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Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases

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KEY TAKEAWAYS

Immigration law judges should have the ability to dismiss a case for failure to state a claim and the ability to render final adjudications at the pleading stage.

This would provide the immigration judiciary the ability to manage their dockets that their robed brothers and sisters have in other courts.

It would also help eliminate the backlog of cases and prune the docket going forward—a win for those whose cases have genuine merit.

Introduction

America is at a political inflection point with respect to immigration policy in the United States. Then-candidate Donald Trump ran, in part, on securing our Southern border by building a wall, and once elected President, touched off another national debate on immigration. From the travel ban,[1] to family separation policies,[2] to the surge at the border, to the clogged immigration courts, to the Administration's new merit-based immigration plan,[3] the issue of immigration has been a thorny topic.

This is, to some extent, to be expected, as immigration policy has been, more or less, a challenge for every United States President in the modern era.[4] Congress has legislated on the issue 238 times in the 20th century,[5] passing sweeping reforms to our nation's immigration laws in 1952, 1965, 1996, and 2012.[6]

In the past two decades, since the Simpson–Mazzoli Act of 1986,[7] major immigration policy issues have included how best to secure the border,[8] whether to grant amnesty for illegal aliens living in the United States,[9] birthright citizenship,[10] whether to keep the visa lottery, what to do about visa overstays,[11] chain migration,[12] the economic impact of lawful and illegal immigration,[13] whether states and businesses have a role in enforcing federal immigration law,[14] the impact of illegal immigration on crime,[15] the degree to which local law enforcement can or should cooperate with federal immigration authorities,[16] the benefits illegal immigrants should be entitled to,[17] and more.[18]

Some states have allowed illegal immigrants to have state driver's licenses.[19] They defend those laws arguing that since illegal immigrants will drive with or without a license, allowing them to have driver's licenses enhances public safety and increases state and federal revenue.[20] Despite a federal law that prohibits state colleges and universities from giving in-state tuition to illegal aliens (unless they offer in-state tuition to everyone), some states have defied federal law and offer in-state tuition to illegal immigrants.[21]

Today, over 170 cities and counties across the United States have passed sanctuary city laws that protect illegal immigrants from Immigration and Customs Enforcement (ICE).[22] California and seven other states are now sanctuary states, meaning that they prohibit local law enforcement from cooperating with ICE.[23] Some cities in those sanctuary states have pushed back, vowing to defy state law and cooperate with federal immigration authorities as they (and their state) had for decades.[24]

Yet, as our national immigration debate rages on, we remain an immigrant-friendly country, giving legal status to more foreigners every year than any other country.[25] The United States offers lawful permanent residency (LPR) to over a million people a year, even as the estimated number of illegal aliens in this country has climbed from 2 million in 1984[26] to 12 million in 2015.[27] The number of asylum claims has jumped from 48,321 in 2012 to 65,218 in 2018.[28]

Overseeing the adjudication of asylum and other immigration-related cases are federal immigration judges. Appointed by the Attorney General of the United States, immigration judges serve within the executive branch, and, unlike Article III federal judges, do not require Senate confirmation. Like state and federal judges, immigration judges sit in courtrooms, handle cases, rule on motions, and adjudicate the merits of cases. They, too, are required to follow Supreme Court and federal Circuit Court precedent.

But immigration judges lack the tools that all federal and most state judges have—that is, the ability to effectively and efficiently manage their

dockets. Immigration judges cannot dismiss a case for failure to state a claim, nor can they render a judgment on the pleadings, even in patently frivolous cases. As a result, the immigration court caseload has exploded in size, from no cases in 1984 to 260,000 in 2011—to a whopping 876,552 today.[29] Cases with merit, which deserve the court's time and attention, are lumped in with meritless cases, creating a chaotic and unmanageable docket. This inures to the benefit of those whose cases lack merit (as their cases drag on for years) and delays justice for those whose cases have merit.

Giving immigration law judges the ability to dismiss a case for failure to state a claim and the ability to render final adjudications at the pleading stage—like their robed brothers and sisters have in other courts—would provide the immigration judiciary with the ability to effectively and efficiently manage their dockets, help eliminate the backlog of cases, and prune the docket going forward.

