ARTICLE II JUDGES: SECTION 238'S VIOLATION OF SEPARATION OF POWERS

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ABSTRACT

Expedited removal proceedings are truncated immigration decisions presided over by executive agents who are also imbued with the power to decide when such proceedings can be utilized. One of the statutes that permits this adjudicative structure is INA § 238. This Article examines the history of § 238 expedited removals, tracing their origins back to the Anti-Terrorism and Effective Death Penalty Act of 1996 and the reduction of protections for migrants convicted of an aggravated felony codified in that law. Subsequently, the step-by-step process of administrative removals is examined in detail in preparation for an analysis of why, on a structural level, § 238 violates Article III's separation of powers guarantees. Due to their adjudicative power, the executive officials entrusted with expedited removals should be conceived of as an Article I-like Court. In which case, Congress has impermissibly delegated Article III power to the executive branch. This Article concludes that, as far as § 238 is concerned, Congress has overstepped its authority to delegate Article III power to the Executive, and it is time for practitioners to consider a legislative courts challenge to administrative removals.

TABLE OF CONTENTS

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I. INTRODUCTION

Just after nine in the morning on April 19, 1995, a truck bomb exploded at the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.[1] The Oklahoma City Bombing remains the most deadly act of domestic terrorism in United States history.[2] The four conspirators killed 168 people, including 19 children, and injured several hundred more when their bomb sent glass and debris flying.[3] Timothy McVeigh, a white supremacist enraged by the federal government's mishandling of the confrontations at Ruby Ridge and Waco,[4] was quickly apprehended by the police along with his

1. JODY LYNEÉ MADEIRA, KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE, at xiv (2012).

2. CHAD F. NYE, JOURNALISM AND JUSTICE IN THE OKLAHOMA CITY BOMBING TRIALS 2 (Melvin I. Urofsky ed., 2014).

3. MADEIRA, *supra* note 1, at 21; *Oklahoma City Bombing*, FBI, https://perma.cc/9W89-NNND (last visited Nov. 11, 2022).

4. Both incidents involved Federal agents raiding entrenched compounds in Idaho and Texas respectively. Both incidents ended with avoidable loss of life. The precise politics and logistics are beyond the scope of this Article and are hotly contested. However, both raids almost immediately galvanized people who, like McVeigh, were afraid of government overreach. *See generally* Betty A. Dobratz, Stephanie L. Shanks-Meile & Danelle Hallenbeck, *What Happened on Ruby Ridge: Terrorism or Tyranny?*, 26 SYMBOLIC INTERACTION 315, 337–38 (2003).

co-conspirators, and President Clinton promised the American people that the bombers would be brought to justice.[5]

In a vengeful public's eyes, justice was stalled by the appeals of McVeigh and one of his accomplices—Terry Nichols.[6] Indeed, Nichols still remains incarcerated on "Bombing Row" to this day.[7] Under pressure from the victims and the press, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) as a response to what was viewed as a delay of President Clinton's promise of justice for the victims.[8]

AEDPA weathered numerous attacks both before and after its enactment in 1996, especially for its evisceration of habeas corpus relief.[9] However, AEDPA survived *Felker v. Turkin*'s challenge,[10] and in a post 9/11 world, the law is unlikely to be repealed.[11] AEDPA has circumscribed Americans' ability to get meaningful review of wrongful convictions, but it—like the initial prosecutions of the Oklahoma City bombing—was not directed solely at citizens.[12] Strangely enough, a tragedy perpetrated by a domestic terrorist was the impetus for gutting the procedural and personal rights of migrants convicted of aggravated felonies.[13]

Each year, more than 10,000 migrants are subjected to administrative removals, a practice that has its roots in the 1988 Anti-Drug Abuse Act.[14] There, Congress provided that any immigrant convicted of an "aggravated felony" could be subject to an expedited removal proceeding.[15] Initially, aggravated felonies only included three crimes.[16] AEDPA introduced a whole

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5. NYE, *supra* note 2, at 105.
6. MADEIRA, *supra* note 1, at 74–76.
7. NYE, *supra* note 2, at 8.
8. MADEIRA, *supra* note 1, at 74–75.
9. *See* 142 CONG. REC. S3458–59 (daily ed. Apr. 17, 1996) (remarks of Sens. Kennedy & Biden). For the fundamental nature of habeas relief, see Habeas Corpus Act 1640, 16 Car. I c. 10, § 6 (Eng.) (providing guarantee of writ of habeas corpus).
10. Felker v. Turpin, 518 U.S. 651, 660–62 (1997) (upholding AEDPA's constitutionality because one avenue of habeas relief remains available); *see* Berlanga v. Reno, 56 F. Supp. 2d 751, 760–61 (S.D. Tex. 1999) (stating that clear Congressional intent to bar habeas relief for "criminal aliens" suffices to support the constitutionality of the INA as modified by AEDPA).
11. *See* M. Isabel Medina, *Judicial Review–A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1541–42, 1544 (1997) (discussing the rhetoric about danger that underpinned the passage of AEDPA).
12. *See generally* Penny Bender Fuchs, *Jumping to Conclusions in Oklahoma City?*, 17 AM. JOURNALISM REV. 5, 11–12 (1995), https://perma.cc/2AHM-P5GH (describing the influence of racism in Ibrahim Ahmad's wrongful arrest and detention).
13. *Cf.* Hindpal Singh Bhui, *The Place of 'Race' in Understanding Immigration Control and the Detention of Foreign Nationals*, 16 CRIMINOLOGY & CRIM. JUST. 267, 276 (2016) ("It has become virtually impossible to consider either immigration or racism, without understanding the connections with Muslims and Islam.").
14. *New Data on the Processing of Aggravated Felons*, TRAC REPS. (Jan. 5, 2007), https://perma.cc/J7XL-NLWW (noting that roughly half of aggravated felons never see an immigration judge, and the trend is increasing); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 270 (2012); Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 680 (2018); *cf.* Catherine T. Kim, *The President's Immigration Courts*, 68 EMORY L. J. 1, 4–5 (2018).
15. 8 U.S.C. § 1227(a)(2)(A)(iii) (2019).
16. 8 U.S.C. § 1101(a)(43) (2019).

host of new crimes which could subject a convicted migrant to administrative removal.[17] AEDPA was therefore not solely concerned with the expeditious executions of domestic terrorists and death row inmates, but also with the expeditious removal of migrants.[18]

To carry out the vengeance of a stricken nation, habeas relief was eviscerated[19] while due process, Fourth Amendment, and Sixth Amendment protections for migrants were circumvented, as discussed further below.[20] AEDPA is surely one example of hard cases making bad laws.[21] Constitutional critiques of AEDPA are forceful, but practitioners have yet to successfully challenge administrative removals.[22]

The need for these challenges persists. Moreover, this delegation of congressional nationalization power—in the form of expedited removals—to the Attorney General (AG) is not subject to adequate procedural safeguards.[23] Pursuant to the power purportedly granted under § 238(a)(2), the AG has the authority to initiate expedited removal proceedings for any migrant convicted of an aggravated felony.[24] Section 238(b)(1) enables immigration officers to initiate an expedited removal, intended to be executed within 14 days, for which there is no recourse to judicial review unless the migrant can claim citizenship, lawful permanent resident status, or status as an asylee or refugee.[25] No appeal is permitted from the executive official's determination.[26] Instead, conviction of an aggravated felony is conclusive evidence of deportability.[27]

By creating a scheme wherein individuals' personal liberties are first jeopardized, then quarantined from judicial review, and finally presumed immaterial, Congress has overstepped its authority under Article I. Section 238 unconstitutionally delegates lawmaking and adjudicative power to Customs and Border Patrol (CBP) agents. These individuals are part of the Executive

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17. *See* Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 156 (2020) (describing the impact of AEDPA among other laws).

18. Medina, *supra* note 11, at 1534.

19. *See id.*

20. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 481–83 (2013); Manning & Hong, *supra* note 14, at 675. Although these constitutional protections are frequently weaker in the immigration context, they do still exist. *Compare* Perez Cruz v. Barr, 926 F.3d 1128, 1137 (9th Cir. 2019) (holding that egregious Fourth Amendment violations can lead to suppression under the doctrine of Fruit of the Poisonous Tree), *with* Zelaya v. Hammer 516 F. Supp. 3d 778, 812–13 (E.D. Tenn. 2021) (finding that detentions that lack probable cause are Fourth Amendment violations even when the detained individuals are undocumented migrants).

21. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law.").

22. *See* Complaint at 25, 52, Las Americas Immigrant Advoc. Ctr. v. Trump, 451 F. Supp. 3d 1191 (2020) (No. 3:19-cv-2051) (alleging that the perpetuation of asylum-free zones violates the take care clause).

23. *See generally* U.S. CONST. art. I, § 8 (identifying the source of congressional nationalization power).

24. *See* Medina, *supra* note 11, at 1528.

25. 8 C.F.R. § 238.1(b); *see also* Medina, *supra* note 11, at 1542 (discussing other ways in which review has been limited).

26. 8 C.F.R. § 238(b)(5).

27. 8 C.F.R. § 238(c) (2021).

