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Give Me Your Tired, Your Poor, Your Huddled Masses: An Overview of the Immigration System and *Chevron* Deference

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Left alone, en la oscuridad, without hope, sin oportunidad,
In a cage, como puedes verme asi, un monstruo, un demonio
Because of you, nunca entenderás mi angustia
Each day, I ask, mis gritos caen en un suelo frío y duro
Release me, ¿Qué te hice?
They told you a lie, te dijeron que soy un monstruo
All for what? Si me cortan, ¿no sangro?
Don't tell me you can't understand, tal vez si lo pongo en tu idioma me darás mi
Libertad.[1]

INTRODUCTION

Cold and sleep-deprived, Franklin, an eleven-year-old Honduran boy, was woken up by guards at 3 a.m. and fed cold, raw ham.[2] Subjected to jail-like conditions, Franklin and his seven-year-old brother, Byron, were separated from their mother for nearly a month and a half, ultimately reuniting in New York while the family's asylum case was being processed here in the United States.[3] As unfortunate as Franklin's experience was, one would hope that it was an isolated and rare incident, but the general public came to learn that by May 31, 2018, approximately 2,000 migrant children[4] from Latin America shared Franklin's experience. With the swift backlash following these revelations, President Trump reversed course to nominally end family separation and avoid any further political fallout.[5]

True to form, however, President Trump did make some statements regarding the situation. Using Twitter, often a vehicle for his rhetoric, President Trump stated that "criminals" employ the tactic of using

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1 Poem by Gilbert Alexander Cotto-Lazo, LIBERTAD (2020).

2 Daniella Silva, *'Like I Am Trash': Migrant Children Reveal Stories of Detention, Separation*, NBC NEWS (July 29, 2018, 9:44 AM), https://www.nbcnews.com/news/latino/i-am-trash-migrant-children-reveal-stories-detention-separation-n895006 [https://perma.cc/MYK2-D4BM].

3 *Id.*

4 Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME, https://time.com/5314769/family-separation-policy-donald-trump/ [https://perma.cc/N83S-TCCH] (June 20, 2018, 10:37 AM).

5 John Cassidy, *Why a Rogue President Was Forced to Back Down on Family Separation*, NEW YORKER (June 21, 2018), https://www.newyorker.com/news/our-columnists/why-a-rogue-president-was-forced-to-back-down-on-family-separation [https://perma.cc/43NN-4J3Z].

children to gain entry to our country, and he laid blame on "Democratic legislation."

> Children are being used by some of the worst criminals on earth as a means to enter our country. Has anyone been looking at the Crime [sic] taking place south of the border. [sic] It is historic, with some countries the most dangerous places in the world. Not going to happen in the U.S.[6]

> Separating families at the Border [sic] is the fault of bad legislation passed by the Democrats. Border Security [sic] laws should be changed but the Dems can't get their act together! Started the Wall [sic].[7]

Though it is difficult to respond to the volume of misleading and overwhelmingly unsupported statements by President Trump in those tweets, one fact is clear: on April 6, 2018, Jeff Sessions, then Attorney General, directed "all U.S. Attorney's Offices along the Southwest Border" to implement a "new 'zero-tolerance policy,'" which amounts to a directive to prosecute all Department of Homeland Security (DHS) referrals of "attempted illegal entry and illegal entry into the United States by an alien."[8]

President Trump's immigration policies served as the catalyst for the humanitarian crisis that marred the Trump administration during and following the midterm elections in 2018.[9] This period in U.S. politics demonstrated that an overwhelming majority of the U.S. public denounced this approach to immigration.[10]

Indeed, that the Trump administration is able to punitively separate children from families at the border only highlights the fact that an administration willing to take such measures could not do so but for the structural failings of the immigration system. These structural failings stem from three main categories: (1) the credible fear interview; (2) the

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6 THE TWEETS OF PRESIDENT DONALD J. TRUMP: THE MOST LIKED AND RETWEETED TWEETS FROM THE INAUGURATION THROUGH THE IMPEACHMENT TRIAL 201 (2020).

7 *Fact Check: Trump Blames Democrats for His Policy of Separating Kids from Parents at Border*, NBC NEWS (June 5, 2018, 7:27 AM), https://www.nbcnews.com/politics/politics-news/fact-check-trump-blames-democrats-his-policy-separating-kids-parents-n880091.

8 Press Release, U.S. Dep't of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018) [hereinafter Zero-Tolerance Policy], https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/SL7X-PZBU].

9 *See* Silva, *supra* note 2; *see also* Zero-Tolerance Policy, *supra* note 8.

10 *See* Rhodan, *supra* note 4.

discretion of the Attorney General; and (3) the current jurisprudence of *Chevron* deference in immigration law.

In the following four Parts, this Article will make three arguments: (1) that structural administrative flaws—namely, the interview of each person seeking asylum and agency review of that interview—result in deprivation of due process rights of migrants; (2) that these same structural flaws are compounded when the judiciary grants agency deference to administrative decisions; and (3) that where political accountability severely undermines a particular agency's expertise, such as in the immigration context, deference should either be amended from its current form or not afforded at all.

Part I examines the history and current structure of immigration, asylum, and refugee laws in the United States as they pertain to modern-day immigration issues. Part II provides a historical overview of agency deference and its current role in the immigration context. Part III highlights the structural issues resulting from both the administrative state and agency deference and proposes potential solutions. Lastly, the Article concludes by reviewing the argument.

I
HISTORY AND CURRENT STRUCTURE OF U.S. IMMIGRATION SYSTEM

While the Trump administration's punitive policy of separating children from their parents was the first exposure many in the United States had to the immigration system, the lesser-known fact is that U.S. foreign diplomacy, particularly with Latin America, created, directly and indirectly, many of the conditions that force migrants to seek asylum in the United States. Because the history of the immigration system and its current structure would be only a snapshot of its structural failings, an overview of U.S. diplomacy toward Latin America is appropriate. Accordingly, Section I.A discusses U.S. foreign policy with respect to Latin America. Section I.B examines the history of U.S. immigration laws and their current statutory framework. Section I.C provides a brief overview of the asylum process and its necessary standards. Finally, Section I.D examines the structural issues that have eroded due process protections for asylee applicants.