Overview of the Immigration Courts

The immigration courts are part of the Department of Justice's Executive Office for Immigration Review (EOIR).[30] As such, they are part of the executive branch and do not fall under Article III of the Constitution. The EOIR oversees the immigration courts through the Office of the Chief Immigration Judge.[31] The EOIR also oversees the Board of Immigration Appeals (BIA), which hears appeals from the immigration courts.[32] Appeals of BIA decisions are taken up by the Federal Circuit Courts of Appeals, and appeals of their opinions can be made to the United States Supreme Court.[33]

The immigration courts have jurisdiction to determine removal and deportation, adjudicate asylum applications, adjust status, review credible fear determinations[34] made by the Department of Homeland Security, and conduct removal proceedings initiated by the Office of Special Investigation, among other related activities.[35]

Unlike the federal courts, the immigration courts do *not* have a flexible set of procedural rules designed to "secure the just, speedy, and inexpensive determination of every action and proceeding."[36] The Immigration Court Practice Manual is the closest analog, but it does little more than provide a set of standardized practices for a procedure that is strictly governed by regulations. Unlike the Federal Rules of Civil Procedure, the Practice Manual gives immigration judges almost no authority to independently manage a case.[37]

Crippled Courts: The Numbers

The immigration courts are inundated with more cases than they can effectively handle. In 1984, they had no case backlog, but by 2011 their backlog exceeded 260,000 cases.[38] Today, they are drowning under 876,552 pending cases.[39] Meanwhile, the average length of time that a migrant spends waiting for a final decision has more than doubled from 324 days in 1998 to 726 days in 2019.[40]

Despite the immigration courts' limited subject matter, their caseload far surpasses the caseload of all the federal district courts in the country. And yet, the number of federal district judges far surpasses the number of immigration judges. There are only 424 immigration judges managing the 876,552 pending immigration cases.[41] By comparison, 677 federal district judges manage 458,988 cases.[42] Put another way, the average immigration judge has 2,067 pending cases while the average federal district court judge (who also benefits from a staff of several full-time law clerks and the support of magistrate judges) has 678.

The majority of claims or defenses raised by migrants in the 876,552 pending immigration cases are not meritorious. In the second quarter of 2019, 68 percent of removal and deportation cases resulted in removal orders.[43] And, notably, 60 percent of asylum petitions were denied.[44]

Unfortunately, there is little the immigration judges can do to eliminate meritless cases early on in the process. Immigration judges are limited to two rulings for most cases: relief or removal, and these decisions are made only at the end of proceedings.[45] With few exceptions, an immigration judge cannot dispose of a meritless or procedurally defective case.[46]

This allows immigration judges no room to meet special circumstances with the flexibility that federal judges can. Additionally, the Department of Justice (DOJ) has never promulgated a regulation in the Immigration and Nationality Act that would give immigration judges control over a disorderly courtroom. Nor do they have a mechanism to dismiss meritless cases or summarily grant judgment based on stipulated facts or meritless pleadings like other courts. Immigration judges must hear cases from start to finish—regardless of whether or not a case has any legal merit. Predictably, the docket is clogged with meritless cases.

These failures are widespread and harmful to aliens and citizens alike. Aliens are not permitted a speedy trial in any reasonable sense of the word given the exorbitant number of pending cases. Another concern involves the large percentage of aliens who file for relief but support their application with meritless claims. Immigrants who file meritless claims prevent aliens who have legitimate cases from receiving speedy relief.

Attempts to mitigate the backlog of immigration cases include performance guidelines for immigration judges that were set in October 2018 by the EOIR and calling on Congress to hire more judges. These efforts, however, are not proportional to the immensity of the problem. This is not a problem that the DOJ can hire its way out of.

The Fix: Grant Immigration Courts Two Tools Common to the State and Federal Courts

It is a bedrock principle of civil litigation in both federal[47] and state courts that a plaintiff must plead a viable legal claim.[48] Not so in immigration court.[49] Whereas all state and federal courts have tools to dispose of meritless cases at the early stages of litigation, the immigration courts, with one minor exception (when an alien admits that he or she is subject to removal),[50] do not.

