AN INVISIBLE BORDER WALL AND THE DANGERS OF INTERNAL AGENCY CONTROL

by
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Administrative law has long struggled to determine the appropriate balance between internal and external control over federal agencies. Some scholars posit that internal agency controls (those from within the executive branch) are optimal checks on agency behavior. In fact, some argue that external control (from Congress or the courts) is detrimental to agency governance. This Article presents a cautionary tale for those who discount the role of external control; it depicts a case study that poses a major challenge to those who theorize that internal agency controls are a sufficient check on agency behavior.

This case study analyzes the Trump administration's invisible border wall. By building an invisible border wall, the Trump administration reduced the amount of legal immigration to the United States in the absence of statutory change. The wall was invisible because it was not a physical barrier, but rather was the culmination of various federal agency maneuvers that made accessing lawful immigration benefits more difficult. The agency in charge of adjudicating most applications for statutory immigration benefits, United States Citizenship and Immigration Services (USCIS), developed what it called "workarounds" to immigration statutes. Through its internal agency processes, it effectively made it harder to obtain immigration benefits authorized by Congress. This Article sheds light on this administrative law coup, including analysis of empirical data that presents the most exhaustive measure to date of the increase in litigation against USCIS during the Trump administration.

The invisible wall represents a challenge to those skeptical of external control because no facet of internal administrative law prevented construction of the

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invisible wall. The Trump administration abused its internal power over executive branch agencies to build the invisible wall and no internal executive branch power stopped it. In the absence of effective internal control mechanisms, data collected for this case study reveal a dramatic increase in efforts to activate external control over the administration's actions as a means of ameliorating the effects of the invisible wall. From 2016 to 2019, federal court challenges to USCIS's denials of benefits applications increased by almost 200% in one category and nearly 250% in another. In response to the internal administrative law failure, attorneys turned to external control.

While this case study shows that external control plays a crucial role in administrative law, external control is an imperfect solution. It did not stop the building of the invisible wall and its restorative effects are not absolute. In fact, some aspects of the wall could not be controlled externally. For those that could be controlled externally, the number of complaints seeking judicial review was still quite small relative to the number of denials of applications for immigration benefits. This case study therefore illuminates a gap in control over executive power where internal mechanisms failed and where external control is not wholly effective. Without either internal or external control, there is unchecked power. This Article argues that internal administrative law needs to be improved to fill this gap. However, any improvements to internal administrative law must rely on adherence to rule of law values. As the invisible border wall itself illustrates, in the absence of fidelity to rule of law values internal control mechanisms are easily defeated. Therefore, while internal administrative law may improve, it cannot guarantee control.

I. INTRODUCTION

The story of the invisible border wall[1] is a cautionary tale for administrative law. The Trump administration abused its power over executive branch agencies to build an invisible border wall.[2] Through the invisible wall, the Trump administration reduced the amount of legal immigration to the United States in the absence of statutory change.[3] The administration's success presents a major challenge to theories of internal administrative law. Internal administrative law theory posits that agencies are able to govern themselves and that external control, such as judicial review, merely gets in the way and prevents agencies from reaching their full potential.[4]

The invisible wall was constructed with executive branch tools. The executive branch tools used include increased denial rates, delays in processing times, a de facto change to the burden of proof, increased procedural burdens, and changes in guidance documents to narrow interpretations of immigration law. These tools were

[1] AM. IMMIGRATION LAWYERS ASS'N, DECONSTRUCTING THE INVISIBLE WALL: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION ARE SLOWING AND RESTRICTING LEGAL IMMIGRATION 2–3 (2018), https://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall.

[2] *See* Rachel Morris, *Trump Got His Wall, After All*, HUFFPOST: HIGHLINE (Nov. 24, 2019), https://www.huffpost.com/highline/article/invisible-wall/.

[3] Stuart Anderson, *New Data: Legal Immigration Has Declined Under Trump*, FORBES (Jan. 13, 2020, 10:41 AM), https://www.forbes.com/sites/stuartanderson/2020/01/13/new-data-legal-immigration-has-declined-under-trump/#579c05b36e99.

[4] *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244–45, 1279–81 (2017).

developed and implemented without regard to rule of law values. The wall was invisible because it was not a physical barrier, but rather was the culmination of these various bureaucratic maneuvers that made accessing statutory immigration benefits more difficult.[5] The Trump administration called these tools "workarounds."[6] That term presumably referred to working around the statute. Therefore, the Trump administration developed maneuvers around the statute to create its own immigration policy.

No mechanisms of internal administrative law were able to stop the implementation of these "workarounds." No tool within the executive branch existed, was capable of, or was engaged to rebuff the Trump administration's abuses. Instead, data collected for this case study reveal a dramatic increase in efforts to activate external control over the administration's actions as a means of ameliorating the effects of the invisible wall.[7] From 2016 to 2019, federal court challenges to denials of benefits applications by USCIS, the main immigration benefits granting agency, rose nearly 200% in one category and nearly 250% in another.[8]

External control is imperfect, however. It did not stop the construction of the invisible wall, and its restorative effects are not absolute. Therefore, this case study illuminates a fundamental weakness of administrative law. No facet of administrative law, either external or internal, could stop the Trump administration from ignoring rule of law values to enact its own immigration selection preferences.

This Article illuminates the invisible wall, including how immigration attorneys responded to it, and shows the lessons of the invisible wall for administrative law. To make the invisible wall visible, this Article describes its construction and, in the process, shifts scholarly focus to the Trump administration's efforts against legal immigration. These efforts against legal immigration are understudied.[9] To analyze

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[5] The concept of bureaucratic barriers in immigration law did not originate with the Trump administration. *See* Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 205 (2002) (identifying and analyzing "process borders" in immigration adjudication); LEGAL ACTION CTR. & PENN STATE LAW CTR. FOR IMMIGRANTS' RIGHTS, BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL 13–14 (2012), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1006&context=irc_pubs (discussing impediments to access to counsel in immigration benefits adjudication).

[6] *See* Joel Rose, *How the Trump Administration Uses 'Workarounds' to Reshape Legal Immigration*, NPR (Oct. 10, 2019, 4:20 PM), https://www.npr.org/2019/10/10/769009449/how-the-trump-administration-uses-workarounds-to-reshape-legal-immigration.

[7] *See, e.g.*, Appendix Figure A; Appendix Figure C.

[8] *See infra* Figure B; Figure C.

[9] There is relatively little scholarship addressing the Trump administration's efforts to diminish legal immigration in comparison to the amount of scholarship focused on the deportation process. Three recent articles address the invisible wall. *See* Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549 (2019); Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration*

the lessons for administrative law, this Article examines theories of internal administrative law and illustrates how internal administrative law failed in the case of the invisible wall.

Not only does this Article describe the administration's actions, but it also presents empirical data. A crafted data set of complaints filed in federal district courts presents the most exhaustive measure to date of the increase in litigation against USCIS under the Trump administration. Additionally, the Article describes the results of interviews with 25 immigration attorneys about their experiences representing clients applying for legal immigration status under the Trump administration.

This Article adds needed scholarly attention to internal agency controls,[10] and it shows that internal agency control is not an effective counterbalance to the will of an administration untethered to rule of law values. When internal administrative law fails, external control must attempt to pick up the slack. There are three main lessons here for administrative law. First, internal administrative law failed to prevent the construction of the invisible wall. In fact, the Trump administration leveraged internal agency power to construct it. Second, the invisible wall shows that agency control that does not comply with rule of law values is dangerous, is hard to control, and threatens congressional intent. Third, internal administrative law needs to be enhanced because external control is not a panacea.

Part II of this Article explores the contours of the invisible border wall and the available responses to it, including the empirical data on the litigation response. Part III analyzes the dangers of internal agency control and explores how internal administrative law failed to prevent the Trump administration from building an invisible border wall that contradicts rule of law values. It also discusses how internal administrative law needs to be improved, but that it may not be capable of ensuring fidelity to rule of law values.

II. THE INVISIBLE BORDER WALL AND AVAILABLE RESPONSES

President Trump, at times, publicly proclaimed his support for legal immigration.[11] In reality, however, his administration worked against legal immigration

Attorney in the Trump Era, 53 U. MICH. J.L. REFORM 139 (2019); Beth K. Zilberman, *The Non-Adversarial Fiction of Immigration Adjudication*, 2020 WISC. L. REV. 707 (2020).

[10] *See* Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1623–24 (2018) ("[T]he vast majority of administrative law scholars continue to fixate on judicial review of agency action.").