A. The United States' Backyard: A Backdrop of U.S. Policy Toward Latin America

Though U.S. foreign diplomatic relations are largely outside the scope of this Article, a brief overview of U.S.-Latin American relations

and the United States' shifting policies toward Latin America is relevant for purposes of understanding the United States' modern immigration system. Prior to the Second World War, the Roosevelt administration publicly stated that the United States would adopt the "Good Neighbor" policy, characterized by a noninterventionist principle toward Latin America.[11] The Roosevelt administration, however, silently abandoned the noninterventionist stance and began disseminating anti-Communist propaganda in Latin America.[12] Toward that end, in El Salvador, for example, the United States provided authoritarian dictator Maximiliano Hernández Martínez with financial and military aid from the United States, which Martínez, in turn, employed to stamp out dissent in the lower-middle class.[13]

This U.S. position of aiding and defending violent oppressive regimes in Latin America is not unique to the Roosevelt administration.[14] In fact, both the Kennedy and Reagan administrations employed foreign policies in Latin America that, on their face, purported to support Latin American governments but were ultimately aimed at combating the threat of Communism.[15] Indeed, U.S. support

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11 Jorrit van den Berk, *The Promise of Democracy for the Americas: U.S. Diplomacy and the Meaning(s) of World War II in El Salvador, 1941-45*, *in* POLITICS AND CULTURES OF LIBERATION 241, 243 (Hans Bak et al. eds., 2018).

12 *Id.* at 244 ("The U.S. supported the dictators in the interest of local stability and the dictators supported the U.S. in order to be eligible for lend-lease aid, flexible trade and financial agreements, and prestigious United Nations status.").

13 *Id.* at 250–53.

14 *Id.* at 254–56 ("[U.S. Minister to El Salvador, Robert] Frazer had publically [sic] defended the Martínez regime and its cooperative stance during the war and had allowed the dictator to adopt the pro-democratic language of the war while he was in effect a 'nazi-fascist.'").

15 Michael Dunne, *Kennedy's Alliance for Progress: Countering Revolution in Latin America: Part I: From the White House to the Charter of Punta del Este*, 89 INT'L AFFAIRS 1389, 1402 (2013) ("Kennedy [established] . . . a task force on Immediate Latin American problems. . . . [And one of its] basic assumptions . . . was that the greatest task of American diplomacy in Latin America [was] to divorce the inevitable and necessary . . . social transformation from connection with and prevent its capture by overseas Communist Power politics—the USSR and China being specifically identified as the foreign enemies. The other assumption was that the present Communist challenge in Latin America resembles, but is more dangerous than, the Nazi-Fascist threat of the Franklin Roosevelt period and demands an even bolder and more imaginative response.") (internal quotations omitted); *see also* LARS SCHOULTZ, NATIONAL SECURITY AND UNITED STATES POLICY TOWARD LATIN AMERICA 65 (1987) ("The Reagan administration was also successful in focusing policy debates upon what it believed was a linkage between instability in Nicaragua and El Salvador and a broader Soviet-Cuban effort to undermine U.S. power throughout the Caribbean region. As President Reagan noted, 'a determined propaganda campaign has sought to mislead many in Europe and certainly many in the United States as to the true

of repressive and violent regimes created poor living conditions for many Latin Americans, and those conditions were exacerbated by the U.S. adoption of "Dollar Diplomacy"—characterized by "promot[ing] more open trade in [Latin America], unfettered opportunities for foreign investment . . . and new assistance in debt reduction"—which served to further worsen living conditions in Latin America and caused hundreds of thousands to seek refuge in the United States.[16] With the foregoing as a backdrop, the following is an overview of the U.S. immigration system.

B. U.S. Immigration History and Current Structure

The development of U.S. immigration laws indicates a long history of discriminatory policies and legislative acts tending to restrict immigration from non-Western European countries.[17] For example, the Immigration Act of 1875 and the subsequent Chinese Exclusion Act "endeavored to eliminate the problems associated with Chinese immigration."[18] Legislation following these discriminatory nineteenth century acts did not fare better. In fact, subsequent legislative acts imposed limitations on immigration including "(1) the exclusion of specific groups of immigrants, (2) barriers to immigration, such as literacy tests or tests of economic self-sufficiency, and (3) the . . . [use] of national origins quotas."[19]

Even where millions were displaced following World War II, the United States maintained a restrictive posture toward admission of refugees, which the United States considered to be a special class of immigrants.[20] Recognized refugee statuses at the time included only

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nature of the conflict in El Salvador. Very simply, guerrillas, armed and supported by and through Cuba, are attempting to impose a Marxist-Leninist dictatorship on the people of El Salvador as part of a larger imperialistic plan.'").

16 David Sheinin, *The New Dollar Diplomacy in Latin America*, 37 AM. STUD. INT'L 81, 87, 89, 95–96 (1999) ("Dollar diplomacy helped bring unemployment and poor living standards to hundreds of thousands of Latin Americans through privatizations and rationalizations by governments and businesses striving to compete in the global economy; many sought refuge in the US, including more than a million 'illegal' Central American immigrants in Los Angeles alone.").

17 Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REGUL. 253, 254–69 (1995) (discussing the development of refugee law and noting that even when extremely restrictive systems were in place, such as the quota system, immigration from Western Europe remained unimpeded).

18 *Id.* at 258.

19 *Id.*

20 *Id.* at 260–61.

persons fleeing from religious persecution and immediate family members of admissible foreign nationals.[21] Refugee status did not include political persecution or carry with it the option of permanent residency in the United States.[22] The continued use of the restrictive quota system, coupled with overt discriminatory attitudes of Congress and severe limitations in the Displaced Persons Act of 1948, resulted in limited admissions of Jewish refugees, despite the atrocities that occurred in World War II.[23]

It was not until 1965 that Congress disposed of the restrictive and discriminatory quota system by passing the 1965 amendments (Amendments) to the Immigration and Nationality Act (INA).[24] Although the Amendments removed the discriminatory quota system, the Amendments were restrictive in two respects: (1) they limited admission of refugees to six percent of total immigration, and (2) they equated the concept of refugees with individuals fleeing Communist nations, thereby "creat[ing] a permanent ideological basis for admission."[25] Unfortunately, it was not until the Refugee Act of 1980 (Refugee Act) that the United States adopted a less restrictive stance on immigration than its prior legislation.[26]

In 1968, the United States signed onto the U.N. Protocol Relating to the Status of Refugees (Refugee Protocol), which incorporated the key substantive provisions of the 1951 U.N. Convention Relating to the Status of Refugees (Refugee Convention).[27] In 1980, when Congress enacted the Refugee Act for the purpose of conforming provisions of U.S. law to the Refugee Convention, the U.S. immigration system finally began to reflect the humanitarian approach of the Refugee Convention.[28] Moreover, the Refugee Act was the

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21 *Id.*

22 *Id.*

23 *Id.* at 259, 261–63. The quota system was part of early twentieth-century legislation that set forth percentages of immigrants eligible for admission based on nationality and derived from percentages of the U.S. Census Bureau. Moreover, the quota system left immigration from Western European countries unrestricted. *Id.*

24 *Id.* at 270.

25 *Id.* at 270–71.

26 *Id.* at 281.

27 G.A. Res. 429 (V), Convention Relating to the Status of Refugees, at 189 (July 28, 1951); G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966).