Branch, they respond to the President, and as such they are Article II officials. They are not institutionally insulated decisionmakers like Article III judges, nor are they a properly constituted Article I court. Therefore, practitioners and judges should recognize that the structure of administrative removals violates separation of powers by delegating rights-adjudication to an Article II official which the Constitution vests in Article III courts alone.[28]

With these considerations in mind, § 238 likely violates Article III, separation of powers, and the Guarantee Clause. Advocates can present these violations in federal court using the legislative courts doctrine as a framework for actionable deviations from the structure of the Constitution.[29] Under the legislative courts doctrine, adjudicators who lack the Article III protections of life-tenure and fixed salary can only be vested with a limited power to dispense with individuals' personal rights.[30] Even then, such adjudicators must still be subject to Article III review for the congressional scheme to pass constitutional muster.[31] Section 238 cannot pass this test. As such, even where disparate substantive rights challenges have failed, especially when they are pitted against Congress's plenary power to determine immigration laws, a structural challenge to administrative removals may succeed.[32]

In analyzing the constitutionality of § 238, the Court should adopt the approach it has taken in the context of Article I courts.[33] Personal rights adjudication is an essential function of Article III courts, and by creating a single, essentially unreviewable, immigration hearing performed by an official in the Executive Branch, Congress unconstitutionally frittered away the power of the federal judiciary.[34]

This Article reviews the possibility of a challenge to § 238 removals under the Supreme Court's legislative courts jurisprudence. Part II examines the architecture of § 238 removals. Part III sketches the history of the legislative courts doctrine. Part IV tests § 238's validity against the modern, multi-

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28. *See* Medina, *supra* note 11, at 1540.

29. *Cf.* James Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205, 1266 (2019) (discussing judicial independence in the context of D.C.'s Congressionally created courts); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1577 (2020) (arguing that the muddling of legislative courts with Article III courts violates the guarantees of separation of powers in a republican government).

30. *See* Baude, *supra* note 29, at 1541–42 (describing basic separation of powers concerns); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 614–16 (discussing key aspects of judicial power).

31. *See* Baude, *supra* note 29, at 1518–19 ("[T]he availability and form of appellate review over non-Article III courts is itself the subject of disagreement and confusion.").

32. The plenary power doctrine is dealt with more fully *infra* at notes 151–54 & 167–68. The doctrine posits that, at least where admission of foreign nationals is concerned, there are some areas where Congressional power is essentially unreviewable once a facially legitimate purpose is established. *See* Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (permitting delegation of this power to the Executive, even in the face of First Amendment concerns); California v. U.S. Dep't. of Homeland Sec., 476 F. Supp. 3d 994, 1018–21 (N.D. Cal. 2020) (detailing history of the plenary power doctrine). *But see* Tineo v. Att'y Gen., 937 F.3d 200, 217 (3d Cir. 2019) (recognizing that the plenary power doctrine has been increasingly circumscribed by the recognition that it is subject to constitutional constraints).

33. *See* Wellness Int'l Network, Ltd., v. Sharif, 135 S. Ct. 1932, 1943 (2015).

34. Sheldon v. Sill, 49 U.S. 441, 448–50 (1850) (describing federal judicial power).

factored, balancing test with which the Supreme Court weighs the permissibility of delegations of Article III power to an Article I tribunal. Part V concludes that, even if front-line border agents were analogous to an acceptable Article I Court, they would still not meet the requirements imposed on Congress by separation of powers.

II. THE STRUCTURE OF § 238 REMOVALS

A clear picture of § 238's structure reveals the ways in which it violates separation of powers principles. Section 238 expedited removals follow a streamlined five-step process. First, an agent of the executive branch—usually a CBP or ICE agent or other immigration inspector, labeled an "Issuing Service Officer" (ISO), who is not required to have received legal training—determines whether the individual (1) is a migrant, (2) is not a lawful permanent resident, (3) has been convicted of an aggravated felony, and (4) is deportable.[35] Second, the ISO must serve the migrant with Form I–851: "Notice of Intent."[36] At that point, the migrant is subject to arrest and detention.[37] Third, the migrant has 10 days, or 13 if served by mail, in which to secure representation, gather evidence, and file their response.[38] The migrant may wish to view the government's evidence against them, a request which grants them another 10 day window in which to review that evidence and rebut it.[39]

A second employee of the executive branch then steps into the role of "Deciding Service Officer" (DSO) to perform the fourth step. That agent, who is also not required to be an attorney, has some discretion to pick from four options: (1) enter a final order of removal; (2) gather more evidence; (3) refer the case to an immigration judge under § 240; or (4) conduct a reasonable fear interview if the migrant is seeking asylum pursuant to § 208.[40] If the DSO determines they should gather more evidence, the migrant is permitted a final 10-day period in which to respond to that evidence.[41] Finally, if the DSO finds that the migrant is deportable, that officer "shall issue" a Form I–851A ("Final Administrative Removal Order"), at which point the migrant has only 14 days to achieve judicial review. If the migrant is incarcerated, there is an indeterminate period between 14 days and the end of their

35. Proceedings Under 238(b) of the Act, 8 C.F.R. § 238.1(a) (2021); Notice to Appear, 8 C.F.R. § 239.1(a) (2021) (defining forty-five types of employees of the Department of Homeland security authorized to issue a Form I–851, Notice of Intent to Issue a Final Administrative Deportation Order, and one final catch all category including all other authorized employees of DHS); *see Sheldon*, 49 U.S. at 448.

36. 8 C.F.R. § 238.1(b)(2)(1).

37. 8 C.F.R. § 238.1(g).

38. 8 C.F.R. § 238.1(c)(1)–(2)(i).

39. 8 C.F.R. § 238.1(c)(2)(ii).

40. 8 C.F.R. § 238.1(d)(1) (allowing removal if no rebuttal is filed); 8 C.F.R. § 238.1(d)(2)(i)–(ii) (empowering officer to gather evidence); 8 C.F.R. § 238.1(e) (enabling referral to an immigration judge); 8 C.F.R. § 238.1(f)(3) (requiring reasonable fear determination).

41. 8 C.F.R. § 238.1(d)(2)(ii)(B).

sentence during which they may be deported.[42] The Executive officials' perfunctory rulings will now be examined more closely in preparation for an explanation of why these fraught decisionmakers are constitutionally incompetent to perform rights-adjudication.

A. *The Issuing Service Officer's Initial Determination of Aggravated Felon Status*

Expedited removals were first introduced by the failed Criminal Aliens Deportation Act of 1993.[43] In 1994, the Violent Crime Control and Law Enforcement Act[44] codified the judicial expedited removal procedure which was amended later the same year to delete the requirement, contained in § 1252a(b)(4)(D), that a determination of deportability be "supported by clear, convincing, and unequivocal evidence" by the Immigration and Nationality Technical Corrections Act.[45]

Congress's choice to efficiently delegate the "adjudicating" of an immigrant's status to two executive officials—the ISO and DSO—creates serious Article III problems when the chosen definition of conviction, the separate issue of the absence of a definition of aggravated felony, and the inclusion of a conclusive presumption of deportability are examined critically.[46] As such, each of these three facets will be discussed in depth in the coming subsections. Moreover, Congress's intent to completely bar relief—even by habeas corpus—is not a reason for deference to § 238 administrative removals.[47] All told, § 238 represents an unconstitutional violation of separation of powers, enacted during a time of intense fear, that is ripe for more considered review.[48]

1. *Redefining Conviction*

According to the framework described above, the decision to remove a migrant who has been supposedly convicted of an aggravated felony begins with a single agency employee's satisfaction with the sufficiency of evidence regarding the four statutory factors.[49] The ISO has broad discretion to

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42. 8 C.F.R. § 238.1(f)(1)–(g). For the circularity of the judicial review process, see *infra* notes 87–99 and accompanying text.

43. Criminal Aliens Deportation Act of 1993, H.R. 1459, 103rd Cong.

44. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

45. Immigration and Nationality Technical Corrections Act, Pub. L. No. 103-416, 108 Stat. 4305 (1994).

46. Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 375 (2018); *see also* TRAC REPS. (Jan. 5, 2007), *supra* note 14 ("Under this streamlined procedure, ICE is responsible for all steps in the process, from apprehension and detention to issuing the order and deporting the individual.").

47. Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1114 (9th Cir. 2019) (finding a violation of the Suspension Clause).

48. *See* Brief in Opposition at 16–17, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (2020) (No. 19–161) (explaining difference between Suspension and Due Process analysis); MADEIRA, *supra* note 1, at 25 (describing the elevated feelings surrounding the passage of AEDPA).

49. 8 C.F.R. § 1238.1(b) (2021).

determine that a migrant has been "convicted," which legally extends beyond the dictionary definition of a conviction.[50] Thus, even though a DSO is involved in this process, it is a single executive official that is trusted with the threshold adjudication. Under INA § 101(a)(48), a conviction includes a guilty plea, a plea of *nolo contendere*, or any admission of facts sufficient "to warrant a finding of guilt," even where a judgment of guilt has been withheld.[51] Thus, defining "conviction" is entrusted to the findings of a single executive officer who is often not trained in the legal inquiry required, especially if the conviction happened in a foreign jurisdiction.[52]

The underlying conviction must be accompanied by "some form of punishment, penalty or restraint on the alien's liberty."[53] This definition negatively impacts a migrant's liberty interests—an impact which interacts with the broad definition of aggravated felony to create serious due process concerns because normatively it is a jury that adjudicates guilt or innocence.[54] Individuals subjected to § 238 removal are deprived of their liberty without the guarantee of an insulated Article III judge and jury determining whether they have been convicted of an aggravated felony.[55]

This observation becomes even more troubling in the context of the discretion of an ISO to also disregard "any suspension of the imposition or execution" of a sentence.[56] Judicial decisions, such as parole or good behavior release, suddenly become subject to review by an executive employee when they are making the determination as to whether or not to institute administrative removal proceedings.[57] The "sufficient evidence" determination of whether someone has been convicted—ostensibly the simplest piece of the puzzle—is therefore not only difficult because of the broadness of the term "conviction" in the § 238 context, but also because the ISO's determination is fraught with the probability of false positives due to the deep temporal reach of the inquiry and the changing nature of the "conviction" over time.[58]

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50. *Conviction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.").