[11] *E.g.*, JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION 46 (2019) (explaining that, during a debate in 2015, "Trump had heartily endorsed the desire of tech executives . . . to bring in workers from all over the world"); Michael Collins & Alan Gomez, *'We Need People': Donald Trump Says He Wants to See More Legal Immigration in U.S.*, USA TODAY (Feb. 6, 2019, 6:01 PM), https://www.usatoday.com/story/news/politics/2019/02/06/immigration-trump-says-he-wants-more-legal-migrants-u-

even before the onset of the COVID-19 crisis. In response to the COVID-19 crisis, the Trump administration prohibited some travel to the United States, turned away asylum applicants, and paused many forms of legal immigration.[12] In the process, it threatened the finances of USCIS, a fee-funded agency.[13] Long before the COVID-19 crisis, the Trump administration worked to sabotage the legal immigration system. This Article focuses on the pre-COVID-19 efforts.

Since its beginning, the Trump administration tightened the availability of legal immigration opportunities through the everyday work of the immigration bureaucracy.[14] These techniques were not as visible as some of the administration's immigration actions, but they had profound effects.[15] Through these techniques, the Trump administration reduced the amount of legal immigration to the United States in the absence of statutory change.[16] The Trump administration labeled these

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s/2792732002/.

[12] *Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*, WHITE HOUSE (Apr. 22, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrants-present-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/; ROBERT R. REDFIELD, CTRS. FOR DISEASE CONTROL & PREVENTION, ORDER SUSPENDING INTRODUCTION OF CERTAIN PERSONS FROM COUNTRIES WHERE A COMMUNICABLE DISEASE EXISTS 1–2, 9 (Mar. 20, 2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf; *Travelers Prohibited from Entry to the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html; Bill Ong Hing, *Trump Has Achieved His Goal of Abolishing Asylum*, SLATE: JURIS. (Apr. 10, 2020, 11:33 AM), https://slate.com/news-and-politics/2020/04/trump-asylum-coronavirus.html.

[13] *Deputy Director for Policy Statement on USCIS' Fiscal Outlook*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 25, 2020), https://www.uscis.gov/news/news-releases/deputy-director-for-policy-statement-on-uscis-fiscal-outlook; Camila DeChalus, *USCIS Informs 13,000 Federal Employees of Potential Furloughs Without Emergency Funding*, ROLL CALL (June 24, 2020, 3:36 PM), https://www.rollcall.com/2020/06/24/uscis-furlough-employees-2020-emergency-funding/.

[14] Chen & New, *supra* note 9, at 549–51; Zilberman, *supra* note 9, at 709–10; Stuart Anderson, *Ken Cuccinelli, U.S. Immigration Services Chief, Boasts of Increasing Bureaucracy*, FORBES (Oct. 21, 2019, 12:16 AM), https://www.forbes.com/sites/stuartanderson/2019/10/21/usciss-cuccinelli-boasts-of-increasing-immigration-bureaucracy/#280a0fdb1bea; Anderson, *supra* note 3.

[15] *See, e.g.*, Chen & New, *supra* note 9, at 550 ("[M]any of the agency practices and policies that we are calling the second wall have built a bureaucratic barrier that is hard to see, understand, and redress."); Rabin, *supra* note 9, at 140–41 (describing representation of individuals applying for legal immigration benefits under the Trump administration and the opaque changes to the process); Zilberman, *supra* note 9, at 709 (describing how changes to USCIS's mission enhanced the adversarial nature of immigration benefits adjudication).

[16] Anderson, *supra* note 3 (reporting a 7% drop in the number of individuals achieving lawful permanent residence between Fiscal Years 2016 and 2018); *see also* Zolan Kanno-Youngs, *As Trump Barricades the Border, Legal Immigration Is Starting to Plunge*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/us/politics/trump-border-legal-immigration.html.

techniques "workarounds."[17] The Trump administration activated its internal executive branch control over immigration law to establish non-statutory barriers to obtaining legal immigration status. It expressed a general mood against legal immigration through increased denial rates, delays in processing times, a de facto change to the burden of proof, increased procedural burdens, changes in guidance documents to narrow interpretations of immigration law, and decreased customer service and stakeholder engagement. This Part describes USCIS adjudication generally, explains the agency mood against legal immigration dictated from the White House, and then analyzes the "workarounds" that made up the invisible wall.

A. USCIS Adjudication

Congress delegated to the Department of Homeland Security (DHS) the duty to adjudicate eligibility for the legal immigration statuses it created in the Immigration and Nationality Act (INA).[18] USCIS, a part of DHS, adjudicates about 30,000 requests for immigration benefits per *day*.[19] USCIS adjudicates applications for permission to work and live in the United States. The applications are based on a statutory framework that details who is eligible for lawful immigration to the United States.

USCIS is made up of about 19,000 government employees and contractors.[20] It employs a corps of front-line adjudicators, who are not required to be attorneys,[21] to process paper-based applications for legal status. These adjudicators are based at service centers and field offices that are geographically dispersed throughout the United States.[22] USCIS adjudicators do not hold hearings. They are not administrative law judges. They are employees who read paper-based submissions and decide whether an applicant qualifies for a legal immigration status. USCIS adjudicators apply statutes, regulations, and various agency guidance documents.[23]

Because USCIS is a user-fee funded agency, its filing fees are a significant cost.

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[17] *See* Rose, *supra* note 6.

[18] *See, e.g.*, 8 U.S.C. § 1103(a) (2018) (delegating the administration and enforcement of laws "relating to the immigration and naturalization of aliens" to the Secretary of DHS).

[19] *A Day in the Life of USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 13, 2020), https://www.uscis.gov/about-us/a-day-in-the-life-of-uscis.

[20] *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 5, 2020), https://www.uscis.gov/about-us.

[21] Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 66 (2011).

[22] *See A Day in the Life of USCIS*, *supra* note 19.

[23] For further discussion about the structure of USCIS adjudication, see Zilberman, *supra* note 9, at 734–41.

For example, the application fee to apply for popular categories of temporary permission to work in the United States is $460.[24] The fee for only one step in the employment-based green card process is $700.[25] For those who apply for a green card while remaining in the United States, there is an additional $1,140 fee.[26] Filing fees account for about 95% of USCIS's budget.[27] USCIS's fee revenue is estimated to be $3.41 billion over Fiscal Years 2019 and 2020.[28]

As far as agency review of initial agency decisions, there are different available paths. A Motion to Reopen or to Reconsider, filed with USCIS, is available. This is not an administrative appeal, but rather a request for the same level of decision-maker within USCIS to re-examine the application. The filing fee for the motion is $675.[29] Also, there is an appellate administrative agency body within USCIS called the Administrative Appeals Office (AAO).[30] The filing fee for an administrative appeal is $675.[31] Appeal to the AAO is not required to exhaust administrative remedies.[32] Therefore, judicial review is often sought without first seeking agency review. Denials of applications for legal status may be reviewed by a federal district court under the Administrative Procedure Act.[33]

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[24] U.S. CITIZENSHIP & IMMIGR. SERVS., FORM G-1055: FEE SCHEDULE, at 2 (Apr. 1, 2020), https://www.uscis.gov/g-1055. USCIS announced it would increase fees effective October 2, 2020. *USCIS Adjusts Fees to Help Meet Operational Needs*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 31, 2020), https://www.uscis.gov/news/news-releases/uscis-adjusts-fees-to-help-meet-operational-needs; *see also infra* Part II.D.4.

[25] FORM G-1055: FEE SCHEDULE, *supra* note 24, at 3.

[26] *Id.* at 4.

[27] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,282 (proposed Nov. 14, 2019) (to be codified in scattered parts of 8 C.F.R.).

[28] *Id.* at 62,288.

[29] FORM G-1055: FEE SCHEDULE, *supra* note 24, at 4.

[30] *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2020), https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao.

[31] FORM G-1055: FEE SCHEDULE, *supra* note 24, at 4.

[32] The regulation that created the AAO states that denials "may" be appealed to the AAO, but not that they "must." *See, e.g.*, 8 C.F.R. § 103.3(a)(1)(ii) (2020); *see also* AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: FAILURE TO APPEAL TO THE AAO: DOES IT BAR ALL FEDERAL COURT REVIEW OF THE CASE? 1 (Sept. 26, 2016), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/failure_to_appeal_to_aao_practice_advisory.pdf.

[33] *See* 5 U.S.C. § 701 et. seq. (2018).

