonably obtain.

When potential corroborating witnesses reside far from the nearest immigration court, this can present a significant problem. Although the regulations authorize immigration judges to order depositions or issue subpoenas to secure the appearance of a witness or evidence,[144] the regulation's requirements are burdensome,[145] and immigration judges lack the ability to enforce the subpoenas on their own.[146] As a result, immigration judges rarely subpoena witnesses.[147] If a respondent identifies a corroborating witness that an immigration judge might reasonably expect to testify, the respondent is at the mercy of their witness's willingness or ability to travel the long distance to immigration court.[148]

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141. *See* 8 U.S.C. § 1229a(c)(2); *id.* § 1158(b)(1)(B)(i). For individuals who have been legally admitted into the United States, the government bears the burden of establishing, by clear and convincing evidence, that the respondent is deportable. *Id.* § 1229a(c)(3)(A).

142. *See* 8 U.S.C. § 1229a(c)(3)(A); *id.* § 1158(b)(1)(B)(ii).

143. *See L-A-C-*, 26 I. & N. Dec. 516, 524 (B.I.A. 2015).

144. 8 C.F.R. § 1003.35 (2022).

145. *See* Heeren, *supra* note 2, at 1582–83.

146. If an immigration judge wishes to enforce a subpoena after a subpoenaed witness fails to appear, the immigration judge's only recourse is to report the matter to a U.S. Attorney and the request that the U.S. District Court issue an order requiring the witness appear. *See* 8 C.F.R. § 1003.35(b)(6).

147. *See* Heeren, *supra* note 2, at 1571.

148. While the inability to present witness testimony may be tempered to some degree, with respect to the admissibility of written witness statements, these written statements may have limited evidentiary value given that immigration judges are entitled to give statements less weight when the witnesses are not subject to cross-examination. *See H-L-H- & Z-Y-Z-*, 25 I. & N. Dec. 209, 215 (B.I.A. 2015) (giving diminished evidentiary weight to letters from relatives because they were interested witnesses who were not subject to cross-examination), *rev'd on other grounds sub nom. Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). Similarly, while the Immigration Court Practice Manual allows for the possibility of telephonic testimony, they can only use cellular phones at the immigration judge's express permission, and the decision to allow telephonic testimony is entirely at the immigration judge's discretion. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, at ch 4.15(n)(3), (o)(3); *see also Pagayon v. Holder*, 675 F.3d 1182, 1191–92 (9th Cir. 2011) (per curiam) (no due process violation where immigration judge refused to allow telephonic testimony); *Hakim v. Atty. Gen. of U.S.*, 189 F. App'x

Some respondents simply do not have the resources to travel five hundred miles for a hearing. Respondents without their own mode of transportation must rely on a lengthy, public-transit trip (if available),[149] selfless volunteers willing to sacrifice two days' worth of their time, or else hire an individual to take them to court. The transportation expenses can be exorbitant.

The cost of traveling to immigration court also comes in the form of lost wages and missed school. Parents may have to arrange for all-day or overnight childcare for their children, especially when hearings take place early in the morning. Particularly vulnerable individuals, including the indigent, children (especially unaccompanied children), and people without a support network may simply find it impossible to afford the arrangements necessary to travel five or more hours one-way for a hearing.

The costs of travel would be excessive under any circumstances but are particularly egregious when respondents travel such long distances for master calendar hearings, which are often adjourned in under ten minutes.[150] Adding insult to injury, immigration courts often close without much notice, especially in the age of COVID-19.[151] In those cases, immigration courts generally will not call scheduled respondents to inform them of the closure. Represented individuals might get an email from the local American Immigration Lawyers Association (AILA)

135, 137–38 (3d Cir. 2006) (stating that "[t]here is no right to telephonic testimony" and that "the fact that [an expert witness] would have elaborated on his views or answered the IJ's objections during telephonic testimony does not establish that [the respondents] were deprived of a meaningful opportunity to be heard. . . .").

149. *Cf.* Lisa Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 486–87 (2014). Professors Pruitt and Showman describe the effect of the unavailability of public transportation on access to rural justice:

> The challenge is aggravated by the dearth of public transportation in rural America. It is a hallmark of rural living that residents must travel great distances, at greater cost, to access all sorts of services and institutions. Such institutions include courts, and such services include those provided by lawyers, as well as others that are often ancillary to legal issues. . . .

Id.

150. Recently, the EOIR has lessened the use of master calendar hearings for certain represented respondents, relying instead on scheduling orders that require respondents to file written pleadings, evidence related to charges of removability, and applications for relief from removal. *See* OFF. CHIEF IMMIGR. JUDGE, PM 21-18, REVISED CASE FLOW PROCESSING BEFORE THE IMMIGRATION COURT (2021), https://www.justice.gov/eoir/book/file/1382736/download [https://perma.cc/VG43-8F9P]. This practice does not apply to pro se respondents, who must still be present at master calendar hearings to avoid *in-absentia* removal orders, however. *Id.* at 1 n.1.