28 *See* H.R. REP. NO. 96-781 (1980) (Conf. Rep.); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) ("[T]he definition of refugee that Congress adopted is virtually identical to the one prescribed by Article 1(2) of the [Refugee] Convention which defines a refugee as an individual who owing to a well-founded fear of being persecuted for reasons of race,

> first piece of legislation to establish a procedure for the application for asylum by a person physically present within the United States, or by one who presents herself at a U.S. border . . . [and it] broadened the grounds for withholding deportation to include persecution based on social group or nationality.[29]

Despite this promising step, the Refugee Act has severe shortcomings.[30]

C. Refugee Definition and Asylum Procedure

"Why are we having all these people from shithole countries [Haiti and El Salvador] come here?"[31] This sentiment was not uttered in a dimly lit bar by a patron opining on news coverage of modern-day immigration issues. In fact, President Trump infamously uttered the sentiment, further expressing a preference for immigrants from predominately white European countries.[32] However, migrants who come from the countries Trump harbors animus for are often escaping dire circumstances, and the asylum process serves as the primary meaningful recourse for their safety.[33]

The asylum process not only provides "a path to lawful permanent resident status and citizenship" but it also "confers other benefits, including the right to work in the United States."[34] Importantly, the asylum procedure created by the Refugee Act allows for migrants to apply for asylum irrespective of their citizenship status, thereby

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religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.") (internal quotations omitted) (internal citations omitted); *see also* Bockley, *supra* note 17, at 260–62, 278–83.

29 Bockley, *supra* note 17, at 282.

30 *Id.* at 283 ("Three fundamental aspects of current refugee policy are largely responsible for the continuing ideological bias following the enactment of the Refugee Act: (1) the lack of guidelines regarding the proper definition of refugee, resulting in inconsistent and restrictive requirements for the standard of proof required in order to establish refugee status; (2) major flaws in the Department of Justice's implementation of the Refugee Act; and, (3) judicial disregard for the legislative intent of Section 203(e) of the Refugee Act prohibiting the return of refugees to places of persecution.").

31 Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1131 (N.D. Cal. 2018) (quoting President Trump and holding President Trump's animus is imputed to Secretary Nielsen's decision to remove the "shithole" countries from a list affording particular migrants due process protections).

32 *Id.*

33 *See* Arizona v. United States, 567 U.S. 387, 396–97 (2012).

34 O.A. v. Trump, 404 F. Supp. 3d 109, 118 (D.D.C. 2019).

creating statutory protection for any migrant who presents at a port of entry or is residing in the United States.[35] Once a migrant applies for asylum by submitting an I-589 form,[36] the Attorney General has discretion to grant asylum to the migrant-applicant, provided that the migrant-applicant is a refugee within the meaning of the INA.[37]

Under the Refugee Act, a refugee is an individual who cannot or is "unwilling to return to, and is unable or unwilling to avail himself or herself of the protection" of their country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[38] Under the Refugee Act, a refugee applying for asylum must satisfy the evidentiary standard for persecution (i.e., that the refugee has a "'well-founded fear of persecution'").[39] The advantage of asylum status is that it provides a refugee with an opportunity to become a lawful permanent resident.[40] Importantly, the Refugee Act does not delineate the types of evidence that would satisfy the well-founded fear standard.[41] Another undefined standard that the Refugee Act introduced is persecution based on "membership in a particular social group" ("social group standard").[42]

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35 *Id.* at 119.

36 U.S. CITIZENSHIP & IMMIGR. SERV., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf [https://perma.cc/92P8-FR6D].

37 *O.A.*, 404 F. Supp. 3d at 119.

38 8 U.S.C. § 1101(a)(42).

39 Bockley, *supra* note 17, at 283.

40 Acosta, 19 I. & N. Dec. 211, 230 (B.I.A. Mar. 1, 1985).

41 *See* 8 U.S.C. § 1158 (b)(1)(B)(i)–(ii) ("The burden of proof is on [the refugee] to establish . . . that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."). The statute further states that testimony alone may be sufficient only if the trier of fact finds the applicant's testimony credible, persuasive, and refers to specific facts supporting refugee status. *Id.* The "trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." *Id.*

42 *Acosta*, 19 I. & N. Dec. at 233 ("[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.").

D. Erosion of Procedural Protections for Asylees

While the Refugee Act established a uniform procedure for migrants to apply for asylum and escape harsh home-country conditions, various factors have eroded those same procedural protections since the adoption of the Refugee Act. The following Sections examine those factors ailing the immigration system: I.D.1—adoption of the expedited removal process; I.D.2—administrative structural biases; I.D.3—Board of Immigration Appeals (BIA or Board) decisions; and I.D.4—intervention by the Attorney General.

1. Expedited Removal

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) affected the due process rights of not only asylum applicants residing in the United States but also those presenting at U.S. borders and ports of entry.[43] Prior to the IIRIRA, migrants seeking asylum were afforded evidentiary hearings on their asylum claims.[44] Those who presented at "ports of entry, including border ports," would receive fewer procedural protections, but they would still be entitled to an "exclusion hearing before an immigration judge" on their claims.[45] At exclusion hearings, asylum applicants, both those who present at the border and those who apply while residing in the United States, could "present and receive evidence, give testimony, secure witnesses, and appeal an adverse decision."[46] The IIRIRA, in effect, made it easier for immigration officials to remove asylee applicants at the border by creating this "expedited removal" process.[47]

The difficulty in the expedited removal process lies in the various technicalities that would render a refugee inadmissible and subject to expedited removal. Whether these technicalities preclude a refugee from claiming asylum largely turns on the discretion of the immigration and asylum officer. For example, when a refugee presents at the border, an immigration officer must refer the alien for an interview by an asylum officer.[48] If, however, the immigration officer suspects that the

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43 Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 391–92 (2020).

44 *Id.* at 391.

45 *Id.* at 391–92.

46 *Id.* at 392.

47 *Id.*; *see* 8 U.S.C. § 1225 (a)–(b).