B. Setting the Mood Against Legal Immigration

The mood of the legal immigration bureaucracy under the Trump administration was set by President Trump's April 2017 Buy American, Hire American executive order. This executive order proclaimed: "In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad."[34] It directed the immigration agencies to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse."[35]

President Trump's rhetoric also contributed to the mood.[36] President Trump characterized immigrants as mostly criminals, inherently dangerous, from "shithole countries," and as comprising an invasion.[37] President Trump advocated for shooting immigrants attempting to cross the border without permission and for building a trench at the border filled with snakes or alligators.[38]

The Trump administration intended to limit legal immigration. The Buy American, Hire American executive order addressed legal immigration; the rhetoric applied equally to immigrants without and with legal status, and as this Part reveals, the movement against legal immigration occurred on so many fronts that the chance these were all random acts is low. Immigration attorneys interviewed for this study reported that the Trump administration purposefully worked against legal immi-

[34] Exec. Order No. 13,788, 3 C.F.R. § 325, 326 (2017).

[35] 3 C.F.R. § 327.

[36] *See* Eugene Scott, *Trump's Most Insulting—and Violent—Language is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 12:21 PM), https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/.

[37] *Id.*

[38] *Id.*

gration.[39] To one attorney, it was "death by a thousand cuts"[40] while another expressed that "you can see the venom in it."[41] The immigration benefits adjudication process was problematic before the Trump administration. Immigration attorneys pointed out, however, that under previous administrations there was a basic respect for immigrants, even if policies resulted in the denial of benefits.[42] Under past administrations, problems were often caused by a lack of training, more negligence than purposeful degradation.[43] Additionally, Stephen Miller, the president's influential immigration advisor,[44] and other members of President Trump's base built their careers on advocating for less immigration to the United States in general, no

[39] *See* Telephone Interview with Attorney A (Feb. 7, 2020) [hereinafter Attorney A] (on file with author); Telephone Interview with Attorney B (Feb. 7, 2020) [hereinafter Attorney B] (on file with author); Telephone Interview with Attorney C (Feb. 7, 2020) [hereinafter Attorney C] (on file with author); Telephone Interview with Attorney D (Feb. 7, 2020) [hereinafter Attorney D] (on file with author); Telephone Interview with Attorney E (Feb. 5, 2020) [hereinafter Attorney E] (on file with author); Telephone Interview with Attorney F (Feb. 5, 2020) [hereinafter Attorney F] (on file with author); Telephone Interview with Attorney G (Feb. 4, 2020) [hereinafter Attorney G] (on file with author); Telephone Interview with Attorney H (Feb. 4, 2020) [hereinafter Attorney H] (on file with author); Telephone Interview with Attorney I (Feb. 4, 2020) [hereinafter Attorney I] (on file with author); Telephone Interview with Attorney J (Feb. 3, 2020) [hereinafter Attorney J] (on file with author); Telephone Interview with Attorney K (Feb. 3, 2020) [hereinafter Attorney K] (on file with author); Telephone Interview with Attorney L (Feb. 3, 2020) [hereinafter Attorney L] (on file with author); Telephone Interview with Attorney M (Feb. 3, 2020) [hereinafter Attorney M] (on file with author); Telephone Interview with Attorney N (Feb. 3, 2020) [hereinafter Attorney N] (on file with author); Telephone Interview with Attorney O (Feb. 3, 2020) [hereinafter Attorney O] (on file with author); Telephone Interview with Attorney P (Feb. 3, 2020) [hereinafter Attorney P] (on file with author); Telephone Interview with Attorney Q (Feb. 3, 2020) [hereinafter Attorney Q] (on file with author); Telephone Interview with Attorney R (Jan. 30, 2020) [hereinafter Attorney R] (on file with author); Telephone Interview with Attorney S (Jan. 27, 2020) [hereinafter Attorney S] (on file with author); Telephone Interview with Attorney T (Feb. 10, 2020) [hereinafter Attorney T] (on file with author); Telephone Interview with Attorney U (Feb. 11, 2020) [hereinafter Attorney U] (on file with author); Telephone Interview with Attorney V (Feb. 11, 2020) [hereinafter Attorney V] (on file with author); Telephone Interview with Attorney W (Feb. 11, 2020) [hereinafter Attorney W] (on file with author); Telephone Interview with Attorney Y (Feb. 19, 2020) [hereinafter Attorney Y] (on file with author).

[40] Attorney C, *supra* note 39.

[41] Attorney D, *supra* note 39.

[42] Attorney J, *supra* note 39; Attorney P, *supra* note 39; Attorney Y, *supra* note 39.

[43] *See* Attorney L, *supra* note 39; Attorney P, *supra* note 39.

[44] DAVIS & SHEAR, *supra* note 11, at 92–104, 126–28, 168–69, 194, 216, 221, 231, 242, 280–81, 287, 316, 323, 381–82.

matter if the immigration is lawful.[45] This contingent is not satisfied unless legal immigration is more difficult.[46]

C. The "Workarounds"

In April 2019, USCIS "commemorate[d]" the second anniversary of the Buy American, Hire American executive order by highlighting the ways USCIS had made legal immigration more difficult.[47] USCIS used a variety of tactics to reshape the adjudication of legal immigration benefits, including increased denial rates, increased processing delays, a de facto change to the burden of proof applied to applications, increased procedural burdens, narrowed interpretations of law, and a decrease in customer service in favor of an emphasis on enforcement. USCIS described these efforts as "workarounds."[48]

These "workarounds" are also referred to as the "invisible wall."[49] Among the 25 business immigration attorneys interviewed, there was almost unanimous agreement that the invisible wall existed and that it thwarted the legal immigration system without statutory change.[50] The invisible wall received very negative reviews from these attorneys. The invisible wall caused an immense amount of frustration to clients (U.S. employers and foreign national beneficiaries) and attorneys. Attorneys reported that there was no certainty for employers; applications that would have been approved under previous administrations were in doubt.[51] The administration's goal, one attorney said, was to discourage and frustrate to the point where

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[45] *Id.* at 46, 309–10, 316 (explaining the goal of restrictionist organizations to "substantially reduc[e] legal immigration" and the role of Jeff Sessions and Stephen Miller in promoting that goal within the Trump administration).

[46] *Id.* at 42–44.

[47] *USCIS Commemorates Second Anniversary of Buy American and Hire American Executive Order*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 18, 2019), https://www.uscis.gov/news/news-releases/uscis-commemorates-second-anniversary-buy-american-and-hire-american-executive-order.

[48] Acting Director of USCIS Ken Cuccinelli said: "We start all these discussions with the assumption of the law not changing, which is a sad place to start a discussion. I mean, the right way to decide policy is for Congress and the [P]resident to decide policy. That's the way the government was set up . . . . In the alternative, we talk about what amount to workarounds to that. Of course, they have to be within the boundaries of the law." Rose, *supra* note 6.

[49] AM. IMMIGRATION LAWYERS ASS'N, *supra* note 1, at 3.

[50] One attorney questioned the existence of a purposeful effort to reduce legal immigration. Telephone Interview with Attorney X (Feb. 14, 2020) [hereinafter Attorney X] (on file with author). This attorney characterized the Trump administration's changes as good public policy that filters out weak applications. *Id.* This attorney does not feel that the Trump administration's actions have changed the attorney's practice in any meaningful way.

[51] Attorney B, *supra* note 39; Attorney D, *supra* note 39; Attorney I, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney P, *supra* note 39; Attorney Q, *supra* note 39; Attorney S,

applicants give up.[52] Attorneys also commented that their work was more time consuming and expensive under the Trump administration.[53] Therefore, even if a case ultimately was approved, it took its toll. The invisible wall sent a message that the United States was anti-immigrant.[54] As one attorney described the phenomenon, the administration aimed to put "sand in the gears."[55]

When asked what the phrase "invisible wall" means to them, almost every attorney expressed deep frustration. Here is a sample of reactions:

- It is "death by a thousand cuts."[56]
- It is "making practice a living hell."[57]
- "You can see the venom in it."[58]
- "No one meets the statutory requirements."[59]
- It is "maximum pain to the most vulnerable."[60]
- "I never imagined it would be this bad."[61]
- Clients are "panic-stricken."[62]

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supra note 39; Attorney U, *supra* note 39; *see also* Lisa Scott et al., *The Current Minefield for Immigration Practitioners: Protecting the Rights of Clients in the Trump Era*, 51 CASE W. RES. J. INT'L L. 165, 170 (2019) ("Whereas there used to be somewhat predictable outcomes within immigration law, these policy and practice shifts now constitute a minefield for practitioners advising clients in an ever-changing landscape with now unknown consequences."); Kyle Johnson, *Increased Administrative Roadblocks in Naturalization and Immigration Under President Trump*, 25 PUB. INT. L. REP. 44, 50–51 (2019) (discussing the uncertainty caused by increased wait times); *Trump Year One: A Conversation with Four Minnesota Immigration Lawyers*, BENCH & BAR MINN., Mar. 2018, 26, 26–27 ("[T]here has been a lot of fear for clients and uncertainty for me as a practitioner"; "it's even harder to guess at the answer when immigration policies are constantly shifting"; "[e]ven some of the cleanest, seemingly 'slam-dunk' petitions have received 17-page long RFEs, and the government's decisions are too often obviously wrong and legally unfounded—applying standards or criteria that are over the top, illogical, and never before raised as an issue.").