51. 8 U.S.C. § 1101 (2019).

52. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV., INT'L MIGRATION REPORT 2019, U.N. Doc. ST/ESA/SER.A/438, at 53 (2019) (describing different trafficking violations); *cf.* DIV. MGMT. AUTH. U.S. FISH & WILDLIFE SERV. DEP'T INTERIOR, U.S. CITES IMPLEMENTATION REPORT 64–65 (Sept. 23, 2015), https://perma.cc/JQ6A-3ST4 (detailing new importation violations and instances of their enforcement).

53. 8 U.S.C. § 1101(a)(48)(A)(ii) (2019).

54. *See* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–9 (2014) (describing the lack of procedural safeguards in § 238 administrative removals); Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 846 (2020); ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 46–48 (2014), https://perma.cc/8NQE-7VA4.

55. *See infra* notes 147–49 and accompanying text.

56. 8 U.S.C. § 1101(a)(48)(B) (2019).

57. Wadhia, *supra* note 54, at 17–18.

58. *See* Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 541, 550 (2018) (recounting one removal order based on an officer's disbelief in the existence of the Republic of Uzbekistan); Elwyn Lopez, *Family Worries for Health of Military Veteran Detained by ICE During Coronavirus Pandemic*, 11ALIVE (Apr. 3, 2020, 4:03 PM), https://perma.cc/R3N2-6RFJ

2. *Aggravated Felonies Multiply in Response to Fear*

An administrative removal pursuant to § 238 is predicated on the danger supposedly posed by aggravated felons.[59] For an ISO to determine whether a migrant is susceptible to § 238 removal, the executive official must conduct a legal and factual analysis to decide if the migrant's "conviction" was for an aggravated felony.[60] To understand the logic of aggravated felonies, the first place one must turn is the Anti-Drug Abuse Act (ADAA) of 1988.[61] The ADAA provides for the detention and removal of migrants convicted of aggravated felonies and defines aggravated felonies as murder, drug or firearms trafficking, and conspiracy to commit those offenses.[62]

In April of 1996, AEDPA expanded this definition of aggravated felonies to include certain gambling offenses, transportation for the purposes of prostitution, alien smuggling, passport fraud, bribery, forgery, counterfeiting, vehicle trafficking, obstruction of justice, perjury, and failure to appear before a court.[63] Only six months later, Congress determined that the alterations to immigration laws passed in the wake of the Oklahoma City bombings were not sweeping enough to protect the United States from potentially "undesirable" migrants. Thus, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in an omnibus bill.[64]

IIRIRA added sexual abuse of a minor and rape to the list of aggravated felonies.[65] Though these crimes may be better candidates for aggravated felony status than failing to appear before a court, IIRIRA also reduced the sentencing requirements for many of the offenses included in the AEDPA to a single year.[66] The primary motivation behind these changes was to speed up deportation of individuals whom Congress deemed dangerous.[67] The

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(detailing how a veteran's twenty year-old armed robbery resulted in a "targeted enforcement action" on March 18, 2020).

59. 8 U.S.C. § 1101 (2019); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 9–11 (2015).

60. *Chapter 4 - Permanent Bars to Good Moral Character*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2021), https://perma.cc/7RD5-JUGS (listing 21 offenses classified as aggravated felonies). For the ways in which a finding of aggravated felony negatively impacted detainees during the COVID-19 pandemic, see Tatiana Sanchez, *Judge Orders Release of Oakland Man in ICE Detention During Coronavirus Outbreak*, S.F. CHRON. (Apr. 14, 2020, 7:35 PM), https://perma.cc/GE3L-4Z8M.

61. HERNÁNDEZ, *supra* note 59, at 11; Juliet Stumpf, *Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 383 (2006) (noting the merging of criminal and immigration law instigated by the ADAA and AEDPA); *see also* Deportation Nation, *Anti-Drug Abuse Act Re-Defines Aggravated Felony*, YOUTUBE (Dec. 15, 2010), https://perma.cc/A4XY-R4PF.

62. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); *see also* Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, U. CIN. L. REV. 923, 940 n.127 (2018).

63. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214.

64. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1997).

65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1997).

66. *Id.*

67. Amit Jain, *Bureaucrats in Robes: Immigration Judges and the Trappings of Courts*, 33 GEO. IMMIGR. L.J. 261, 263–66 (2019) (calling into question whether this "assembly-line" can truly be considered a court system); *see also* David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1207–16 (2016) (noting the problems with this acceleration).

appearance of an aggravated felony on a migrant's record serves as a proxy for their "incompatibility" with American society.[68] Once incompatibility is determined, a swift deportation means that person does not waste judicial resources by defending their rights in court.[69]

All told, the expansions to the definition of "aggravated felony" since the term was introduced to immigration law in 1988 are "breathtaking in scope,"[70] and include many state common law crimes.[71] Since 1996, arrests for immigration crimes have ballooned, doubling on three separate occasions between 1994 and 2008.[72] In 2010, immigration crimes composed nearly half of the arrests carried out by the United States Marshals Service as well as half of prosecutions at the federal level.[73] With such a large case volume, it is easy to see how the underlying conviction determination made by an ISO has become an intensely important aspect of the federal criminal system as a whole. Summary "findings" of conviction for one of these offenses are now a primary way in which this system is administered.[74] People caught up in this net are not an insignificant sliver of unimportant criminals; they are one of the largest populations against which the federal government exerts criminal control.

3. *Presumption of Deportability*

In theory, an ISO should also determine whether the migrant in question is, in fact, deportable.[75] In the context of § 238 administrative removal, this is an illusory protection. Subsection C of § 238 explicitly declares that "[a]n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."[76] A determination of deportability is the key logic behind detaining migrants, so that they can be removed.[77] The

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68. Jain, *supra* note 67, at 301–09 (documenting a rise in pressure to quickly conclude cases coinciding with political rhetoric about immigrants).

69. *Id.* at 305 (detailing how IJs are supposed to consider efficiency in their docket organization under the AG's orders); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1623 (2000) (describing how appellate jurisdiction stripping provisions of AEDPA and IIRIRA were enacted to prevent delays in effectuating deportation orders). Exceptions exist, such as when an asylee expresses fear of return. However, as explained below, the minimal judicial oversight of the DSO making this determination makes it impossible to guarantee that these exceptions are actually both understood and enforced. *See infra* notes 96–98.

70. Koh, *supra* note 14, at 270 (quotation omitted).

71. *See, e.g.*, FLA. STAT. § 775.082 (2019) (recognized as unconstitutional by Gaymon v. State, 288 So.3d 1087 (Fla. 2020)); OHIO REV. CODE ANN. § 2929.14 (West 2019) (indefinite prison terms provision); *see also* Lopez v. Gonzalez, 549 U.S. 47, 56 (2006) (rejecting the government's argument that a Federal misdemeanor, aiding and abetting another's possession of cocaine, is an aggravated felony by dint of its classification by South Dakota as a felony).

72. HERNÁNDEZ, *supra* note 59, at 11; *see* Shannon Dooling, *'They Fear that They're Going to Die Here'; ICE Detainees in Bristol County Speak Out on COVID-19 Concerns*, WBUR NEWS (Mar. 24, 2020, 5:54 PM), https://perma.cc/A8Q9-PHWV (recounting Congressman Joseph Kennedy's comments about releasing detainees without a criminal conviction, but not aggravated felons).

73. HERNÁNDEZ, *supra* note 59, at 11.

74. *See supra* notes 59–63 and accompanying text.

75. 8 C.F.R. § 238.1(b)(1)(iv) (2021).

76. 8 U.S.C. § 1228(c) (2019).

77. *See*, Demore v. Kim, 538 U.S. 510, 531 (2003) (Kennedy, J., concurring).

officials engaged in this analysis therefore have no discretion to make relief available, and the step of determining whether a migrant is deportable becomes an automatic conclusion, which again elevates expediency over individual rights.[78]

Congress has long remained free to determine which individuals to admit to the United States.[79] Nevertheless, a single executive officer's determination regarding risk of flight or danger to the community is not enough to warrant detention in the immigration context without the necessary next step of deportation because individuals may not be locked up indefinitely.[80] This is especially true as applied to possible citizens or asylum seekers.[81] Of course, detention is itself vulnerable to legitimacy critiques.[82] However, where deportability is conclusively presumed, an individual in the United States is denied even the most rudimentary features of an independent determination of their personal rights because they are subject to automatic detention.[83]

B. *The Procedures Employed*

The tangled history and ambiguity of aggravated felonies demonstrate the problem with § 238 allowing an executive official to determine the term's application to a given migrant.[84] In the expedited removal process, the

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78. *See generally* Jain, *supra* note 67, at 264 (detailing ideas for reform that could retain efficiency while also ensuring that immigrants receive a fairer day in court).

79. *See* U.S. CONST. art. I, § 8; *see, e.g.*, D. Carolina Núñez, *Dark Matter in the Law*, B.C. L. REV. 1555, 1566–70 (2021) (discussing the early cases that established the plenary power doctrine).

80. *See* Juliet Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 97–98 (2014). *Contra* Viana Santos v. McAleenan, 392 F. Supp. 3d 192, 194–95 (D. Mass. 2019) (denying writ of habeas corpus).

81. Stumpf, *supra* note 80, at 77 (describing the circumstances where an executive immigration official is actually stripped of discretion and must detain individuals suspected of being non-citizens).