48 8 U.S.C. § 1225(b)(1)(A)(ii). For clarification, the term "alien" is used as it is the statutory term in application for asylum. However, previous usage of the term "refugee" will continue to be used as previously employed unless the reference is to the statutory text. Insofar as "alien" is used, for purposes of this Article, it is interchangeable with "refugee."

alien "may be inadmissible" under subparagraph (A), the officer "shall order the alien removed."[49] Under section 1225, an alien is inadmissible if her or she willfully makes material misrepresentations to procure a visa or admission into the United States or if they are not in possession of a valid unexpired immigrant visa, reentry permit, or border crossing ID.[50] Although aliens are not subject to expedited removal if they indicate either an "intention to apply for asylum" or a fear of persecution, it is not required that immigration officers make such a determination before they suspect an alien is inadmissible.[51] If the immigration officer does determine an alien has claimed asylum or conveys a fear of persecution, then the alien may proceed to the credible fear interview with an asylum officer.[52]

Moreover, even though the asylum officer must be an immigration officer who "has had professional training in country conditions, asylum law, and interview techniques comparable" to full-time adjudicators or is supervised by an officer meeting those requirements,[53] this does not preclude an administration from employing officers who are ill-equipped to handle such interviews. This results in an erosion of procedures aimed at assisting potential asylees with valid claims.[54] Indeed, that the Trump administration directed Customs and Border Protection officers to conduct screenings is likely illegal considering the training requirements.[55] Additionally, where an asylum officer determines that the alien has not met the credible fear of persecution standard, the officer "shall order the alien removed from the United States without further hearing or review."[56] Consequently, an officer who has little to no training on asylum procedure and is generally skeptical regarding an alien's statements

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In an effort to use more humanizing language than "alien" and "refugee," as these terms carry a negative connotation or are used as derogatory terms, the terms "noncitizen," "migrant," or "asylum seeker" are used in this Article when specific reference to statutory text is not necessary or context does not require usage of alien or refugee. For purposes of this Article, the above terms describe non-United States citizens seeking asylum in the United States.

49 8 U.S.C. § 1225(c)(1)(A); *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (stating that an alien is inadmissible if subject to 8 U.S.C. § 1182(a)(6)(C) or § 1182(a)(7)).

50 8 U.S.C. § 1182(a)(6)(C), (a)(7).

51 8 U.S.C. § 1225(b)(1)(A)(i)–(ii).

52 O.A. v. Trump, 404 F. Supp. 3d 109, 120 (D.D.C. 2019).

53 8 U.S.C § 1225(b)(1)(E).

54 Lee, *supra* note 43, at 399–400.

55 *Id.* at 396.

56 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

can, at their sole discretion, determine to remove the alien without further consideration by an immigration judge.

2. Structural Biases

In addition to legislative changes making it more difficult for refugees to claim asylum, the structure of the immigration adjudicatory system tends to favor the agency tasked with enforcing the immigration laws. Notably, although the Executive Office for Immigration Review (EOIR) adjudicates immigration cases, the Attorney General established the EOIR as part of the U.S. Department of Justice (DOJ).[57] The Director of the EOIR supervises immigration judges and the BIA.[58] Furthermore, the Department of Homeland Security (DHS), the agency under which immigration and asylum officers work, appears on behalf of the government.[59] Though the DOJ and DHS are theoretically distinct, practically, both agencies still exist under the broad umbrella of the Executive.[60] With the policies of an administration guiding executive agencies, it is more likely than not that various agencies would work in tandem as opposed to being adversaries.[61] Where the agency in charge of interviews—which largely form and, effectively, drive the claim through the system—is reviewed by an agency that may be equally as biased, the potential erosion of due process protections is highly likely.[62]

This is not to suggest that there is a likelihood of systemic bias merely because agencies overlap jurisdictions in handling immigration claims. Rather, this Article suggests, discussed further below, that in a system where multiple agencies have the potential to function in unison to erode due process protections without substantive review of agency action by another branch, the likelihood of due process protections being eroded is high. Indeed, this likelihood is further heightened

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57 Melissa J. Hernandez Pimentel, *The Invisible Refugee: Examining the Board of Immigration Appeals' "Social Visibility" Doctrine*, 76 MO. L. REV. 575, 578 (2011).

58 *Id.*

59 *Id.*

60 *See* Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 358–403 (2017).

61 *See* Kavitha Surana, *How Racial Profiling Goes Unchecked in Immigration Enforcement*, PROPUBLICA (June 8, 2018, 5:00 AM), https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania [https://perma.cc/9A9E-KLEX].

62 *See generally* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011) (examining how factors such as immigration judges' lack of independence and low risk of judicial review allow implicit bias to drive the adjudication of immigration claims, thereby negatively affecting marginalized groups).

when the issue the agencies are tasked with administering is highly politicized, divisive, and a key agenda of an administration, demonstrated in President Trump's immigration rhetoric.

Moreover, merely having an administrative agenda does not give rise to abuses of power with overlapping agencies. If that were so, then this argument would reach too far and capture agencies that necessitate overlapping jurisdictions. If, however, the politicization of a particular issue undermines the purpose of agencies—specialized expertise—then, where evidence demonstrates that executive decisions are based on politicized agendas, more comprehensive review is necessary. Much like President Trump has authority over officers who are not sympathetic or adequately trained in administering credible fear interviews,[63] a staunch anti-immigration Attorney General can further galvanize any structural biases considering the Attorney General's broad power in overseeing the immigration system.[64]

3. BIA Interpretations

BIA decisions further affect the very definitions of undefined categories such as the social group standard, discussed above. *Matter of M-E-V-G* expanded on the interpretation of the social group standard handed down by the *Acosta* Board.[65] In *Matter of M-E-V-G*, the Board incorporated criteria of particularity and social distinction into the definition of membership in a particular social group.[66] Further, the Board considered the criteria consistent with the immutable characteristic standard in *Matter of Acosta*.[67] The former is satisfied when the group is "discrete and [has] definable boundaries—and it must not be amorphous, overbroad, diffuse, or subjective."[68] The latter criteria refers to the "social recognition" of a group (i.e., perceived as

63 Lee, *supra* note 43, at 396.

64 Jessica Senat, *The Asylum Makeover:* Chevron *Deference, the Self-Referral and Review Authority*, 35 TOURO L. REV. 867, 888–89 (2019) (discussing the issues with the self-referral provision, which allows the Attorney General, the BIA, and the Secretary of the DHS to refer immigration cases to themselves at their own discretion). Moreover, any decisions taken in those self-referred cases carry precedential weight. *Id. See also* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 544–46 (2011).

65 M-E-V-G-, 26 I. & N. Dec. 227, 237–38 (B.I.A. Feb. 7, 2014).

66 *Id.* at 237.

67 *Id.*

68 *Id.* at 239.

a group by society).[69] However, these additional elements can muddle the waters. That is, "if the applicant provides evidence proving that the society in question uses specific parameters to define the social group, rendering them 'socially distinct,' these parameters may not satisfy the particularity requirement if the BIA finds that it is too 'broad' or 'amorphous.'"[70]

4. Attorney General Intervention and Executive Action

Executive acts, via the Attorney General or the President, can demonstrate a clear political influence on the immigration system. Indeed, one of the more pivotal political appointments a President can make is selecting an Attorney General. Although an Attorney General is customarily an independent actor and not beholden to every directive given by the Commander in Chief, Attorney General (AG) William Barr notwithstanding, an Attorney General can ideologically mirror an administration such that they function as an extension of any divisive rhetoric.