[52] Attorney D, *supra* note 39.

[53] Attorney B, *supra* note 39; Attorney P, *supra* note 39; Attorney Q, *supra* note 39; Attorney R, *supra* note 39; Attorney T, *supra* note 39; Attorney U, *supra* note 39. One attorney estimated that it takes two to three times more work to get something approved now. Attorney Q, *supra* note 39.

[54] Attorney I, *supra* note 39.

[55] Attorney Y, *supra* note 39.

[56] Attorney C, *supra* note 39.

[57] Attorney D, *supra* note 39.

[58] *Id.*

[59] Attorney K, *supra* note 39.

[60] Attorney I, *supra* note 39.

[61] Attorney J, *supra* note 39.

[62] Attorney P, *supra* note 39.

The invisible wall was a phenomenon felt by all but one of the attorneys interviewed.[63]

Because immigration benefits adjudication was problematic before the Trump administration,[64] attorney interviews for this project included a question about how the invisible wall was different from efforts in past administrations to use executive power to change immigration policy. Almost all of the attorneys expressed that the invisible wall was vastly different than previous efforts. One expressed that, under the Trump administration, executive discretion was used *against* foreign nationals.[65] Another said that the Trump administration was unbelievably restrictive,[66] while another expressed that the administration blatantly tried to lower immigration.[67] Another explained that the Trump administration did not care about operational success.[68] Prior administrations worked to make things run as smoothly as possible.[69] The Trump administration, this attorney observed, was not concerned about operations because if things were not running well, that worked against legal immigration.[70] As evidence of a lack of respect for people going through the immigration process, some attorneys specifically referenced the role of racial and ethnic bias in the administration's policies,[71] while another referenced the anger and malice expressed towards immigrants under the Trump administration.[72]

Other attorneys explained that there has always been some unpredictability in immigration adjudication, but under the Trump administration the unpredictability was the goal of the system.[73] Another expressed that the administration aimed to deny every case.[74] One explained that no president since the 1920s had believed that all immigrants are bad for America.[75] Another said that there had never been such a heavy-handed approach and that the Trump administration was "hell-bent" on

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[63] *See supra* note 50 and accompanying text.

[64] *See, e.g.*, Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 567 (2012); Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 46 (2011).

[65] Attorney A, *supra* note 39.

[66] Attorney C, *supra* note 39.

[67] Attorney F, *supra* note 39.

[68] Attorney Y, *supra* note 39.

[69] *Id.*

[70] *Id.*

[71] Attorney F, *supra* note 39; Attorney R, *supra* note 39; Attorney T, *supra* note 39. The interviewer did not specifically ask about the role of race or ethnicity, but three attorneys brought up the issue on their own when responding to other questions.

[72] Attorney Y, *supra* note 39.

[73] Attorney H, *supra* note 39; Attorney I, *supra* note 39; Attorney Y, *supra* note 39.

[74] Attorney I, *supra* note 39.

[75] Attorney J, *supra* note 39.

finding ways to eliminate legal immigration.[76] One expressed that past administrations "made some passing attempt to base their policies on logic, the law, and some sort of rational assessment" but that the Trump administration was just "lashing out."[77] "This [was] the first time we've ever seen a concerted effort to find every way imaginable to reduce legal immigration," said another.[78] Expressing a similar sentiment, one attorney said the "culture of no" was even stronger under the Trump administration than it was immediately after September 11, 2001.[79]

Even when USCIS approved an application—and the great majority of applications were ultimately approved—the invisible wall took its toll in increased time, expense, and effort to obtain that approval.[80] Also, if employers and foreign nationals did not file applications because of the invisible wall, then the invisible wall still worked to deter legal immigration.[81] Attorneys reported that the invisible wall deterred applications.[82]

1. Increased Denial Rates and Processing Delays

Denial rates for certain legal categories rose under the Trump administration.[83] Immigration attorneys reported that USCIS denied applications for benefits that would have been approved under prior administrations.[84] While the great majority

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[76] Attorney K, *supra* note 39.

[77] Attorney P, *supra* note 39.

[78] Attorney Q, *supra* note 39.

[79] Attorney U, *supra* note 39.

[80] In Fiscal Year 2019, across all categories of legal immigration, USCIS received about 7.6 million applications and it approved about 6.5 million applications. The approvals may be for cases filed in other fiscal years. U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF SERVICE-WIDE FORMS FISCAL YEAR TO-DATE, BY QUARTER, AND FORM STATUS, FISCAL YEAR 2019, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q4.pdf (last visited Jan. 29, 2021).

[81] *See, e.g.*, Stuart Anderson, *Immigrants Flock to Canada, While U.S. Declines*, FORBES (Feb. 18, 2020, 12:07 AM), https://www.forbes.com/sites/stuartanderson/2020/02/18/immigrants-flock-to-canada-while-us-declines/#1dcbb4ed6e54; Alana Semuels, *Tech Companies Say It's Too Hard to Hire High-Skilled Immigrants in the U.S.—So They're Growing in Canada Instead*, TIME (July 25, 2019, 3:18 PM), https://time.com/5634351/canada-high-skilled-labor-immigrants/.

[82] *See* Attorney C, *supra* note 39; Attorney E, *supra* note 39; Attorney J, *supra* note 39; Attorney R, *supra* note 39; Attorney S, *supra* note 39; Attorney W, *supra* note 39. One attorney, however, expressed his belief that any deterrent effect is discouraging the filing of weak cases. Attorney X, *supra* note 50.

[83] Sinduja Rangarajan, *The Trump Administration Is Denying H-1B Visas at a Dizzying Rate, But It's Hit a Snag*, MOTHER JONES (Oct. 17, 2019), https://www.motherjones.com/politics/2019/10/h1b-tech-visa-denial-appeal-trump/.

[84] Laura D. Francis, *Revocations of H-1B Visas Rise in New Front Against Immigration*, BLOOMBERG L.: DAILY LAB. REP. (June 11, 2019, 3:17 AM), https://news.bloomberglaw.com/daily-labor-report/revocations-of-h-1b-visas-rise-in-new-front-against-immigration ("There's no

of cases were still approved, USCIS statistics confirm immigration attorneys' reports that denials were more frequent. H-1B[85] approval rates dropped to 84.5% and 84.8% in Fiscal Years 2018 and 2019, respectively, contrasted to the previous three years' approval rates of 92.6%, 93.9%, and 95.7%.[86] L-1 approval rates also decreased.[87] For Fiscal Year 2019, 71.9% of applications were approved, compared to 85% in Fiscal Year 2016.[88] The approval rates for other temporary worker categories remained stable, however, suggesting that the increased denial rates were targeted.[89]

Immigration benefits adjudication slowed under the Trump administration. Even if an approval was obtained, it took longer to achieve that result. According to data analyzed by the American Immigration Lawyers Association (AILA), processing times increased across a variety of applications and petitions.[90] In Fiscal Year 2018, the average case processing time was 9.48 months, compared to 6.5 months in Fiscal Year 2016.[91] USCIS's backlog was 2.4 million cases in July 2019, a significant increase over prior years.[92] In response to the processing delays, some applicants felt compelled to pay a premium processing fee of $1,440 to receive a decision within

question that there are cases, H-1B petitions, that have been approvable for the last 20 years that aren't approvable today . . . .") (quoting attorney H. Ronald Klasko).

[85] H-1B status is a temporary, employment-based status that is reserved for foreign nationals coming to the United States to fill a specialty occupation; in other words, one that requires at least a bachelor's degree. 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2018); 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020) (explaining that a specialty occupation is one where "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position").