Federal and state court judges have two tools to dismiss meritless cases soon after they are filed: dismissal for failure to state a claim and judgment on the pleadings. These two tools ensure that legally deficient cases do not waste scarce judicial resources. These tools are not, however, available to immigration judges who must manage thousands of meritless cases from filing to final judgment.[51]

By contrast, federal judges are empowered by Federal Rule of Civil Procedure 12(b)(6) to dismiss claims that are inadequately pleaded or legally baseless.[52] The courts of all 50 states also have this authority.[53] To determine whether a claim is legally baseless, the court assumes that the facts alleged are true.[54] The court then considers whether those facts satisfy the elements of a viable claim. If the facts as pleaded do not give rise to a viable claim, then the court must dismiss the case.[55] Courts need not wait for a motion to dismiss a meritless claim, but in most cases, they must give the party whose claims are dismissed an opportunity to be heard.

The federal and all but three of the states' courts have another tool to eliminate meritless cases early in the judicial process: judgment on the pleadings.[56] Federal Rule of Civil Procedure 12(c) gives federal district courts the power to grant judgment to a party based solely on the pleadings. Typically, this tool is used when the parties agree on the underlying facts of a case but disagree about their legal effect.[57] Alternatively, as with a dismissal under 12(b)(6), a court may assume that the facts alleged are true and consider whether they give rise to a viable claim.[58] The court then applies the law to those facts to determine if a party is entitled to early judgment. Typically, a party must move for judgment on the pleadings before a

court can enter an early judgment, but one Circuit Court of Appeals permits district courts to grant judgment on the pleadings without a motion if one party is plainly assured of victory as a matter of law.[59]

Immigration judges lack both of these tools. That means that when a plainly meritless case comes before them, they have no choice but to retain it, manage it, hold hearings in it, and enter the inevitable judgment only after the judicial process is exhausted. The result is judicial gridlock. Meritorious cases stall behind a backlog of baseless ones.

Giving immigration courts these two tools—which are ubiquitous and unexceptional in federal and state courts—would help to alleviate the gridlock. Asylum petitions provide a clear example. The law precisely sets out the elements of a valid claim to asylum.[60] An applicant for asylum must demonstrate that he is unwilling to return to his home country because of persecution, or fear of persecution, on account of race, religion, nationality, membership in a particular social group, political opinion, or other special circumstances as the President may specify.[61] Nothing else provides a basis for asylum. Thus, if an applicant appears before an immigration judge and applies for asylum on the grounds that he fears gang violence in his home country, he is ineligible for asylum, unless the fear is based on a protected ground. Nevertheless, the immigration judge cannot deny asylum until the applicant has filled out the appropriate forms and had a hearing. The time and effort the judge must spend on that plainly meritless case is time the judge cannot spend on a potentially meritorious one.

The federal courts have long recognized that "judicial resources better spent on meritorious claims [are] wasted on frivolous ones."[62] It is time to give immigration courts the powers employed by the federal and state courts to prioritize meritorious cases and quickly dispose of meritless ones.

Implementation: Amendments to the Regulations Governing the Immigration Courts

To effect this change, the regulations should be amended to grant immigration judges the ability to dispose of petitions that do not rise to the pleading standards required by Federal Rules of Civil Procedure 12(b)(6) and 12(c). The proposed changes are set forth below; additions are italicized and removals are stricken through.

First, 8 C.F.R. § 1240.11(c)(1) should be amended as follows:

> (1) If the alien expresses fear of persecution or harm *on account of a protected statutory basis under section 208 of the Act* upon return to any of the

countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;

(ii) Make available the appropriate application forms; and

(iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

Additionally, 8 C.F.R § 1240.11(c)(3) should be amended as follows:

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute *unless the factual matter is accepted as true*. An evidentiary hearing extending beyond issues related to the basis for a ~~mandatory~~ denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

Furthermore, 8 C.F.R. § 1208.14 should be amended as follows:

(a) By an immigration judge. Unless otherwise prohibited in § 1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations. *An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face*.

~~(d) Applicability of § 103.2(b) of this chapter. No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter.~~

Lastly, 8 C.F.R. § 1240.12(b) should be amended as follows:

> (b) Summary decision. Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily, *factually, or legally* ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal. *An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.*

Conclusion

Giving immigration judges these tools is not a partisan or political act, it is a matter of fairness and common sense. If they had these common judicial management tools, immigration judges would be able to focus on cases of merit, dispose of meritless cases, and thus trim their dockets.

These proposals are also not unique; every federal district court judge in the country has these tools, as does nearly every state and local judge across the land.

The issue of how best to solve immigration policy in the United States is complex. Regardless of whether you endorse comprehensive immigration reform or a commonsense step-by-step approach, these tools are needed *now*. Furthermore, they can be put into place immediately if Congress decides to put aside partisan differences and focus on commonsense apolitical solutions to at least one aspect of immigration reform.

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Endnotes

1. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (the first travel ban); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (the second travel ban); Proclamation No. 9723, 83 Fed. Reg. 15,937 (commonly referred to as the third travel ban, this proclamation amended Order 13,780 to remove Sudan and add Chad, North Korea, and Venezuela to the list of restricted countries).
2. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018); Department of Homeland Security, Draft of *Policy Options to Respond to Border Surge of Illegal Immigration*, https://www.documentcloud.org/documents/5688664-Merkleydocs2.html, as reported by Julia Ainsley, *Trump admin weighed targeting migrant families, speeding up deportation of children*, NBC News, Jan. 17, 2019, https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811. Family separations were challenged in several lawsuits by the American Civil Liberties Union, a group of seventeen states, and individuals. *See, e.g.*, Alison Frankel, *ACLU, class counsel for migrant kids dispute DOJ on crucial Flores detention issue*, Reuters, June 25, 2018, https://www.reuters.com/article/us-otc-flores/aclu-class-counsel-for-migrant-kids-dispute-doj-on-crucial-flores-detention-issue-idUSKBN1JL2U3; Gene Johnson, *17 states sue to force Trump administration to reunite migrant families separated at border*, Associated Press, June 26, 2018, https://www.chicagotribune.com/nation-world/ct-states-lawsuit-family-separations-20180626-story.html; Josh Gerstein, *New lawsuit challenges Trump administration over family separation*, Politico, June 19, 2018, https://www.politico.com/story/2018/06/19/family-separation-trump-administration-lawsuit-654822.
3. The White House, President Trump's Bold Immigration Plan for the 21st Century, May 21, 2019, https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century. *See also* Kay Cole James, *et al.*, *An Agenda for American Immigration Reform*, Heritage Foundation Special Report No. 210 (Feb. 20, 2019), *available at* https://www.heritage.org/sites/default/files/2019-02/SR210_0.pdf.
4. For Franklin Delano Roosevelt, the issue was the internment of Japanese Americans. With Executive Order 9066, he gave the Secretary of War power to intern anyone he deemed a potential espionage threat. Exec. Order 9066, 7 Fed. Reg. 1,407 (Feb. 25, 1942). The Supreme Court upheld the order in *Korematsu v. United States*, 323 U.S. 214 (1944), but that opinion was repudiated in *dicta* in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018). Presidents Truman through Reagan contended with mounting domestic concern that illegal immigration was a threat to the U.S. job market. As a result, Congress passed a number of bills starting with the Immigration and Nationality Act of 1952 (called the McCarran–Walter Act), which established a system of preferences based on professional skills and family ties, and culminating in the Immigration Reform and Control Act of 1986 (called the Simpson–Mazzoli Act), which imposed penalties on American businesses for employing illegal immigrants. *See* USCIS History Office and Library, Overview of INS History, 2012, https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf. George H. W. Bush signed the Immigration Act of 1990, which, among other things, increased immigration quotas, provided family-based immigration visas, and created categories of occupation-based visas. *See* Warren R. Leiden, *et al.*, *Highlights of the U.S. Immigration Act of 1990*, 14 Fordham Int'l L.J. 328 (1990). Bill Clinton dealt with the fallout of the Mariel Boatlift and came to an agreement with the Cuban government that would come to be known as the "wet foot, dry foot policy." Justin Wm. Moyer, *The forgotten story of how refugees almost ended Bill Clinton's Career*, The Washington Post, Nov. 17, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/11/17/the-forgotten-story-of-how-refugees-almost-ended-bill-clintons-career; U.S. Department of State, Archive: Cuba, *Migration*, March 16, 2000, https://1997-2001.state.gov/regions/wha/cuba/migration.html. George W. Bush attempted, but failed, to secure the passage of the Comprehensive Immigration Reform Act of 2007. Donna Smith, *Senate kills Bush immigration reform bill*, Reuters, June 28, 2007, https://www.reuters.com/article/us-usa-immigration/senate-kills-bush-immigration-reform-bill-idUSN2742643820070629. Finally, Barack Obama implemented a policy of deferred action for childhood arrivals (DACA) and deferred action for parents of children born in the United States to illegal immigrants (DAPA), although the latter was enjoined by the courts. *See* Adam Liptak, *et al.*, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. Times, June 23, 2016, https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html.
5. *See* U.S. Citizenship and Immigration Services, Legislation from 1901–1940, https://www.nps.gov/elis/learn/education/upload/Legislation-1901-1940.pdf; U.S. Citizenship and Immigration Services, Legislation from 1941–1960, https://www.nps.gov/elis/learn/education/upload/Legislation-1941-1960.pdf; U.S. Citizenship and Immigration Services, Legislation from 1961–1980, https://www.nps.gov/elis/learn/education/upload/Legislation-1961-1980.pdf; U.S. Citizenship and Immigration Services, Legislation from 1981–1996; https://www.nps.gov/elis/learn/education/upload/Legislation-1981-1996.pdf.
6. These are just the major federal acts passed since 1900. There have been scores of amendments to each of these laws, notably including the 1990 Immigration Act, the INA Amendments, and the Immigration Reform and Control Act of 1986.
7. 8 U.S.C. 1101, the Immigration Reform and Control Act of 1986. *See also* Edwin Meese III, *I Recall the 1986 Immigration Act Rather Differently*, The Heritage Foundation, June 13, 2013, https://www.heritage.org/immigration/commentary/i-recall-the-1986-immigration-act-rather-differently.
8. See The Heritage Foundation, *Solutions 2018 The Policy Briefing Book: Border Security*, https://solutions.heritage.org/providing-for-a-strong-defense/border-security.
9. *See* David Inserra, *'Amnesty First' Breaks Faith with the American People*, The Heritage Foundation, May 24, 2018, https://www.heritage.org/immigration/commentary/amnesty-first-breaks-faith-the-american-people.
10. *See* Hans A. von Spakovsky, *Birthright Citizenship: A Fundamental Misunderstanding of the 14th Amendment*, The Heritage Foundation, Oct. 30, 2018, https://www.heritage.org/immigration/commentary/birthright-citizenship-fundamental-misunderstanding-the-14th-amendment; Amy Swearer, *The Citizenship Clause's Original Meaning and What it Means Today*, The Heritage Foundation Legal Memorandum No. 243, May 14, 2019, https://www.heritage.org/immigration/report/the-citizenship-clauses-original-meaning-and-what-it-means-today.

11. *See* Diem Nguyen, *et al.*, *Biometric Exit Programs Show Need for New Strategy to Reduce Visa Overstays*, The Heritage Foundation Backgrounder No. 2358, Jan. 25, 2010; https://www.heritage.org/homeland-security/report/biometric-exit-programs-show-need-new-strategy-reduce-visa-overstays.
12. *See* James Jay Carafano, *The Border Is in Disarray, but Change May Be Coming*, The Heritage Foundation, April 11, 2019, https://www.heritage.org/immigration/commentary/the-border-disarray-change-may-be-coming.
13. *See* Robert Rector, *et al.*, *The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer*, The Heritage Foundation Special Report No. 133, May 6, 2013, https://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer.
14. *See* Chamber of Commerce v. Whiting, 563 U.S. 582 (2011). *See also* Charles Stimson, *States Get a License to Enforce Immigration Laws*, The Heritage Foundation WebMemo No. 3342 Aug. 22, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/wm3342.pdf.
15. *See* Hans A. von Spakovsky, *Crimes by Illegal Aliens, Not Legal Immigrants, are the Real Problem*, The Heritage Foundation, June 4, 2017, https://www.heritage.org/immigration/commentary/crimes-illegal-aliens-not-legal-immigrants-are-the-real-problem.
16. *See* James Carafano, *Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement*, The Heritage Foundation Web Memo No. 1212, Sep. 14, 2006, https://www.heritage.org/immigration/report/build-section-287g-the-immigration-and-nationality-act-boost-state-and-local.
17. *See* Rector, *et al.*, *supra* note 13.
18. *See, e.g.*, James, *et al.*, *supra* note 3; Olivia Enos, *et al.*, *The U.S. Refugee Admissions Program: A Roadmap for Reform*, The Heritage Foundation Backgrounder No. 3212, July 5, 2017, https://www.heritage.org/sites/default/files/2017-07/BG3212.pdf; Charles Stimson, *et al.*, *States are Violating Federal Law to Benefit Illegals*, The Heritage Foundation, Nov. 30, 2011, https://www.heritage.org/immigration/commentary/states-are-violating-federal-law-benefit-illegals.
19. *See* Gilberto Mendoza, *States Offering Driver's Licenses to Immigrants*, National Conference of State Legislatures, Nov. 30, 2016, http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx (noting that twelve states and the District of Columbia allow illegal immigrants to obtain a driver's license); The American Civil Liberties Union of Northern California, *ACLU Supports Drivers Licenses for Immigrants, Urges Vigilance*, Oct. 3, 2013, https://www.aclunc.org/news/aclu-supports-drivers-licenses-immigrants-urges-vigilance.
20. After California passed a bill permitting illegal immigrants to obtain driver's licenses, Governor Edmund G. ("Jerry") Brown Jr. said, "[t]his bill will enable millions of people to get to work safely and legally. Hopefully, it will send a message to Washington that immigration reform is long past due." Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Issues Statement Following Passage of AB 60 (Sep. 12, 2013), https://www.ca.gov/archive/gov39/2013/09/12/news18203/index.html.
21. *See* Hans A. von Spakovsky, *et al.*, *Providing In-State College Tuition for Illegal Aliens: A Violation of Federal Law*, The Heritage Foundation Legal Memorandum No. 74, Nov. 22, 2011, http://thf_media.s3.amazonaws.com/2011/pdf/lm_0074.pdf.
22. *See* Center for Immigration Studies: Maps: Sanctuary Cities, Counties, and States by Bryan Griffith and Jessica M. Vaughan; April 16, 2019; https://cis.org/Map-Sanctuary-Cities-Counties-and-States.
23. *See* Center for Immigration Studies: Sanctuary Cities; Nov. 7, 2018; https://cis.org/Fact-Sheet/Sanctuary-Cities.
24. *See, e.g.*, Heather Knight, *et al.*, *S.F. scrambles to protect sanctuary city status*, San Francisco Chronicle, Nov. 20, 2016, https://www.sfchronicle.com/politics/article/S-F-scrambles-to-protect-sanctuary-city-status-10625669.php.
25. *See* Department of Homeland Security, Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2015 to 2017, https://www.dhs.gov/immigration-statistics/yearbook/2017/table6 (last visited June 10, 2019).
26. *See* ProCon.org, US Undocumented Immigrant Population Estimates, 1969-2016, https://immigration.procon.org/view.resource.php?resourceID=000844#1983.
27. *See* Department of Homeland Security Office of Immigration Statistics: Population Estimates, December 2018, https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf.
28. See U.S. Department of Justice Executive Office for Immigration Review Office of Planning, Analysis, and Technology's Immigration Courts Report: Asylum Statistics FY 2012–2016, https://www.justice.gov/eoir/file/asylum-statistics/download.
29. Executive Office for Immigration Review, Adjudication Statistics: Pending Cases (April 23, 2019), https://www.justice.gov/eoir/page/file/1060836/download.
30. Executive Office for Immigration Review, Immigration Court Practice Manual (2018), https://www.justice.gov/eoir/page/file/1084851/download.
31. *Id.*
32. *Id.*
33. Executive Office for Immigration Review, Board of Immigration Appeals Practice Manual (2018), https://www.justice.gov/eoir/page/file/1103051/download.
34. A credible fear determination requires the judge to determine whether an asylum applicant has a credible fear of persecution or torture upon returning to his or her home country. *See* 8 C.F.R. § 208.31.
35. Immigration Court Practice Manual, *supra note 30*.
36. *See* Fed. R. Civ. P. 1.

37. *See* Immigration Court Practice Manual, *supra note 30.*
38. *See* TRACImmigration Report 242, As FY 2010 Ends, Immigration Case Backlog Still Growing (Oct. 21, 2010), https://trac.syr.edu/immigration/reports/242/. Although the baffling growth in the case backlog can primarily be credited to the ineffective court system, prior to 2017 the Executive Office for Immigration Review (EOIR) unlawfully closed over 300,000 cases, which the Trump Administration added back into the backlog queue. TRACImmigration Report 536, Immigration Court Backlog Surpasses One Million Cases (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/.
39. Executive Office for Immigration Review, Adjudication Statistics: Pending Cases (April 23, 2019), https://www.justice.gov/eoir/page/file/1060836/download.
40. TRACImmigration, Immigration Court Backlog Tool (April, 2019), https://trac.syr.edu/phptools/immigration/court_backlog/.
41. Executive Office for Immigration Review, Adjudication Statistics: Immigration Judge Hiring (April, 2019), https://www.justice.gov/eoir/page/file/1104846/download.
42. United States Courts, Caseload Statistics Data Tables: U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics (March 31, 2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2019.pdf.
43. Executive Office for Immigration Review, Adjudication Statistics: FY 2019 Second Quarter Decision Outcomes (April 23, 2019), https://www.justice.gov/eoir/page/file/1105111/download.
44. *Id.*
45. Immigration Court Practice Manual, *supra note 30.*
46. *See, e.g.*, *id.* Chapter 3.1(d)(ii) (providing that if an application for relief is untimely, the alien's interest in that relief is deemed waived or abandoned).
47. Where this paper mentions "federal courts" and "federal judges" it refers exclusively to those courts established under Article III of the Constitution.
48. *See* Fed. R. Civ. P. 8; *see also infra* text accompanying note 53.
49. *See Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) ("In the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of those applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief.") (emphasis added).
50. *See* 8 C.F.R. §§ 1240.12(b), 1240.10(c). The authors note that there is an apparent drafting error in § 1240.12(b) in that it cross references to § 1240.10(b) when it plainly intended to cross reference to § 1240.10(c).
51. *See, e.g.*, 8 C.F.R. § 1240.11(c)(1) (providing that if an alien expresses any fear of harm upon returning to the country to which he or she might be removed, the immigration judge must provide the alien with an application for relief, grant a continuance on that application, hold a hearing on the merits, and issue a decision); *see also Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (although the immigration judge found that the alien was not entitled to asylum based on a general fear of the violence in Guatemala, the BIA ruled that the judge should have granted the alien a continuance to find a lawyer and then apply for relief from removal).
52. *See generally* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1356, 1357 (3d ed. 2019) [hereinafter Federal Practice and Procedure].
53. AL ST RCP Rule 12; Alaska R. Civ. P. 12 Ariz. R. Civ. P. 12; AR R RCP Rule 12; CA CIV PRO § 430.50; CO ST RCP Rule 12; CT ST § 52-91; DE R Super CT RCP Rule 12; FL ST RCP Rule 1.110; GA ST § 9-11-12; HI R RCP Rule 12; ID R RCP Rule 12; IL ST CH 735 § 5/2-615; IN ST Trial P Rule 12; IA R 1.421; KS ST 60-212; KY ST RCP Rule 12.02; LA C.C.P. Art. 927; ME R RCP Rule 12; MD R RCP CIR CT Rule 2-322; MA ST RCP Rule 12; MI R RCP MCR 2.116; MN ST RCP Rule 12.02; MS R RCP Rule 12; MO R RCP Rule 55.27; MT R RCP Rule 12; NE R PLDG § 6-1112; NV ST RCP Rule 12; NH R Super CT Civ Rule 9; NJ R Super Tax Surr CTS CIV R. 4:6-2; NM R Dist CT RCP Rule 1-012; NY CPLR Rule 3211; NC ST RCP § 1A-1, Rule 12; ND R RCP Rule 12; OH ST RCP Rule 12; OK ST T. 12 § 2012; OR R RCP ORCP 21; PA ST RCP Rule 1032; RI R RCP Rule 12; SC R RCP Rule 12; SD ST § 15-6-12(b); TN R RCP Rule 12.02; TX R RCP Rule 91a; UT R RCP Rule 12; VT R RCP Rule 12; VA ST § 8.01-273; WA R Super CT CIV CR 12; WV R RCP Rule 12; WI ST 802.06; WY R RCP Rule 12.
54. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).
55. *See, e.g.*, Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1365 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 F. App'x 769 (Fed. Cir. 2014); White v. Monohan, 326 Fed. Appx. 385, 386 (7th Cir. 2009); Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969 (9th Cir. 2008); Insomnia Inc. v. City of Memphis, Tennessee, 278 Fed. Appx. 609 (6th Cir. 2008); MM&S Financial, Inc. v. National Ass'n of Securities Dealers, Inc., 364 F.3d 908 (8th Cir. 2004).
56. Federal Practice and Procedure, *supra* note 51, § 1367; *See also* AL ST RCP Rule 12; Alaska R. Civ. P. 12; Ariz. R. Civ. P. 12; AR R RCP Rule 12; CA CIV PRO § 439; CO ST RCP Rule 12; DelVecchio v. DelVecchio, 146 Conn. 188, 148 A.2d 554 (Conn. 1959) (recognizing a motion for judgment on the pleadings even though Connecticut's rules do not provide for it); DE R Super CT RCP Rule 12; FL ST RCP Rule 1.140; GA ST § 9-11-12; HI R RCP Rule 12; ID R RCP Rule 12; IL ST CH 735 § 5/2-615; IN ST Trial P Rule 12; IA R 1.954; KS ST 60-212; KY ST RCP Rule 12.03; LA C.C.P. Art. 965; ME R RCP Rule 12; MA ST RCP Rule 12; MI R RCP MCR 2.116; MN ST RCP Rule 12.03; MS R RCP Rule 12; MO R RCP Rule 55.27; MT R RCP Rule 12; NE R PLDG § 6-1112; NV ST RCP Rule 12; NJ R Super Tax Surr CTS CIV R. 4:6-2; NM R Dist CT RCP Rule 1-012; NY CPLR Rule 3212; NC ST RCP § 1A-1, Rule 12; ND R RCP Rule 12; OH ST RCP Rule 12; OR R RCP ORCP 21; PA ST RCP Rule 1034; RI R RCP Rule 12; SC R RCP Rule 12; SD ST § 15-6-12(c); TN R RCP Rule 12.03; Pat H. Stanford, Inc. v. Franklin, 312 S.W.2d 703 (Tex. Civ. App. 1958) (recognizing a motion for judgment on the pleadings as a creation of the common law); UT R RCP Rule 12; VT R RCP Rule 12; Kelly v. Carrico, 256 Va. 282, 287, 504 S.E.2d 368, 371 (Va. 1998) (permitting a motion for judgment on the pleadings even though Virginia's rules do not provide for it where the opposing party did not object); WA R Super CT Civ CR 12; WV R RCP Rule 12; WI ST 802.06; WY R RCP Rule 12.

57. *Id.*
58. *Id.*
59. *See* Flora v. Home Fed. Sav. & Loan Ass'n, 685 F.2d 209 (7th Cir. 1982).
60. 8 U.S.C. § 1158(b)(1)(A) (limiting asylum to those who qualify as "refugees"); 8 U.S.C. § 1101 (defining "refugee").
61. 8 U.S.C. § 1101.
62. Smith v. State of S.C., 882 F.2d 895, 898 (4th Cir. 1989).