Cade, Jason A. *Welcome to the Trump Administration's Board of Immigration Appeals. The Immigrant Always Loses.* YALE LAW JOURNAL, 24-112 (September 25, 2026).

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My Summary

- Sophisticated aggregated analysis of first 100 BIA cases of Trump 2.0. (BIA's Volume 29) with an eye toward putting federal courts on notice of the administration's pattern of policy manipulation through the appellate process.

- Arsenal of arguments for federal petitions for review:
    - *Loper Bright* gives federal courts the opportunity to eschew deference and reexamine the BIA's fast and loose statutory interpretation that is *always* skewed against the immigrant.
    - The BIA's pattern of anti-immigrant, policy-based decisions means that they are not engaging in true appellate review, and their conclusions therefore lack persuasiveness.
    - Appealing to the BIA is a futile exercise with a predetermined outcome; therefore, the exhaustion requirement is no longer justified.
    - The BIA makes selective use of the criminal / civil distinction in whichever way most disadvantages the immigrant.

Notes & Quotes

Introduction

- "Read together, these precedents, which function as a rulebook for every American immigration court, reveal an unmistakable pattern. No matter what an immigrant suffered, no matter what Congress intended, no matter what the hearing-level judge found, the answer is removal." 25

- "This body of appellate precedents does not represent the case-by-case doctrinal evolution that administrative adjudication is supposed to produce. . . . [I]ts compressed pace, accelerated AG-designation, uniform outcomes, and overturning of multiple longstanding protective precedents mark Volume 29 as something different. It is a crucial component of the Trump Administration's systematic dismantling of the protections built into immigration law." 26

- "Part III argues that federal courts should read Volume 29 as the published minutes of a verdict reached in advance." 28

- "A body whose output has tripled, whose membership was purged and rebuilt for ideological alignment, and whose precedential decisions resolve over ninety-eight percent of questions in the same direction is entitled to very little persuasive weight." 29

- "The exhaustion doctrine's justifications also collapse when the administrative body to be exhausted has been engineered to foreordain a result." 29"Additionally the Board's selective deployment of the civil/criminal distinction, which invariably cuts against the noncitizen, is itself a doctrinal choice that post-*Loper Bright* courts should examine without deference." 29

I. The Anatomy of a Project

"A body of precedent that resolves every ambiguity in the same direction, across every doctrinal mechanism available, is not engaged in neutral statutory interpretation." 43

A. *Noncitizens Alleging Persecution*

1. Foreclosing Protection at the Threshold

- "The Administration's project of foreclosing protection includes new categorical rules that work to eliminate entire classes of asylum at the threshold—often reaching withholding and CAT claims as well—before any individualized review of whether a particular applicant faces persecution." 30
- For Example (*inter alia*):
  - ***Matter of S-S-F-M-*:** harm by private actors treated "as personal conduct lacking the required nexus to a protected ground." 31
  - ***Matter of Negusie*:** no more coercion-based duress exception for persecutor bar, 32
  - ***Matter of K-E-S-G-*:** "The Board has also aggressively foreclosed gender-based asylum claims at the threshold, before any individualized merits review." 33
    - "It appears that no realistic gender-based PSG formulation survives outside FGM contexts, and the Board has given IJs categorical authority to dismiss these formulations without engaging with each claim's specific facts." 35
  - ***Matter of D-G-E-A-*:** political opinion must relate to a government or de facto government—but "the Board constructed its de facto government test in a way that gangs cannot satisfy, even where the evidence demonstrates neighborhood control, taxation, regulation of worship, and lethal violence." 35
  - ***Matter of L-A-L-T-*:** "held that if the underlying PSG is not cognizable, then being perceived to be a member of that group is also not cognizable." (e.g., "gang member" vs. "perceived gang member") 35
  - ***Matter of H-A-A-V-*:** pretermission at the MCH stage 36
  - ***Matter of C-I-G-M- & L-V-S-G-*:** Third country ACAs (asylum cooperative agreements)—which IJs cannot independently assess for viability. 36

2. Impermissible Factfinding and the Evidentiary Hierarchy

- "When noncitizens do obtain merits review of asylum or CAT, a pattern of evidentiary manipulation and impermissible factfinding under cover of de novo review still leads to the Board's predetermined outcome: removal." 37
- For Example (*inter alia*):
  - ***Matter of J-H-M-H-*:** IJs are not bound by party stipulations, even when a government agency concedes that a noncitizen may face torture.
    - "That matters especially since the IJs in this Administration were selected to reach a particular result, and their efforts are now insulated from correction even by the government's own enforcement arm." 37
  - ***Matter of A-A-R-*:** establishes that conditions in El Salvador's state-of-exception prisons don't constitute torture because the officials didn't create the harsh conditions specifically to inflict pain and suffering. 37-38
  - ***Matter of S-S-*:** conditions in Haiti's prisons do not constitute torture, because the Haitian government didn't *intend* the substandard conditions to be punishment. 24, 38
    - These cases "set the specific-intent element so high that documented widespread suffering in state custody is considered ordinary penal

administration, not warranting protection, rather than torture, which does warrant protection." 38
    - "Indeed, the effect is to reclassify acts the Convention recognized as torture as lawful and ordinary deterrence, sanctions, or criminal-law operations." 38
- **Evidentiary hierarchy** = Re. *A-A-R-*: DOS reports are considered more probative than NGOs and expert witnesses, "which are often the only independent sources of country conditions information, are discounted as biased, anecdotal, or insufficiently individualized, while DOS reports, whose content and emphasis are more directly susceptible to executive-branch influence, are elevated as the preferred evidentiary baseline when they support denial of relief." 39
    - "An IJ who follows *A-A-R-*'s instruction to treat DOS reports as the preferred evidentiary baseline is now relying on a document the Administration has shaped to reach the conclusion it wants." 39
    - "Across Volume 29 decisions, the Board defines "sufficient" evidence depending on whether it helps or hurts the noncitizen's claim." 40
    - "Every IJ who follows *A-A-R-*'s hierarchy will elevate DOS reports and discount both NGO evidence and expert testimony regardless of what those sources actually document; every IJ who follows the standard applied in *D-G-B-L-* will have authority to recharacterize credited testimony as 'vague' to reach a preferred result." 41

3. Country Conditions and the Jurisprudence of Survival

- "These cases reveal a Board that systematically converts the circumstances of a noncitizen's survival into evidence against their claim of enduring risk." 41
- For Example (*inter alia*):
    - Internal relocation: ***Matter of F-B-A-*:** "Because Russia is a large country, because the respondent is now a member of the majority religion, and because her family had not threatened her in the two years since she fled, the Board found the IJ's relocation finding 'clearly erroneous.'" 42
    - Threats: ***Matter of E-M-F-S-*:** only rise to the level of persecution if the person could *immediately* carry them out. 42
    - Similarly-situated Individuals: ***Matter of C-I-R-H- & H-S-V-R-*:** ". . . even substantial, documented evidence of harm to similarly situated people, or to the respondent's own family members, will not establish the individualized risk required for relief." 42-43
- "In each instance, the Board treats the fact that the applicant has not yet been killed—because a threat went unexecuted or because it was relatives, not the applicant, who were harmed—as a reason to doubt the danger." 43
- " . . . the Board converts a respondent's ability to evade persecution temporarily—and even their ability to depart the country at all—into dispositive evidence against their claim." 43
- "Together, these cases establish an emerging jurisprudence of survival: a respondent who managed to survive for a period of time in their home country after being threatened and who was able to depart has, by those very facts, undermined the legitimacy of their fear." 43

B. *Detention and Bond*

"The detention precedents in Volume 29 collectively aim to eliminate the individualized inquiry that the immigrant bond system was designed to provide." 48

1. Mandatory Detention and the Elimination of Bond Hearings

- Rehearsal of reversal of practice re. EWI bond applicants. 44-46

2. Raising the Bar for Release

- "The Board has lowered the bar for mandatory detention and, for those who do have access to a bond hearing, simultaneously raised the bar for release." 46
- "The message across the Board's precedential bond decisions in Volume 29 is that IJs who find a respondent safe for release should not expect deference on administrative appeal." 47
- ". . . in Volume 29, the Board uses de novo review of [IJs'] discretion as a one-way ratchet." 47
- Re. the BIA's use of state-court judgments: ***Matter of Choc-Tut*:** "The practical effect is that a noncitizen released on bail by a criminal court may still be held without bond, on the basis of arrests alone, as the result of an IJ applying a less favorable standard." 47
  - "The decision exemplifies a recurring pattern: state-court determinations can cut both ways, but the Board treats them as authoritative only when they work against the noncitizen." 47-48

C. *The Removal Consequences of Criminal History and Related Grounds*

"The through line of these decisions is that wherever prior law offered any ambiguity or room for mercy in how criminal convictions should be treated by the immigration system, the Board has resolved that ambiguity against the noncitizen." 48

1. Discretionary Relief and the One-Way Ratchet

- "Other Volume 29 cancellation of removal denials follow a similar pattern [to *Matter of Kim*], in which the IJ weighs the full record, credits positive equities, and grants relief; the Board reweighs on de novo review and finds the equities insufficient." 49

2. Ambiguity Always Resolved Against the Noncitizen

- Discussion of burden allocation 50-52
- "State court processes provide the predicate for the removal system, but their outputs are credited selectively, deferred to when they condemn and discounted when they exonerate or mitigate." 53

3. The Misrepresentation Ratchet

"The charge [of fraud] creates the liability; the same conduct then defeats the only mechanism Congress provided to forgive it [i.e., the fraud waiver]. No matter how minor the omission and whatever the equities, this Board's precedents preclude waiver-based relief." 56

- Re. fraud-based removability 53-56
- "In Volume 29, the conduct that triggers fraud-based removability is defined more broadly than before, the statutory mechanism for forgiveness has been foreclosed for a large class of LPRs, and the discretionary residual—for those who retain access to it—is structured so that the very conduct creating the liability defeats the only available cure." 54
- ***Matter of Forjoe***: "restructured the fraud waiver through statutory reinterpretation." 54
  - Can't access the fraud waiver unless you're doing it "at the time of admission," which is reread to mean "entering the country on a visa."

- "The practical reach of this decision is substantial because the majority of LPRs obtained their status through interior adjustment rather than consular admission. *Forjoe* eliminated the fraud waiver for all of them, regardless of equities, when the misrepresentation occurred at the adjustment stage." 54

- ***Matter of M-K-*:** re. the answer you give to the question about "membership in any organizations" – this is the Mahmoud Khalil case, where he was faulted for omitting a 6-month internship with UN Relief and Works Agency.
  - "This standard goes beyond Khalil's case. The form's question reaches any organization, association, club, or similar group anywhere in the world; any noncitizen who has worked, interned, or volunteered with any such group without disclosing it faces exposure." 55-56

D. *Narrowing Hardship, Weaponizing Delay*

- 42B Cancellation of removal – raising of exceptional and extremely unusual hardship standard 56-59
- ***Matter of Buri Mora*:** "The Board reversed the IJ's grant of relief on de novo review, holding that the economic detriment the family was experiencing was 'a common feature of a parent departing the United States' and that emotional hardship from family separation does not meet the standard for requisite hardship." 57
- ***Matter of Pelagio Mendoza*:** "The Board reversed, holding that a qualifying relative's testimony about his mental-health conditions—including suicidal ideation—is generally insufficient to establish exceptional hardship where expert evidence regarding those mental-health conditions 'could reasonably have been produced.'" 57
- ***Matter of Arevalo-Vargas*:** QR ages out because BIA delayed 6 years and 7 months in its decision on the government's appeal. Discussion of relevant (and manipulated) precedent: 58-59
  - "The extension of precedent here goes beyond the stated terms of the cases cited, ignores their limiting language, and borrows a pro-noncitizen doctrine for an anti-noncitizen end. Ultimately, it rewards six years of institutional failure by the Board and punishes the person that the failure harmed." 58

- "Bureaucratic delay has long served as a structural mechanism of state control over immigrant populations. What Elizabeth F. Cohen has called the 'political value of time'—the deployment of temporal requirements as instruments of state power rather than neutral administrative necessity—finds salient illumination in a case where an adjudicative body's six-year delay is transformed by that same body into an affirmative legal basis for denial. When institutional delay systematically produces adverse outcomes, the delay is not incidental to the system but constitutive of it." 58-59 (see fn.210 for reference)

- "The Board did not simply make a legal error in *Arevalo-Vargas*. It converted its own failure to act into a legally operative fact, and one that extinguished relief already granted by a factfinder who had evaluated the claim on its own merits." 59

- "The asymmetry is rhetorical as well as doctrinal: when the government benefits from time, delay is treated as routine administrative function; when noncitizens benefit from time—aging into eligibility, accumulating equities, or developing rehabilitative records—that benefit is often recharacterized as exploitation or as obstruction." 59

E. *Procedural Foreclosure*

- Foreclosure of procedural avenues Congress created "to allow vulnerable noncitizens on statutory pathways to legal status to defer removal while their claims are resolved by USCIS" 59
- New rules governing removal proceedings, involving e.g. notice, in absentia orders, motions practice, access to fee waivers for BIA. 59
- "Taken together, the two clusters of precedents ensure that no procedural tool allows time, discretion, or administrative-error correction to work in the noncitizen's favor." 59

1. Statutory Pathways to Status

- "Thirteen of these precedents address what happens when a noncitizen qualifies for a congressionally created immigration benefit but cannot yet access it because of visa-queue backlogs or agency delay. The Board's answer is consistent: no procedural tool should let them remain in removal proceedings while they wait." 59-60
- ***Matter of Ibarra-Vega*:** ends admin closure over government's objection because U visa was not available "in the reasonably near future." 60
- ***Matter of Cahuec Tzalam*:** admin closure inappropriate for prima facie SIJS applicant
- ***Matter of Pinzon Rozo*:** continuance not warranted for approved SIJS applicant waiting for a visa number.
  - "The harshness of that rule is sharpened by the fact that the Trump Administration has also eliminated routine deferred action for approved SIJS beneficiaries, removing the informal protection that previously provided a measure of interim security." 61-62
- ***Matter of Medina Madrid*:** BIA characterized 13 years of admin closure as amnesty and refused to allow more while she waited for consular processing. "At the precise moment when Ms. Medina Madrid had neared the front of the visa line and was close to resolving her case 'the right way,' the Board handed DHS the keys to restart her removal proceedings." 62
- "The BIA has decreed that no pending immigration-benefit application justifies pausing or reopening removal proceedings." 63
- "The Board is not merely interpreting the statute narrowly. It is recharacterizing the humanitarian commitments made by Congress as amnesty, while the Administration simultaneously strips away the informal protections that had filled the gaps." 63

2. The Rules of the Courtroom

"Together with the procedural rules described in Part II, these precedents make the path from immigration court to meaningful federal review expensive, treacherous, and stacked against the noncitizen." 65

- "Every procedural mechanism that could slow down a removal proceeding, preserve a noncitizen's options, or create space for error correction has been tightened or eliminated." 63
- ***Matter of Arana Castillo / Matter of Bolivar-Bolivar / Matter of Laurent Castro:*** all dealing with one party or another not appearing 63-64
- ***Matter of Garcia Martinez*:** "making fee waivers effectively unavailable to a large portion of represented respondents, regardless of respondents' potential indigent status." 65

II. Towards a Procedural Architecture of Futility

- Current BIA appeal practice & proposed rules narrowing appeals even further: 65-67
- "Briefing schedules are now simultaneous for all appeals, meaning that when DHS appeals a decision favorable to the noncitizen, the noncitizen has no opportunity to respond directly to the government's arguments." 66
- "If the Trump Administration is successful, the fee wall, simultaneous-briefing requirement, and summary-dismissal default will together ensure that the appellate process functions not as a check on the system Part I describes, but as its capstone—the final procedural guarantee that the immigrant loses." 67

III. Reading the Blueprint

- "The body of Volume 29 decisions analyzed in Part 1 and the revisions to the BIA's procedural architecture described in Part II constitute a coordinated conversion of an adjudicative system nominally committed to individualized review into one engineered to produce a predetermined result." 67

- "Considered together, this body of administrative work, which continues to grow every week, cannot be reasonably understood as applying statutory law with fairness and fidelity." 68

- IMPLICATIONS:
  - "First, because *Loper Bright* now requires courts to review the Board's statutory interpretations de novo, and because Volume 29's institutional condition forfeits any persuasive weight its decisions might otherwise command, courts should independently reject the statutory readings this Essay documents rather than defer to them." 68

  - "Second, because the exhaustion doctrine presupposes an agency capable of meaningful self-correction, courts should hesitate to enforce it rigidly against a Board whose decisions reflect prejudgment rather than adjudication." 68

  - "Third, the Board's selective invocation of the 'civil' character of removal—deployed to justify outcomes that would be impermissible in any criminal proceeding—warrants closer scrutiny than it has received." 68

A. *Loper Bright* and the Case for Independent Review

- "Many of the Board's most consequential rulings turn on statutory interpretation questions that were previously insulated from rigorous judicial review by deference doctrines." 69

- "Under *Loper Bright*, these decisions now present pure questions of law for courts to decide using the traditional tools of statutory construction and interpretation. These tools include the longstanding rule of lenity—or strict construction of removal statutes in favor of the noncitizen—whose role in resolving ambiguity is strengthened now that the competing gravitational pull of agency deference has been removed." 69

- "The BIA's decisions in Volume 29 fly in the face of congressional intent in designing the modern immigration system." 70

- "While agencies have leeway to develop doctrine through adjudication, Volume 29's features—its pace, uniformity, outsized AG role, and simultaneous overruling of

multiple longstanding protective precedents—mark a project rather than ordinary doctrinal evolution." 70

- "The Board manipulates precedent-management doctrine in whichever direction removes the noncitizen. . ." 71

- "Volume 29 has transformed *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006), into a wide-ranging tool for displacing IJ findings anchored in record evidence, treating any inferential step from country conditions or expert evidence as impermissible speculation." 75 n.303 (with list)

- On retroactivity of Vol. 29: ". . . noncitizens who structured their claims or pleas in reliance on prior law—for example, asylum applicants who formulated PSG claims under standards the Board has now categorically foreclosed—should press retroactivity arguments on appeal." 76

- "Immigration policymaking through adjudication raises serious separation-of-powers concerns, because Congress alone is afforded responsibility for defining the outer limits of a system imposing consequences as harsh as detention and removal." 76

- "Mary Hoopes has argued that judicial scrutiny should be calibrated to evidence of a compromised adjudicative system, with deference responsive to agency quality rather than oblivious to it." 77 (n.312 for reference)
  - IOW, if the appellate body is not adjudicating fairly, applying "institutional expertise, careful record development, accurate factfinding, [and] insulation from political direction," then the appellate body should be afforded a higher level of judicial scrutiny rather than deference.

  - "An adjudicative system exhibiting precisely the pathologies that justify robust judicial oversight is the worst possible candidate for exceptionalist treatment in the other direction. The result-driven determinations and lack of analytical care that characterize Volume 29 must be taken into account when considering whether to afford the BIA any deference." 77

B. Reconsidering Exhaustion

- "The exhaustion doctrine serves legitimate interests in the ordinary case. But those justifications rest on an assumption that the administrative process is capable of providing meaningful adjudication—that the agency will 'have an opportunity to correct its own errors,' 'afford the parties and the courts the benefit of its experience and expertise,' and 'compile a record which is adequate for judicial review.'" 77-78 (n.314 references *Weinberger v. Salvi*, 422 U.S. 749, 765 (1975) (on exhaustion))

- "In these circumstances, federal courts should reconsider whether strict exhaustion requirements continue to serve their intended purposes." 78

- "Exhaustion may be excused where an agency has 'predetermined' an issue such that resort to it would be futile." 78 (n.317 references *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (for the futility of exhaustion))

C. The Civil/Criminal Asymmetry 79-81

- Selective use of & reinterpretation of state and federal criminal statutes in the immigration context, always to the detriment of the noncitizen.
- Re. *Padilla*: "A safe plea today may not be a safe plea tomorrow." 80
  - Reliance interest in *Padilla* may provide an argument if BIA changes things up.
- "This selectivity complements a parallel asymmetry documented at the enforcement level, where the civil classification enables system actors to disclaim criminal-court outcomes that benefit noncitizens while freely importing criminal investigative tools to accomplish deportation ends." 81

Conclusion

- **"The task that remains belongs to the federal courts; armed with the independent-review command of *Loper Bright*, unbound by the deference that once shielded these interpretations, and now on notice of the pattern, they should withhold the deference Volume 29 forfeits and review its decisions for what the record shows them to be—a project, not a jurisprudence—before that project hardens into the new baseline of immigration law." 82**