[86] U.S. CITIZENSHIP & IMMIGRATION SERVS., I-129: PETITION FOR A NONIMMIGRANT WORKER: OCTOBER 1, 2014 – SEPTEMBER 30, 2019 [hereinafter USCIS VISA REPORT 2015–2019], https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2019_Q4.pdf (last visited Feb. 22, 2021).

[87] L-1 is a category reserved for intracompany transferees who wish to work in the United States for a limited period. To qualify, the individual must be an executive or a manager. 8 U.S.C. § 1101(a)(15)(L) (2012).

[88] USCIS VISA REPORT 2015–2019, *supra* note 86.

[89] *Id.* (revealing stable approval rates for the O and P categories).

[90] *Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigration & Citizenship of the H. Comm. on the Judiciary*, 116 Cong. 2–3 (2019) (statement of Marketa Lindt, President, American Immigration Lawyers Association), https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-LindtM-20190716.pdf; *see also* Steve Bates, *Experts: U.S. Immigration Policies Are Making It Harder to Fill Job Openings*, SOC'Y HUM. RESOURCE MGMT. (July 16, 2018), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/us-immigration-policies-fill-job-openings.aspx.

[91] Lindt, *supra* note 90, at 3.

[92] *Policy Changes and Processing Delays at U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigration & Citizenship of the H. Comm. on the Judiciary*, 116 Cong. 2 (joint written testimony of Don Neufeld, Associate Director, U.S. Citizenship and Immigration Services, et al.), https://docs.house.gov/meetings/JU/JU01/20190716/109787/HHRG-116-JU01-Wstate-NeufeldD-20190716.pdf.

15 days.[93]

One specific example of an increase in processing times is the time it took USCIS to adjudicate an application for an Employment Authorization Document (EAD).[94] In various scenarios, individuals may apply for an EAD to obtain legal permission to work in the United States. One scenario involves the spouses of H-1B workers, who are eligible to apply for an EAD that allows the spouse to work in the United States.[95] The processing time for EADs in this context grew from 2.6 to 4.5 months from Fiscal Year 2016 to Fiscal Year 2019.[96] The delay in the processing of EADs occurred in the context of the Trump administration's publicized disagreement with the regulation that allows spouses of H-1B visa holders to work while living in the United States.[97]

Even applications for citizenship faced delays.[98] Nationwide, the processing time for a naturalization application grew from 5.6 to 9.9 months from Fiscal Year 2016 to Fiscal Year 2019.[99] Military service members were not immune, as the Trump administration worked to limit the use of fast-track naturalization provisions Congress created to benefit service members.[100]

According to AILA, USCIS's "own inefficient policies and practices [were] core drivers of the case backlog."[101] For example, USCIS under the Trump administration required all individuals applying for a green card to submit to an in-person interview.[102] Scheduling and conducting in-person interviews takes time and re-

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[93] Stuart Anderson, *Critics Charge Slow Immigration Processing Nets USCIS Billions in Fees*, FORBES (Mar. 2, 2020, 12:05 AM), https://www.forbes.com/sites/stuartanderson/2020/03/02/critics-charge-slow-immigration-processing-nets-uscis-billions-in-fees/#767bedc8457a.

[94] *Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year*, U.S. CITIZENSHIP & IMMIGR. SERVS. [hereinafter *Historical Processing Time*], https://egov.uscis.gov/processing-times/historic-pt (last visited Jan. 29, 2021).

[95] Employment Authorization for Certain H-4 Dependent Spouses, 80 Fed. Reg. 10,284, 10,287, 10,311 (Feb. 25, 2015) (codified at 8 C.F.R. pts. 214, 274a).

[96] *Historical Processing Time*, *supra* note 94.

[97] Issie Lapowsky, *'God Is Really Testing Us': Immigrant Tech Spouses Sue the Administration over Visas*, PROTOCOL (Mar. 2, 2020), https://www.protocol.com/delays-h1b-visa-holders.

[98] COLO. STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE BACKLOG IN CITIZENSHIP AND NATURALIZATION APPLICATIONS 18 (2019), https://www.usccr.gov/pubs/2019/09-12-Citizenship-Delayed-Colorado-Naturalization-Backlog.pdf.

[99] *Historical Processing Time*, *supra* note 94.

[100] Chen & New, *supra* note 9, at 564–66.

[101] Lindt, *supra* note 90, at 4.

[102] *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 28, 2017), https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.

sources. The number of USCIS employees who can conduct these interviews is limited. Previous security precautions dictated only that certain green card applicants necessitated an in-person interview.[103]

Delay is detrimental for both petitioners (U.S.-based employers or family members) and foreign national beneficiaries. If the application is for permission to work in the United States, delay traced to the invisible wall added to already existing delays within the system. The immigration benefits adjudication system was not known for providing nimble and quick adjudication before the Trump administration. Therefore, U.S. employers waited even longer under the Trump administration to add workers (if the application was ultimately approved). Immigration law traditionally has forced employers to project employment needs far into the future, and the invisible wall exacerbated that scenario.[104] In the family-based immigration context, further delay meant more time apart for close family members.

2. Increased Procedural Burdens and a De Facto Burden of Proof

The Trump administration increased the procedural burdens of the benefit application process. For example, USCIS issued more Requests for Evidence (RFEs). An RFE is issued in response to an application when the adjudicating agency employee believes more information is needed to decide whether to grant a benefit. The number of H-1B cases completed with an RFE issued rose from 22.3% in Fiscal Year 2015 to 40.2% in Fiscal Year 2019.[105] For the L-1 category, the number of cases completed with an RFE rose to 54.3% in Fiscal Year 2019, from 34.3% in Fiscal Year 2015.[106]

Table A

H-1B Approvals and RFEs Issued, Fiscal Years 2015–2019[107]

Fiscal Year	Filed	Percent Approved	Percent Completed with RFE
2015	368,148	95.7	22.3
2016	398,660	93.9	20.8
2017	403,085	92.6	21.4
2018	418,741	84.5	38.0
2019	420,617	84.8	40.2

[103] *See id.*

[104] Maureen Minehan, *Delays, Visa Concerns Hinder Employment-Related Immigration*, 20 NO. 14 EMP. ALERT 1 (2003), Westlaw.

[105] USCIS VISA REPORT 2015–2019, *supra* note 86.

[106] *Id.*

[107] *Id.*

Table B

L-1 Approvals and RFEs Issued, Fiscal Years 2015–2019[108]

Fiscal Year	Filed	Percent Approved	Percent Completed with RFE
2015	40,195	83.7	34.3
2016	41,754	85.0	32.1
2017	42,804	80.8	36.2
2018	41,243	77.8	45.6
2019	40,939	71.9	54.3

In addition to increased issuance of RFEs, the Trump administration implemented a new policy allowing its adjudicators to deny an application without issuing an RFE or any notice of intent to deny.[109] If an applicant is denied outright without any chance to respond, the applicant's recourse is to pursue an appeal of the denial or to refile the application.[110] Either path leads to increased procedural burdens.

The Trump administration also implemented a policy that applications for extension of the same, already approved status would be treated de novo—no weight would be given to the fact that the same status was approved in the past for the same individual.[111] This increased the time it took to complete an extension application and to adjudicate it, as applicants had to re-argue the merits of an already-approved scenario and adjudicators had to re-adjudicate the scenario de novo. As immigration attorneys explained, this injected immense uncertainty into the business immigration process.[112]

The "no deference to previous approvals" policy affected certain green card applicants in a particularly unsettling way. Applicants for green cards who hold H-1B status may apply for an extension of their H-1B status while they wait for a

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[108] *Id.*

[109] U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0163, POLICY MEMORANDUM: ISSUANCE OF CERTAIN RFES AND NOIDS; REVISIONS TO *ADJUDICATOR'S FIELD MANUAL* (*AFM*) CHAPTER 10.5(A), CHAPTER 10.5(B) 1 (2018), https://www.uscis.gov/sites/default/files/document/memos/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf; *see also* DAVIS & SHEAR, *supra* note 11, at 321.

[110] *See* DAVIS & SHEAR, *supra* note 11, at 321.

[111] U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0151, POLICY MEMORANDUM: RESCISSION OF GUIDANCE REGARDING DEFERENCE TO PRIOR DETERMINATIONS OF ELIGIBILITY IN THE ADJUDICATION OF PETITIONS FOR EXTENSION OF NONIMMIGRANT STATUS 3 (2017), https://www.uscis.gov/sites/default/files/document/memos/2017-10-23-Rescission-of-Deference-PM602-0151.pdf.