An Attorney General is afforded significant discretion regarding self-referring a case for his or her review, and this self-referral invariably carries precedential weight.[71] For example, AG Barr overturned a BIA decision that held "immediate family" constituted a "particular social group" under the social group standard, discussed above.[72] Similarly, former AG Sessions overruled a decision "effectively limiting the availability of asylum to most individuals fleeing gender-based violence or violence at the hands of gangs—each of which is often central to the fears of harm that prompt people from El Salvador to flee to the United States."[73]

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69 *Id.* at 240.

70 Senat, *supra* note 64, at 873–74 (citing Rachel Gonzalez Settlage, *Rejecting the Children of Violence: Why U.S. Asylum Law Should Return to the Acosta Definition of "A Particular Social Group*," 30 GEO. IMMIGR. L.J. 287, 310 (2016)); *see also* Hernandez Pimentel, *supra* note 57, at 582–92 (discussing the three main approaches in defining the social group standard adopted by various BIA courts and federal circuits and noting the inconsistencies in all three approaches).

71 Senat, *supra* note 64, at 888–89.

72 *Compare* L-E-A-, 27 I. & N. Dec. 581, 581 (U.S. Dep't of Just. July 29, 2019) ("[M]ost nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups.'"), *with* L-E-A-, 27 I. & N. Dec. 40 (B.I.A. May 24, 2017) (holding that immediate family is a particular social group).

73 HUMAN RIGHTS WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE 106 (2020); *see also* A-B-, 27 I. & N. Dec. 316 (A.G. 2018); *see also* E-F-H-L-, 27 I. & N. Dec. 226 (U.S. Dep't of Just. Mar. 5, 2018). *But cf.* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. Aug. 26, 2014) (establishing

With respect to executive action, one policy serves as a stark reminder of the breadth of avenues by which the President can alter immigration enforcement. In January 2019, President Trump instituted the Migrant Protection Protocols (MPP).[74] Under this policy, "the U.S. . . . returns to Mexico nearly all asylum seekers who have been put into removal proceedings."[75] Often, these asylum seekers are vulnerable populations, and this policy "regularly results in family separations."[76] Discussed above, the initial interviewing officers may not be adequately trained, resulting in fewer protections for those seeking asylum.

II
AGENCY DEFERENCE AND IMMIGRATION

Where a noncitizen applies for asylum, it is within the discretion of the immigration judge whether the evidence presented during the course of a credible fear interview and the subsequent proceedings satisfies the credible fear standard for asylum status.[77] Similar to federal appellate courts, the BIA applies a clearly erroneous standard of review for the lower tribunal's factual findings but reviews *de novo* questions of law, discretion, judgment, and all other issues in the appeal.[78]

The BIA standard of review, however, has had serious issues regarding its scope of review.[79] This difficulty in determining the scope of review arises, in part, from the BIA conflating what it considers to be a question of fact and a question of law—exemplified by certain BIA decisions determining that "events that have not yet occurred

domestic violence survivors as a "particular social group" under U.S. asylum law in certain cases); *c.f.* Memorandum from Joseph E. Langlois, Chief, Asylum Div., U.S. Citizenship & Immigr. Servs. (Mar. 2, 2010), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf [https://perma.cc/6K8Z-S4F4] (discussing circuit court precedent in which gang membership is considered to be a "particular social group" under U.S. asylum law in certain cases).

74 HUMAN RIGHTS WATCH, *supra* note 73, at 102–03.

75 *Id.*

76 *Id.* at 103.

77 Hernandez Pimentel, *supra* note 57, at 579.

78 *Id.*

79 Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 290 (2011) ("[T]he Board fails to consistently define the scope of its review. Irrespective of the analysis employed, the fact that the Board decisions are both internally inconsistent and inconsistent with the attorney general's commentary is itself problematic.").

cannot be considered facts."[80] This would cause issues, as asylum applicants would necessarily have to divulge facts indicating a fear of persecution if they were to return to their home country. These facts necessarily are events that have yet to occur.

Fortunately, in response to an overwhelming number of federal circuit courts striking down the BIA's application of *de novo* review regarding the possibility of future events, the BIA overruled its prior decision.[81] Though federal courts were able to address a logically inconsistent standard of review,[82] most applicants do not make it to this step of review.[83] Moreover, that BIA decisions are appealed at a significantly low rate compared to the number of claims[84] suggests that the opportunities an Article III court has to review these agency decisions are very limited, irrespective of whether the reviewing court employs *Chevron* deference.[85]

A. Chevron *Deference*

A cornerstone of judicial review of agency decisions, the *Chevron* doctrine has prescribed that federal courts bend a deferential ear to agency decisions on the premise that the agency's expertise and the political accountability of the Executive Branch warrant such deferential review.[86] In short, the two-step mode of analysis begins with the reviewing court examining if Congress directly spoke on the

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80 *Id.* at 291–94; *see also* A-S-B-, 24 I. & N. Dec. 493 (B.I.A. May 8, 2008).

81 Z-Z-O-, 26 I. & N. Dec. 586, 589 (B.I.A. May 26, 2015) ("[T]he Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have . . . held that an Immigration Judge's finding that a future event will occur is a finding of fact that the Board must review under the clearly erroneous standard.") (citations omitted).

82 *Id.*

83 *See* David North, *Immigration, the Courts, and Statistics*, CTR. FOR IMMIGR. STUD. (Mar. 4, 2016), https://cis.org/North/Immigration-Courts-and-Statistics [https://perma.cc/3BR7-B6MY]. The percentage of BIA decisions appealed to federal circuits varies from 1.9% to 48.70%, with the Ninth Circuit being the only circuit above 20%. *Id.* Moreover, the statistics indicate that only five circuits have applicant-friendly decisions above 10%. *Id.*

84 *See* U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK (2018), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/73RX-DGUW].

85 David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1179–80 (2016) (discussing factors affecting appeal rates in immigration decisions and disparities between removal and appeal rates).

86 Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 DUKE L.J. 1059, 1078–80 (2011); *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (reasoning that political accountability of the Executive Branch and agency expertise are justifications for courts to defer to agencies).

issue before the court (i.e., determining whether the organic act is silent on the particular issue).[87] If the intent of Congress is unclear, the next step for the court is to determine whether the agency interpretation is based on a "permissible construction of the statute."[88] It is well settled that *Chevron* deference is applicable to the INA.[89]

One criticism, however, is that in the context of immigration, reviewing courts are "too deferential to interpretations made by the attorney general."[90] This concern is compounded by the fact that the Supreme Court has sparingly addressed *Chevron* deference in the immigration context compared to the number of asylum applications and appeals filed each year.[91]

B. Agency Deference in Immigration

Absent an opinion upending *Chevron* deference in the immigration context,[92] the current framework of jurisprudence in immigration cases "demonstrate[s] the Court's lack of a coherent approach to the role of the [Refugee] Convention in establishing the construction of domestic asylum provisions or of any consistent methodology for interpreting the treaty's terms."[93] This is in part due to federal circuits deferring to the BIA's construction of the Refugee Act, despite the BIA's interpretations being inconsistent with international treaties that heavily influenced the Refugee Act.[94]

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87 *Chevron*, 467 U.S. at 842–43.

88 *Id.* at 843.

89 Negusie v. Holder, 555 U.S. 511, 516 (2009) (citing I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999)).

90 Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 530 (2003).

91 Farbenblum, *supra* note 86, at 1085.

92 Though outside the scope of this Article, one case currently before the Supreme Court may significantly affect the future of *Chevron* deference in the immigration context. *See* Dai v. Sessions, 884 F.3d 858 (9th Cir. 2018), *cert. granted sub nom.* Wilkinson v. Dai, No. 19-1155 (argued Feb. 23, 2021). As of the publication of this Article, the Supreme Court has not issued an opinion in *Wilkinson v. Dai*. The legal question in *Dai* primarily rests on whether a federal appellate court can reverse, without remand to the lower tribunal, the denial of an asylum application where the Immigration Judge and Board of Immigration Appeals do not make an adverse credibility finding. Brief for Respondent at i, 2–3, *sub nom.* Wilkinson v. Dai, No. 19-1155 (argued Feb. 23, 2021). Though the parties' arguments revolve on the Ninth Circuit's application of the substantial evidence standard of review, this matter provides an opportunity for the Court to address the tension between the federal judiciary's oversight role of immigration agency decisions and statutory deference.

93 Farbenblum, *supra* note 86, at 1085.

94 *Id.* at 1084.

In *I.N.S. v. Cardoza-Fonseca*,[95] the first of three landmark cases, the Court limited *Chevron* in three significant ways.[96] First, it limited the applicability of *Chevron* deference by distinguishing BIA decisions that fill statutory gaps from those addressing "pure issues of statutory construction."[97] Significantly, the second manner in which the *Cardoza-Fonseca* Court limited *Chevron* was by looking to standards under the Refugee Convention and the supporting materials to inform statutory interpretation.[98] Lastly, the *Cardoza-Fonseca* Court counseled lower courts to examine the legislative history of the Refugee Act to determine whether "Congress expressed an intention about the statute's meaning that was contrary to its plain language."[99]

In the second landmark case, *I.N.S. v. Aguirre-Aguirre*, however, the Court changed course by holding that deference to the BIA was appropriate because the "Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law'" when considering cases before it.[100] Notably, the Court cited possible implications to foreign relations as a driving principle for deference to BIA interpretations.[101] Reversing the Ninth Circuit's holding, which based its interpretation of the INA on an international U.N. handbook that was a supporting material to the Refugee Protocol,[102] the *Aguirre* Court held that the U.N. handbook was not binding on the Attorney General,[103] the BIA, or U.S. courts. Therefore, the Court held that deference to the BIA would be appropriate.[104]

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95 480 U.S. 421 (1987).

96 Farbenblum, *supra* note 86, at 1086.

97 *Id.* (explaining that the *Cardoza-Fonseca* Court declined to defer to the BIA's construction regarding the evidentiary standard for asylum status, instead "embracing the [Refugee] Convention-based approach").

98 *Id.* at 1087.

99 *Id.* at 1088; *see also Cardoza-Fonseca*, 480 U.S. at 432 n.12 (determining that the legislative history of the Refugee Act provides additional support to the Court's holding that Congress did not intend to limit asylum eligibility to aliens who satisfied the standard the Court considered consistent with international treaties).

100 I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (citing regulation 8 C.F.R. § 3.1(d)(1) (1998) as the basis for the Attorney General conferring discretion to the BIA).

101 *Id.* ("A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.").

102 *Id.* at 428–29, 433.

103 *Id.* at 427–28.

104 *Id.* at 427–30.

The last landmark case, *Negusie v. Holder*, "considered the relationship between *Chevron* deference and congressional intent to implement the Convention."[105] The issue before the Court was whether the prosecutor bar, which rendered a noncitizen inadmissible if they persecuted others, applied when the noncitizen "was compelled to assist in persecution."[106] Though the Court noted the BIA's misapplication of law regarding the prosecutor bar, the Court reasoned that "[w]hen the BIA has not spoken on 'a matter that statutes place primarily in agency hands,' our ordinary rule is to remand to 'giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.'"[107] Importantly, the Court "concluded that the BIA ha[d] not yet exercised its *Chevron* discretion to interpret the statute in question" and determined "remand to the agency for additional investigation or explanation" was the appropriate decision.[108]

A troubling aspect of the *Negusie* decision is that although the Court did acknowledge that the intent of the Refugee Act was to bring domestic asylum law in accordance with international principles, "the majority did not consider, or even mention, Article 1F or the [Refugee] Convention."[109] Indeed, Justice Stevens' concurrence indicates as much by highlighting the congressional intent of the Refugee Act.[110] Moreover, this stands in stark contrast to *Cardoza-Fonseca*.

In effect, the majority's omission of congressional intent related to the Refugee Protocol and the Refugee Convention amounts to a blank check for BIA decisions. Put another way, that the Court's analysis does not focus on the international treaties contemplated by the Refugee Act allows for BIA interpretations to diverge from those humanitarian treaties without being deemed inconsistent with congressional intent, thereby affording *Chevron* deference to those interpretations. This, arguably, is tantamount to the judiciary rubber-stamping BIA interpretations that would otherwise be inconsistent with the more humanitarian and inclusive approaches promoted by the

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105 Farbenblum, *supra* note 86, at 1092.

106 Negusie v. Holder, 555 U.S. 511, 516 (2009); *see also* 8 U.S.C. § 1158(b)(2)(A)(i); 8 U.S.C. § 1231(b)(3)(B)(i).

107 *Negusie*, 555 U.S. at 517 (quoting I.N.S. v. Orlando Ventura, 537 U.S. 12, 16–17 (2002) (*per curiam*)).

108 *Id.* at 523 (quoting Gonzales v. Thomas, 547 U.S. 183, 186 (2006)).

109 Farbenblum, *supra* note 86, at 1094.

110 *Negusie*, 555 U.S. at 536–37.

Refugee Convention. If the foregoing demonstrates anything, it is this: Supreme Court guidance regarding *Chevron* deference in immigration is likely to reinforce already pervasive systemic issues in immigration administration.

Additionally, a doctrine related to *Chevron* deference equally affects immigration law—namely, the *Brand X* doctrine.[111] Under *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[112] Citing concerns regarding separation of powers—that is, that the judiciary would have preclusive final say over agency interpretations—the *Brand X* Court reasoned that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[113]

Ironically, in an effort to address criticisms of separation of powers going the other way—that the agency could effectively overrule judicial precedent—Justice Thomas draws an analogy to how state courts can arrive at a different, yet consistent with federal courts, interpretation of a state's law.[114] Justice Thomas addresses a separation of powers criticism with a retort centered on federalism. That federal courts and state courts, functioning within the same branch, arrive at different interpretations of state law does not bear on another branch's ability to sidestep judicial precedent, thereby receiving *Chevron* deference with the revised interpretation.

The future of *Brand X*, however, may be short-lived, as its own author, Justice Thomas, has expressed a willingness to overrule his own opinion.[115] Indeed, then-judge-now-Justice Gorsuch has been and continues to be a vocal critic of not only *Chevron* deference but also of *Brand X*.[116] Considering Justice Thomas conveyed his penchant for overruling *Brand X* in a dissent to a denied petition and coupled with

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111 *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

112 *Id.* at 982.

113 *Id.* at 982–83.

114 *Id.* at 983–84.

115 Baldwin v. United States, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari).

116 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1150 (10th Cir. 2016) (Gorsuch, J., concurring) (voicing disdain for *Brand X* as a circuit court judge).

Justice Gorsuch's stance,[117] it is likely that garnering four votes is probable and may soon provide the Court with another opportunity to address *Brand X*. Moreover, with the arguable crawling back of *Auer* deference, the future of *Chevron* deference and *Brand X* is, at best, in a precarious position.[118]

Whether overruling *Chevron* provides a net positive regarding tension between the judiciary and the executive agencies has yet to be determined. Although this Article does address structural shortfalls and how *Chevron* deference may contribute to systemic issues in immigration administration, this is not to suggest that overruling *Chevron* is the best course of action. In fact, overruling *Chevron* may prove to be detrimental to substantive immigration reform in the long run. President Trump has altered the face of the federal judiciary, dwarfing the number of confirmed judicial appointments of both the Bush and Obama administrations.[119] This increase in Trump-appointed judges raises the likelihood of drawing a conservative majority on a panel.[120] Trump-appointed judges have already influenced various areas including immigration.[121]

Herein lies the quagmire: overrule *Chevron,* and an increasingly conservative and anti-immigration judiciary has control over immigration case law for the foreseeable future; or retain *Chevron* deference and continue with the general trend of deference to an interagency system where any meaningful change can be unilaterally upended by the Attorney General of the week. Indeed, *Chevron* deference can underscore an administration's efforts to effectively process and address asylees, but where an administration takes a

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117 *See id.* at 1151 (criticizing *Chevron*, and *Brand X* as its logical extension) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.").

118 *See* Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (limiting the application of *Auer* deference).

119 Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/ [https://perma.cc/Q79U-JNJV].

120 Tom McCarthy, *Trump's Judges: A Revolution to Create a New Conservative America*, GUARDIAN (Apr. 28, 2020, 5:00 PM), https://www.theguardian.com/us-news/2020/apr/28/donald-trump-judges-create-new-conservative-america-republicans [https://perma.cc/4EBE-EBCM].

121 *Confirmed Judges, Confirmed Fears*, PEOPLE FOR THE AM. WAY, https://confirmedfears.com [https://perma.cc/F8Y5-WFW2] (last visited Feb. 3, 2020) (presenting an interactive database of decisions by Trump-appointed judges by topic and the individual judge, with immigration topics indicating eighty-four decisions by Trump-appointed judges invariably favoring immigration agency decisions).

xenophobic stance on immigration, *Chevron* deference may only serve to entrench those ideals in administrative and federal case law.[122] Bleak as these options are, a middle road is more likely. That is, *Chevron* may be scaled back similarly to *Auer* deference. Indeed, considering how the Roberts Court deals with *Chevron* in the near future, *Chevron* may still be able to serve a role in future reform. This uncertainty should, in fact, counsel against interpreting *Chevron* as it currently stands. However, unless and until the Supreme Court revisits *Chevron*, the following proposals to the current doctrine could alleviate systemic pitfalls.

III
STRUCTURAL ISSUES AND PROPOSED SOLUTIONS

Parts I and II demonstrate that the structural issues affecting the immigration system stem from three main sources: (1) the credible fear interview; (2) the discretion of the Attorney General; and (3) the current jurisprudence of *Chevron* deference in immigration law. As this section will show, the solutions to these issues are (1) the creation of an Article I immigration court, (2) the video recording of the credible fear interviews, (3) the creation of an Office of the Commissioner within the new immigration court system, and (4) the return to the *Cardoza-Fonseca* form of bifurcated analysis or a Step-Zero-like analysis.

A. Summary of Structural Issues in Immigration

Regarding the credible fear interview, former AG Sessions's pronouncement regarding the zero-tolerance policy affected migrants' ability to claim asylum because many would not have the required documentation and would therefore be inadmissible under the current statutory framework. Moreover, the immigration officer's discretion affects the trajectory of the asylum claim. If the officer suspects the refugee of illegally entering the country, the refugee is referred, under the zero-tolerance policy, to DHS for criminal prosecution and is subject to expedited removal without seeing an immigration judge.

If a refugee does obtain a referral to an asylum officer, that refugee will continue to experience hurdles because the asylum officer has broad discretion to determine whether a refugee has satisfied the

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[122] *See* J. Kirk McGill & Ben K. McGill, *Lucia v. SEC: Justice Breyer Warns of Dramatic Expansion of the President's Control over the Federal Civil Service*, 96 DENV. L. REV. 104, 105 (2018).

credible fear standard and can also deport a refugee via expedited removal. This pitfall is only exacerbated by U.S. Customs and Border Protection officers, who have a "history of abuse of and misconduct towards asylum seekers," administering the credible fear interviews.[123] Moreover, unless the refugee is hearing impaired, a translator is not provided during the interview.[124] Considering this interview can often be dispositive of an asylum application, the combination of factors listed above renders a high likelihood that otherwise qualifying asylum applicants are precluded from entry or a meaningful review of their status as potential asylees.

Even if a refugee indicates the intention to apply for asylum, obtains a credible fear interview with an asylum officer, and successfully obtains an evidentiary hearing before an immigration judge, the immigration judge may still hand down an adverse decision as they and the BIA answer to the Attorney General.[125] Moreover, this is compounded by the Attorney General's discretion to self-refer cases that he or she does not agree with.[126]

B. Proposed Solutions

With respect to the credible fear interview and the discretion of the Attorney General, a solution addressing those shortfalls would be for Congress to create an immigration court system under Article I, similar to the tax or bankruptcy court system.[127] Although there are principles underscoring the utility of agencies—expertise and political accountability—these principles should not further the consolidation of power where the potential for systematic abuse is high and can result in harm to vulnerable people. Often, these same asylum seekers are escaping conditions that were created by prior U.S. diplomatic

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123 *FOIA Lawsuit Demands Information About CBP Officers' Role in Credible Fear Interview Process*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/litigation/foia-lawsuit-demands-information-about-cbp-officers-role-credible-fear-interview-process [https://perma.cc/7L9P-S7FD] (last visited Feb. 3, 2020).

124 *Preparing for Your Asylum Interview*, U.S. CITIZENSHIP & IMMIGR. SERV., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/preparing-your-asylum-interview [https://perma.cc/AN7Z-3H9K] (Sept. 22, 2020).

125 Family, *supra* note 64, at 543 ("The lack of decisional independence stems from the placement of immigration judges and the Board as mere employees of the Attorney General. The entire Board exists by regulation only, and the Attorney General is ultimately in charge of hiring, firing, training, and reviewing the immigration judge corps. The bureaucratic placement of the adjudicators signals dependence on a politically appointed prosecutor.").

126 Senat, *supra* note 64, at 888–89.

127 26 U.S.C. § 7441; 28 U.S.C. § 151.

policies.[128] The creation of an independent court system would substantially curb the Attorney General's control over the immigration system.

Moreover, the initial interviews should be video recorded in addition to the written application generated by the asylum officer, as this would address potential translation issues or serve as a deterrent for asylum officers to inappropriately dismiss supported claims.[129] In addition to video recording the credible fear interviews, Congress should also establish within the Article I immigration court system an officer similar to that of an appellate commissioner. This commissioner would serve as a threshold judicial officer reviewing only denied claims to determine whether the initial denial by the asylum officer was correct and that the credible fear interview was properly conducted. The immigration judge would continue to review claims the asylum office deems meritorious, and the commissioner would refer any denied claims the commissioner finds appropriate for the immigration judge to review. Additionally, that interviewing officers know their conduct is being recorded and reviewed by an independent body may deter unreported abuses.

Lastly, *Chevron* deference has served to reinforce a system that should otherwise not be afforded deference, especially if the BIA decisions do not align with the Refugee Act's intent to incorporate the Refugee Protocol and Refugee Convention. If the above neutral court system were adopted, a structure of deference to an Article I court may, in fact, function as originally intended. However, absent such a system, the current *Chevron* doctrine in the immigration context should, at the least, return to the *Cardoza-Fonseca* form of bifurcated analysis. That is, BIA decisions filling in statutory gaps still undergo the traditional *Chevron* analysis, whereas issues of pure statutory construction should not be afforded deference. Additionally, focus on the original international treaties that animated the Refugee Act should drive statutory interpretation.

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128 *See supra* Part I.

129 *Asylum Officer's Notes from Credible Fear Interview*, IMMIGR. JUST. CAMPAIGN, https://immigrationjustice.us/get-trained/credible-and-reasonable-fear/understanding-what-happens-during-a-credible-reasonable-fear-interview/transcript-of-interview/?mode=list [https://perma.cc/2EQD-K3CM] (last visited Feb. 3, 2020); *see also* Lee, *supra* note 43, at 400 ("Many interviews take place telephonically, with no ability for the adjudicator and the applicant to establish in-person rapport. The interviews are not recorded, and interpretation problems plague the process, such that asylum seekers often receive inadequate or no interpretation in their primary language.").

Alternatively, considering that political accountability and expertise underscore agency utility, a reviewing court should, in a Step-Zero-like analysis,[130] determine if political accountability severely undermines agency expertise. In other words, if the record demonstrates that certain actions by the Executive Branch effectively inhibit the agency from employing its expertise, then, at a minimum, *Chevron* deference should be questioned. At most, it should be inappropriate to afford *Chevron* deference to agency action. For example, where the Attorney General unilaterally overrules a BIA decision, despite substantive contrary precedent or inadequate reasoning, the reviewing court should decline to apply the *Chevron* framework.

Additionally, when applying the *Chevron* framework, reviewing courts should generally distinguish between the kind and level of expertise that underscores agency action. The *Chevron* Court did rely on agency expertise when crafting its deference principles.[131] In fact, the Court noted that courts, on the whole, were not experts in the technicalities pertaining to pollution-emitting devices.[132] This deference is reasonable considering courts are, by nature, generalists when addressing matters of law. Thus, they may lack the expertise of a more specialized body.

Expertise, however, should not be a blanket term, effectively barring a court from addressing an issue. Rather, where the "expertise" of an agency strongly resembles the same aspects that make judges experts in their own right, agency expertise should give way to judicial review. The credible fear interview is exactly the type of interaction that a judge can have near equal expertise in adjudicating. Though a judge may not be readily familiar with background history of the refugees' home nation, the credible fear interview deals with aspects the judge is undoubtably an expert in—namely, credibility determinations and procedural integrity. To argue that the immigration and asylum officers are experts distinct from a judge would be to undermine a court's ability to adjudicate the same evidence presented. Moreover, if immigration judges or the BIA have expertise distinct from an Article

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[130] King v. Burwell, 576 U.S. 473 (2015) (establishing the controversial "Major Questions" doctrine, which posits that certain questions with such sweeping impact are appropriately reserved for the judiciary, thereby rendering *Chevron* inapplicable); *see also* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (holding that *Chevron* does not apply to statutory interpretations produced through defective procedures).

[131] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[132] *Id.* at 865–66.

III judge, it would be only insofar as familiarity with the body of law, not the skill set. Accordingly, expertise alone should not serve as justification for deference, especially when agency expertise so closely resembles the expertise of a reviewing court.

CONCLUSION

In short, immigration in today's political discourse is extremely divisive, and a prevailing reason for this is the structure of the immigration system. Regardless of political stance, a humanitarian crisis where vulnerable refugees are harmed should not be a result of any system under the rule of law. However, the structure of the immigration system allows for a xenophobic administration to abuse its power at the cost of human suffering. Because the agency conducting the interview for asylum and the courts reviewing the same claim both answer to the President, a President can upend a system only weeks into a new administration. Moreover, the Attorney General's broad discretionary power makes meaningful change within the system unlikely.

Accordingly, the solution that would most adequately address the failings of the current immigration system would be for Congress to establish an Article I immigration court system. Also, video recording of asylum interviews would present a more accurate depiction of what qualifies a refugee for asylee status before an immigration judge. Additionally, creating an office of the commissioner within the new immigration court system would function as a backstop for denied claims that would otherwise be viable.

In the immigration context, *Chevron* deference should be afforded only where the BIA fills in statutory gaps, not when it deals with an issue of pure statutory construction. In general, where conduct by the Executive suggests that agency expertise is severely curtailed, the reviewing court should not afford *Chevron* deference. Lastly, the reviewing court should distinguish between the kind and type of expertise, and if the expertise is wholly distinct from that of the reviewing court, then deference is appropriate. If, however, the expertise underlying agency actions is similarly or closely analogous to the expertise of a court, then deference should not be afforded.