151. *See* Camila DeChalus, *Immigration Attorneys Face Courtroom Challenges Amid Pandemic*, ROLL CALL (Jun. 17, 2020, 3:07 PM), https://www.rollcall.com/2020/06/17/immigration-attorneys-face-courtroom-challenges-amid-pandemic/ [https://perma.cc/G6D7-MNDA].

chapter (assuming the local chapter chair was informed of the closure to begin with), but unrepresented individuals will likely have to rely on the EOIR's Twitter page[152] for last-minute information about court closings—something that is only helpful, of course, if they are familiar enough with social media. Unfortunately, many will not discover a closure until they have already been on the road for several hours or until they arrive to the immigration court.

3. THE GOVERNMENT'S INTEREST

The procedural due process analysis requires that courts weigh the respondent's interest and the risks of deprivation caused by the current geographic distribution of immigration courts against the government's interest. A consideration of obvious paramount importance is, to quote the *Eldridge* Court, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources. . . ."[153]

To call the immigration court system overburdened is an understatement. For years scholars,[154] national media,[155] and even immigration judges themselves[156] have sounded the alarm on the increasingly drastic under-budgeting, understaffing, and disorganization plaguing our country's immigration courts. Facing an unprecedented immigration court backlog of over two million cases,[157] the government has a weighty interest in efficient adjudication.

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152. A short visit to the EOIR's Twitter page shows just how common court closures can be, particularly in the age of COVID-19. Many court closures are announced in the middle of the day or hours after the closure has taken effect. *See, e.g.*, Exec. Off. for Immigr. Rev. (@DOJ_EOIR), TWITTER (Sept. 28, 2021, 4:26 PM), https://twitter.com/DOJ_EOIR/status/1442948924256362499 [https://perma.cc/U8HB-YZBJ].

153. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

154. *See, e.g.*, Jill Family, *Beyond Decisional Independence*, 89 KAN. L. REV. 576–79 (2011); Stacy Caplow, *The Sinking Immigration Court: Change Course, Save the Ship*, INSIGHTFUL IMMIGR. BLOG (Aug. 1, 2021), http://blog.cyrusmehta.com/2021/08/the-sinking-immigration-court-change-course-save-the-ship.html [https://perma.cc/PD9N-V9S5]; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651–76 (2010); Caplow, *supra* note 47, at 85–88; Michele Benedetto, *Crisis on the Immigration Bench an Ethical Perspective*, 73 BROOK. L. REV. 467, 468–70 (2008).

155. *See, e.g.*, Editorial, *Immigration Courts Aren't Real Courts. Time to Change That.*, N.Y. TIMES (May 8, 2021), https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html.

156. *See, e.g.*, Marks, *supra* note 122; Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary, 116th Cong. 299–306 (2020) [hereinafter Statement by Round Table of Former Immigration Judges] (statement of the Round Table of Former Immigration Judges).

157. TRAC, *supra* note 120.

In weighing the government interest, however, one could argue that the government should be estopped from invoking the immigration court backlog and the costs administering the ballooning immigration court docket given that these are problems of its own making, produced by administrative mismanagement and insufficient funding. Though the increase in asylum-seekers in recent years contributes to these problems, a significant contributing factor involves executive policies that interfere with the immigration court's ability to manage its own docket,[158] periodic sweeping shifts in priorities "based on the political priority of the day,"[159] and restrictions on the exercise of prosecutorial discretion by ICE OPLA attorneys.[160] These policies disrupt the immigration court system such that they have sparked a wave of immigration judge resignations, further exacerbating the backlog.[161] Former Immigration Judge Jon Richardson, for example, noted that his motivation to leave the bench stemmed from

> the draconian policies of the [Trump] Administration, the relegation of [immigration judges] to the status of "action officers" who deport as many people as possible as soon as possible with only token due process, and blaming [immigration judges] for the immigration crisis caused by decades of neglect and under funding of the Immigration Courts.[162]

Funding for the immigration system has focused overwhelmingly on immigration enforcement and detention, rather than on adjudication.[163]

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158. *See* Statement by Round Table of Former Immigration Judges, *supra* note 156, at 301, 303; NAT'L ASS'N IMMIGR. JUDGES, THE IMMIGRATION COURT—IN CRISIS AND IN NEED OF REFORM (2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf [https://perma.cc/AEQ6-XWP4]; Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707 (2019).

159. Statement by Round Table of Former Immigration Judges, *supra* note 156, at 301; Marouf, *supra* note 158, at 711–15 (discussing immigration policy of the Trump Administration); Legomsky, *supra* note 154, at 1667–75 (describing the influence that the Attorney General has over immigration judges).

160. *See* Shoba Sivaprasad Wadhia, *Immigration Enforcement Under Trump: A Loose Cannon*, HARV. L. REV. BLOG (Feb. 21, 2018), https://blog.harvardlawreview.org/immigration-enforcement-under-trump-a-loose-cannon/ [https://perma.cc/NZ4V-RKX5].

161. *See* Rachel Franzin, *Immigration Judges Say They're Leaving Jobs Because Of Trump Policies*, THE HILL (Feb. 13, 2019, 9:24 PM), https://thehill.com/latino/429940-immigration-judges-say-theyre-leaving-jobs-because-of-trump-policies [https://perma.cc/2FH6-F2WS].

162. *See id.*

163. *See* Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL'Y INST. (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point [https://perma.cc/3YQC-BRFL] (recognizing that ICE and Customs and Border

In fiscal year 2015, for example, funding for Customs and Border Protection and ICE increased by three hundred percent; funding for the immigration courts, increased by only seventy-four percent.[164] Professor David Martin, who previously served as general counsel for DHS and the legacy INS under both Democratic and Republican administrations, succinctly explained how this disproportionate funding created this backlog problem:

> You fund more investigators, more detention space, more border patrol, almost all of these are going to produce some kind of immigration court case. . . . You are putting a lot more people into the system. It's just going to be a big bottleneck unless you increase the size of that pipeline.[165]

Cost and administrative efficiency should not be the only government interest considered in this analysis. The maintenance (or restoration) of perceived legitimacy of the immigration courts is a paramount government interest that weighs in favor of expanding respondent access to the immigration courts.[166] Social science research shows that when the public perceives courts to be exercising their authority fairly, courts gain legitimacy.[167] Legitimacy is crucial for the respect of the rule of law, as people who view the law as legitimate are

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Protection carry out functions besides immigration enforcement, comparing the immigration court's appropriations of $437 million to Customs and Border Protection $16.7 billion and ICE's $7.5 billion appropriations).

164. HUM. RTS. FIRST, THE U.S. IMMIGRATION COURT: A BALLOONING BACKLOG THAT REQUIRES ACTION 4 (2016), https://humanrightsfirst.org/wp-content/uploads/2022/10/HRF-Court-Backlog-Brief.pdf [https://perma.cc/7MBY-VGLH].

165. *Id.*

166. *See* Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1102–03 (2013/2014) (linking perceived legitimacy of the courts to procedural fairness). Concerns over the perceived legitimacy of immigration courts seem to have motivated the 1994 OCIJ directive requiring all immigration judges to don black judges robes in proceedings, notwithstanding their status as attorneys acting in a quasi-judicial role. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* GEO. IMMIGR. L.J. 261, 289–91 (2019); EXEC. OFF. FOR IMMIGR. REV., OFF. OF THE CHIEF IMMIGR. JUDGE, OPPM 94-10, WEARING OF THE ROBE DURING IMMIGRATION JUDGE HEARINGS (1994) ("To enhance the solemnity of the proceedings, the Judge's robe, a traditional symbol of dignity and authority, has been provided for each Immigration Judge . . . . Therefore, it is the policy of the Office of the Chief Immigration Judge that each Immigration Judge shall wear a traditional black judicial robe when conducting a hearing where one or more of the parties are present. . . .").

167. Tyler & Sevier, *supra* note 166, at 1102.

more likely to follow the law and accept judicial decisions when they consider courts legitimate.[168]

Professors Steven Blader and Tom Tyler have identified four key factors that affect people's perceptions of procedural justice: (1) the ability to participate in the decision-making process; (2) the perceived neutrality of the tribunals; (3) the degree to which they are treated with dignity and politeness; and (4) the perception that a tribunal operates with integrity and good faith.[169] The first of these factors addresses whether a person has had an opportunity to be heard before a court makes a decision and determines an outcome; having a voice in proceedings increases the probability that a person will feel that procedures have been fair, and thus, that the adjudication process has legitimacy.[170] The third factor recognizes that perceptions of procedural justice increase when people "have their status as human beings and members of the political community acknowledged."[171] A perception of procedural justice—especially perceptions of having been treated with dignity and listened to in good faith—allow courts to establish legitimacy with those under its jurisdiction even when people cannot receive their desired outcome.[172]

If only to promote legitimacy and respect for the nation's immigration laws, then, full and fair proceedings should also be considered a weighty government interest. Given the drastic stakes of removal proceedings—where deportation can mean permanent family separation or a return to persecution—the government should not be content to sacrifice fairness for efficiency. As Professor Margaret Taylor has succinctly observed, "[p]olicy makers and immigration officials should also recognize procedural fairness and just results as important goals."[173]

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168. *Id.* at 1104. Recently, scholars have questioned whether the current immigration enforcement apparatus and the laws under which it functions even deserves a presumption of legitimacy, given the laws' racist origins and the racist and inhumane applications of these laws. *See*, *e.g.*, Angélica Cházaro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1045–46 (2021); César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 249–50 (2017). These scholars poignantly highlight that no degree of procedural due process can fix the underlying ills of deportation or provide justice for the noncitizen. These crucial questions are well-taken by this author, though the broader discussion regarding the continued, presumed legitimacy of the immigration court system is beyond the scope of this Article.

169. Tyler & Sevier, *supra* note 166, at 1106–07 (citing Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERS. & SOC. PSYCHOL. BULL. 747, 748, 757 (2003)).

170. *Id.*

171. *Id.* at 1106.

172. *Id.* at 1112.

173. Margaret Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1710 (1997).

4. OTHER PUBLIC POLICY CONCERNS

In *Eldridge*, the Court equated the government interest with the public interest.[174] But the public interest encompasses more than government expense. The effect that policies and procedures will have on communities across the country is a matter of public interest. The geographic distribution of immigration courts, which forces respondents and attorneys to travel long distances, gives rise to significant justice concerns.

Literature on rural access to justice reveals the detrimental effects that geographic distance and isolation can have on a community's ability to develop and maintain a legal community.[175] Similar effects are present for legal communities located far from immigration courts, even when these areas are not technically rural. Given that legal representation is the best predictor for determining the success rate of any particular case in immigration court,[176] requiring attorneys to travel hundreds of miles for hearings disincentivizes them to continue practicing removal defense, particularly if few of their clients can afford to pay for their travel expenses and time. This, in turn, reduces the number of attorneys from these areas who will be available to represent respondents in removal defense proceedings.

This is especially true when immigration courts eliminate technological accommodations that could facilitate virtual appearances for attorneys and their clients, like when the Memphis Immigration Court stopped, as a matter of policy, considering motions for telephonic appearances at master calendar hearings.[177] Documents produced pursuant to a FOIA request on the policy change reveal that a law firm in Little Rock, Arkansas, a city about a three-hour drive from Memphis, voiced concerns to the immigration court administrator that the policy

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174. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.").

175. *See, e.g.*, Lisa R. Pruitt, Amanda L. Koola, Lauren Sudeall, Michele Statz Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15, 121 (2018) (noting that courthouse closures in areas that are already geographically isolated negatively impacts a lawyer's desire to continue practicing there); Pruitt & Showman, *supra* note 149, at 486–87.

176. Elinor R. Jordan, *What We Know and Need to Know About Immigrant Access to Justice*, 67 S.C. L. REV. 295, 297–99 (2016) (noting that legal representation makes a difference, if not *the* difference, in removal proceedings); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) ("[W]hether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.").

177. *See* MUCKROCK, *supra* note 11.

would seriously interfere with their ability to continue representing clients in removal proceedings.[178] Noting that most of their clients were already on payment plans and unable to afford increased legal fees, the firm acknowledged that it would be unable to afford to continue representing Arkansas clients appearing before the Memphis Immigration Court if the policy continued.[179] The lawyers predicted that, given the Memphis Immigration Court's large geographic footprint, this would be the case in other areas, too, and further predicted that this policy would ultimately lead to an increase in pro se respondents.[180] The immigration court administrator, in an internal email addressing the law firm's concerns, seemed unbothered: "As we all discussed most Immigration Courts do not conduct telephonic hearings. The firms will simply have to make a business decision."[181]

The consequences of distance are particularly acute for nonprofit organizations, which are unable to offset their travel expenses to indigent clients. As an attorney at a relatively remote nonprofit immigration law firm, I can attest that when grant contracts require that organizations meet minimum representation metrics, such as when grants require that an attorney represent X number of clients in a grant period, the time lost during travel to distant immigration courts can make meeting grant requirements impossible, jeopardizing the future of the organization.

The time and expense required to travel to a distant immigration court also impairs the pipelines that help populate an area with experienced lawyers. Law school immigration clinics play an integral role in introducing young practitioners to the practice of immigration law, which courts have noted for bearing a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete."[182] Over time, law school clinics may serve as pipelines for producing lawyers familiar with immigration law in geographic areas lacking attorneys.[183] But if immigration courts are not near law schools, the viability of a program that provides removal defense is questionable. A law school may consider that expenses related to travel, hotels, and shipping unjustifiable to continue the program.

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d Cir. 1977) ("The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").

183. *See, e.g.*, Cal. Cmty. Found., *Justice Fund Is Building a Pipeline of Immigration Law Defenders*, #LATOGETHER (Feb. 13, 2019), http://latogether.org/2019/02/13/justice-fund-is-building-a-pipeline-of-immigration-law-defenders/ [https://perma.cc/F4UX-G7E8].

IV. POTENTIAL SOLUTIONS TO THE GEOGRAPHY PROBLEM

Across administrations, the government's purported plan for dealing with the backlog and capacity strains of the immigration court system has largely involved increasing the number of immigration judges, without increasing the number of immigration court venues to account for the migration patterns that have led to an increase in noncitizens in areas that have not traditionally been immigrant hubs,[184] like the Southeastern and Northwestern regions of the United States.[185] As explained above, however, this plan will not alleviate the due process concerns stemming from the inequitable distribution of immigration courts. The Section below explains possible solutions to the access problems caused by the geographic distribution of immigration courts, which range from increasing the number of brick-and-mortar immigration courts to alleviate the current immigration court deserts, to strategically harnessing the powers of videoconferencing technology in hearings that do not involve detailed witness testimony.

A. Increase the Number of Immigration Courts in Areas Most Affected by the Unequal Geographic Distribution of Immigration Courts

The ideal solution to the geography problem would be for the OCIJ to increase the number of immigration court locations, with the goal of shrinking the areas of responsibility of those administrative control courts with the largest geographic footprint.[186] Having a fully functional

184. *See, e.g.*, U.S. DEP'T OF JUST., FY 2015 BUDGET REQUEST: ENFORCE IMMIGRATION LAWS 1 (Feb. 8, 2014), https://www.justice.gov/sites/default/files/jmd/legacy/2014/08/03/immigration.pdf (announcing the Obama Administration's intention to facilitate immigration enforcement by hiring thirty-five new immigration judges and fifteen Board of Immigration Appeals attorneys); U.S. DEP'T OF JUST., JUSTICE DEPARTMENT ANNOUNCES ADDITIONAL PROSECUTORS AND IMMIGRATION JUDGES FOR SOUTHWEST BORDER CRISIS, https://www.justice.gov/opa/pr/justice-department-announces-additional-prosecutors-and-immigration-judges-southwest-border (May 2, 2018) (announcing the Trump Administration's plans to increase the number of current immigration judges by fifty percent); EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., FY 2023 BUDGET REQUEST AT A GLANCE 33, https://www.justice.gov/jmd/page/file/1489471/download# (Mar. 2022) (explaining the Biden Administration's plans to hire one hundred additional immigration judges).

185. *See Immigration Population by State 1990-Present*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-state-1990-present (last visited Feb. 26, 2023).

186. Federal regulations authorize the OCIJ to provide the overall direction of the immigration court system, articulate policies and procedures related to removal proceedings and other proceedings involving the immigration courts, and to establish immigration court priorities. *See* 8 C.F.R. § 1003.9 (2022). As an exercise of this authority, the OCIJ regularly recommends that the EOIR establish a new immigration court location when "it recognizes a pattern of sustained need." U.S. GOV'T

immigration court—staffed with front-desk clerks that can answer questions or help noncitizens file change of address forms and other submissions—would help alleviate many of the risks of deprivation identified in Part III above and ensure that respondents have a "place" they can go to verify their understanding of their obligations in removal proceedings.[187]

Of course, of all the possible solutions, this option may best serve the interests of noncitizens and would likely be the costliest for the government. But adding immigration court locations could also benefit the immigration court system. For example, currently when immigration courts with large geographic areas of responsibility close for emergencies, they cancel hearings for individuals who may not be affected by the same circumstances hundreds of miles away. Opening additional immigration courts in regions where courts are few and far between would help lessen the immigration court backlog by allowing immigration judges to make more localized decisions about closings related to issues of inclement weather,[188] COVID-19 and other public health concerns,[189] planned protests, or "civil unrest."[190] Localized control can also help immigration courts better plan for and anticipate the needs of their particular communities, by, for example, hiring staff or contractors with language skills that match the languages most commonly spoken in particular community.

The facilitating effect that increasing immigration courts could have on access to counsel in these areas would likely also result in a long-term net positive for the immigration court system. As numerous studies have shown, when respondents are represented by competent counsel, they not

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ACCOUNTABILITY OFF., GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 4 (2006), gao.gov/assets/gao-06-771.pdf [https://perma.cc/S95K-8NUF].

187. *See supra* Part III.

188. *See, e.g.*, Exec. Off. for Immigr. Rev. (@DOJ_EOIR), TWITTER (Feb. 15, 2021, 9:43 PM), https://twitter.com/DOJ_EOIR/status/1361506473684172801 [https://perma.cc/C78N-WSK7] (announcing the closure of the Memphis Immigration Court for inclement weather).

189. *See, e.g.*, Exec. Off. for Immigr. Rev. (@DOJ_EOIR), TWITTER (Mar. 12, 2021, 10:44 AM), https://twitter.com/DOJ_EOIR/status/1370415355613569024 [https://perma.cc/5Y98-YYNQ] (announcing the closure of the Memphis Immigration Court due to COVID-19 exposure).

190. Exec. Off. for Immigr. Rev. (@DOJ_EOIR), TWITTER (Mar. 24, 2021, 1:56 PM), https://twitter.com/DOJ_EOIR/status/1374797208390922244 [https://perma.cc/CXX2-2XYF] (announcing the closure of the Seattle Immigration Court due to "planned protests"). The Trump-era EOIR used the term "civil unrest" to indicate the presence of protestors near an immigration court. These cancellations became more common after the shooting of George Floyd in May 2020. *E.g.*, Exec. Off. for Immigr. Rev. (@DOJ_EOIR), TWITTER (July 22, 2020, 8:51 AM), https://twitter.com/doj_eoir/status/1285935396287909890 [https://perma.cc/2ZJM-P369] (announcing the closure of the Portland Immigration Court due to "civil unrest").

only have a higher chance of success on their cases, but they also make proceedings less burdensome and smoother for the immigration judges themselves.[191]

Given that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands,"[192] the EOIR should tailor its immigration court distribution to ensure that the configuration addresses the deprivations and vulnerabilities of specific communities, including the deprivations described above in Section III.2. Among the factors the agency should consider are the current size of an immigration court's area of responsibility, the resources already being allocated in a particular region,[193] and the availability of public transportation.

B. Create an Immigration Court Detail City or Immigration Court Circuit Ride for Remote Respondents Located in Areas of Low Respondent Density

An immigration court detail could alleviate the expenses of opening a permanent immigration court while still providing a reasonably reachable space for respondents to appear for hearings. The Immigration Court Practice Manual already allows immigration judges to hold removal proceedings hearings "in alternate locations, such as designated detail cities where the caseload is significant but inadequate to warrant the establishment of a permanent immigration court."[194] The problem of geography is not a new one; it is one that the EOIR has addressed using detail courts in the past. For example, over twenty years ago, in a liaison

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191. *See* Eagly & Shafer, *supra* note 5, at 1–3, 18 (finding that "representation by counsel is strongly associated with immigrants coming to court" and that "[w]hen immigrants appear in immigration court, immigration judges can more effectively do their jobs").

192. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

193. The Atlanta Immigration Court, for example, has two locations in Atlanta. *See Find an Immigration Court (And Access Internet-Based Hearings)*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings [https://perma.cc/3L7P-76UU] (last visited Feb. 18, 2023). Determining whether the Atlanta region needs two fully staffed immigration courts would require research that is beyond the scope of this Article. But one may question whether those traveling long distances to appear at one of the Atlanta Immigration Court would be better served if the EOIR relocated one of the Atlanta immigration courts to a nearby area where there is an unmet need.

194. *See* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 29, ch. 1.5(a)(2); *see also EOIR/AILA Liaison Meeting, March 7, 2002*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/eoir-aila-mar7-2002 [https://perma.cc/958Q-K7KR] (Feb. 13, 2015) [hereinafter *EOIR/AILA Liaison Meeting Notes*] (practitioner informs the EOIR representative that the territorial reaches of various immigration courts are not clear from the EOIR website and asks which local rules apply for immigration courts in detail cities).

meeting with the American Immigration Lawyers Association, the EOIR referenced detail assignments as a solution to the same problem this Article discusses:

> **[QUESTION:]** Is there a possibility of expanding detail assignments by Immigration Judges into areas, particularly in the South, where there are large numbers of immigrants, but the nearest Immigration Courts are several hundred miles away? Some IJ's have been very flexible with telephonic hearings, but that doesn't help for merits hearings or unrepresented respondents.
>
> **RESPONSE:** The OCIJ is always reviewing its caseload to determine where details are needed. This year, we have added regular details to Memphis, Atlanta, Orlando, San Antonio and Bradenton to assist with the increased caseload in these Courts. The OCIJ has also hired judges for Atlanta, Orlando, Memphis, and Hartford.[195]

More recently, the EOIR has deployed immigration judges on detail to various detention centers along the border, including to detention centers that did not otherwise house official immigration courts.[196]

A related solution could involve a circuit ride system, whereby an immigration judge based in one of the major administrative control courts travels periodically to preside over hearings at smaller, satellite immigration court locations located in underserved regions. This system would be more cost-effective than opening full-fledged immigration court locations, as these circuit ride locations could hire a skeletal staff, whose main functions are to accept filings and other mail while coordinating hearings on days that immigration judges are in the building. To facilitate the appearance of ICE trial attorneys, immigration judges could allow ICE attorneys to appear from their home base, via video teleconference,

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195. *EOIR/AILA Liaison Meeting Notes*, *supra* note 194. It is unclear whether the EOIR's answer is responsive to the practitioner's question, as it appears that the practitioner is asking about increasing immigration court locations through detail assignments, while the EOIR seems to be referencing detailing immigration judges to already existing immigration courts.

196. *See* Press Release, 17-378, Dep't of Just. Off. of Pub. Aff., Attorney General Jeff Sessions Announces the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-s-renewed-commitment-criminal [https://perma.cc/AL3C-G858]; Meredith Hoffman, *Trump Sent Judges to the Border. Many Had Nothing to Do.*, POLITICO (Sept. 27, 2017), https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649/ [https://perma.cc/769N-A9F2].

something many ICE attorneys have been doing during the pandemic.[197] Given that ICE OPLA attorneys rarely put on witnesses or evidence, the risk described in Section IV.C below would likely only minimally affect ICE OPLA attorneys.

The Department of Homeland Security already makes use of circuit rides to conduct asylum interviews for certain vulnerable asylum-seekers who live far from the asylum offices. In those cases, asylum officers travel to local U.S. Citizenship and Immigration Services field offices—which are more numerous and evenly distributed across the country—and conduct asylum interviews in the same manner they would were the interviews taking place at the main asylum offices.[198] This arrangement allows the agency to use preexisting office space to control costs without making it extraordinarily difficult for asylum-seekers to present their claims for protection.

C. Increase Use of Video Teleconferencing for Master Calendar Hearings

The INA authorizes immigration judges to conduct proceedings via teleconference.[199] Before the COVID-19 pandemic, the EOIR was already making extensive use of video teleconferencing (VTC) technology in certain immigration court settings, such as in cases involving detained people[200] or those ostensibly appearing in the "tent-city" courts that emerged as part of the Trump-era "Remain in Mexico" border policy, known officially by the Orwellian name "Migrant Protection Protocol."[201] The practice became much more prevalent, however, during the COVID-19 pandemic, when immigration court

197. *See* Memorandum from James R. McHenry III, Director, EOIR, to All of EOIR, Immigration Court Hearings Conducted by Telephone and Video Teleconferencing (Nov. 6, 2020), https://libguides.law.ucla.edu/ld.php?content_id=62233591 [https://perma.cc/F4MG-PWSU].

198. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling [https://perma.cc/TWV7-8QHU] (last updated May 31, 2022).

199. 8 U.S.C. § 1229a(b)(2)(A)(iii).

200. *See* Liz Bradley & Hillary Farber, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference*, 36 GEO. IMMIGR. L.J. 515, 518–19 (2022); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 944–48 (2015).

201. *See, e.g.*, Alicia A. Caldwell, *Tent Court on the Border: Migrants Face a Judge on a Screen and a Lawyer They Can't See*, WALL ST. J. (Jan. 9, 2020), https://www.wsj.com/articles/tent-court-on-the-border-migrants-face-a-judge-on-a-screen-and-a-lawyer-they-cant-see-11578565802.

administrators were keen to explore VTC technology to limit the number of people in the courtrooms.[202]

A rich body of literature explores the effects, positive and negative, of expanded VTC use in immigration courts and other tribunals.[203] In assessing potential solutions to the access to justice crisis in rural areas, for example, rural law scholars laud the potential of video teleconferencing to help bridge the divide between clients, lawyers, and tribunals.[204] Professor Lisa Pruitt describes how the use of video streaming could replace the need for fully staffed local courts in the near future.[205] Much like the Montana and Alaska tribunals that Professor Pruitt describes, the EOIR could expand immigration court access through VTC. A closer look at the effects and limitations of VTC, however, reveals its use for removal proceedings, particularly for individual merits hearings, could prove to be a due process cure that is worse than the poison.

Scholars, advocates, and even immigration judges themselves have identified serious problems with the effectiveness and fairness of hearings conducted via VTC. Studies show that VTC hearings obscure the indicia of credibility that adjudicators rely on to make credibility assessments.[206] This is particularly troublesome in removal proceedings, where the INA explicitly calls immigration judges to make credibility determinations of respondents based, in part, on their "demeanor, candor, or responsiveness."[207] In asylum cases, credibility is a threshold finding that an immigration judge must speak to on the record.[208] Research shows that videoconferencing can negatively affect the immigration judge's ability to assess credibility, in part, due to the "split-second" lags that made testimony subtly choppier, making the respondent appear less truthful.[209] Issues like lighting and camera angle, camera zoom, and sound transmission issues make emotions more difficult to transmit, and the nonverbal cues that many immigration judges may look at to assess

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202. *See* Memorandum from James R. McHenry III, Director, EOIR, to All of EOIR, *supra* note 197 (describing increased availability of VTC technology and WebEx conferencing service in response to stakeholders' concerns about COVID-19).

203. *See, e.g.*, Bradley & Farber, *supra* note 200; Eagly, *supra* note 200; Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 72–78 (2007); Eugenio Mollo, Jr., Note, *The Expansion of Video Conferencing Technology in Immigration Proceedings and Its Impact on Venue Provisions, Interpretation Rights, and the Mexican Immigrant Community*, 9 J. GENDER, RACE & JUST. 689 (2006).

204. Pruitt & Showman, *supra* note 149, at 505.

205. *Id.*

206. *See, e.g.*, *Developments in the Law: Access to Courts*, 122 HARV. L. REV. 1151, 1182 (2009).

207. *See* 8 U.S.C. § 1229a(c)(4)(C).

208. *See* 8 U.S.C. § 1158(b)(1)(B)(iii).

209. *See* Bradley & Farber, *supra* note 200, at 554–55; *Developments in the Law: Access to Courts*, *supra* note 206, at 1185.

credibility, such as body language or facial expression, may be obscured or not clearly visible.[210] Respondents have difficult making eye contact (or knowing where to look), and may come off as having a flat affect.[211] This results in a less credible and less emotionally-compelling testimony, which is why researchers note that judges are likely "to feel more emotionally distant from and apathetic to an immigrant on a television screen."[212]

Government agencies have reported on videoconferencing's negative effect on credibility assessments. In a recent Government Accountability Office report assessing the immigration court case backlog, for example, investigators noted that immigration court officials from half of the immigration courts studied stated that they had change an initial credibility assessment made during a VTC hearing after they had an opportunity to see the respondent in an in-person hearing.[213] Immigration judges changed credibility assessments after in-person hearings revealed that the previous hearing had fact-gathering and interpretation issues attributable to subpar audio quality.[214] In one instance, an immigration judge reported being unable to identify a respondent's cognitive disability during a VTC hearing, only to realize that the disability was clearly evident during the in-person hearing.[215] Professors Bradley and Farber note that more recently, the National Association of Immigration Judges reported technical problems with VTC, including "pixelated screens, sound quality issues, and dropped Internet reception."[216] In 2017, a report commissioned by the EOIR itself to study immigration court operations actively encouraged *limiting* the use of VTC to procedural matters only.[217]

A recurring theme in the literature is the way that faulty technology, such as frozen screens, dark zones, faulty sound transmission, and general technical problems interfere with a respondent's ability to

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210. *See Developments in the Law: Access to Courts*, *supra* note 206, at 1185.

211. *Id.*

212. *Id.* at 1185–86; *see also* Bradley & Farber, *supra* note 200, at 552.

213. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 55 (2017), https://www.gao.gov/assets/gao-17-438.pdf [https://perma.cc/W8A8-276X].

214. *Id.*

215. *Id.*

216. *See* Bradley & Farber, *supra* note 200, at 554.

217. U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., LEGAL CASE STUDY: SUMMARY REPORT 23 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf [https://perma.cc/3V5G-AND]; *see also* Bradley & Farber, *supra* note 200, at 547.

meaningfully participate in their own hearings.[218] Judges report that VTC technical problems include "them being able to see us, us being able to see them, even being connected at all."[219] Interpreters, who must reflect the tone, emotions, and language used by respondents, struggle to perceive and mirror these characteristics in their interpretations.[220] When video alters the voice of the speaker, this can alter the meanings of words, particularly for speakers of tonal languages.[221] Further still, when all parties appear on the same virtual platform, like in a hearing conducted over WebEx, attorneys have limited capacity to confer confidentially with their clients.[222]

For these reasons, increased use of VTC for all hearings will not alleviate the due process concerns caused by distant immigration courts. In hearings or status meetings, where a judge will likely not be inspecting substantive evidence, hearing witness testimony, or assessing credibility, however, the benefits to both the respondent and the government may outweigh the risks associated with VTC hearings. While the EOIR now exults the increased use of VTC as a "proven success,"[223] there is no indication that the reliability of VTC has improved since the EOIR-commissioned report discouraged extensive use of VTC in 2017.[224] For

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218. Bradley & Farber, *supra* note 200, at 547; Eagly, *supra* note 200, at 993; *Developments in the Law: Access to Courts*, *supra* note 206, at 1187; Willie J. Epps, Jr. & Cailynn D. Hayter, *Zoomed in to Justice: Remote Proceedings During a Pandemic*, AM. BAR ASSOC. (July 27, 2021), https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/summer/zoomed-to-justice-remote-proceedings-during-pandemic/.

219. Eagly, *supra* note 200, at 993.

220. Mollo, *supra* note 203, at 705–06; Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. ON MIGRATION & HUM. SEC. 207, 211 (2021).

221. *Id.*

222. Eagly, *supra* note 200, at 990–91; Epps & Hayter, *supra* note 218.

223. Memorandum from James R. McHenry III, Director, EOIR, to All of EOIR, EOIR Practices Related to the COVID-19 Outbreak (June 11, 2020), https://www.justice.gov/eoir/page/file/1284706/download [https://perma.cc/Y43E-VBQ5].

224. In a recent article, Professors Bradley and Farber note that the EOIR's claimed "success" is unsubstantiated and provide data demonstrating that the EOIR's own data is inconsistent and unreliable. *See* Bradley & Farber, *supra* note 200, at 559–63. Researchers with the Transactional Research Access Clearinghouse (TRAC) at Syracuse University, an institute that uses FOIA to study the federal government, have likewise raised the alarm to significant irregularities and inconsistencies in EOIR data. In a recent report, TRAC researchers noted that the EOIR's "reckless deletion of potentially irretrievable court records raises urgent concerns that without immediate intervention the agency's sloppy data management practices could undermine its ability to manage itself, thwart external efforts at oversight, and leave the public in the dark about essential government activities." *EOIR's Data Release on Asylum So Deficient Public Should Not Rely on Accuracy of Court Records*, TRAC IMMIGR, (June 3, 2020), https://trac.syr.edu/immigration/reports/611/ [https://perma.cc/JJ8W-7MKB].

purposes of addressing the procedural difficulties resulting from the current geographic distribution, then, increasing the use of VTC for master calendar hearings, perhaps in conjunction with the satellite or circuit court options described above, may be a procedural safeguard that can meaningfully increase a noncitizen's access to the immigration court (if only virtually).

CONCLUSION

In recent years, the legitimacy of the U.S. immigration system has reached a state of crisis. Political interference, bureaucratic mismanagement, and, in some cases, bad faith have wreaked havoc in the immigration court system and caused many to see the institution as dysfunctional at best and at worst, a farce.

Much of this chaos is the federal government's own doing.[225] It cannot follow, then, that noncitizens alone should bear the brunt of the government inefficiencies and prosecutorial policies, especially if that burden comes by way of sacrificing a noncitizen's constitutional rights. While many of the problems plaguing the immigration courts are ones that the EOIR, on its own, cannot solve, what the EOIR *can* control is a commitment to preserving the essence of what a tribunal is—a space where individuals can expect fairness and a meaningful opportunity to be heard. By taking affirmative steps to help noncitizen respondents reach the immigration courts, the Biden Administration can deliver on a promise on which it has so far largely failed—making the United States immigration system more just, humane, and worthy of respect.

225. *See* Austin Kocher, *Immigration Courts, Judicial Acceleration, and the Intensification of Immigration Enforcement in the First Year of the Trump Administration*, *in* READING DONALD TRUMP: A PARALLAX VIEW OF THE CAMPAIGN AND EARLY PRESIDENCY 83, 90–94 (Jeremy Kowalski ed., 2019).