[112] For further description of the uncertainty, see Sinduja Rangarajan, *Melania Trump Got an "Einstein Visa." Why Was It So Hard for This Nobel Prize Winner?*, MOTHER JONES (Feb. 27, 2020), https://www.motherjones.com/politics/2020/02/genius-green-card-visa-nobel-prize-trump/.

green card to become available.[113] Because Congress placed a limit on how many individuals may receive a green card each year, even qualified applicants often have to wait for years to get one.[114] Before the Trump administration, applications for extensions of H-1B status while awaiting a green card were fairly pro forma. That predictability diminished, however, under the Trump administration. An employee could have been in the United States with H-1B status for years, only to have their extension application denied because the Trump administration no longer believed their same employment qualified for H-1B status.[115] The denial rates for H-1B extensions increased to 12% in Fiscal Year 2019 from 4% in Fiscal Year 2016.[116]

Finally, interviewed immigration attorneys asserted that USCIS implemented a de facto increase in the burden of proof that applies to applications for legal status. Attorneys observed that USCIS effectively raised the burden of proof to "clear and convincing" evidence from "preponderance of [the] evidence."[117] Attorneys also explained that USCIS often ignored evidence submitted or unjustifiably discounted evidence, such as expert testimony submitted in support of an application.[118]

3. Narrowed Interpretations of Law

As a part of the invisible wall, USCIS narrowed interpretations of statutes and regulations. For example, USCIS narrowed its interpretation of what constitutes a "specialty occupation" under the H-1B category. The INA requires an applicant for H-1B status to be employed in the United States in a "specialty occupation."[119] A

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[113] American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313 § 106, 114 Stat. 1251, 1254 (2000).

[114] *See* Abigail Hauslohner, *The Employment Green Card Backlog Tops 800,000, Most of Them Indian. A Solution Is Elusive.*, WASH. POST (Dec. 17, 2019, 2:26 PM), https://www.washingtonpost.com/immigration/the-employment-green-card-backlog-tops-800000-most-of-them-indian-a-solution-is-elusive/2019/12/17/55def1da-072f-11ea-8292-c46ee8cb3dce_story.html.

[115] Attorney B, *supra* note 39; Attorney J, *supra* note 39; *see also* Stuart Anderson, *Latest Data Show H-1B Visas Being Denied at High Rates*, FORBES (Oct. 28, 2019, 12:08 AM) [hereinafter Anderson, *Latest Data*], https://www.forbes.com/sites/stuartanderson/2019/10/28/latest-data-show-h-1b-visas-being-denied-at-high-rates/#507466954c32; Stuart Anderson, *USCIS Policies Harming Labor Mobility of H-1B Professionals*, FORBES (Dec. 17, 2018, 12:03 AM), https://www.forbes.com/sites/stuartanderson/2018/12/17/uscis-policies-harming-labor-mobility-of-h-1b-professionals/#7803da8a61f7.

[116] Anderson, *Latest Data*, *supra* note 115.

[117] Attorney H, *supra* note 39; Attorney D, *supra* note 39 (explaining that it is impossible at times to meet the burden of proof as applied); Attorney J, *supra* note 39; Attorney L, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney S, *supra* note 39; *see also Trump Year One*, *supra* note 51, at 27 ("In spite of a 'preponderance of evidence' standard that the law requires, they are suddenly applying a 'beyond a reasonable doubt' standard to employment-based immigration cases.").

[118] Attorney A, *supra* note 39; Attorney E, *supra* note 39; Attorney S, *supra* note 39.

[119] 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2018).

regulation defines a "specialty occupation" as an occupation where "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position."[120] USCIS, under the Trump administration, challenged whether certain positions qualified as a specialty occupation even though that position qualified as a specialty occupation under previous administrations.[121]

There are at least two different ways that the Trump administration narrowed the definition of a specialty occupation. First, USCIS interpreted the regulatory term "normally" to mean "always," thus applying a standard that a bachelor's degree is *always* a minimum requirement for entry into the position.[122]

Second, USCIS attempted to define a specialty occupation as one that requires a very specific degree. For example, a judge rejected USCIS's argument that the position of "Quality Engineer" was not a specialty occupation because it did not require a sufficiently specific degree.[123] An existing agency regulation had been interpreted before the Trump administration to only require a degree directly related to the position.[124] USCIS did not follow that approach in the case and instead argued that because the Quality Engineer position required a general engineering degree, and not a specific sub-specialty of engineering, it was not a specialty occupation. The court determined that USCIS's narrowed interpretation of its own regulation did not deserve deference,[125] was unreasonable, and was therefore invalid.[126]

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[120] 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) (2020).

[121] *E.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0142, POLICY MEMORANDUM: RESCISSION OF THE DECEMBER 22, 2000 "GUIDANCE MEMO ON H1B COMPUTER RELATED POSITIONS" 2 (2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.

[122] *Id.* at 3; *see Implementation of March 31, 2017 Memo*, Rescission of the December 22, 2000 "Guidance Memo on H1B Computer Related Positions", AM. IMMIGR. LAW. ASS'N (Sept. 17, 2019), https://www.aila.org/File/Related/19091601w.pdf (AILA Doc. No. 19091601).

[123] InspectionXpert Corp. v. Cuccinelli, No. 1:19-cv-65, 2020 WL 1062821, at *28 (M.D.N.C. Mar. 5, 2020). Other district courts have disapproved of USCIS's narrowed definition. *See* Stuart Anderson, *Judges Slap Down USCIS Again on H-1B Visas*, FORBES (Apr. 8, 2020, 12:05 AM), https://www.forbes.com/sites/stuartanderson/2020/04/08/judges-slap-down-uscis-again-on-h-1b-visas/#7781d4028747.

[124] *InspectionXpert Corp.*, 2020 WL 1062821, at *10.

[125] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019) (explaining that a court must "bring all its interpretive tools to bear" on a regulation prior to finding it ambiguous, and only then should a court consider whether agency deference applies).

[126] *InspectionXpert Corp.*, 2020 WL 1062821, at *26. The case illustrates the increased procedural burdens in legal immigration adjudication as well. The application for H-1B status was filed, USCIS issued an RFE, the applicant responded to the RFE with about 250 pages of additional evidence. *Id.* at *2–3. USCIS denied the petition and the applicant filed a challenge to the denial in U.S. District Court. *Id.* at *4. USCIS then re-opened the application and issued another RFE. *Id.* The applicant submitted another 110 pages of material. *Id.* USCIS denied the

Additional examples of narrowed interpretations in the H-1B context were the subject of litigation in the District Court for the District of Columbia. The ITServe Alliance, a coalition of IT service companies, sued USCIS over three policies.[127] ITServe Alliance instigated a self-described "mass litigation campaign" designed to short-circuit a USCIS litigation practice of reopening applications and approving them after an applicant challenged an individual denial in federal district court.[128] The process of cherry-picking claims for settlement provided a happy ending for one individual applicant but "did not prevent USCIS from continuing to violate the law" in other similar applications.[129]

The ITServe Alliance litigation campaign challenged three policies: (1) generally tougher adjudication of petitions for H-1B status filed by employers whose employees perform their work on a client's premises;[130] (2) a specific requirement that employers whose employees perform their work on a client's premises must show guaranteed work assignments for three years (the maximum period of H-1B status that may be granted at one time);[131] and (3) increased instances of USCIS approving H-1B status in less than three-year increments.[132] ITServe Alliance argued that these three policies were aimed to decrease H-1B approvals for IT consulting companies and were all departures from previous interpretations of regulations and statutes.[133]

The District Court for the District of Columbia ruled in favor of ITServe on the first two policies. The court held that the 2018 policy memorandum that created policies one and two should have been implemented through notice and comment rulemaking.[134] The court also held that the agency's interpretations in the policy

application again. *Id.* at *9. The applicant amended its complaint and the district court litigation continued. *Id.* at *14.

[127] PR Newswire, *Mass Litigation Hearing on Arbitrary and Unlawful H-1B Visa Denials by USCIS*, BUS. INSIDER (May 8, 2019), https://markets.businessinsider.com/news/stocks/mass-litigation-hearing-on-arbitrary-and-unlawful-h-1b-visa-denials-by-uscis-1028183823.

[128] *Id.*

[129] *Id.*

[130] Stuart Anderson, *H-1B Denials Remain High, Especially for IT Services Companies*, FORBES (Feb. 26, 2020, 12:07 AM), https://www.forbes.com/sites/stuartanderson/2020/02/26/h-1b-denials-remain-high-especially-for-it-services-companies/#3537543927b2 (presenting data showing H-1B denials focused on IT consulting companies).

[131] U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0157, POLICY MEMORANDUM: CONTRACTS AND ITINERARIES REQUIREMENTS FOR H-1B PETITIONS INVOLVING THIRD-PARTY WORKSITES 6–7 (2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

[132] PR Newswire, *supra* note 127.

[133] ITServe All., Inc. v. Cissna, 443 F. Supp. 3d 14, 19–20 (D.D.C. 2020), *appeal dismissed sub nom.*, ITServe All., Inc. v. Cuccinelli, No. 20-5132, 2020 WL 3406588 (D.C. Cir. June 15, 2020).

[134] *Id.* at 31.

memorandum were inconsistent with existing regulations and statutes.[135] On the third issue, the court held that USCIS does have authority to issue grants of H-1B status in less than three-year increments, but it must provide a legitimate reason for doing so. The court explained that the first two—now-invalidated—policies are not legitimate reasons for granting less than three years of status.[136] The ITServe litigation ultimately settled in 2020.[137] As a term of the settlement agreement, USCIS agreed to rescind the 2018 policy memorandum.[138]

The H-1B program was not the only target of narrowed interpretations. USCIS issued policy guidance that narrowed the availability of L-1 status by making it more difficult to satisfy statutory requirements.[139] Another interpretation that limited legal immigration was a requirement that all inbound green card applicants must have health insurance or the ability to pay for it.[140] One estimate concluded that the new health insurance requirement "could prohibit the entry of roughly 375,000 immigrants annually."[141]

An additional Trump administration policy required diversity visa lottery entrants to have a valid passport before entering the lottery.[142] Previously, applicants did not need a valid passport to enter the lottery. Rather, lottery winners needed a passport to immigrate if they won legal status through the lottery. Requiring a valid passport to enter the lottery is a deterrent to entering because, for many foreign nationals, obtaining a passport is procedurally difficult and expensive.[143] While this

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[135] *Id.* at 37.

[136] *Id.* at 43.

[137] *See* Settlement Agreement at 6, ITServe All., Inc. v. Cissna, No. 18-2350 (D.D.C. May 16, 2020), https://nfap.com/wp-content/uploads/2020/05/ITSERVE-SETTLEMENT-AGREEMENT-fully-executed_Redacted52020.pdf.

[138] *Id.* at 1.

[139] *USCIS Clarifies the L-1 One-Year Foreign Employment Requirement*, PROSKAUER ROSE LLP (Dec. 6, 2018), https://www.proskauer.com/alert/uscis-clarifies-the-l-1-one-year-foreign-employment-requirement; *see* U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0167, POLICY MEMORANDUM: SATISFYING THE L-1 1-YEAR FOREIGN EMPLOYMENT REQUIREMENT; REVISIONS TO CHAPTER 32.3 OF THE ADJUDICATOR'S FIELD MANUAL (AFM) 1–3 (2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-11-15-PM-602-0167-L-1-foreign-employment-requirement.pdf.

[140] Proclamation No. 9945, 84 Fed. Reg. 53,991, 53,992 (Oct. 9, 2019).

[141] Julia Gelatt & Mark Greenberg, *Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration*, MIGRATION POL'Y INST. (Oct. 2019), https://www.migrationpolicy.org/news/health-insurance-test-green-card-applicants-could-sharply-cut-future-us-legal-immigration.

[142] Visas: Diversity Immigrants, 84 Fed. Reg. 25,989, 25,989 (June 5, 2019) (to be codified at 22 C.F.R. pt. 42); *see* Rose, *supra* note 6; Daniel Shoer Roth, *Fewer People Will Be Eligible to Apply for the Visa Lottery Thanks to This New Change*, MIAMI HERALD (Sept. 20, 2019, 3:49 PM), https://www.miamiherald.com/news/local/immigration/article231301803.html.

[143] Rose, *supra* note 6.

policy did not reduce the number of lottery winners, it could change the characteristics of the pool of entrants.

4. A New Mission

The forces behind the "workarounds" are evident in a new USCIS mission statement adopted in 2018. The new mission statement deemphasized responsibility for customer service and instead characterized USCIS as a law enforcement agency.[144] The new mission statement read:

> U.S. Citizenship and Immigration Services administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.[145]

The previous USCIS mission statement read:

> USCIS secures America's promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.[146]

USCIS Director Cissna changed the mission statement because he thought the old statement overly emphasized customer service.[147] He removed the use of the word "customers" and the reference to the United States as a "nation of immigrants."

The legislation that created DHS split the provision of immigration benefits and immigration enforcement into three different agencies within DHS: (1) USCIS; (2) Customs and Border Protection (CBP); and (3) Immigration and Customs Enforcement (ICE).[148] Congress created USCIS to administer benefits, while CBP and ICE took on enforcement missions. As the old mission statement stated, USCIS originally viewed working to advance the ability of U.S. employers and foreign nationals to access congressionally mandated benefits as central to its mission.

Consistent with a turn away from customer service and towards enforcement, USCIS reduced its stakeholder engagement efforts and eliminated customer service outlets for applicants under the Trump administration.[149] Attorneys felt shut out

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[144] *See* Richard Gonzales, *America No Longer A 'Nation Of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018, 6:18 PM), https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says.

[145] *Mission and Core Values*, *supra* note 20.

[146] Gonzales, *supra* note 144.

[147] *Id.*

[148] *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 24, 2020), https://www.uscis.gov/about-us/our-history; *see also* 6 U.S.C. § 211(a) (2018); 6 U.S.C. § 252 (2018); 6 U.S.C. § 271(a) (2018).

[149] Lindt, *supra* note 90, at 6.

from USCIS.[150] Also, the Trump administration called on USCIS to enhance its already existing screening procedures and to increase the activities of its already existing Fraud Detection and National Security Directorate.[151] The White House called for, among other things, "a process to evaluate the applicant's likelihood of becoming a positively contributing member of society," and "the applicant's ability to make contributions to the national interest."[152] It also ordered "a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States."[153] Referrals to the Fraud Detection and National Security Directorate increased.[154] The mood changed the balance; USCIS acted more as an enforcement agency, engaging in investigations that delayed applications.[155]

USCIS also expressed interest in transferring over $200 million from application fees to ICE for immigration enforcement efforts as a part of a fee increase proposal.[156] While USCIS ultimately dropped this transfer proposal, the fact that it was proposed is evidence of a desire, from at least some corners of the Trump administration, to further push USCIS away from its original mission as a customer-focused, benefits-granting agency.

D. Additional Actions Against Legal Immigration

The USCIS "workarounds" were implemented along with other actions against

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[150] Attorney P, *supra* note 39; Attorney Q, *supra* note 39; Attorney R, *supra* note 39; Attorney T, *supra* note 39; Attorney Y, *supra* note 39.

[151] *Cuccinelli Announces USCIS' FY 2019 Accomplishments and Efforts to Implement President Trump's Goals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 16, 2019), https://www.uscis.gov/news/news-releases/cuccinelli-announces-uscis-fy-2019-accomplishments-and-efforts-to-implement-president-trumps-goals.

[152] Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Feb. 1, 2017).

[153] *Id.*

[154] *Cuccinelli Announces USCIS' FY 2019 Accomplishments and Efforts to Implement President Trump's Goals*, *supra* note 151 (touting a 22% increase in referrals from Fiscal Year 2018 to Fiscal Year 2019); *see also* Laura D. Francis, *Trump Immigration Fraud Focus Yields Limited Results*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 6, 2018, 3:30 AM), https://news.bloomberglaw.com/daily-labor-report/trump-immigration-fraud-focus-yields-limited-results-1 (discussing increased activity of USCIS's Fraud Detection and National Security Directorate).

[155] Attorney E, *supra* note 39 (describing overzealous investigations); *see also* Chen & New, *supra* note 9, at 562–64 (discussing USCIS's Controlled Application Review and Resolution Program and social media vetting).

[156] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,327 (proposed Nov. 14, 2019) (to be codified in scattered parts of 8 C.F.R.); *see also USCIS Fee Changes*, CATH. LEGAL IMMIGR. NETWORK, INC., https://cliniclegal.org/issues/fee-schedule-changes (last visited Jan. 29, 2021).

congressionally endorsed immigration benefits. The Trump administration implemented barriers to achieving asylum and refugee status and new bans on travel to the United States from some majority-Muslim nations. The administration attempted to implement a new public charge rule that would have excluded applicants previously included. It also attempted to implement new, much higher application fees. The "workarounds" were a part of a larger effort against legal immigration. These additional actions were more visible and generated more public debate than the "workarounds."

1. Limiting Refuge in the United States

The Trump administration impeded refuge in the United States by creating barriers for asylum applicants and by drastically reducing the number of refugees accepted for resettlement. Individuals who apply for protection at the border or from within the United States are known as asylum applicants.[157] Refugees are individuals identified abroad and are selected for resettlement in various countries, including in the United States.[158] Congress authorized the admission of refugees and asylees. Therefore, restrictions on both are efforts to restrict legal immigration.

For asylum applicants, the Trump administration: (1) implemented an application metering system at the border; (2) forced some asylum applicants to remain in Mexico until their applications were fully adjudicated; and (3) reduced the pool of individuals eligible for asylum.

The metering system slowed the approach of would-be asylum applicants to the border by only allowing a set number of applicants to approach the border per day.[159] Like at a deli counter, an applicant had to wait in Mexico until his or her turn to approach border officials. The administration claimed it needed a metering system because it did not have enough space to process applicants.[160] Yet statistics on available holding facility space contradicted the administration's proffered reasoning.[161]

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[157] 8 U.S.C. § 1158(a)(1) (2018).

[158] 8 U.S.C. § 1101(a)(42) (2018); *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 7, 2020), https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees.

[159] AM. IMMIGRATION COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER: THE MIGRANT PROTECTION PROTOCOLS, PROMPT ASYLUM CLAIM REVIEW, HUMANITARIAN ASYLUM REVIEW PROCESS, METERING, ASYLUM TRANSIT BAN, AND HOW THEY INTERACT 1 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf; Stephanie Leutert et al., *Metering Update: August 2019*, STRAUS CTR. 1–2 (2019), https://www.strausscenter.org/wp-content/uploads/MeteringUpdate_190808.pdf.

[160] Elliot Spagat, *Holding-Cell Stats Raise Questions About Trump Asylum Policy*, AP NEWS (Feb. 13, 2020), https://apnews.com/article/6d32dd1fcda84a98bbf7c6455a2d6ae5.

[161] *Id.*

Two possibilities followed an applicant's opportunity to approach border officials and to apply for asylum. One is that the applicant was then placed into expedited removal proceedings and detained in the United States while their asylum application was adjudicated. The second is that the individual was placed into the "Remain in Mexico" program.[162] Applicants in the "Remain in Mexico" program had to wait in Mexico for a series of hearings, which took place just across the U.S. border in tent courts or in immigration courts, depending on port of entry.[163]

The metering and Remain in Mexico policies may have discouraged applicants from pursuing their applications because there was not adequate infrastructure to support applicants in Mexico while they waited. In addition to a lack of shelters or other housing, waiting in Mexico was dangerous. Applicants fell prey to criminals aiming to take advantage of this vulnerable population.[164] Some applicants were bussed to wait out their time in more remote areas of Mexico with no guaranteed way of returning to the border for any hearing.[165]

The Trump administration narrowed the pool of applicants eligible for protection in the United States through a variety of methods. For example, the Trump administration entered into "safe third country" agreements with Central American countries. These agreements prevented asylum seekers from obtaining protection in the United States if they traveled through a "safe third country" first and did not apply for asylum there.[166] Experts doubted that these countries were indeed safe or that these countries were in a position to provide a robust protection program.[167] Also, the Trump administration changed agency precedents to narrow interpretations of statutes and international obligations. Attorney General Jeff Sessions determined, for example, that victims of domestic violence do not qualify for asylum

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[162] AM. IMMIGRATION COUNCIL, *supra* note 159, at 2–3, 7.

[163] *Id.* at 2–3.

[164] Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico; Ed Vulliamy, *Kidnappers Prey with 'Total Impunity' on Migrants Waiting for Hearings in Mexico*, GUARDIAN (Feb. 18, 2020, 3:00 AM), https://www.theguardian.com/us-news/2020/feb/18/mexico-kidnappers-migrants-trump-immigration.

[165] Patrick J. McDonnell, *Mexico Sends Asylum Seekers South—with No Easy Way to Return for U.S. Court Dates*, L.A. TIMES (Oct. 15, 2019, 4:00 AM), https://www.latimes.com/world-nation/story/2019-10-15/buses-to-nowhere-mexico-transports-migrants-with-u-s-court-dates-to-its-far-south.

[166] Peniel Ibe, *The Dangers of Trump's "Safe Third Country" Agreements in Central America*, AM. FRIENDS SVC. COMMITTEE (July 28, 2020), https://www.afsc.org/blogs/news-and-commentary/dangers-trumps-safe-third-country-agreements-central-america.

[167] *Id.*; Nicole Narea, *Trump's Agreements in Central America Are Dismantling the Asylum System as We Know It*, VOX (Nov 20, 2019, 3:08 PM), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

protection, reversing previous agency precedent.[168]

All of the Trump administration's efforts led to a decrease in asylum grants. The percentage of asylum applicants denied protection increased to 69% in Fiscal Year 2019.[169] The denial rate was 55% for Fiscal Year 2016.[170]

To limit the number of refugees resettled in the United States, the Trump administration slashed the number of refugees it would accept. The president, in consultation with Congress, has the authority to set a yearly ceiling on the number of refugees who will be resettled into the United States.[171] President Obama proposed a ceiling of 110,000 refugees for Fiscal Year 2017.[172] The Trump administration never implemented that proposal.[173] Every fiscal year, the Trump administration drastically lowered the ceiling.[174] The ceiling for Fiscal Year 2020 was 18,000.[175]

2. Travel Bans

The Trump administration also limited lawful immigration by implementing an unprecedented travel ban that prevented nationals of some Muslim-majority countries from travelling to the United States. The bans negated statutory eligibility for legal immigration status.[176] For example, even if an individual qualified for an employment-based immigration status, that person could not achieve that immigration status if the individual was a national of a country subject to the travel ban.

The Supreme Court upheld the third version of the travel ban.[177] "Travel Ban Three" took effect in 2017.[178] The ban affected nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.[179] These countries were deemed "inadequate" regarding identity-management protocols, information-sharing practices,

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[168] Matter of A-B-, 27 I. & N. Dec. 316, 319 (A.G. 2018).

[169] *Record Number of Asylum Cases in FY 2019*, TRAC IMMIGR. (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[170] *Asylum Decisions*, TRAC IMMIGR. (Oct. 2020), https://trac.syr.edu/phptools/immigration/asylum/ (select Graph Time Scale "by Fiscal Year"; Time Series "Percent"; and "Decision" in first column).

[171] 8 U.S.C. § 1157(a)(2) (2018) (giving the president authority to determine the number of refugees who may be admitted); *id.* § 1157(d) (requiring the president to report to and consult with Congress "regarding the foreseeable number of refugees who will be in need of resettlement").

[172] Nahal Toosi & Seung Min Kim, *Obama Raises Refugee Goal to 110,000, Infuriating GOP*, POLITICO (Sept. 14, 2016, 12:45 PM), https://www.politico.com/story/2016/09/obama-refugees-228134.

[173] Jens Manuel Krogstad, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Oct. 7, 2019), https://www.pewresearch.org/fact-tank/2019/10/07/key-facts-about-refugees-to-the-u-s/.

[174] *Id.*

[175] Determination No. 2020-04, 84 Fed. Reg. 65,903, 65,904 (Nov. 29, 2019).

[176] Proclamation No. 9645, 3 C.F.R. § 135, 140–43 (2017).

[177] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

[178] 3 C.F.R. § 135; *Trump*, 138 S. Ct. at 2405–06.

[179] *Trump*, 138 S. Ct. at 2405–06. Chad was originally included, but DHS announced on

and risk factors.[180] The ban affected different countries in various ways. For Libya and Yemen, no one was allowed to obtain a green card, and no new visitor visas were granted.[181] No Iranian was eligible for a green card or to enter in any nonimmigrant category, except as a student or exchange visitor.[182] Certain Venezuelan government officials were banned from visiting the United States.[183] Nationals of Somalia were not allowed to obtain a green card.[184] North Korea and Syria were subject to a total suspension of immigration, no matter the type.[185] Travel Ban Three did not apply to individuals who already had a legal immigration status.[186] It also did not apply to dual nationals where at least one country of nationality was not banned.[187]

The Trump administration expanded the ban in January 2020 to include Nigeria, Myanmar, Sudan, Tanzania, