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## Cover Page Footnote

The author would like to thank Professor Ericka Curran for her advice and assistance throughout the research and writing process. The author would also like to thank his family, especially his brother, Jean Pierre Espinoza, Esq., for the help, guidance, and continuous moral support throughout the writing of this Comment.

# *MATTER OF CASTRO-TUM*: HOW ATTORNEY GENERAL JEFF SESSIONS CHANGED IMMIGRATION JUDICIAL EFFICIENCY

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## I. INTRODUCTION

Within the executive branch of the United States Government, the Office of the Attorney General sits at the head of the Department of Justice ("DOJ"), an agency that houses the Executive Office of Immigration Review ("EOIR").[1] The EOIR has the privilege of operating the United States' entire immigration adjudication system.[2] One of the many powers bestowed upon Attorneys General is the power to certify and refer a case to themselves, so they can issue a precedential decision that may or may not overrule existing precedent issued by the Board of Immigration Appeals ("BIA" or the "Board").[3] Perhaps one of the most critical precedential decisions issued by an Attorney General, which changed how immigration lawyers (and judges) practiced immigration law, was recently handed down when Jefferson B. Sessions, the 84th Attorney General, decided *Matter of Castro-Tum* in 2018.[4]

Immigration judges have historically exercised their discretion and authority to manage their dockets through the usage of administrative closure, the process by which they temporarily remove a case from their active calendar or docket.[5] However, in 2018, Attorney General Jeff Sessions moved away from the precedent set by the Board in *Matter of Avetisyan* and *Matter of W-Y-U* and stripped this authority from immigration judges and BIA members when he decided *Matter of Castro-Tum*.[6] In this groundbreaking decision, Attorney General Jeff Sessions held that "judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure."[7] Further, he stated that immigration judges and BIA members had relied on regulations that only allowed the use of administrative closure in specific categories of cases; and that

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[1] *About the Office*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/about-office (Feb. 3, 2021).

[2] *Organization, Mission and Functions Manual: Executive Office For Immigration Review*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/jmd/organization-mission-and-functions-manual-executive-office-immigration-review (Jan. 3, 2022); *see The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, S. POVERTY L. CTR (June 25, 2019), https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool.

[3] Richard Frankel, *Deporting Chevron: Why the Attorney General's Immigration Decisions Should Not Receive Chevron Deference*, 54 U.C. DAVIS L. REV. 547, 548 (2020).

[4] *Attorney General Jeff Sessions' Opinion in the Matter of Castro-Tum*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-opinion-matter-castro-tum (June 11, 2018). It is important to note that this case has been recently overturned after President Biden took office; however, this Comment discusses the tremendous influence and power that the Attorney General has, and how easy it is for an Attorney General to cause shifts in the system that are capable of generating nothing but havoc, and why it is of the utmost importance that immigration judges control their own dockets without any interference from the Attorney General. *See* Matter of Cruz-Valdez, 28 I. & N. Dec. 326, 329 (B.I.A. 2021) (stating that *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018), departed from the long-standing practice of allowing immigration judges to control their own dockets).

[5] Matter of Avetisyan, 25 I. & N. Dec. 688, 692 (B.I.A. 2012); *Castro-Tum*, 27 I. & N. Dec. at 271.

[6] *See generally Castro-Tum*, 27 I. & N. Dec. at 292.

[7] *Id.* at 271.

"[n]either section 1003.10(b) nor section 1003.1(d)(1)(ii) confers the authority to grant administrative closure."[8]

By deciding *Matter of Castro-Tum*, the Attorney General severely curtailed longstanding principles established by the Board that supported using administrative closure. Although there were still some instances where judges could apply administrative closure despite the precedent set in *Matter of Castro-Tum*, the Attorney General ended the practice of a powerful and practical docket management tool that immigration judges had used for decades.[9] Prior to *Matter of Castro-Tum*, in *Matter of Avetisyan*, the Board had expanded this tool by holding that an immigration judge could close a case even after the objection of one party; and it established an array of factors for a judge to follow when determining whether administrative closure would be appropriate.[10] Furthermore, in *Matter of W-Y-U*, the Board held that a primary consideration for an immigration judge to determine whether to grant administrative closure was "whether the party opposing administrative closure [had] provided a persuasive reason for the case to proceed and be resolved on the merits."[11]

This decision was controversial, to the point that a year after the Attorney General's decision, the Fourth Circuit Court of Appeals issued a decision overturning *Matter of Castro-Tum*.[12] Moreover, a year later, in 2020, the Seventh Circuit Court of Appeals followed the Fourth Circuit Court's lead and issued a similar decision overturning the Attorney General's decision.[13] On the other hand, the Sixth Circuit of Appeals criticized the Fourth and Seventh Circuit Court's rationale and upheld abolishing administrative closure, backing Attorney General Jeff Sessions' decision and creating a split among the circuit courts.[14] More circuit courts joined the dispute; the Third Circuit Court of Appeals relied on the Fourth and Seventh

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[8] *Id.* at 284. "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b) (2019).

> Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

8 C.F.R. § 1003.1(d)(1)(ii) (2019).

[9] *See, e.g.*, 8 C.F.R. § 1214.3 (2019) ("If the alien appears eligible for V nonimmigrant status, the immigration judge or the Board, whichever has jurisdiction, shall administratively close the proceeding or continue the motion indefinitely."); Memorandum from Brian M. O'Leary, Chief Immigr. J., on *Continuances and Administrative Closure* to All Immigr. JJ. et al. 3 (March 7, 2013) (on file with U.S. Dept. Just.) [hereinafter J. O'Leary Memo (2013)].

[10] *Avetisyan*, 25 I. & N. Dec. at 693–96.

[11] Matter of W-Y-U-, 27 I. & N. Dec. 17, 20 (B.I.A. 2017).

[12] *See* Romero v. Barr, 937 F.3d 282, 297 (4th Cir. 2019) (overturning *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018)).

[13] *See* Morales v. Barr, 973 F.3d 656, 667 (7th Cir. 2020) (overturning *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018)).

[14] *See generally* Hernandez-Serrano v. Barr, 981 F.3d 459 (6th Cir. 2020).

Circuit Court's rationale and overturned *Matter of Castro-Tum*.[15] Although the Seventh, Fourth, and Third Circuit Courts brought back a glimmer of hope that administrative closure would be restored as a docket management tool, the fact that these decisions were only binding within their Circuits shows there was a need for more action by the Supreme Court or Congress to remedy this situation.[16]

Consequently, in response to the Fourth and Seventh Circuit Court's decisions, the EOIR published a Notice of Proposed Rulemaking in August 2020 ("NPRM") seeking to amend, *inter alia*, sections 1003.10 and 1003.1 of the Code of Federal Regulations ("CFR") to establish that immigration judges do not have the general authority to administratively close cases.[17] The EOIR published a final rule (the "Rule") in December of that same year, and the regulation became effective as of January 2021.[18] The Ninth Circuit Court of Appeals, in March 2021, issued a nationwide preliminary injunction to enjoin the EOIR from "[i]mplementing or enforcing the Rule . . . ."[19] This injunction meant that administrative closure would be available in jurisdictions that had rejected *Matter of Castro-Tum*.

After discussing the current situation in the immigration system and how *Matter of Castro-Tum* affected the practice of Immigration Law, Part II will examine the background and applicability of discretionary closure over the past three decades and how immigration judges have enjoyed using this docket management tool. Part III will examine and discuss why administrative closure should have remained available as a discretionary tool for judges to use instead of other tools available and examine ways President Biden could have restored it prior to *Matter of Castro-Tum* being overturned. Part IV will conclude by explaining that the EOIR should have repealed or amended the Rule published at the end of 2020, why *Matter of Castro-Tum* should have been overturned, and that immigration judges should permanently have the authority to use administrative closure in removal proceedings when necessary.

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[15] *See* Sanchez v. Atty'y Gen. United States, 997 F.3d 113, 123 (3d Cir. 2021).

[16] *Fourth Circuit Strikes Down Attorney General Opinion, Restores Fundamental Power to Immigration Judges*, AM. IMMIGR. LAW.'S ASS'N, (Aug. 30, 2019), https://www.aila.org/advo-media/press-releases/2019/aila-fourth-circuit-strikes-down-attorney-general.

[17] *See* Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491, 52492 (proposed Aug. 26, 2020) (to be codified at 8 C.F.R. pts. 1003 and 1240).

[18] 85 Fed. Reg. 81588 (Dec. 16, 2020).

[19] Centro Legal de La Raza et al., v. Exec. Office for Immigr. Rev., 524 F. Supp. 3d 919, 980 (N.D. Cal. 2021). The Ninth Circuit Court of Appeals handles the highest amount of immigration cases due to its geographic scope, mainly because of California. *Jurisdiction of the Federal Circuit Courts*, MYATTORNEYUSA, http://myattorneyusa.com/jurisdiction-of-the-federal-circuit-courts (last visited May 3, 2022).

## II. BACKGROUND

### *A. The Attorney General*

The Attorney General's office has existed for over two centuries after Congress created it through the Judiciary Act of 1789.[20] One of the Attorney General's primary duties is to prosecute and advise the President on questions of law.[21] The Attorney General, who is appointed by the President, is the head of the DOJ, an executive agency within the cabinet that guides the "world's largest law office."[22]

When Congress enacted the Immigration and Nationality Act ("INA") in 1952, it conferred to the Attorney General the task of creating a functioning immigration system.[23] Because of this obligation, the Immigration and Naturalization Service agency ("INS") was located within this system.[24] The INS was tasked with implementing and adjudicating immigration laws and deciding deportation cases.[25] The INS officers lacked independence mainly because the Attorney General employed them.[26] In 1983, after several structuring concerns were raised, the Attorney General decided to create the EOIR, housing both the immigration courts and the Board, to achieve a working immigration system.[27]

The EOIR is tasked with adjudicating immigration cases by administering the immigration laws of the country.[28] The Board handles appeals from the immigration courts throughout the nation, and it is regarded as the "highest administrative body for interpreting and applying immigration laws."[29] When the Board reviews appeals, it constructs binding precedential decisions on all immigration courts in the United States, "unless modified or

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[20] *Attorney General*, BRITANNICA, https://www.britannica.com/topic/attorney-general (last visited May 3, 2022).

[21] *Id.* The Judiciary Act of 1789 established a six-member Supreme Court and the renowned position of Attorney General by declaring that the attorney general shall "prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States . . . ." *The Judiciary Act of 1789*, GEO. WASH. MOUNT VERNON, https://www.mountvernon.org/education/primary-sources-2/article/the-judiciary-act-of-1789/ (last visited May 3, 2022).

[22] *Office of Attorney Recruitment & Management*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/oarm (last visited May 3, 2022); *Executive Agencies*, JUSTIA, https://www.justia.com/administrative-law/executive-agencies/ (last visited May 3, 2022); *The Executive Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-executive-branch/ (last visited May 3, 2022).

[23] S. POVERTY L. CTR., *supra* note 2.

[24] *Id.*

[25] *Id.*

[26] Dory Mitros Durham, *Note: The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 658 (2006).

[27] S. POVERTY L. CTR. *supra* note 2; *see also* U.S. DEP'T. JUST., *supra* note 1.

[28] U.S. DEP'T. JUST., *supra* note 1.

[29] *Board of Immigration Appeals*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last visited May 3, 2022); THE U.S. DEP'T. OF JUST., *supra* note 1.

overruled by the Attorney General or a federal court."[30] The importance of the Board cannot be overstated because, as the body that generally construes and applies new immigration regulations and statutes, "[i]t [also] interprets and applies new court decisions."[31] Accordingly, the Board issues numerous decisions each year.[32]

The INS remained within the DOJ until President George Bush enacted the Homeland Security Act ("HSA") in 2002, which established the Department of Homeland Security ("DHS").[33] The DHS incorporated the INS and transferred it to three newly created agencies within the Department.[34] Mainly, the HSA transferred the INS's adjudication authority to the U.S. Citizenship and Immigration Services ("USCIS"), which essentially abolished the INS, giving the immigration system a sense of independence and fairness.[35]

i. The Attorney General's Power

The Attorney General possesses broad power in the immigration context.[36] When the Attorney General created the BIA, he retained review authority, also known as "agency head review."[37] Per the CFR, the Attorney General may review on certification "(1) cases that the AG directs be referred to him; (2) cases that the BIA refers to the AG for consideration; and (3) cases that the [DHS] refers to the AG for review."[38] As established by the regulations, the Attorney General can use that certification power and issue final, binding agency decisions, which serve as precedent for future cases.[39] The Attorney General uses this certification power to enact agency-binding decisions and carry out changes to the immigration law field.[40] Aside from

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[30] U.S. DEP'T. JUST., *supra* note 30; Jennifer Safstrom, *An Analysis of the Applications and Implications of Chevron Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 54 (2019).

[31] Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 36 (1977).

[32] Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767 (2010).

[33] H.R. 5005, 107th Cong. (2002) (enacted); Andrew Glass, *Bush creates Homeland Security Department, Nov. 26, 2002*, POLITICO (Nov. 11, 2018, 12:00 AM), https://www.politico.com/story/2018/11/26/this-day-in-politics-november-26-1012269.

[34] *The Homeland Security Act*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/10-why-employers-must-verify-employment-authorization-and-identity-of-new-employees/11-the-homeland-security-act (Apr. 27, 2020) (Immigration and Customs Enforcement; U.S. Customs and Border Patrol; and U.S. Citizenship and Immigration Services).

[35] Durham, *supra* note 27, at 680.

[36] Frankel, *supra* note 3, at 558 (One example of this broad power is the fact that immigration judges and BIA members are subordinates of the Attorney General); "The Attorney General's authority on review is extraordinarily broad . . . ." Trice, *supra* note 33, at 1767.

[37] 8 C.F.R. §§ 1003.1(d)(7), 1003.1(h) (2019); Frankel, *supra* note 3, at 561; U.S. DEP'T. JUST., *supra* note 1.

[38] Andrew R. Arthur, *AG Certification Explained: A legal way for the AG to set immigration policy and guide IJ and BIA discretion*, CTR. FOR IMMIGR. STUD. (Nov. 05, 2019), https://cis.org/Arthur/AG-Certification-Explained; *see also* 8 C.F.R. § 1003.1(h) (2019).

[39] Trice, *supra* note 33, at 1767.

[40] *Id.* at 1770, 1771. "[T]he authority allows the attorney general to review and overrule decisions made by the [BIA] . . . ." Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through*

this certification tool, the Attorney General also possesses the authority to issue regulations through adjudication and rulemaking.[41]

The Attorney General's power can also be found in the INA.[42] The INA gives the Attorney General authority to supervise all immigration proceedings.[43] Per the INA, the Attorney General has the authority to "establish such regulations, . . . issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary . . . ."[44] Among the authority to supervise immigration proceedings, the statutes also state that the proceedings conducted by immigration judges "shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe . . . ."[45]

ii. Department of Justice Hierarchy

Because the DOJ is an executive agency, the head of the Department, the Attorney General, is subject to "unlimited presidential removal authority . . . ."[46] The Attorney General appoints immigration judges, who have the title of "judges" but are neither Article III nor Article I judges; they are "administrative judges."[47] Per the INA, immigration judges are considered subordinates of the Attorney General, and their employment does not have protection or tenure, unlike a judge under Article III.[48] The Attorney General can hire immigration judges whenever it is deemed

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*Attorney General Referral and Review*, MIGRATION POL'Y INST. (Jan. 2021), https://www.migrationpolicy.org/research/obscure-powerful-immigration-attorney-general-referral-review.

[41] Frankel, *supra* note 3, at 560. Adjudication and Rulemaking are types of administrative action that an agency can take to create binding decisions upon either an individual or a group of people. Jeffry J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. STATE UNIV. L. REV. 529, 530 (2005). Agencies have, historically, had the discretion to choose from either act as a tool to develop policy. *Id.*

[42] Immigration and Nationality Act, ch. 477, 66 Stat. 163, § 103 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537).

[43] Matter of Castro-Tum, 27 I. & N. Dec. 271, 282 (Att'y Gen. 2018).

[44] INA § 103(g)(2).

[45] INA § 101(b)(4).

[46] Gary Lawson, *Federal Administrative Law* (8th ed. 2019). *See, e.g.*, Tessa Berenson, *President Trump Wanted to Fire Attorney General Jeff Sessions for Not 'Protecting' Him. The Constitution Says That's OK*, TIME (Jan. 5, 2018, 4:41 PM), https://time.com/5089974/president-trump-power-fire-attorney-general/ (Trump fired Jeff Sessions after he recused himself from the Russia investigation).

[47] *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool,* S. POVERTY L. CTR. 7 (June 25, 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (Article III judges derive their authority from the judicial branch, and judges who derive their authority under Article I conduct proceedings under the Administrative Procedure Act); 8 C.F.R. § 1003.10(a) (2019).

[48] INA § 101(b)(4) ("An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service."); *Board of Immigration Appeals*; *Procedural Reforms to Improve Case Management; Final Rule*, 67 Fed. Reg. 54878, 54893 ("Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General [and are] . . . subject to removal by the Attorney General . . . ."); *About Federal Judges*, U.S. CT.'S, https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited May 3, 2022) (judges "hold their office during good behavior").

necessary.[49] Furthermore, the Attorney General also appoints the Chief Immigration Judge, the individual tasked with providing program direction and implementing new policies for all immigration judges in the nation.[50]

### *B. Administrative Closure*

Administrative closure is a "procedural tool created for the convenience of the Immigration Courts and the Board."[51] The BIA and immigration judges have used it in removal proceedings "to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."[52] Most frequently, this tool has been used in cases when the noncitizen was awaiting a decision from another agency, mainly the USCIS.[53] Moreover, administrative closure does not terminate proceedings; it grants DHS the opportunity to "recalendar" the case before the immigration judge and resume proceedings at any time.[54] It has been used mainly to "regulate proceedings" as a matter of practicality.[55] Thus, the judge issues no final order when this tool is used.[56]

#### i. Evolution of Administrative Closure

The existence of this docket management tool in the immigration law field dates back to the 1980s when the Chief Immigration Judge established an operating policy allowing immigration judges to use, among other tools, administrative closure in cases in which the noncitizen failed to appear at a hearing.[57] The first time the Board addressed administrative closure was

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[49] *See e.g.*, Memorandum Jeffery Sessions, U.S. Att'y Gen., on Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest to the Exec. Off. For Immigr. Rev for the Exec. Off. For Immigr. Rev. (Dec. 5, 2017 (the Attorney General hired 50 new immigration judges in 2017).

[50] *Office of the Chief Immigration Judge*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios (Apr. 20, 2022).

[51] Matter of Avetisyan, 25 I. & N. Dec. 688, 690 (B.I.A. 2012).

[52] *Id.* at 692.

[53] *Practice Advisory: The Return of Administrative Closure*, NAT'L IMMIGRANT JUST. CTR. 1, 8 (Jul. 2020); *see e.g.*, *Petition for Alien Relative*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/i-130 (May 6, 2022) (USCIS adjudication of a family-based petition).

[54] "Administrative closure serves the interest of both parties . . . [b]y suspending activity in cases that are not (and may never be) ripe for adjudication . . . ." Brief for Am. Bar Ass'n as Amicus Curiae Supporting Respondent at 3, Matter of Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018) (No. A 206-842-910). "Administrative closure is simply a version of a stay that removes a case from 'active status' on a court's docket." *Id.* at 6. "While a case is administratively closed, any party may file a "motion to recalendar" with the Immigration Court or the BIA (whichever body closed the case) in order to have the case returned to the active docket." *Practice Advisory, Administrative Closure and Motions to Recalendar*, AM. IMMIGR. COUNCIL 13–14 (Aug. 29, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_administrative_closure_and_motions_to_recalendar.pdf.

[55] *Avetisyan*, 25 I. & N. Dec. at 694.

[56] *Id.* at 695.

[57] Memorandum from William R. Robie, Chief Immigr. J., on *Cases in Which Respondents/Applicants Fail to Appear for Hearing* to All Immigr. JJ. 1 (Mar. 7, 1984) (on file with U.S. Dept. of Just.) [hereinafter J. Robie Memo].

in *Matter of Amico* in 1988.[58] In that case, the respondent failed to appear at his final hearing after the judge had issued several continuances; therefore, the judge ultimately administratively closed the respondent's case.[59] To support this decision, the Board stated that it wanted to ensure "proper use of the administrative closing procedure."[60]

For over a decade after the decision in *Matter of Amico*, the Board held as precedent that a judge could only grant administrative closure when both parties supported it.[61] For example, in 1990, when the Board decided *Matter of Lopez-Barrios*, it held that the "administrative closing procedure should not be used if it is opposed by either party to the proceedings."[62] The Board applied the same ruling under *Lopez-Barrios* six years later when it decided *Gutierrez-Lopez*.[63]

In 2012, the Board addressed the usage of administrative closure once again when it decided *Matter of Avetisyan*.[64] To employ the use of administrative closure, the Board addressed the powers and duties delegated to it by law and the Attorney General to regulate the course of the hearing.[65] The Board reproved the rule stated in *Gutierrez-Lopez* that a case may not be administratively closed if either party opposes because it generated direct conflict with "the delegated authority of the Immigration Judges and the Board . . . ."[66] Furthermore, the Board stated that "[t]he circuit courts and the Board have rejected the notion that a party to proceedings may exercise absolute veto power over the authority of an Immigration Judge or the Board to act . . . ."[67] Under this rationale, the Board held that immigration judges and Board members have the authority to administratively close proceedings through their discretion and independent judgment—even if a party opposes.[68] The Board overruled *Gutierrez-Lopez* and established six guiding factors to better the courts' assessment of when administrative closure would be appropriate.[69]

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[58] Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J. F. 567, 570 (2020).

[59] Matter of Amico, 19 I. & N. Dec. 652, 653 (B.I.A. 1988); Montano, *supra* note 59, at 570–71.

[60] *Amico*, 19 I. & N. Dec. at 653.

[61] Matter of Castro-Tum, 27 I. & N. Dec. 271, 274 (Att'y Gen. 2018).

[62] Matter of Lopez Barrios, 20 I. & N. Dec. 203, 204 (B.I.A. 1990).

[63] Matter of Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (B.I.A. 1996).

[64] *See generally* Matter of Avetisyan, 25 I. & N. Dec. 688 (B.I.A. 2012).

[65] *See* 8 C.F.R. § 1003.10(b).

[66] *Avetisyan*, 25 I. & N. Dec. at 693.

[67] *Id.*

[68] *Id.* at 694.

[69] *Id.* at 696 ("(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.").

Five years after the decision in *Matter of Avetisyan*, the Board decided *Matter of W-Y-U*, addressing administrative closure one last time before its abolishment in *Matter of Castro-Tum*.[70] In this case, the respondent, a Chinese citizen in the midst of removal proceedings, was disputing the administrative closure of his case.[71] He had filed a timely asylum application and argued that the administrative closure of his case would prevent him from pursuing that relief.[72] The immigration judge in the case explained that "he denied the respondent's motion to recalendar and kept his case administratively closed to reserve the Immigration Court's 'limited adjudication resources . . . .'"[73] However, on appeal, the Board held that the respondent had a right to a hearing on the merits because he might be eligible for lawful status; meanwhile, having his case administratively closed provided no legal benefit.[74] Ultimately, the Board held that when determining whether to administratively close or "recalendar" a case in removal proceedings, a judge needed to consider whether the opposing party had provided enough justification for the case to proceed and be resolved.[75]

Despite these recent developments where the courts shaped administrative closure and its use, former Attorney General Jeff Sessions put an end to this practice in 2018 when he decided *Matter of Castro-Tum*.[76] Upon directing the BIA to refer *Matter of Castro-Tum* for his review, he held that neither Immigration Judges nor the Board have the general authority to use administrative closure to suspend removal proceedings for an indefinite period.[77] He based his decision primarily on the premise that there had been an increase in administratively closed cases between 2011 and 2017.[78] The former Attorney General further stated that the DOJ only allows a judge or the Board to use administrative closure in specific cases.[79] When issuing this decision, Sessions' reasoning also relied on using the motion for continuance as an apt alternative to administrative closure.[80]

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[70] Matter of W-Y-U-, 27 I. & N. Dec. 17, 17 (B.I.A. 2017).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 18; AM. IMMIGR. COUNCIL, *supra* at 54, at 13–14 ("While a case is administratively closed, any party may file a 'motion to recalendar' with the Immigration Court or the BIA (whichever body closed the case) in order to have the case returned to the active docket.").

[74] *W-Y-U-*, 27 I. & N. Dec. at 19.

[75] *Id.* at 20.

[76] *See generally* Matter of Castro-Tum, 27 I. & N. Dec. 271, 271 (Att'y Gen. 2018).

[77] *Id.* at 272.

[78] *Id.* at 273 ("Statistics maintained by EOIR reveal that over three decades, from EOIR Fiscal Year 1980 to Fiscal Year 2011, 283,366 cases were administratively closed. But in a mere six years, from October 1, 2011 through September 30, 2017, immigration judges and the Board ordered administrative closure in 215, 285 additional cases, nearly doubling the total number of cases subjected to administrative closure.").

[79] *Id.* at 274.

[80] *Id.* at 291.

ii. Post *Matter of Castro-Tum*

This decision created confusion and triggered responses from different entities. After Attorney General Sessions overruled *Matter of Avetisyan* and *Matter of W-Y-U* in 2018, the American Immigration Lawyers Association ("AILA") and the American Civil Liberties Union Foundation ("ACLU") issued a practice advisory for all immigration lawyers to be aware of this systematic change.[81] In 2019, a year after *Matter of Castro-Tum* was decided, the Fourth Circuit Court decided *Zuniga Romero v. Barr*, in which the court vacated *Matter of Castro-Tum*.[82] In ruling for the vacatur, the Fourth Circuit Court reasoned that the CFR confers unambiguous authority to immigration judges and the Board to administratively close cases.[83]

In 2020, the Seventh Circuit Court decided *Morales v. Barr*, in which the Court, under similar reasoning as the Fourth Circuit Court, rejected *Matter of Castro-Tum* and held that immigration judges and the Board have the general authority to administratively close a case.[84] As a response to these decisions, the EOIR and the DOJ issued an NPRM, in which the agency proposed to amend, *inter alia*, 8 C.F.R. § 1003.1(d)(1)(ii) and 1003.10(b) to make clear that these provisions provide no "freestanding" power to Immigration Judges and the Board to administratively close cases.[85]

At the end of 2020, another case regarding administrative closure was decided.[86] Through the issuance of *Hernandez-Serrano v. Barr*, which affirmed the Attorney General's decision, the Sixth Circuit Court appeared to

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[81] *Administrative Closure Post* Castro-Tum *Practice Advisory*, AM. IMMIGR. COUNCIL & AMER. C.L. UNION FOUND., 1 https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf (Oct. 22, 2019) ("This practice advisory provides a brief overview of administrative closure and explains the impact of the Attorney General's decision on the future availability of administrative closure, as well as on cases that are currently administratively closed."). The American Civil Liberties Union is a nonprofit organization founded to protect people's rights, with a trajectory that dates back more than 100 years. *About the ACLU*, ACLU, https://www.aclu.org/about-aclu (last visited May 4, 2022). The American Immigration Lawyers Association is the national association of lawyers and professors that teach and practice immigration law. *About*, AM. IMMIGR. LAW.'S ASS'N, https://www.aila.org/about (last visited May 4, 2022).

[82] Romero v. Barr, 937 F.3d 282, 297 (4th Cir. 2019).

[83] *Id.* at 292.

[84] Morales v. Barr, 973 F.3d 656, 667 (7th Cir. 2020); *United States Court of Appeals for the Seventh Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Seventh_Circuit (May 2, 2022) (The Seventh Circuit Court of Appeals oversees appeals from district courts located in Illinois, Indiana, and Wisconsin).

[85] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491, 52503 (Aug. 26, 2020) (to be codified at 8 C.F.R. pts. 1003, 1249); *see also Administrative Rulemaking*, LAW SHELF, https://lawshelf.com/videocoursesmoduleview/administrative-rulemaking-module-3-of-5/ (last visited May 5, 2022) ("Rulemaking is the process by which administrative agencies adopt binding rules of general applicability as a means of furthering the statutory mandate of the agency.").

[86] Hernandez-Serrano v. Barr, 981 F.3d 459, 466 (6th Cir. 2020).

strike back at the Fourth and Seventh Circuit Courts.[87] In that case, Roberto Hernandez-Serrano was "very close to being able to adjust [his] status" when the court denied his appeal and motion to remand based on administrative closure.[88] The court relied on the fact that continuances are an optimal replacement for administrative closure and that Mr. Hernandez-Serrano could have easily sought one.[89] This decision further augmented the dispute about whether administrative closure should be allowed as a tool for immigration judges and the BIA, which has created a split among the different circuit courts.[90]

## III. ANALYSIS

### *A. The Use of Administrative Closure has been Authorized and Encouraged*

#### i. Statutes and Regulations

When he decided *Matter of Castro-Tum*, Attorney General Sessions tirelessly stated that no general authority to administratively close cases had been conferred upon the Board or immigration judges.[91] However, his posture presented an erroneous view. Various statutes enacted by the INA, coupled with many regulations promulgated by past Attorneys General, granted immigration judges powers much like the ones Article III judges possess, including the authority to administratively close a case.[92] Immigration judges have been granted the power to decide whether a respondent in deportation proceedings will face removal or be allowed to stay in the country.[93] Because of the critical responsibility of determining whether an individual's life will change substantially, the BIA and immigration judges have been afforded the

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[87] *Id.* at 461 ("A regulation delegating to immigration judges authority to take certain actions '[i]n deciding the individual cases before them' does not delegate to them general authority not to decide those cases at all.").

[88] *Id.* To adjust status refers to the process by which a noncitizen applies for permanent residency in the United States. *Adjustment of Status*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status (Sept. 25, 2020).

[89] *Hernandez-Serrano*, 981 F.3d at 464 ("That is what continuances are for; and the Attorney General has expressly delegated to [Immigration Judges'] IJs authority to 'grant a motion for continuance for good cause shown.'").

[90] Farah Al-khersan, *Sixth Circuit Issues Decision Regarding Administrative Closure*, AL-KHERSAN LAW (Nov. 7, 2020), https://mcarlinlaw.com/sixth-circuit-issues-decision-regarding-administrative-closure/. A "circuit split" occurs when two or more regional circuits have conflicting decisions about a certain legal matter, often resolved by the Supreme Court. *See* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020).

[91] Matter of Castro-Tum, 27 I. & N. Dec. 271, 272 (Att'y Gen. 2018).

[92] *See, e.g.*, 8 C.F.R. § 212.7(e)(4)(v) (2020).

[93] 8 U.S.C. § 1229a(c)(1)(A) (2018).

necessary tools to conduct hearings, administrative closure being one of them.[94]

Former Attorneys General promulgated different regulations that explicitly grant the BIA and immigration judges broad powers to conduct hearings efficiently.[95] One of these regulations is 8 C.F.R. § 1003.10(b), which authorizes immigration judges to "exercise their independent judgment and discretion and . . . take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."[96] A similar regulation, 8 C.F.R. § 1003.1(d)(1)(ii), which confers the BIA broad authority over immigration proceedings, states that "Board members shall exercise their independent judgment and discretion in considering and determining the cases . . . and . . . may take any action . . . appropriate and necessary for the disposition of the case."[97] This language found in the regulations and statutes is evidence that Congress and past Attorneys General have allotted immigration judges and the Board the power to, among other things, administratively close a case if they deemed it "appropriate" or "necessary."[98]

In *Matter of Castro-Tum*, Attorney General Sessions reasoned that the BIA and immigration judges do not have the authority to use administrative closure because such adjudicatory authority was not explicitly mentioned in either section 8 C.F.R. § 1003.10(b) or 8 C.F.R. § 1003.1(d)(1)(ii), and analyzed that there is a nonexistent basis for assuming they have such authority.[99] He further reasoned that judges should rely on their authority to grant continuances, a power expressly conferred in the regulations.[100] In 1987, the DOJ established 8 C.F.R. § 1003.29, which ratified the inherent authority that immigration judges possess to grant continuances.[101] Nevertheless, because administrative closure pauses removal proceedings for an indefinite period while a simultaneous process is being completed, it is a type of continuance.[102] This rationale signifies the

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[94] Brief for Retired Immigration Judges and Former Members of the Board of Immigration Appeals as Amici Curiae Supporting Petitioner at 8, Matter of Castro-Tum, 27 I. & N. Dec. 271 (No. A 206-842-910) [hereinafter Brief of Retired Judges] (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)).

[95] *Id.* at 10–11 ("DOJ promulgated a regulation ratifying the inherent authority for Immigration Judges to grant continuances.").

[96] 8 C.F.R. § 1003.10(b) (2020).

[97] *Id.* § 1003.1(d)(1)(ii).

[98] *Id.* § 1003.10(b) (Immigration judges have the power to administer oaths, issue administrative subpoenas, interrogate, and so forth).

[99] Matter of Castro-Tum, 27 I. & N. Dec. 271, 285 (Att'y Gen. 2018).

[100] *Id.* at 282.

[101] Brief of Retired Judges, *supra* note 95, at 10; Council, *Practice Advisory*, *Motions for A Continuance*, AM. IMMIGR. COUNCIL 1 (Sept. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_for_a_continuance_practice_advisory.pdf ("A continuance is a docket-management tool that an Immigration Judge (IJ) may utilize to move an upcoming hearing from one scheduled date to another or to pause an ongoing hearing and move it to a future date.").

[102] Brief of Retired Judges, *supra* note 95, at 10–11.

authority the BIA and immigration judges have to grant administrative closure.

ii. Memoranda

The use of this docket management tool has also been encouraged and authorized by the constant issuance of various documents and memoranda by the DOJ throughout the years.[103] As mentioned above, one of the first occasions where administrative closure was promoted dates back to 1984, when the DOJ issued a memorandum to all immigration judges.[104] In that instance, the Chief Immigration Judge, William R. Robie, issued an operating policy for cases in removal proceedings where the respondent failed to appear at a hearing.[105] The memorandum issued by the Chief Immigration Judge suggested that immigration judges have various options available to them when deciding a case of this nature.[106] The Chief Immigration Judge made clear that it was ultimately up to the judges' discretion to employ adequate action according to their judgment, which would suggest that, for more than three decades, immigration judges have had the ability to choose the necessary and appropriate methods for deciding a case.[107]

The Chief Immigration Judge's memorandum is not the sole document issued by the DOJ mentioning administrative closure as a viable option for immigration judges; in 2013, Brian M. O'Leary, the Chief Immigration Judge at that time, issued another memorandum advocating for the use of continuances and administrative closure.[108] Aside from reassuring judges that they have decisional independence pursuant to 8 C.F.R. § 1003.10, the memorandum further stated that judges have to ensure that the resources available to them are applied to resolve disputes.[109] The language of the 2013 memorandum stated that "[a]dministrative closure is a legitimate method of removing a case from the court's active docket," was acutely clear regarding the validity of administrative closure as a docket management tool.[110]

Chief Immigration Judge Brian M. O'Leary issued another memorandum in 2015 alluding to the use of administrative closure in Special Immigrant Juvenile ("SIJ") cases.[111] In that memorandum, he stated that

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[103] *See* J. O'Leary Memo (2013), *supra* note 9, at 1–2, 5.
[104] J. Robie Memo, *supra* note 58, at 1, 3.
[105] *Id.* at 1.
[106] *Id.*
[107] *Id.*
[108] J. O'Leary Memo (2013), *supra* note 9, at 1, 5.
[109] *Id.* at 1.
[110] *Id.* at 2.
[111] *See* Memorandum from Brian M. O'Leary, Chief Immigr. J., on *Docketing Practices Relating to Unaccompanied Children Cases and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities* to All Immigr. JJ. (March 24, 2015) (on file with U.S. Dep't of Just.) [hereinafter J. O'Leary Memo (2015)]; *Green Card Based on Special Immigrant Juvenile Classification*, U.S.

an SIJ case needed to be administratively closed for it to be adjudicated.[112] These guidance documents and policy-promoting memoranda reinforce the fact that the BIA and immigration judges possess the authority to administratively close a case when needed.

iii. Federal Courts

Attorney General Sessions reasoned in *Matter of Castro-Tum* that, unlike Article III judges, immigration judges and the Board do not have inherent power, generally, to employ administrative closure.[113] However, the Supreme Court announced in 1936 that courts have the power to control the disposition of their dockets in a manner that is both time-efficient and economical and that to accomplish this task, courts have to use "judgment [that] must weigh competing interests and maintain an even balance."[114] Furthermore, federal courts like the First Circuit Court of Appeals have stressed that administrative closure is one of many tools that judges use in many districts throughout the country to "shelve pending, but dormant, cases."[115]

Other circuit courts have also issued opinions regarding the use of administrative closure; a notable example of this is a decision by the Third Circuit Court, which held that "[d]istrict courts often use administrative closings to prune their overgrown dockets."[116] The purpose of administrative closure is the same throughout the federal court system, including the immigration court system—to unclog immigration judges' congested dockets to make room for cases ready for adjudication.[117] By stating that neither the Board nor immigration judges have the authority to administratively close cases, the Attorney General is depriving judges of a necessary means of relieving their dockets of clutter.

Moreover, the difference between the number of federal judges and immigration judges in the nation is staggering. There are currently 816 active

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CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/green-card/green-card-eligibility/green-card-based-on-special-immigrant-juvenile-classification (Apr. 5, 2018) ("The Special Immigrant Juvenile (SIJ) classification provides certain children who have been subject to state juvenile court proceedings related to abuse, neglect, abandonment, or a similar basis under state law the ability to seek lawful permanent residence in the United States.").

[112] J. O'Leary Memo (2015), *supra* note 112, at 2.

[113] Matter of Castro-Tum, 27 I. & N. Dec. 271, 291 (Att'y Gen. 2018).

[114] Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936)).

[115] Lehman v. Revolution Portfolio L.L.C., 166 F.3d 389, 392 (1st Cir. 1999).

[116] Freeman v. Pittsburgh Glass Works, L.L.C., 709 F.3d 240, 247 (3d Cir. 2013) (citing Penn West Associates v. Cohen, 371 F.3d 118, 121 (3d Cir. 2004) (After reaching a settlement agreement, the court ordered the case closed, which could be reopened if the agreement fell apart)).

[117] *The Life and Death of Administrative Closure*, TRAC IMMIGR. (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623/ ("Administrative closures have allowed judges to temporarily close cases and take them off their active docket either because judges wish to focus limited resources on higher priority removal cases or because jurisdictional issues were prolonging the case. Often administrative closure is used when a case's outcome is affected by applications pending for decision before another government body, such as [USCIS].").

judges serving at the federal level, compared to only 535 immigration judges.[118] This imbalance means more judges are available to adjudicate cases in the federal court system than in the immigration court system. More importantly, statistics show that the number of federal cases has declined while the number of cases at the immigration level has increased.[119] With the current volume of pending immigration cases nationwide, immigration judges need tools that will help them manage their dockets and prioritize cases to de-clog the system and preserve resources.

### *B. Administrative Closure is More Efficient than Other Tools Available*

When he decided *Matter of Castro-Tum*, the Attorney General effectively limited the number of tools available to immigration judges that could be used to adjudicate removal proceedings.[120] Some of the resources still available to the Board and immigration judges were motions for continuance ("continuance") and status dockets; however, these tools proved to be less efficient because of the significant difference between these resources and administrative closure.[121]

#### i. Motion for Continuance

In the *Matter of Castro-Tum* decision, Attorney General Sessions stated that, although the regulations do not expressly confer immigration judges the authority to generally use administrative closure, they do confer the authority to grant continuances.[122] A continuance is another docket management tool available for immigration judges that allows them to postpone a hearing to a future date.[123] At first glance, a continuance may seem like an excellent alternative to administrative closure; unfortunately, it does not promote the same efficiency.

A continuance merely postpones a case to a future date, creating repeated and unnecessary appearances before the immigration court;

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[118] John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ (816 active judges serving in the court system governed by Article III of the United States as of 2021); *Office of the Chief Immigration Judge*, THE U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (Aug 2, 2021) (showing there are 535 judges located in 66 immigration courts as of late 2021).

[119] *Federal Judicial Caseload Statistics 2019*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (last visited May 5, 2022) (Civil Appeals declined by 3 percent; U.S. Court of Appeals for the Federal Circuit filings decreased by 10 percent); *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 5, 2022) (Fiscal Year 2020 saw an increase of pending immigration cases to 1,246,164. Pending cases increased the most from Fiscal Year 2018 (768,257) to Fiscal Year 2019 (1,023,767) after the Attorney General decided *Castro-Tum*).

[120] Matter of Castro-Tum, 27 I. & N. Dec. 271, 276 (Att'y Gen. 2018).

[121] *Id.* at 276.

[122] *Id.* at 283.

[123] AM. IMMIGR. COUNCIL, *supra* note 102, at 1; *see also* 8 C.F.R. § 1003.29 ("The Immigration Judge may grant a motion for continuance for a good cause shown.").

this occurs more frequently when a parallel case is pending in another agency and the case has to be pushed back while it is still on the judge's docket.[124] A great example of this situation is *Matter of Avetisyan*, where the immigration judge granted a total of five continuances while the respondent's case was still pending with USCIS.[125] This lamentable misuse of time and resources trumps the purpose of existing regulations, which is to ensure "expeditious, fair, and proper resolution of matters coming before Immigration Judges."[126]

Moreover, aside from being less efficient than administrative closure, continuances do not provide the same basis of regulatory relief that is available solely through the use of administrative closure.[127] This is the case for respondents seeking a waiver of inadmissibility.[128] An immigrant is ineligible for the waiver if they are "in removal proceedings . . . unless the removal proceedings are administratively closed and have not been recalendared at the time of filing the application . . . ."[129] A continuance does not meet the statutory requirement, and the availability of this provisional waiver to "almost any noncitizen in removal proceedings" will be nullified, and many families could face potential separation.[130]

Conveniently, after Attorney General Sessions decided to limit the general practice of administrative closure, he also decided to complicate the attainment of continuances. This alternative was supposed to be the optimal replacement for administrative closure.[131] Without delay, and within a few months after stripping judges of a vastly-relied-on authority, Attorney General Sessions decided *Matter of L-A-B-R-*, where he held that "an immigration judge should assess whether good cause supports such a continuance by applying a multifactor analysis . . . ."[132]

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[124] *See* Brief of Retired Judges, *supra* note 95, at 22–23.

[125] Matter of Avetisyan, 25 I. & N. Dec. 688, 689 (B.I.A. 2012). The counsel for DHS also admitted that he did not have the file because it was with the agency and that the file was being sent back and forth each time for each hearing. *Id.* at 689–90.

[126] 8 C.F.R. § 1003.12 (2019).

[127] *See* Brief for Am. Immigr. Law.'s Ass'n as Amicus Curiae Supporting Petitioner at 20–21, Gonzalez-Penaloza v. Garland, 854 F.App'x. 637 (5th Cir. 2021) (No. A 205-665-068).

[128] *Provisional Unlawful Presence Waivers*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers (Jan. 5, 2018) ("[I]mmigrant visa applicants who are immediate relatives . . . of U.S. citizens can apply for provisional unlawful presence waivers before they leave the United States for their consular interview.").

[129] 8 C.F.R. § 212.7(e)(4)(iii) (2019).

[130] Brief for Am. Immigr. Law.'s Ass'n as Amicus Curiae Supporting Petitioner at 22, Gonzalez-Penaloza, 854 F.App'x 637 (No. A 205-665-068).

[131] *See* Matter of L-A-B-R-, 27 I. & N. Dec. 405, 406 (Att'y Gen. 2018).

[132] *Id.* An immigration judge should focus on two factors: "(1) likelihood that the alien will be recieve collateral relief, and (2) whether that relief will materially affect the outcome of the removal proceedings." *Id.* at 413. The Attorney General does not provide details on when a collateral relief will be sufficient for a continuance; however, he does provide when a type of collateral relief will be sufficient to meet the good cause. *Id.* at 413-14. Some examples of these situations involve (1) a continuance used to apply for a provisional waiver, (2) when a respondent's visa priority date is remote enough to raise the adjustment of status prospect above a level of speculation, and (3) when the collateral relief has already been denied on one occasion and no relevant change of circumstances are evident. Victoria Neilson et al., *Practice*

The Attorney General further stated that the good-cause requirement should not be abused and should be a vital check on the judge's authority that reflects the public's interest in expediting this proceeding.[133] By eliminating the general use of administrative closure and limiting the instances when a judge may grant a continuance, Attorney General Sessions consistently continues to place obstacles that prohibit noncitizens from obtaining migratory relief.

Prior to the decision of *Matter of L-A-B-R-*, the DOJ started scrutinizing the use of continuances. MaryBeth Keller, the Chief Immigration Judge, issued a memorandum admitting that continuances contributed to increases in processing times.[134] A year later, and a few months before *Matter of L-A-B-R-* was decided, James McHenry III, the EOIR Director, issued a memorandum imposing benchmarks and performance metrics for judges to follow.[135] The Director stated that the immigration court system and the EOIR are not an exception to the rule that "[a]lmost every trial court system utilizes performance measures or case completion metrics" and permitted performance measures, which he deemed necessary to ensure optimal efficiency.[136]

This memorandum was significant because a few months later, when he decided *Matter of L-A-B-R-*, Attorney General Sessions abrogated *Matter of Hashmi*, which held that immigration judges could not consider goal completions when deciding a motion for continuance.[137] Therefore, the decision to implement a performance metric system bolstered the idea that administrative closure is necessary in the immigration system. Judges' discretion had been further hindered, as they were now required to make the critical choice of either meeting a deadline or suffering discipline or even

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*Advisory Seeking Continuances in Immigration Court in the Wake of the Attorney General's Decision in* Matter of L-A-B-R-, CATH. LEGAL IMMIGR. NETWORK 4, 5 (Dec. 6, 2018), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-matter-l-b-r-27-dec-405-ag-2018. Furthermore, there are specific considerations to keep in mind when seeking for a continuance for the purpose of pursuing a collateral relief. *Id.* at 11. Specific considerations are needed when a continuance is sought in family-based matters, when it is sought to pursue special juvenile immigrant status, for a U Nonimmigrant Status, to pursue a T Nonimmigrant Status, to pursue a self-petition through VAWA, to pursue asylum with USCIS with an unaccompanied Child, to pursue Adjustment of Status for an arriving immigrant, to pursue Adjustment of Status through the Cuban Act, for a Post-Conviction Relief. *Id.* at 12, 18, 24, 27, 30, 32, 34, 36. These considerations have been laid out in previous BIA decisions, which Matter of L-A-B-R- did not overrule. Rebecca Scholtz, *AG Imposes Limitations on Motions for Continuance*, CATH. LEGAL IMMIGR. NETWORK (Aug. 20, 2018), https://cliniclegal.org/resources/removal-proceedings/ag-imposes-limitations-motions-continuance.

[133] *L-A-B-R-*, 27 I. & N. Dec. at 405–406.

[134] Memorandum from MaryBeth Keller, Chief Immigr. J., on *Continuances* to All Immigr. JJ. et al. 1–3 (July 31, 2017) (on file with U.S. Dept. of Just.) ("[O]ver half of all cases surveyed had one or more continuance, with an average in those cases of four continuances and 368 days of continuance, per case.").

[135] Memorandum from James R. McHenry III, Dir. Exec. Off. for Immigr. Rev., on *Case Priorities and Immigration Court Performance Measures* to Off. of the Chief Immigr. J. et al. 2–3 (Jan. 17, 2018) (on file with U.S. Dept. of Just.) [hereinafter J. McHenry Memo (2018)].

[136] *Id.* at 3–4.

[137] Matter of L-A-B-R- et al., *27 I&N Dec. 405 (AG 2018): AG Sets Rules for Continuances to Pursue Collateral Relief*, MYATTORNEYUSA, http://myattorneyusa.com/matter-of-l-a-b-r-et-al-27-iandn-dec-405-ag-2018-ag-sets-rules-for-continuances-to-pursue-collateral (last visited May 5, 2022).

termination.[138] Goal completion metrics took a shot at the judges' power to control their docket, and they also targeted the appropriate due process and fairness procedures that respondents deserve.[139] Rushed decisions inevitably seemed to have a negative impact on many decisions issued by judges. Establishing a goal completion metric system was another successful attempt to limit the immigration judge's discretion. Moreover, after *Matter of L-A-B-R-* was decided, the BIA decided *Matter of L-N-Y-*, which made it even more difficult for a noncitizen to obtain a continuance while awaiting USCIS adjudications.[140]

ii. Status Docket

Status dockets, which are used in many, but not all, immigration courts, are a new management tool created in an EOIR memo from January 2018 addressing the performance measures of continuances.[141] Status dockets are inactive dockets that immigration judges use when they are not ready to resolve a case.[142] The early use of status dockets was clouded with unanswered questions since they had only been introduced in a footnote of the memorandum issued by the DOJ regarding performance metrics for continuances.[143] Status dockets' use was inconsistent, and some judges opted not to utilize it because there was a tremendous lack of guidance since no official announcement was ever made.[144]

Many immigration judges sitting in jurisdictions where status dockets were allowed opted to use continuances instead because of their concerns with this newly-created tool, and administrative closure was no longer an option.[145] These concerns were derived from the fact that, once the case was placed on a status docket, the judge would no longer have control over it because it would be transferred to the Assistant Chief Immigration Judge, limiting the judge's management over the case.[146] Moreover, judges feared that the EOIR could change its policy on status dockets in a way that could prejudice respondents.[147]

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[138] Matthew Hoppock, *Immigration Court "Status Docket" – the Secret Almost Alternative to Administrative Closure*, HOPPOCK LAW FIRM (NOV. 5, 2019), https://www.hoppocklawfirm.com/immigration-court-status-docket-the-secret-almost-alternative-to-administrative-closure.

[139] *Id.*

[140] *See generally* Matter of L-N-Y-, 27 I. & N. Dec. 755, 755 (B.I.A. 2020) ("In assessing whether to grant an alien's request for a continuance regarding an application for collateral relief, the alien's prima facie eligibility for relief and whether it will materially affect the outcome of proceedings are not dispositive . . . .").

[141] Hoppock, *supra* note 139.

[142] Rebecca Scholtz et al., *Practice Advisory, Status Dockets in Immigration Courts*, CATH. LEGAL IMMIGR. NETWORK 2 (Sept. 30, 2019), https://cliniclegal.org/file-download/download/public/365.

[143] Hoppock, *supra* note 139.

[144] *Id.*

[145] Scholtz, *supra* note 143, at 2 (also because most of these cases involved minor children).

[146] *Id.*

[147] *Id.*

On August 16, 2019, EOIR Director James McHenry III issued a memorandum regarding the use of status dockets, clarifying their purpose and providing some guidance for their application.[148] Although status dockets are similar to administrative closure, they differ in fundamental aspects: (1) they are not available in every immigration court, and (2) they are not mentioned in any regulation.[149] The August 16, 2019 memo further generated confusion in different immigration courts across the country, mainly because the memo limited the application of status dockets to three types of cases.[150] Before the memorandum was issued, many respondents in different immigration categories were eligible to have their cases placed on a status docket; one of these categories was SIJ cases.[151] This constraint forced judges to either find a way to place their cases on a status docket or, by failing to do so, issue a removal order against the young respondents.[152] Narrowing the use of an already complicated tool like a status docket further diminished judges' ability to govern their courtrooms and dockets.

### *C. Examining How the Immigration System was Impacted by the Discontinuance of Administrative Closure*

#### i. Due Process and Fairness Concerns

Some procedural due process rights are extended to noncitizens placed in removal proceedings.[153] The Supreme Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[154] Various decisions have also held that noncitizens enjoy rights such as retaining counsel at no expense of the government, and a full

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[148] Memorandum from James R. McHenry III, Dir. Exec. Off. for Immigr. Rev., on *Use of Status Dockets* to All Immigr. Ct. Pers. (Aug. 16, 2019) (on file with U.S. Dept. of Just.).

[149] Scholtz, *supra* note 143, at 2–3.

[150] Lenni Benson & Alexandra Rizio, *EOIR Policy Memo 19-13, "Use of Status Dockets" How the Court Administration is Constraining Local Control*, SAFE PASSAGE PROJECT (Sept. 4, 2019), https://www.safepassageproject.org/2019/09/eoir-policy-memo-19-13-use-of-status-dockets-how-the-court-administration-is-constraining-local-control (different judges in the state of New York have had different understandings on what the language of the memorandum meant and are trying to figure out how to place special immigrant juveniles on a status docket).

[151] Immigration and Nationality Law Committee et al., *Report on the Independence of the Immigration Courts*, N.Y. CITY BAR (OCT. 21, 2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/independence-of-us-immigration-courts#_edn56. The Special Immigrant Juvenile Status allows children who have been neglected by their parents to be eligible to adjust their status and gain a permanent residency. *Chapter 1: Purpose and Background*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1 (Aug. 12, 2021).

[152] Benson & Rizio, *supra* note 151.

[153] Gretchen Frazee, *What constitutional rights do undocumented immigrants have?*, PBS NEWS HOUR (June 25, 2018, 5:08 PM), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have.

[154] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

and fair hearing, among others.[155] Furthermore, the Supreme Court has held that "[m]eticulous care must be exercised . . . [to] meet the essential standards of fairness."[156] However, while noncitizens are entitled to due process rights under the Fifth Amendment, there is great concern that many of these rights are violated or constrained due to the immigration system's structure and how influential the President can be.[157]

This influence on the immigration system can be witnessed through the different executive agencies in charge of separate proceedings.[158] Since the President has the authority to remove the head of the DOJ at will, the Attorney General is more prone to be politically influenced by the President and make decisions that may jeopardize the procedural fairness of noncitizens.[159] Under former President Trump's administration, the Attorney General's Office, more than any of its predecessors, liberally used its review certification power to issue decisions that transformed the immigration system and due process rights of noncitizens.[160] *Matter of Castro-Tum* is one of those decisions. The former administration has "eroded" the safeguards of immigration judges by instituting policies that exert an unprecedented amount of control over immigration judges; an example of this is how the goal completion metrics are paired with the new standard that governs the approval or denial of a continuance.[161]

The due process of noncitizens was gravely affected by the DOJ's goal completion metrics established in 2018.[162] According to the new metric guidelines, judges must complete 700 cases per year.[163] Perhaps the most shocking benchmark on the list of new guideline metrics found in the memorandum is "Benchmark 5," which states that "[n]inety-five percent (95%) of all hearings should be completed on the initial scheduled individual merits hearing date."[164] The establishment of the performance metric system is an unequivocal assault on immigrants' due process rights as the judges'

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[155] *Id.*; Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 719 (2019); *see also* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

[156] Bridges v. Wixon, 326 U.S. 135, 154 (1945).

[157] Marouf, *supra* note 155, at 723.

[158] *Id.* at 725 ("Most of the executive branch's authority over immigration is wielded through powerful administrative agencies.").

[159] *See e.g.*, Daniel Cotter, *The Attorney General Should be Separate*, HARV. L. POL'Y REV. (Apr. 22, 2020), https://harvardlpr.com/2020/04/22/the-attorney-general-should-be-separate.

[160] Kim Bellware, *On immigration, Attorney General Barr is his own Supreme Court. Judges and lawyers say that's a problem.*, WASH. POST (Mar. 5, 2020), https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power.

[161] *See generally* Letter from Sheldon Whitehouse, U.S. Sen., on *Immigration Court Independence* to William Barr, U.S. Att'y Gen. (Feb. 13, 2020) (on file with author).

[162] *See generally* J. McHenry Memo (2018), *supra* note 136, at 3, 5 (describing the goal completion metric).

[163] *National Association of Immigration Judges: Hearing on The State of Judicial Independence and Due Process in U.S. Immigration Courts Before the Subcomm. on Immigr. and Citizenship*, 116th Cong. 4 (2020) (statement of J. A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. JJ.).

[164] J. McHenry Memo (2018), *supra* note 136, at app. A.

discretion was actively being taken away, resulting in a negative effect on the immigration system as a whole. Judges should be able to manage their docket at the convenience of the court and the convenience of both parties involved without any miscarriage of justice towards the noncitizen placed in removal proceedings. By removing administrative closure as an available tool for judges, which narrowed the circumstances when continuances are granted and imposed new guideline metrics, the DOJ attacked the immigration system and its integrity, as well as due process and fairness.

Experts in immigration law did not take long to scrutinize this weak attempt to reduce the backlog in the immigration courts while also trying to fill the void left by the abolition of administrative closure.[165] The main issue with that new policy is that fairness will be severely undermined because judges, "[w]ith a clock constantly ticking over their heads," will have to face the tough decision of "choo[sing] between guaranteeing justice or losing their jobs."[166] Noncitizens deserve a hearing before an "impartial adjudicator" that will allow them to examine the evidence, present evidence, and examine witnesses as well.[167] Immigration proceedings are overly complex, mainly because various agencies may handle a single case simultaneously.[168] The wide array of agencies that may have a stake in a case is among the many factors out of an immigration judge's hands that may force the continuance of a case.[169]

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[165] *The Need for an Independent Immigration Court Grows More Urgent As DOJ Imposes Quotas on Immigration Judges*, AM. IMMIGR. LAW.'S ASS'N (Oct. 1, 2018), https://www.aila.org/advo-media/press-releases/2018/need-independent-court-doj-judges (President of the American Immigration Lawyers Association stated that "[this] will force judges to choose between guaranteeing justice or losing their jobs. With a clock constantly ticking over their heads, judges cannot possibly issue well-reasoned decisions . . . ."); Kathryn P. Russell, *Performance Metrics for Immigration Judges: A Matter of Judicial Efficiency or an Erosion of Independent Judiciary?*, 3 ATTORNEY AT L. MAG. CLEV. ED., no. 10, at 15, https://mydigitalpublication.com/publication/?m=35698&i=452866&p=14&ver=html5 ("While general performance metrics can be seen as facially innocuous, the suggestion sparked an immediate backlash from immigration advocates claiming that the measures would 'threaten the integrity of the immigration court system and undermine judicial independence.'").

[166] *By the Numbers: Why Quotas on Immigration Judges Will Adversely Impact the Court's Backlog*, NAT'L ASS'N OF IMMIGR. JUDGES 2–3, https://www.naij-usa.org/images/uploads/publications/By_the_Numbers_-_3-13-18.pdf; AM. IMMIGR. LAW.'S ASS'N, *supra* note 165. The National Association of Immigration Judges is a voluntary group of immigration judges who have made their mission to promote efficiency, dignity, and professionalism of the Immigration Courts. *Home*, NAT'L ASS'N OF IMMIGR. JUDGES, https://www.naij-usa.org (last visited May 6, 2022).

[167] Whitehouse, *supra* note 161, at 2.

[168] Megan Davy et al., *Who Does What in U.S. Immigration*, (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration; *US Government Agencies Involved in The Immigration Process*, HACKING IMMIGR. L., https://thevisafirm.com/dc-immigration-lawyer/us-government-agencies-involved/ (last visited May 6, 2022).

[169] NAT'L ASS'N OF IMMIGR. JJ., *supra* note 166, at 3; Matter of Avetisyan, 25 I. & N. Dec. 688, 689 (B.I.A. 2012) (The respondent had filed a visa petition but was waiting for her husband to become a naturalized U.S. citizen. The judge had no other choice but to continue the case more than once due to the fact that DHS did not have the file because it was with the "visa petition unit."). Other factors that may have to result in a continuance by the judge are illness by any party in the case, failure to appear by the interpreter of the case, and lengthy testimony among other things. *Id.*

Administrative closure allows the respondent an opportunity to seek alternative relief while the judge pauses their removal proceedings.[170] The narrowly construed guideline to issue continuances, and an overly intrusive performance metric system without administrative closure, ordering the removal of a noncitizen when other valid alternatives are available infringes on their rights.[171] It was not easy to imagine a system where a noncitizen has relief available but cannot apply for it because having their case administratively closed was required.[172] Moreover, there were instances where an immigrant in removal proceedings, seeking meritorious relief, was required to have their case administratively closed in order to apply for it.[173] One of those instances was the waiver of grounds of inadmissibility pursuant to 8 C.F.R. § 212.7(e), which states that an alien is ineligible for a provisional waiver if the immigrant is in removal proceedings unless the proceedings are administratively closed.[174] *Matter of Castro-Tum* seriously impacted noncitizens who were in the process of obtaining a benefit from an immediate qualifying relative.[175]

ii. The Backlog in the Courts

In the past, one of the most concerning issues in the immigration court system was the court's growing backlog due to the vast number of pending cases.[176] Statistics favor the use of administrative closure as a tool for judges to manage their dockets when they deem it appropriate.[177] The number of pending cases grew exponentially from 2016 to 2020, specifically from 500,000 to 1,281,586 cases.[178] One goal of the Trump Administration was to

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[170] Brief of Retired Judges, *supra* note 95, at 21–22, 25.

[171] *Id.* at 21 (citing Vahora v. Holder, 626 F.3d 907, 918 (7th Cir. 2010)).

[172] Letter from A. Ashley Tabaddor, President Nat'l Ass'n of Immigr. JJ., on Aministrative Closure of Removal Cases *Matter of Castro-Tum*, 27 I. & N. Dec. 187 (Att'y Gen. 2018) to Hon. Jeff Sessions (Jan. 30, 2018).

[173] *Id.*

[174] 8 C.F.R. § 212.7(e)(4)(iii) (2020). "[A] person seeking admission must overcome the inadmissibility grounds." Richard A. Boswell, ESSENTIALS OF IMMIGRATION LAW 33 (5th ed. 2020). A waiver of inadmissibility is "forgiveness" of the ground of inadmissibility. *Waivers of Inadmissibility: Who Is Eligible and How to Apply*, NOLO, https://www.nolo.com/legal-encyclopedia/waivers-inadmissibility-who-is-eligible-how-apply (last visited May 8, 2022). In order to apply for a provisional waiver, I-601A, noncitizens in removal proceedings need to have their case administratively closed. 8 C.F.R. § 212.7(e)(4)(iii) (2020).

[175] *Consular Processing*, U.S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing (May 4, 2018). "Consular processing is required to secure the immigrant visa, but the respondent needs a waiver for unlawful presence under INA section 212(a)(9)(B)(v) to ensure expeditious processing abroad for purposes of family unity." Tabaddor, *supra* note 172.

[176] Gaby Del Valle, *Immigration Courts Under Trump: Backlogs and Courts Independence*, DOCUMENTED (Oct. 14, 2020, 3:14 PM), https://documentedny.com/2020/10/14/analysis-how-trump-has-changed-the-immigration-courts/. There are currently 1,755,934 pending cases in the U.S. *Immigration Court Backlog Tool*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 5, 2022).

[177] TRAC IMMIGR., *supra* note 118.

[178] *Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 5, 2022).

decrease the number of pending cases; not only was this not accomplished, but the number of pending immigration cases in the United States is the highest it has ever seen.[179] When he decided *Matter of Castro-Tum*, Attorney General Sessions stated that administrative closure contributed to the backlog of the American immigration court system; nonetheless, if administrative closure had never been used, there would still be an increase of pending cases by twenty-four percent.[180]

Inevitably, a steady rise in the number of pending cases increased the average time it takes to complete a case. Currently, the average length of a case is 934 days, exceeding the average time that a case took in 2015 by almost 300 days.[181] A dramatic increase in the court's backlog was easily foreseeable, as eliminating such a useful docket management tool would undoubtedly have severe repercussions.[182]

### *D. Examining the Battle Between the Courts and the Department of Justice*

#### i. *Auer* Deference and Administrative Closure

Courts should not have afforded deference to the Attorney General's interpretation of 8 C.F.R. §§ 1003.1(d)(1)(ii) and 1003.10(b). *Auer* deference played an essential role in determining whether administrative closure should have been upheld or vacated.[183] *Auer* deference, also called *Seminole Rock* deference, states that a court reviewing an agency's interpretation of their regulation should defer to their construction of said interpretation as long as it is not "plainly erroneous or inconsistent with the regulation."[184] *Auer* deference, which had been notoriously controversial and criticized for many years because it conferred agencies with an "inordinately strong level of judicial deference," was recently narrowed in *Kisor v. Wilkie*.[185] This Supreme Court decision narrowed the construction of *Auer* deference to three principles that courts would have to take into account before applying *Auer* deference: (1) the regulation must be deemed genuinely ambiguous after exhausting all tools of construction; (2) it must be

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[179] Del Valle, *supra* note 176.

[180] TRAC IMMIGR., *supra* note 118.

[181] TRAC IMMIGR., *supra* note 178 (This was based on the entire United States for the fiscal year 2021 compared to the fiscal year 2015 which averaged 643 days).

[182] *See generally* NAT'L ASS'N OF IMMIGR. JUDGES, *supra* note 166.

[183] *Auer* deference is a deference that applies to an agency's interpretations of its own regulations. *See* Conor Clarke, *The Uneasy Case Against* Auer *and* Seminole Rock, 33 YALE L. & POL'Y REV. 175 (2014).

[184] Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COL. L. REV. 85 (2019).

[185] 139 S. Ct. at 2414 (holding that even though *Auer* deference will be upheld, it would be expanded); Nicholas R. Bednar, Comment, *Defying* Auer *Deference*, 100 MINN. L. REV. (2015). Justice Thurgood Marshall and Justice Antonin Scalia were avid critics of the *Seminole* deference doctrine. Kevin O. Leske, *Between* Seminole Rock *and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 219, 233 (2013).

reasonable; and (3) the character of the agency interpretation is entitled to controlling weight.[186]

Attorney General Sessions' decision to end administrative closure was not welcomed with open arms by some courts. For example, the Fourth Circuit Court rejected *Matter of Castro-Tum* in a case decided in August of 2019.[187] Almost a year after, the Seventh Circuit Court decided *Morales v. Barr*, another important decision about administrative closure, which along with the Fourth Circuit's decision, signaled that judges were not going to "tolerate an unreasonable interpretation of law. . . ."[188] In both instances, the courts' reasoning relied on *Auer* deference and focused on whether the regulation was "sufficiently" ambiguous to be deferred to the agency for interpretation.[189] The courts concluded, rightly so, that the regulation's language unambiguously conferred immigration judges and the BIA authority to use administrative closure as a tool.[190]

Under the new and narrowly construed *Auer* deference, 8 C.F.R. §§ 1003.1(d)(1)(ii) and 1003.10(b) were not genuinely ambiguous because of their expansive language, specifically the word "any" paired with the words "appropriate and necessary."[191] Both the Fourth and the Seventh Circuit Courts used a similar rationale regarding the expansiveness of the language in §§ 1003.1 and 1003.10 by holding that the Attorney General's interpretation of this regulation did not deserve *Auer* deference because of its lack of ambiguity.[192] The Third Circuit Court also used a similar rationale when it vacated *Matter of Castro-Tum*, stating that "the plain language establishes that general administrative closure

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[186] *Kisor*, 139 S. Ct. at 2415–16.

[187] Romero v. Barr, 937 F.3d 282, 297 (4th Cir. 2019). "[The statutes] unambiguously confer upon IJs and the BIA the general authority to administratively close cases such that the BIA's decision should be vacated and remanded." *Id.* "[W]e conclude that the relevant regulations confer the general authority to administratively close cases to IJs and the BIA." *Id.* In *Romero v. Barr*, Jesus Zuniga Romero had an approved I-130 petition and intended to file a provisional waiver I-601A due to the fact that his wife had become a U.S. Citizen. *Id.* But in order to apply for a provisional waiver, his removal case had to be administratively closed pursuant to federal regulation. 8 C.F.R. § 212.7(e)(4)(iii) (2020).

[188] *See* AM. IMMIGR. LAW.'S ASS'N, *supra* note 16; Morales v. Barr, 973 F.3d 656, 656 (7th Cir. 2020). Yeison Meza Morales was a shooting victim who applied for a U-Visa, which was pending when ICE initiated removal proceedings. *Id.* at 659. He appeared pro se in front of the Immigration Judge and explained that he had a U-Visa pending, to which the judge agreed to continue the case for thirty days, but he was ordered removed due to the fact that the U-Visa was still pending even though he sought another continuance or his case to be administratively closed. *Id.* at 659–60. U Nonimmigrant Visa applies to people who have been a victim of a qualifying crime within the United States, and who has collaborated with the investigation of such crime. *Victims of Criminal Activity: U Nonimmigrant Status*, U. S. CITIZENSHIP AND IMMIGR. SERV.'S, https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status (Feb. 28, 2022); *Morales*, 973 F.3d at 660.

[189] *Romero*, 937 F.3d at 290; *Morales*, 973 F.3d at 664; *see* AM. IMMIGR. LAW.'S ASS'N, *supra* note 16.

[190] *Morales*, 973 F.3d at 667; *Romero*, 937 F.3d at 292. Even if the court had not determined that the language was not sufficiently ambiguous, "a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties." Kisor v. Wilkie, 139 S. Ct. 2400, 2417–18 (2019).

[191] *Romero*, 937 F.3d at 288.

[192] *Id.* at 290; *Morales*, 973 F.3d at 664.

authority is unambiguously authorized by these regulations."[193] Moreover, even if the Courts had found that the regulations' language was ambiguous, the Courts should not have granted the Attorney General deference because the new interpretation created an "unfair surprise to regulated parties" due to the interpretation's significant shift from precedent.[194]

ii. New Regulation Issued by the EOIR Regarding Administrative Closure

After the Fourth and Seventh Circuit Courts' decisions overturned *Matter of Castro-Tum* and restored administrative closure in their respective jurisdictions, the EOIR issued an NPRM.[195] One primary purpose of the proposed rule was to amend §§ 1003.1 and 1003.10 to eliminate the authority of immigration judges and BIA members to use administrative closure, even in jurisdictions where *Matter of Castro-Tum* had been vacated.[196] This proposed rule was issued after administrative closure and remained controversial in different jurisdictions.[197] The DOJ stated that "[n]otwithstanding the Attorney General's controlling interpretation of the law under [federal law], the question whether [the regulations] allow[ed] immigration judges and Board members to indefinitely adjourn immigration [cases] through . . . administrative closure continues to drive litigation . . . ."[198]

After receiving 1,284 comments from interested entities, on December 16, 2020, the EOIR and the DOJ issued the Rule, set to go into effect starting January 15, 2021, only a few days before President Biden's inauguration.[199] This regulation amendment meant that immigration judges and BIA members would have to abide by the Rule, even in jurisdictions that

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[193] *See* Sanchez v. Att'y Gen. United States, 997 F.3d 113, 122 (3d Cir. 2021) (using the Fourth and Seventh Circuits as guidance to come to a decision).

[194] *Kisor*, 139 S. Ct. at 2417–18 (citations omitted).

[195] Appellate Procedures and Decisional Finality in Immigration Proceedings, 85 Fed. Reg. 52491 (Aug. 26, 2020) (to be codified at 8 C.F.R. pts. 1003, 1240). Rulemaking is the process in which an agency formulates, amends, or repeals a rule. 5 U.S.C. § 551(5) (2012). A rule is a statement of an agency that has general applicability and future effect. Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, CONG. RSCH. SERV., 1 (2017).

[196] Appellate Procedures and Decisional Finality in Immigration Proceedings, 85 Fed. Reg. 52491, 52492 (Aug. 26, 2020) (to be codified at 8 C.F.R. pts. and 1003, 1240). "The Department [of Justice] . . . proposes to amend the regulations to make clear that there is no freestanding authority of line immigration judges or BIA members to administratively close cases." *Id.* at 52491.

[197] *Id.* at 52497.

[198] *Id.*

[199] Centro Legal de La Raza et al., v. Exec. Off. of Immigr. Rev. et al., 524 F. Supp. 3d 919, 935 (N.D. Cal. 2021) (The vast number of comments received signal to the importance of administrative closure in the immigration law field.); Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588 (Dec. 16, 2020) (to be codified at 8 C.F.R. pts. 1003 and 1240). Since the final rule's effective date was a few days before President Biden's inauguration, and also prior to the regulatory memo to freeze these regulations, the provisions of the rule are in effect and are not subject to the sixty-day implementation delay.

overturned *Matter of Castro-Tum*.[200] More importantly, the Rule's provisions applied to initiated, reopened, or even recalendared cases, which suggested that the government could reopen administratively closed cases in jurisdictions that vacated the Attorney General's decision.[201]

The Rule created "sweeping changes" to the already complicated immigration system and, among other things, supplemented *Matter of Castro-Tum* under the conception that it was necessary to clarify and resolve the varying interpretations of §§ 1003.1(d)(1)(iii) and 1003.10(b), which resulted from courts misapplying administrative closure.[202] The implementation of the Rule only generated further controversy. Many entities criticized the process through which the Rule was incorporated, stating that the DOJ had not allowed enough time for commenters to prepare responses to the NPRM.[203] Typically, thirty days is the reasonable amount of time that an agency may provide for commenters to voice their opinions on a proposed rule; however, an agency may offer a more extended period of time, especially in extenuating circumstances.[204]

This controversy drove the Ninth Circuit Court to temporarily enjoin the EOIR from implementing the Rule. It found that the DOJ and the EOIR had engaged in "arbitrary and capricious decision-making" since the agencies did not provide evidence to justify the elimination of administrative closure on efficiency grounds.[205] The temporary injunction meant that the Rule would be on hold, and the Seventh and Fourth Circuit Courts regained the authority to use administrative closure.

### *E. Examining Potential Solutions that Could Have Been Implemented to Solve an Issue of this Magnitude*

Within a few days after taking office, President Biden issued an executive order directing the review of current regulations and orders that impede "access to immigration benefits and fair, efficient adjudications of these benefits" in order to get recommendations on how to remove these barriers.[206] Before vacating *Matter of Castro-Tum* at a national level, the newly published Rule by the EOIR needed to be repealed in some way.

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[200] Garvey, *supra* note 195, at 1. "Rules that are issued in compliance with certain legal requirements, and that fall within the scope of authority delegated to the agency by Congress, have the force and effect of law." *Id.*

[201] Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81588, 81647 (Dec. 16, 2020) (to be codified at 8 C.F.R. pts. 1003 and 1240). "[A]ny administratively closed case can be reopened by the court or BIA." Jessica Suotmaa, *Are Administratively Closed Immigration Court Cases Still "Safe"?,* LUM L. GRP. (May. 25, 2018), http://www.lumlawgroup.com/are-administratively-closed-immigration-court-cases-still-safe/.

[202] *Centro Legal de la Raza*, 524 F. Supp. 3d at 928.

[203] *Id.* at 935.

[204] *See infra* Part E.ii.; Executive Order 12866 states that an agency "should include a comment period of not less than 60 days" in most cases. Exec. Order No. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993).

[205] *Centro Legal de la Raza*, 524 F. Supp. 3d at 954–55.

[206] Exec. Order No. 14,012, 86 Fed. Reg. 8227 (Feb. 2, 2021).

If *Matter of Castro-Tum* had not been overturned, the following are some of the potential ways this issue could have been resolved.

i. Congressional Review Act

Aside from the standard rulemaking procedures prescribed by the Administrative Procedure Act ("APA"), which establishes the process of issuing, amending, or repealing a rule, administrations may also rely on another action to reverse previous regulations.[207] The Congressional Review Act ("CRA") of 1996 could have been used to "undo" the previous administration's regulations; as a matter of fact, it has been used in the past by other presidents to repeal regulations that challenged their political views.[208] The CRA establishes certain procedures that Congress may use to repeal regulatory rules, mainly by a joint resolution of disapproval.[209] This path to reverse previous regulations is more expeditious than the typical notice of proposed rulemaking; the principal requirement is the passage of a joint resolution by both the House of Representatives and the Senate along with the President's signature.[210] The CRA's employment is not a novel tactic and has been used to reverse regulatory provisions disliked by an administration since some presidents have "abused" this tool.[211] The Trump administration made sure to "[n]ullify, postpone, suspend, stay, and replace" some of former President Obama's environmental regulations by employing the CRA.[212]

The CRA is "of particular interest when a new Congress and President take office because it provides an opportunity for the new Congress to review certain regulations issued by the previous administration" and because of the immediacy in which the regulation comes to an end.[213] Furthermore, the CRA is a powerful resource because it prevents

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[207] 5 U.S.C. §§ 551(5), 553 (2018).

[208] Blake A. Watson, *Nullify, Postpone, Suspend, Stay, and Replace: The Trump Administration and the Methane Waste Prevention Rule*, 44 U. DAYTON L. REV. 363, 368 n.27, 372 (2019).

[209] Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CONGR. RSCH. SERV., 1 (2011). Previous administrations that have used the joint resolution through the Congressional Review Act include the Ronald Regan Administration, the William Clinton Administration, the George W. Bush Administration, and the Barack Obama Administration. Maeve P. Carey, *Can a New Administration Undo a Previous Administration's Regulations?*, CRS INSIGHT (Nov. 21, 2016), https://sgp.fas.org/crs/misc/IN10611.pdf.

[210] *See* Carey, *supra* note 209.

[211] Paul Rose & Christopher J. Walker, *The Congressional Review Act and the Biden Administration's Approach to Financial Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 29, 2021), https://corpgov.law.harvard.edu/2021/01/29/the-congressional-review-act-and-the-biden-administrations-approach-to-financial-regulation/. "The Trump administration and the 115th Congress used the CRA quite extensively . . . ." *Id.*

[212] Watson, *supra* note 208, at 368, 372 (Former President Trump used this tool).

[213] MaryBeth Musumeci, *How Can Trump Administration Regulations Be Reversed?*, KAISER FAM. FOUND. (Jan. 29, 2021), https://www.kff.org/medicaid/issue-brief/how-can-trump-administration-regulations-be-reversed/; Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 8 (2019).

the promulgation of "substantially the same" regulations as the disapproved rule, unlike a regular repeal.[214]

When President Biden took office, 1,400 rules were finalized by the previous administration that fell subject to a joint dissolution approval under the CRA.[215] Most importantly, the Rule issued by the EOIR was one of them; however, the CRA has one caveat: it does not allow legislators to overturn multiple rules at once.[216] The limited use of the CRA could have been particularly problematic because it was up to the new President and Congress's discretion to choose which regulations were in dire need of being overturned, especially in matters deemed more pressing like regulations made by the Environmental Protection Agency.[217] Nevertheless, problematic did not mean impossible.

ii. Agency Rulemaking

Agency Rulemaking was another path the Biden administration could have taken to repeal the new regulation.[218] Although it is not as immediate as overturning a regulation through the use of the CRA, agency rulemaking was still an effective way of amending or even repealing a rule, and the process is not complicated, merely time-consuming:

> [A]n agency generally must first provide notice that it intends to promulgate a rule. An agency does this by publishing a notice of proposed rulemaking in the *Federal Register*. The notice must provide (1) the time, place, and nature of the rulemaking proceedings; (2) a reference to the legal authority under which the rule is proposed; and (3) either the terms or subject of the proposed rule. The agency must then allow "interested persons an opportunity" to comment on the proposed rule. Typically, an agency will provide at least 30 days for public comment. The agency is required to review the public comments and respond to "significant"

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[214] Noll & Revesz, *supra* note 213, at 8.

[215] Sheila McCafferty et al., *The Return of the Congressional Review Act*, PILLSBURY L. (Jan. 19, 2021), https://www.pillsburylaw.com/en/news-and-insights/congressional-review-act-cra-biden.html. The Congressional Review Act provides an opportunity for the new Congress to review and nullify regulations issued by the previous administration with a 60-day period that governs which regulations will be under review. MaryBeth Musumeci, *supra* note 213. This refers to legislative days, which means that they can be longer than 60 calendar days. *Id.* The window for regulations to apply for CRA falls back to August 21, 2020. *Id.*

[216] McCafferty, *supra* note 215.

[217] Michael D. Bloomquist et al., *Potential Use of the Congressional Review Act in President Biden's First 100 Days*, VENNABLE LLP (2021), https://www.venable.com/insights/publications/2021/01/potential-use-of-the-congressional-review-act-in. Environmental matters seem to be a politicized topic that tends to vary from one administration to another, a great example of the use of the CRA for the environmental policy was the repeal of the Methane Waste Prevention Rule issued under the Obama Administration in 2016. Watson, *supra* note 208, at 398.

[218] 5 U.S.C. § 551(5) (2018).

> comments received, and it may make changes to the proposal based on those comments.[219]

Ultimately, even though the rulemaking process may have been longer, it remained a valid option to restore authority to the immigration judges and the BIA to use administrative closure.

iii. Executive Orders

An executive order is an administrative tool available to carry out functions that the President would not otherwise pursue through Congress.[220] Executive orders are controversial because they circumvent the administrative rulemaking process, which provides for discussion and judicial review.[221] For a President's executive order to have the effect of federal law, Congress must have delegated authority to the executive branch through a statute under the nondelegation doctrine.[222]

One of the critical questions regarding the implementation of executive orders has been whether a President can utilize them to amend a regulation already codified in the Federal Register.[223] This question arose under former President Trump's administration when he amended a regulation, rather than guiding the agency to do it, regarding the administrative judges' hiring process.[224] Former President Trump issued this executive order by invoking 5 U.S.C. §§ 3301 and 3302, which allowed him to prescribe adequate regulations.[225] President Biden could have potentially issued an executive order amending the Rule about administrative closure; however, it is vital to keep in mind that the President can only issue an executive order if authorized by "an act of Congress or . . . the Constitution itself."[226]

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[219] *An Overview of Federal Regulations and the Rulemaking Process*, CONGR. RSCH. SERV., https://sgp.fas.org/crs/misc/IF10003.pdf (Mar. 19, 2021).

[220] John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 335 (2010). Through the use of executive orders, the President is able to take different actions that will guide the operation of executive agencies; and he is able to implement a statute. *Id.* at 335–37.

[221] *Id.* at 337; Dave Roos, *How Executive Orders Work*, HOWSTUFFWORKS, https://people.howstuffworks.com/executive-order3.htm (Jan. 29, 2021) ("A White House aide to President Bill Clinton described the lure of executive orders [as a] '[s]troke of the pen, law of the land.'"). Executive orders have become increasingly legislative and an important weapon of policymaking and are often referred to as "presidential legislation." *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 660 (1987).

[222] GEO. WASH. L. REV., *supra* note 221. Under the nondelegation doctrine, Congress needs to establish sufficiently intelligible standards for the administrative agency to follow. *Id.* Courts have considered executive orders the equivalent of federal statutes, making them identical to agency action. *Id.* The President can only act legislatively when Congress has delegated authority. *Id.* at 220.

[223] *See generally* Valerie C. Brannon, *Can a President Amend Regulations by Executive Orders?*, CONGR. RSCH. SERV. (July 18, 2018) 1, https://crsreports.congress.gov/product/pdf/LSB/LSB10172.

[224] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

[225] Brannon, *supra* note 223, at 2 (quoting 5 U.S.C. § 3302).

[226] *Id.*

The Constitution speaks very little about who will be the regulator of immigration law, making the Supreme Court the initial source and entity responsible for shaping this field.[227] Congress has unfettered authority to restrict noncitizen's entry, which means that the executive branch will also possess most of this authority through delegation.[228] Congress created the INA in the 20th century, and under § 212(f), the President has broad authority to restrict the entrance of persons or classes of persons.[229] Although the President has, as many would say, "broad" authority under § 212(f), it would have been tough for President Biden to issue an executive order amending the recently issued Rule.

## IV. CONCLUSION

Without a doubt, the immigration court system has been, and will always be, in dire need of a tool like administrative closure to ensure the fair adjudication of immigration cases. Judges should be in control of their dockets, and they should have tools at their disposal to help them manage their cases accordingly. By halting a practice that had been ratified on many occasions by the DOJ and the BIA, the Attorney General went against precedent and directly attacked the "heart of a court's responsibility"—the efficient management of dockets.[230] It created confusion among immigration lawyers and advocates. The Attorney General tried fixing something unbroken, and the consequences could not have been more damaging. Serious ramifications, like the unprecedented backlog in the immigration system, cannot go unnoticed.

The Attorney General erroneously decided *Matter of Castro-Tum*; it was used as a vehicle to implement former President Trump's ruthless immigration policy. It stripped judges of a power they had been using for decades, and the Attorney General failed to provide them with an optimal replacement. As a matter of fact, instead of finding a way for judges to cope with the absence of this helpful tool, he diminished their discretion even further by imposing draconian policies that would do nothing other than

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[227] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L. J. 458, 466 (2009); *The Federal Role in Immigration*, NAT'L GEOGRAPHIC (Jan. 27, 2020), https://www.nationalgeographic.org/article/federal-role-immigration/12th-grade/. The only section of the Constitution that speaks to immigration law is Article I, Section 8, which grants Congress the power to "establish [a] uniform Rule of Naturalization . . . throughout the United States." *Id.* The Constitution does not confer authority over immigration to any of the branches of government. *The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles*, CONGR. RSCH. SERV., 3 (Dec. 30, 2019), https://crsreports.congress.gov/product/pdf/R/R46142.

[228] CONGR. RSCH. SERV., *supra* note 227.

[229] Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, AM. CONST. SOC'Y, https://www.acslaw.org/analysis/acs-supreme-court-review/trump-v-hawaii-and-the-future-of-presidential-power-over-immigration/ (last visited May 8, 2022).

[230] Tabaddor, *supra* note 172.

obfuscate their judgment. Continuances and status dockets are practical tools, but they are constrained, making them an inadequate replacement.

Attorney General Sessions, through his certification tool, issued a decision that created havoc in the immigration system. It is extremely important to address this power because, although administrative closure was restored, nothing prevents a future Attorney General from stripping judges of this essential judicial review tool.

Of equal importance, this Comment emphasizes the fact that the immigration system is politicized and lacks the necessary independence to function efficiently. The Attorney General has broad power to make precedential decisions that, even though they may not be in the best interest of the immigration field, still reflect the political views of the sitting administration.