82. *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANNUAL REV. L. & SOC. SCI. 97, 107 (2019); Angélica Chazáro, *The End of Deportation*, 68 UCLA L. REV. 1040, 1084, 1096–98 (2021) (employing Kanstroom's "extended border control" and "post entry social control" to critique the goals of deportation); *see also* Letter from ICE Detainees of Unit B (Mar. 23, 2020), https://perma.cc/8LDU-CAMR (describing the fears of fifty-seven individuals detained in a sixty-six bed facility during the Coronavirus pandemic).

83. Bridges v. Wixon, 326 U.S. 135, 154 (1945) (citations omitted) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."); Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (Brandeis, J.) (stating that deportation "may result also in loss of both property and life, or all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law."); Hong, *supra* note 58, at 565–67 (detailing both the profits of the private prison industry, including five more multi-million dollar contracts in 2017, and the illegitimacy of treating asylum seekers like deterrence propaganda); *see also* Manning & Hong, *supra* note 14, at 699 (describing several studies that show above 95% reduction in removal rates for migrants with legal representation during expedited removal proceedings); Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52. U.C. DAVIS L. REV. 407, 418 (describing the asymmetry of power in remote detention centers and how that asymmetry operates to subject unrepresented migrants to expedited removal); Alex Boon, Ben España, Lindsay Jonasson, Teresa Smith, Juliet P. Stumpf & Stephen W. Manning, *Divorcing Deportation: The Oregon Trail to Immigrant Inclusion*, 22 LEWIS & CLARK L. REV. 623, 642 (2018) (noting the negative impacts detention has on migrants and the high stakes of deportation); Stumpf, *supra* note 61, at 410 (describing the sovereign state's use of sanctions for moral condemnation and how that has bled over into the arena criminal migrant liability).

84. Torres v. Lynch, 136 S. Ct. 1619, 1638 (2016) (Sotomayor, J., dissenting) ("Looking for consistency in the aggravated felony provisions of the INA is often a fool's errand."); *cf.* Lenni B. Benson,

damage that IIRIRA and AEDPA did to the procedural and personal rights of migrants who are accused of having been convicted of an aggravated felony is quite severe.[85]

Finding an aggravated felony conviction has at least six distinct impacts on a migrant's status: (1) they will be ineligible to stop deportation; (2) they are unable to apply for other legal immigration status; (3) they are subjected to mandatory detention; (4) DHS can deport them "administratively," in the absence of a hearing by an immigration judge; (5) they are denied legal rights to request an appeal to a federal judge; and (6) they will be permanently ejected from the United States.[86]

Given these impacts, a 10-to-13-day rebuttal time to research and brief one's best case is simply insufficient. Compounded with the fact that the procedure is designed to be completed in a maximum of 53 days, administrative removals leave little room for migrants to prepare for a situation where "all that makes life worth living" could be at stake.[87]

One is tempted to breathe a sigh of relief at § 238(b)(3)'s stricture against executing an administrative removal before 14 days has passed in order to give the migrant time to apply for judicial review.[88] However, this judicial review is entirely circular, if not illusory.[89] Section 242 is the only avenue of relief available, by appeal to the court of appeals for the circuit in which the administrative removal is taking place.[90] Buried within § 242, and enacted by the AEDPA in 1996, is a jurisdictional bar against the review of final orders of removal entered against migrants who have "committed" a crime.[91] What this means, practically, is that the migrant can only rely on 10 to 13 days to seek judicial review after receiving Form I–851 "Notice of Intent" because it is only prior to the issuance of Form I–851A that the removal order is not final and thus barred by § 242(a)(2)(C).[92]

You Can't Get There from Here: Managing Judicial Review of Immigration Cases, 2007 U. CHI. LEGAL F. 405, 409 (2007) ("[T]he largest forces shaping enforcement are the actions and decisions of the enforcement agencies.").

85. Koh, *supra* note 46, at 349–50. *Compare Torres*, 136 S. Ct. at 1638 (Sotomayor, J., dissenting), *with Ng Fung Ho*, 259 U.S. at 276 (Brandeis, J.).

86. *Aggravated Felonies and Deportation*, TRAC REPS. (June 9, 2006), https://perma.cc/F57L-Y7QH.

87. *Ng Fung Ho*, 259 U.S. at 284; *see* Stumpf, *supra* note 61, at 413–18 (discussing the risks of a negative immigration decision).

88. 8 U.S.C. § 1228(b)(3) (2019).

89. Legomsky, *supra* note 69, at 1624 (listing the provisions that limit review, and the bar on review for criminal migrants subject to expedited removal); *see also* Medina, *supra* note 11, at 1542 (discussing other ways in which judicial review has been eliminated).

90. 8 U.S.C. § 1252(b)(2) (2019); *see* Petition for Writ of Certiorari at 3, Dept. of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 427 (2020) (No. 19-161) (discussing review process).

91. 8 U.S.C. § 1252(a)(2)(C) (2019) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony]."); *see* H.R. REP. NO. 104-518, at 66 (1996).

92. *See* 8 U.S.C. § 1228(b)(3) (2019) (providing that an alien has fourteen days to apply for judicial review before removal order is executed); 8 C.F.R. § 238.1(b)(2)(i) (2021) (allowing aliens ten days to contest charges underlying government's Notice of Intent); 8 U.S.C. § 1252(a)(2)(C) (2019) (eliminating judicial review over final removal orders against "criminal" removals); *see also* Ragbir v. Homan, 923

Moreover, the prohibition on the AG removing the migrant before 14 days has elapsed cannot provide adequate Article III review, even assuming it provides some judicial review at all, because Article III review is also likely barred by the exhaustion requirement contained in § 242(d)(1).[93] Judicial review of a § 238 administrative removal is therefore unavailable unless the DSO exercises their discretion to turn the removal over to an immigration judge or if the Final Order is withheld pending a reasonable fear interview.[94] Only the asylum process offers a migrant any chance of putting the brakes on the deportation mill that § 238 represents, but in the end, an aggravated felony is also a bar to asylum.[95]

In the § 238 context, discretion rests entirely with an executive agency official to determine the meaning of conviction, determine whether the conviction was under the Protean category of aggravated felony, and determine whether to turn the case over to an immigration judge.[96] These officials, and even the immigration judges themselves, operate under broadly entrenched biases in favor of deportation.[97] Other capable scholars and attorneys have challenged the systemic violation of personal rights at issue in both expedited and administrative removal proceedings.[98] However, the fact that the discretion to determine these rights lies with an executive official who does not even rise to the level of an administrative law judge poses serious separation of powers problems when this adjudication is seen as analogous to a legislative court.[99]

F.3d 53, 65 (2d Cir. 2019) (holding that the Congressional bar in § 1252(g) to judicial review even applies to constitutional claims), *vacated*, 141 S. Ct. 227 (2020) (mem).

93. 8 U.S.C. § 242(d)(1) (2019) (allowing review of final removal orders only after exhaustion of appeals to BIA).

94. *See* 8 C.F.R. § 208.31(e) (2021); 8 C.F.R. § 238.1(f)(3).

95. 8 U.S.C. § 1158(b)(2)(B)(i) (2019); *see* Hong, *supra* note 58, at 563 ("The end result then is an administrative structure that is effective in deporting people as quickly as possible, without regard to—and arguably designed to maximize—errors, mistakes, and wrongful deportations."); *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL 1 (2021), https://perma.cc/SK5S-QD52. *See generally* Las Americas Immigrant Advoc. Ctr. v. Trump, 475 F. Supp. 3d 1194 (D. Or. 2020) (detailing the prevalence of asylum-free zones, and top executive officials' involvement in perpetuating an attitude of hostility towards asylum seekers and their attorneys).

96. *See* Koh, *supra* note 46, at 349 (explaining that immigration officers carry out the § 238 expedited removal process from beginning to end).

97. *See generally* Tess Hellgren, Las Americas v. Biden, INNOVATION L. LAB (Mar. 27, 2020), https://perma.cc/9JY7-ENW6 (arguing that enforcement metrics, backlogs, and numerous policy decisions create a culture in favor of swift resolution by deportation).

98. *See, e.g.*, Manning & Hong, *supra* note 14, at 687–89 (describing the need for attorneys in expedited removal proceedings); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1137 (2002); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–43 (discussing the impact of prosecutorial enforcement decisions on criminal rights).

99. *See* Medina, *supra* note 11, at 1545; *but see* Berlanga v. Reno, 56 F. Supp. 2d 751 (S.D. Tex. 1999) (refusing a suspension clause challenge to IIRIRA, and thus avoiding IIRIRA's carve out of judicial power). *See generally What's an Aggravated Felony According to U.S. Immigration Law?*, NOLO, https://perma.cc/9P58-9T5M (last visited Sept. 21, 2022) (explaining that "[t]he difficulty with the term 'aggravated felony' is that it comes from federal law, yet must be applied to crimes that were most likely prosecuted under a state law, or even the law of another country.").

III. HISTORY OF LEGISLATIVE COURTS

To understand a legislative courts challenge to § 238, one must first confront the convoluted and tangled history of the legislative courts doctrine.[100] The doctrine both unfetters and limits Congressional control of the federal judiciary.[101] On the one hand, the legislative courts doctrine frees Congress from the separation of powers guarantees contained in Article III[102] in three semi-distinct areas: (1) territorial courts; (2) courts-martial; and (3) public rights cases.[103] On the other hand, the inverse of the third category sets an outer limit of Congressional power to delegate adjudication to a non-Article III tribunal: private or personal rights disputes.[104] The tension between public rights and personal rights makes the legislative courts doctrine difficult to work with. Indeed, one commentator in the 1990s declared that "the impression is strong that it is the subject [of legislative courts], not the [Supreme] Court, that has won" the ideological struggle to define the ambit of the legislative courts doctrine.[105] Nevertheless, these divisions remain the language used by the Court to this day.[106]

The legislative courts doctrine has its origins in Congress's attempt during the early nineteenth century to deal with property held by the United States in territory that is now Florida.[107] In the 1820s, 356 bales of cotton washed ashore from a shipwreck, one David Canter claimed the bales as salvage, and a court in Key West decreed him the *bona fide* purchaser.[108] Among the reasons for appeal in *American Insurance Co. v. 356 Bales of Cotton* was the question of whether the court in Key West, created by the territorial legislature of Florida, was competent to hear a salvage case, which is an admiralty law claim, and thereby could transfer property rights from the original owner to Canter.[109] The Supreme Court reasoned that Congress had vested the

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100. *See* Baude, *supra* note 29, at 1513 ("When it comes to the doctrine of so-called legislative courts, we are lost.").

101. For an introduction to the origins of the legislative courts doctrine, see generally Baude, *supra* note 29, at 1526–27.

102. U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their offices during good Behaviour . . . Compensation, which shall not be diminished during their Continuance in Office.").

103. *See* Baude, *supra* note 29, at 1542 (stating that "public rights" generally referred to forms of adjudication that did not deprive any people of their private rights to life, liberty, or property in the nineteenth century).

104. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69, 69 n.22 (1982) (citing Crowell v. Benson, 285 U.S. 22 (1932)) ("The distinction between public rights and private rights has not been definitively explained in our precedents.").

105. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 240 (1990).

106. *See* Ortiz v. United States, 138 S. Ct. 2165, 2185 (2018) (Thomas, J., concurring) ("The Founders' understanding of judicial power was heavily influenced by the well-known distinction between public rights and private rights.").

107. *N. Pipeline*, 458 U.S. at 64–65 (1982) (recognizing the territorial courts exception to Article III "dates from the earliest days of the Republic").

108. American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 515 (1828); *see also* United States v. Cuevas-Arredondo, No. 8:05CR325, 2008 WL 80127, at *4 (D. Neb. Jan. 4, 2008) (rejecting defendant's contention that U.S. district courts are not Article III courts).

109. *American Ins. Co.*, 26 U.S. at 539.

power of creating courts in the territorial legislature of Florida, and because the jurisdiction of the United States did not yet extend to Florida, Congress exercised the power of a state legislature there.[110] A state legislature is not constrained by Article III limitations, and is therefore free to create courts not subject to Article III's life tenure and fixed salary guarantees.[111] Outside the territory of the United States, Congress was free to create a "legislative court" competent of admiralty jurisdiction.[112] This analysis has remained relatively undisturbed ever since.[113]

Similarly, the principles underlying courts-martial were reaffirmed as recently as 2018 when the Supreme Court was confronted in *Ortiz v. United States* with the question of whether it was competent to hear an appeal from the United States Court of Appeals for the Armed Forces (CAAF).[114] The Court upheld the doctrine of legislative courts in this context for the reason that appeal could be had to the Supreme Court.[115] Moreover, for those in the military, history and precedent dictate that due process is a court-martial even where one is deprived of personal rights like liberty and property.[116]

Although territorial courts and courts-martial are relatively straight-forward exceptions to Article III, an entirely different analysis applies in other situations.[117] Generally, what occurs is Congress sets up a non-Article III tribunal, and then Article III courts must parse whether that tribunal deals with public rights and is therefore permissible, or rather falls into the personal rights category.[118] This analysis is complicated, convoluted, and tends to balance practical considerations as much as it accounts for principled structuralist approaches.[119]

Constitutionally, when Congress creates a substantive federal right, it is free to leave adjudication of that right in the hands of a legislative court or administrative agency.[120] Where review is available to an Article III court, legislative courts may adjudicate personal rights that are tightly bound up

110. *Id.* at 546.
111. *Id.*
112. *Id.*
113. Bator, *supra* note 105, at 236.
114. *See* Ortiz v. United States, 138 S. Ct. 2165, 2172–74 (2018) (upholding the constitutionality of the United States Court of Appeals for the Armed Forces).
115. *Id.* at 2170–71.
116. *Id.* at 2185 (Thomas, J., concurring).
117. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 951 (1988) ("As a historical matter, the public rights category has had shifting boundaries.").
118. *See* Bator, *supra* note 105, at 256–57 (critiquing Supreme Court jurisprudence on public rights as "ad hoc," "subjective," and "depending on its own sense of the competing institutional considerations").
119. Baude, *supra* note 29, at 1517–18 ("The Supreme Court has fallen short in both functionalist and formalist approaches.").
120. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81–82 (1982) (Brennan, J., plurality opinion) (rejecting the idea that "Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress.").

with the public rights at issue.[121] The Supreme Court has recognized that public rights of this kind are not necessarily subject to the protections of Article III, yet what counts as a public right remains ill defined.[122]

The public rights exception has had a long and tortured history which in part explains why the category is so poorly defined.[123] That history begins with public land claims,[124] but the seminal case in the area is *Murray's Lessee v. Hoboken Land* & Improvement Co.[125] In that case, a collector of customs issued a distress warrant against the plaintiff's property to recover on a government debt.[126] The plaintiff alleged that the warrant could not have been valid because the matter had been adjudicated by an executive official—the customs collector—rather than a life-tenured and salary insulated Article III judge.[127] This meant, the plaintiff contended, that he had been deprived of his property without due process of law.[128]

In considering this claim, the Court stated that "[i]t is manifest that it was not left to the legislative power to enact any process which might be devised."[129] Congress is constrained by the structural guarantees of the Constitution, and the Court looked to the text of the Constitution and historical practice to determine what processes Congress could enact that qualified as due process in conformity with the limitations set out in Article III.[130] In searching English legal history, the Court determined that there had always been summary procedures for the collection of public debts, and therefore Congress was well within Constitutional limits.[131] Yet, had Congress attempted to withdraw from judicial cognizance a suit within the traditional ambits of law or equity, on the other hand, the Court posited that the outcome would have been very different.[132]

On these generalizations, the unsteady bedrock of the modern administrative state was built.[133] A major issue that arose in the early twentieth century was what to do with tribunals that did not meet this historical test.[134] New categories of public rights cases evolved, including situations where the

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121. *See* Koh, *supra* note 46, at 348 (describing the benefits of judicial review in the immigration context).

122. *Compare N. Pipeline*, 458 U.S. at 67 (explaining that the public rights doctrine relies on the government's consent to be sued), *with* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856) (stating that public rights are a carve-out of nonjusticiable questions).

123. *See Murray's Lessee*, 59 U.S. at 284 (declining to locate a firm distinction between justiciable public rights cases and cases not subject to judicial determination); Crowell v. Benson, 285 U.S. 22, 50 (1932) (leaving the definition as "various matters, arising between the government and others").

124. *See generally* Foley v. Harrison, 56 U.S. 433 (1853) (adjudicating a dispute over public land).

125. 59 U.S. 272 (1856).

126. *See id.* at 275.

127. *Id.*

128. *See id.*

129. *Id.* at 276.

130. *Id.* at 277.

131. *Id.* at 285–86.

132. *Id.* at 284.

133. *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929).

134. Baude, *supra* note 29, at 1546 ("Oddly, the first Supreme Court "public rights" case, *Murray's Lessee* . . . may [have been] an exception that belongs in a different category . . . .").

government was a party or where the cause of action had been created by federal statute.[135] Across multiple pragmatic balancing tests, the problem of what to do when public rights become intrinsically tangled with personal rights persisted.[136] The situation called for judicial clarification.

In 2011, Chief Justice Roberts' plurality opinion in *Stern v. Marshall* held that Congress could not validly delegate the power to enter a final judgment on a state-law tort claim to a bankruptcy judge.[137] In doing so, Chief Justice Roberts followed another seminal plurality opinion from the 1980s which had rejected Congress's bankruptcy schema.[138] That case, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, rejected a broad grant of power by Congress to bankruptcy courts to hear all matters related to a Title 11 proceeding.[139] Although *Stern* recognized serious inconsistencies in the Court's legislative courts jurisprudence, including inconsistencies in *Northern Pipeline*, it declined to clarify the public rights exception.[140] Since it was enough that the claim at issue was a state court claim over which Congress exercised no power, that was the narrow ground on which the case was decided.[141]

After *Stern*, it still remained unclear how a legislative courts challenge should analyze adjudications that deal with a mixture of public rights issues and personal rights issues—as the decisions of ISOs and DSOs do in the § 238 context.[142] However, in 2015 the Supreme Court brought some clarity to the doctrine with *Wellness International Network, Ltd., v. Sharif*.[143] In *Wellness*, the Court upheld Congress's bankruptcy schema, and it clarified that the legislative courts inquiry proceeds in the form of a four-factor balancing test when a non-Article III tribunal is in the constitutionally questionable zone where public and personal rights are inseparably entangled.[144] A very important factor to weigh is the degree of control through *de novo* review

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135. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593–94 (1985); Crowell v. Benson, 285 U.S. 22, 50 (1932).

136. Baude, *supra* note 29, at 1547.

137. Stern v. Marshall, 564 U.S. 462, 503 (2011) ("Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress . . . exceeded that limitation in the Bankruptcy Act of 1984.").

138. *Id.* at 485.

139. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (Brennan, J., plurality opinion) ("We conclude that 28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of the essential attributes of judicial power from the Art. III district court, and has vested those attributes in a non-Art. III adjunct.").

140. *Stern*, 564 U.S at 494 ("We recognize that there may be instances in which the distinction between public and private rights . . . fails to provide concrete guidance . . . ."); *see also id.* at 468 (describing *Stern* as a "Bleak House" case).

141. *Id.* at 502–03 ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

142. *See* Baude, *supra* note 29, at 1518 (describing the continuing incoherency of a unifying principle in the Supreme Court's jurisprudence on public rights). For the overlap between public and personal rights, see *infra* notes 162–64 and accompanying text.

143. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 679 (2015).

144. *Id.* at 679–81 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

exercised by an Article III court over the non-Article III tribunal.[145] As one final unifying exception to explain anomalies in the public rights case law, the Court posited that where consent is knowingly and voluntarily given, litigants can waive Article III adjudication of their personal rights outside of the criminal context.[146] In light of the *Wellness* clarifications, it is time to analyze § 238's treatment of a migrant's rights because, at minimum, § 238 administrative removals ensnare private rights in determinations branded as involving public rights.

IV. EVEN IF IMMIGRATION COURTS COULD MEET THE REQUIREMENTS OF AN APPROPRIATE ARTICLE I COURT, AN AGENCY OFFICIAL DOES NOT

A legislative court is a tribunal that is not protected by the insulation from politics via life-tenure and salary security that are the hallmarks of Article III courts.[147] It is clear that Article III has never been interpreted to demand that all tribunals created by Congress are subject to its protections.[148] Nevertheless, even in the face of a veritable army of administrative agencies that do not conform to Article III requirements, the Supreme Court has not hesitated to strike down Congressional schemes to circumvent Article III protections in favor of efficiency.[149]

Immigration law, especially an immigration law that removes individuals already within the United States as § 238 does, cannot logically fall into either the territorial courts or courts-martial exceptions to Article III.[150] Yet, immigration presents an especially tough nut to crack in the legislative courts context because immigration is widely held out as a classic example of the public rights exception.[151] Therefore, the first contention that must be dealt with in a legislative courts challenge to § 238 is the plenary power

145. *Id.* at 681 ("So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.").

146. *Wellness*, 575 U.S. at 679; *see also* Baude, *supra* note 29, at 1556 (noting that consent proved decisive to *Wellness*'s 6–3 majority holding). *Contra Wellness*, 575 U.S. at 719 (Roberts, C.J., dissenting) ("Even if consent could lift the private-rights barrier to non-judicial Government action, it would not necessarily follow that consent removes the *Stern* adjudication from the core of . . . judicial power.").

147. U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour . . . Compensation, which shall not be diminished during their Continuance in Office."); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–58 (1982) (Brennan, J., plurality opinion) ("Basic to the constitutional structure established by the Framers was . . . [a] Federal Judiciary . . . designed by the Framers to stand independent of the Executive and Legislature . . . to guarantee that the process of adjudication itself remained impartial.").

148. DONALD L. DOERNBERG & EVAN TSEN LEE, FEDERAL COURTS: A CONTEMPORARY APPROACH 375 (5th ed. 2013).

149. *See, e.g.*, *N. Pipeline*, 458 U.S. at 64; Stern v. Marshall, 564 U.S. 462, 483 (2011) (quoting Montesquieu).

150. *But see* Bator, *supra* note 105, at 264 (arguing that there is such significant overlap between the branches that these formal distinctions do not retain coherency).

151. *Id.* (finding no issue with the fact that "[e]very time . . . the Immigration Service determines that Z is a deportable alien and issues an order to deport, an implicit adjudicatory process is going on"); *see* Crowell v. Benson, 285 U.S. 22, 88–89 (1932) (Brandeis, J., dissenting) ("[A]dministrative bodies [are concerned] with matters ordinarily outside of judicial competence, the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails—matters which are within the power of Congress to commit to conclusive executive determination.").

doctrine.[152] A full unpacking of the plenary power doctrine is beyond the scope of this Article.[153] However, a major thesis of the plenary power doctrine is that Congress's power to determine which non-citizens are admissible and removable is, to a degree, unreviewable and absolute.[154]

However, this simplistic view is significantly more circumscribed than it initially appears because the plenary power doctrine does not undermine structural constitutional principles.[155] Although Congress can decide who is and is not admissible, it is not free to dispense with the Constitution.[156] Furthermore, when the rights of criminal defendants are at issue, Congress may not erase due process, Sixth Amendment protections, or the First Amendment simply because the individuals in question are non-citizens.[157] To be sure, these rights are generally not applied to non-resident migrants and have received varying treatments by the Supreme Court.[158] However, § 238 usually applies after a migrant has arrived, and importantly, after the facts that would support a conviction of aggravated felony have supposedly occurred.[159] As such, these rights among others are theoretically worthy of being upheld. Normatively, a legislative courts analysis can therefore proceed beyond this basic hurdle.

A. *Section 238 Cannot Pass the Modern* Wellness *Test*

Congressional schemes in which constitutional rights are adjudicated violate separation of powers under the modern legislative courts doctrine unless there is meaningful review in an Article III court.[160] A legislative courts analysis follows the rubric laid out by Justice Sotomayor in *Wellness*.[161] The analysis proceeds, at an initial level, to a three part inquiry: (1) whether the court in question is entrusted with public rights adjudication only, or if it is (2) dealing with a mixture of public rights and personal rights to which parties may consent if Congress has delegated power to an Article I tribunal

152. Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 60 (2016).

153. The plenary power doctrine is discussed in slightly more depth *infra* notes 167–75 and accompanying text.

154. *See* Family, *supra* note 152, at 59–60.

155. *See id*. at 89 (arguing that, in the face of judicial and legislative inaction, "the executive branch should provide more process"); *see also* Núñez, *supra* note 79, at 1587 (emphasizing the uncertainties in the plenary power doctrine).

156. Family, *supra* note 152, at 61 (arguing that although "Congress has delegated discretion to the executive in enforcing immigration law," Congress is not the sole repository of immigration authority).

157. *See, e.g*., Padilla v. Kentucky, 550 U.S. 356, 368 (2010); Plyler v. Doe, 457 U.S. 202, 224–25 (1982); Viana Santos v. McAleenan, 392 F. Supp. 3d 192, 194 (D. Mass. 2019) (recognizing that § 1252(e)'s restrictions on habeas corpus violate the Suspension Clause); *see* Jain, *supra* note 67, at 323; Manning & Hong, *supra* note 14, at 675; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 610 (1990).

158. David Cole, *Are Foreign Nationals Entitled to the Same Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 369–70 (2003).

159. Wadhia, *supra* note 54, at 14–15 (describing the situation of "Eduardo" and his past misdemeanor).

160. *See* Baude, *supra* note 29, at 1514.

161. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 679 (2015).

entrusted with administering the public right, or if (3) the Article III problems are so severe that the Congressional scheme is unconstitutional.[162]

The analysis only continues if the Article I tribunal falls into the second category. The first category results in no separation of powers problems, even where the Congressional scheme is mandatory.[163] The third category results in a *per se* finding of unconstitutionality of the Congressional scheme, yet is reserved for murder trials, felony sentencing, and adjudication of constitutional violations.[164]

The largest hurdle in the way of a legislative courts challenge to § 238 is, therefore, the idea that the immigration context involves only public rights held in common by the body politic.[165] Casting a migrant's rights in immigration court as public rights requires one to assume that the only right at issue is the migrant's right to be present in the United States.[166] If that narrow view is adopted, a legislative courts challenge to § 238 fails. A possible reason for accepting this belief is Congress's Article I power to "establish an uniform Rule of Naturalization," which suggests that Congress has plenary authority to legislate in the immigration context.[167] However, public and judicial trust in the plenary power doctrine has eroded in recent years.[168] Indeed, given the danger that expedited administrative removal poses to core constitutional guarantees, including the First, Fourth, Fifth, and Sixth Amendments,[169] presence in the United States cannot be the only right at issue, and therefore plenary power does not shield § 238 from review.[170]

Moreover, complete deference to Congress's plenary authority is no longer reconcilable in the face of the "crimmigration crisis."[171] The crimmigration crisis derives from the crossover between immigration and criminal law and demonstrates that a multiplicity of constitutional rights are in play every time a purported criminal faces an immigration consequence.[172] The Fifth Amendment rights to due process and freedom from self-incrimination, the

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162. *Id.* at 678–79; Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847–49 (1986).

163. *Wellness Int'l*, 575 U.S. at 678–79; *see Schor*, 478 U.S. at 852–54 (explaining that separation of powers concerns are diminished in public rights disputes).

164. *See Wellness Int'l*, 575 U.S. at 700–02 (Roberts, C.J., dissenting).

165. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 562 (2007).

166. *See* Koh, *supra* note 46, at 349–51 (discussing consequences of this view and the waiver of this minimal right); *cf.* Nelson, *supra* note 165, at 564 n. 17 (casting immigration as a public right between people and the government).

167. U.S. CONST. art. I, § 8.

168. *See* Núñez, *supra* note 79, at 1589–90 (suggesting that the Supreme Court has grown increasingly uncomfortable with the racist lineage of the plenary power doctrine); Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1114–15 (2021) (noting the willingness of lower federal courts to vindicate the rights of immigration detainees).

169. *See, e.g.*, Stumpf, *supra* note 61, at 389–91; Koh, *supra* note 20; *Know Your Rights: 100 Mile Border Zone*, ACLU, https://perma.cc/3KCP-X2T7 (last visited Nov. 17, 2022).

170. *See* Holper, *supra* note 168, at 1079–1113 (describing how the presumption of freedom at times overcomes the plenary power doctrine).

171. Stumpf, *supra* note 61, at 390 (detailing the Fourth, Fifth, and Sixth Amendment rights at issue).

172. *Id.*

Sixth Amendment right to effective assistance of counsel, and the Fourth Amendment right to be free from unreasonable search and seizure are all implicated in the context of § 238 administrative removals.[173] Therefore, an individual migrant's personally-held rights *are* at issue, and not just the public rights of a group of people to be present within the United States.[174] To be sure, these personal rights are often strained, weakened shadows of themselves. Yet, it is § 238's explicitly criminal trigger—a conviction for an aggravated felony—that demonstrates just how deeply intermingled the public right of presence is with the personal rights of former or current criminal defendants in danger of expedited removal. If § 238 does not in fact fall into *Wellness*'s third category, which would result in a *per se* violation of separation of powers, then the analysis must proceed under the second category.[175]

In examining a congressional scheme that falls into the second *Wellness* category, Justice Sotomayor's majority opinion adopted a four-factor balancing test taken from Justice O'Connor's opinion in *Commodity Futures Trading Commission v. Schor*.[176] The *Schor* four-part balancing test weighs: (1) the extent to which essential Article III attributes are reserved to Article III courts; (2) the powers exercised by the non-Article III forum; (3) the importance and origins of the right to be adjudicated; and (4) the concerns that drove Congress to depart from Article III requirements.[177] Historically, the first three factors have been weighed more heavily than the fourth, with the first factor taking primacy.[178] Expediency, efficiency, and cost effectiveness typically do not weigh heavily on the scale against constitutional violations.[179]

1. *The Essential Attributes of Article III Courts are Impermissibly Stripped by § 238*

The measured adjudication of an individual's rights has no place in expedited removals, explicitly because the essential attributes of Article III, such as appellate review and case-by-case analysis, would defeat the expediency of removal and exclusion which Congress sought to enhance through § 238.[180] Furthermore, the executive official in question is not subject to any form of

173. Manning & Stumpf, *supra* note 83, at 422–30 (recognizing the interplay in the immigration system between the Fifth and Sixth Amendments).

174. Koh, *supra* note 46, at 360 (noting the private implications of an expedited or administrative removal).

175. Wellness Int'l Network, Ltd. v. Sharif, 557 U.S. 665, 675–76 (2015) (explaining that situations in which public and private rights are mixed, litigant consent can be established).

176. *Id*. at 678; *see also* Baude, *supra* note 29, at 1556.

177. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (laying out the four factors).

178. Stern v. Marshall, 564 U.S. 462, 501 (2011) (concluding that the exercise of Article III attributes weighs heavily against an acceptance of a Congressional bankruptcy scheme, no matter how expeditious it may be); *cf*. Richard H. Fallon, Jr., *Applying the Suspension Clause*, 98 COLUM. L. REV. 1068, 1071 (1998).

179. *Stern*, 564 U.S. at 501.

180. *See generally* Manning & Hong, *supra* note 14, at 676 (describing speed deportations and their concentration of power into the hands of a "structurally biased adjudicator whose decision is final and not subject to appeal").

review or oversight from an Article III judge because of the circularity in the judicial review process noted above.[181] In the absence of any review of the executive officer, Article III courts cannot retain their essential attributes in the context of a § 238 administrative removal.[182]

Deference is permissible in the Article I court context, but complete absence of review is an impermissible carve out of Article III power.[183] Without the ability for Article III judges to review administrative removals, no analysis of whether the deference owed to the executive official within the congressional scheme can even take place. Moreover, this unreviewable decision can involve questions of guilt, innocence, and mercy that are constitutionally entrusted to judges and juries.[184] Therefore, the first factor weighs heavily against § 238 because essential attributes of Article III power are stripped from the appellate courts where appeals from administrative removals would ostensibly take place and from district courts entrusted with determining the ramifications of criminal cases in the first place.

2. *Executive Officials Usurp an Unconstitutional Amount of Article III Power in the Context of § 238 Administrative Removals*

Article II officials are given almost unchecked authority to wield the power that Congress took away from Article III judges when it enacted § 238. The attributes of an Article III court exercised by an agency official are the ability to make findings of fact regarding a migrant's conviction, the ability to reach conclusions of law regarding whether that conviction was for an aggravated felony, and the ability to offer the only discretionary relief available in the § 238 context—a transfer to an immigration judge.[185] Where that determination cannot be challenged and is not susceptible to discretionary relief, Congress has exceeded its authority under the Nationality Clause and impermissibly interfered with the judiciary.[186]

Although the plenary power doctrine insulates congressional determinations about who can enter and remain in the United States, it does not enable Congress to circumvent constitutional allocations of power.[187] The ability of ISOs and DSOs to use Article III power as agents of executive social control demonstrates that § 238 carves out too much unfettered

181. *See supra* notes 64–67 and accompanying text.

182. *See generally* Wellness Int'l Network, Ltd. v. Sharif, 557 U.S. 665 (2015).

183. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845–46 (1986) (giving deference to the CFTC).

184. *See supra* note 55 and accompanying text.

185. *See supra* note 76 and accompanying text.

186. For the long history of keeping judicial review open, even in the face of legislative opposition, see Brief of Legal Historians as Amicus Curiae in Support of Respondent at 15, Dept. of Homeland Security v. Thuraissagiam, 140 S. Ct. 427 (2020) (No. 19–161) (citing *DuCastro's Case,* 92 Eng. Rep. 816 (1697)).

187. Holper, *supra* note 168, at 1113–17 (discussing the ways in which lower courts have upheld constitutional rights, even in the face of congressional aggrandizement of plenary immigration power).

adjudicatory discretion.[188] Even leaving aside the deprivation of due process more broadly, this vast delegation of Article III duties to determine fact and law can incorrectly unhinge a person's life.[189] In other words, under the auspices of § 238, CBP and ICE wield judicial power to selectively remove anyone from the United States in furtherance of Executive policy goals, media narrative, or personal animus, and there is little that the removed person can do to stop them.

In situations akin to bankruptcy, it is appropriate to create a specialized bench learned in a narrow area of law.[190] Under § 238, agency officials—many without the benefit of a law degree—are responsible for understanding and interpreting federal, local, and international criminal law, immigration law, and evolving case law.[191] Indeed, one scholar has estimated that perhaps over 4.25 million people have been denied the right to have their status determined by an impartial adjudicator.[192] Thus, and interrelatedly with the first factor, executive officials are entrusted with an unconstitutionally broad grant of Article III power. The second factor therefore also weighs against § 238.

3. *The Origins and Importance of an Individual's Right to Due Process, Access to Counsel, and Freedom from Unreasonable Seizure Cannot be Clearer*

Where the rights at issue in a legislative courts analysis derive from the Constitution, it is inappropriate to leave them to an adjudicator who is not protected by Article III from legislative or executive interference.[193] The argument on this factor must focus on the fact that § 238 removals implicate Fourth, Fifth, and Sixth Amendment concerns.[194] The ways in which these rights are impacted by § 238 has been discussed above, and the foundational

188. *Id.* at 1116 (discussing the role of detention decisions in this context); Jill E. Family, *An Invisible Border Wall and the Dangers of Internal Agency Control*, 25 LEWIS & CLARK L. REV. 71, 83 (2021) (describing how this discretion can be abused); *see also* Ruth Campbell, Matter of Negusie *and the Failure of Asylum Law to Recognize Child Soldiers*, 25 LEWIS & CLARK L. REV. 997, 998 (2021) (noting the AG's power to arrogate legal and factual determinations about asylum).

189. ACLU, *supra* note 54, at 67–68 (noting several instances of United States citizens being wrongfully placed in administrative removal proceedings, some after having been incorrectly determined to have been convicted of an aggravated felony).

190. *See* Stern v. Marshall, 564 U.S. 462, 489–90 (2011); Wellness Int'l Network, Ltd. v. Sharif, 557 U.S. 665, 668–71 (2015).

191. *See generally* Koh, *supra* note 14, at 262–95 (discussing the many adjudicatory decisions required in the interplay between criminal and immigration law); Stumpf, *supra* note 61, at 416–18 (relating the international layers of complexity in immigration law).

192. Hong, *supra* note 58, at 550; *see also* Baude, *supra* note 29, at 1557 ("Judicial power is necessary because the Due Process clause gives one a right to it.").

193. *Wellness*, 557 U.S. at 675–76.

194. *See* Manning & Hong, *supra* note 14, at 678–79 (outlining why there should be a Fifth Amendment right to counsel in expedited removal proceedings); Note, *The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 HARV. L. REV. 726, 727 (2018) (noting the danger of not even being able to tell an attorney when a hearing is occurring).

nature of these rights is beyond argument.[195] The Fourth Amendment provides that "the right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated."[196] The Fifth Amendment prohibits any person being "deprived of life, liberty, or property, without due process of law."[197] The Sixth Amendment, although it attaches only to criminal prosecutions, entitles the accused to "the Assistance of Counsel for his defense."[198] The origins of these rights are indisputable.[199] Precisely because of the summary nature of § 238 removals, the contours of these rights cannot be adequately dealt with by non-lawyers in the short timeframe provided for removal.

This third factor should weigh against § 238, but the administrative removals at issue are directed towards criminal migrants rather than citizens. However, due process attaches for migrants present in the United States, and, importantly, § 238 has the potential to grind United States citizens through its deportation mill.[200] Therefore, the third factor still weighs against § 238.

Constitutional rights are not the only rights at issue in a § 238 expedited removal. Other rights adjudicated in the abbreviated timeframe include family reunification, humanitarian protections, and numerous other rights.[201] Although the origins of these rights may be statutory, they are still important rights for individual non-citizens. Congress has the authority to shape statutory rights and the available remedies for the violation thereof.[202] As such, although the disrespect for these rights shown by § 238 is concerning, the strongest argument for advocates will be one that locates the origin and importance of the constitutional rights at issue. With this advocacy strategy in mind, the third *Wellness* factor cuts against § 238.

4. *Expediency does not Justify a Departure from Article III*

Congress created an inexpensive scheme to expedite the removal of certain individuals from the United States in § 238, but expediency and cost-cutting do not weigh heavily against constitutional rights, safeguards, and structural concerns.[203] However, the fourth *Wellness* factor considers the needs Congress expressed in enacting the various provisions that would come to be

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195. *See supra* Section II.3.B (discussing ways in which the procedures enacted by § 238 violate individual rights).

196. U.S. CONST. amend. IV.

197. *Id.* amend. V.

198. *Id.* amend. VI; Padilla v. Kentucky, 550 U.S. 356, 368 (2010). *But see* Immigration and Nationality Act, 8 U.S.C. § 1229a (2019) ("The alien shall have the privilege of being represented . . . .").

199. *Cf.* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

200. ACLU, *supra* note 54; U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-487, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER TRACK CASES INVOLVING U.S. CITIZENSHIP INVESTIGATIONS (2021).

201. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1101 (2019).

202. *See* Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1500 (2021) (noting that Congress can dictate the path to redressing the violation of a statutory right).

203. Stern v. Marshall, 564 U.S. 462, 501 (2011).

codified in § 238, demonstrating a preoccupation with public safety and the efficient removal of dangerous outsiders.[204]

No matter how illegitimate or pretextual this rationale might feel to advocates, especially in light of the historical context in which AEDPA was enacted,[205] the plenary power doctrine tips the fourth *Schor* factor in favor of § 238.[206] This is a significant issue which was articulated in the threshold analysis above, and which remains problematic for any challenge to immigration laws.[207] However, one of the primary rationales behind detention is the removal of dangerous people from the community.[208] With that in mind, even in terms of public safety, § 238 deviates further from Article III protections than is necessary to assuage Congress's concerns about migrants convicted of aggravated felonies.[209] Separation of powers may be inefficient, but cost-cutting is an insufficient reason to abandon the structure of our government.

On balance, the first three factors go against § 238 and ultimately outweigh the fourth factor's slight pressure in the other direction.[210] Especially when the adjudication of personal rights guaranteed to criminal defendants by the Bill of Rights is at issue, mere expediency does not weigh particularly heavily.[211] Section 238 could therefore fail a legislative courts challenge, especially if the Court used the opportunity to clarify just how principled it is willing to be regarding the structural safeguards of Article III.

B. *Section 238's Separation of Powers Violation Needs a Lawsuit*

The unification of judicial and executive power bequeathed to individuals who are neither appointed for life tenure nor insulated from their employer by a guaranteed salary exposes migrants and citizens caught in § 238's net to arbitrary control.[212] Separation of powers should be taken seriously in a society rocked by periodic changes in governmental leadership and the policy changes that accompany elections.[213] One advantage that life-tenured judges have is that they are not, at least in theory, directly responsive to a supervisor

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204. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214.

205. Koh, *supra* note 20, at 28–30 (discussing the truncated comment periods and public concern with terrorism).

206. Jain, *supra* note 67, at 269; Gerald L. Neuman, *Federal Courts Issues in Immigration Law,* 78 TEX. L. REV. 1661, 1662 (1999).

207. *See supra* text accompanying note 156; Núñez, *supra* note 79, at 1568 (discussing the anti-Asian racism that undergirds the plenary power doctrine).

208. HERNÁNDEZ, *supra* note 59, at 168 (identifying public safety and assurance of future appearance as the two primary reasons for detention).

209. *See supra* text accompanying note 62.

210. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 678–82 (2015) (weighing factors to be considered before finding a violation of Article III).

211. Stern v. Marshall, 564 U.S. 462, 501 (2011).

212. *See generally* Medina, *supra* note 11, at 1546 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 202 (1977)).

213. *See* Holper, *supra* note 168, at 1089–95 (illustrating the shifting rationales of immigration administration); Kim, *supra* note 14, at 29; Jennifer Lee Koh, *Anticipating Expansion, Committing to*

within one of the political branches.[214] This means that they are never confronted with a hard choice between their livelihoods and a fair adjudication of an individual's case.[215] The same is unfortunately not true of ISOs and DSOs.[216]

Lawsuits alleging that some aspect of the federal government cannot coexist with the textual structure founded by the Constitution are known as structural challenges. Structural challenges face an uphill battle due to the Court's hostility towards granting structural causes of action, a problem that is even more difficult in the immigration context given the plenary power trappings of immigration.[217] However, a legislative courts approach deserves a new chance, especially in light of *Wellness* and the serious structural defects of § 238 outlined above.

Various other uses of federal courts principles present themselves in the immigration law context. The difficulty is applying them to crimmigration, an often shadowy area of the law in which some structural protections apply, while others do not.[218] Chief among them are implied rights of action and the Suspension Clause, and further exploration is needed into how these doctrines surrounding legislative courts might play out in a landscape that appears increasingly hostile to nationwide injunctions.[219] Challenges to immigration law using historical understandings of these doctrines may play better with some constitutional originalists and textualists than flashier due process concerns.[220] Even if advocates cannot achieve the sweeping reforms they desire through this tactic, § 238—one of the most readily abused sections of the INA—is ripe for undermining by pointing out the ways in which Congress's desire to react to a crisis of the day caused it to fritter away

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Resistance: Removal in the Shadows of Immigration Court Under Trump, 43 OHIO N.U. L. REV. 459, 465 (2017).

214. Medina, *supra* note 11, at 1547.

215. Wadhia, *supra* note 54, at 5; Complaint at 37–52, Las Americas Immigrant Advoc. Ctr. v. Trump, No. 3:19-CV-2051 (D. Or. Dec. 18, 2019) (outlining ways that executive officials have pressured immigration courts into deciding cases in certain ways).

216. *Id*. at 2–4 (describing executive control of immigration officials and how it makes them susceptible to top-down anti-immigrant bias); *see also* Jain, *supra* note 67, at 300 (raising a similar point about immigration judges).

217. *See* United States v. Texas, 577 U.S. 1101 (2016) (mem.); Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326 (2015); Blumenthal v. Trump, 373 F. Supp. 3d 191 (D.D.C. 2019); *see also* Complaint, Grace v. Whitaker, No. 1:18-CV-01853 (D.D.C. Aug. 7, 2018); Núñez, *supra* note 79, at 1561 (noting the perseverance of the plenary power doctrine).

218. Stumpf, *supra* note 61, at 392.

219. Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (Sotomayor, J., dissenting) (arguing against the Supreme Court doing any favors for the executive branch). *But see* Egbert v. Boule, 142 S. Ct. 1793, 1807 (2022) (stating that there is no cause of action against CBP or ICE agents for violations of the First or Fourth Amendments); Hernandez v. Mesa, 885 F.3d 811, 815 (5th Cir. 2018) (denying Mexican parent's *Bivens* claim).

220. Robert Miller, *Equitable Mootness: Ignorance is Bliss and Unconstitutional*, 107 KY. L.J. 269, 297 (2018) ("[A]ppellate jurisdiction of courts of the Chancellor at common law and the district court under the 1800 Bankruptcy Act is similarly concomitant to the appellate jurisdiction of district courts.").

separation of powers principles.[221] There is a reason why the Framers placed the judicial power of the United States in neither Article I nor Article II.

V. CONCLUSION

After the enactment of AEDPA, non-citizens found to have been convicted of aggravated felonies were subjected to an almost complete deletion of their due process rights. The sole exception is where they claim relief through asylum channels, but even then, if an immigration judge finds that they have been convicted of an aggravated felony, they are barred from asylum relief. We have seen that administrative removal is easily weaponized to deter asylum seekers from even coming to the United States in the first place.[222] Section 238 is therefore one of the most important intersections between criminal and immigration law because it is so easily manipulated to serve deterrence goals, anti-asylum biases, or, more generally, whatever an administration views as a legitimate policy goal.

However, its own flexibility and use-value as an unreviewable deportation valve can be turned against § 238. By challenging those very features which make it effective at deporting people, advocates can highlight the ways in which § 238 unconstitutionally shifts judicial power to a pair of agency officials. The lack of judicial review, the power wielded by the agency officials in question, and the importance of safeguarding both citizens' and non-citizens' rights demonstrate why § 238 should fail a legislative courts analysis.

It may be that immigration judges are constitutionally sound Article I courts staffed by legitimately appointed adjudicators. That question is left for another day. However, § 238 administrative removals and the Article II employees tasked to perform them cannot make the same claim. In the absence of even a pretense of a judge, administrative removals should be consigned to the annals of history, a cautionary tale about mass panic and the caprices of a majority more concerned with security than rights.

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221. Medina, *supra* note 11, at 1562 ("The Article III branch with its constitutionally mandated independence serves to ensure that its exercise will be the result of reason and a deliberative process.").

222. *See* Emily R. Summers, *Prioritizing Failure: Using the 'Rocket Docket' Phenomenon to Describe Adult Detention*, 102 IOWA L. REV. 851, 871 (2017).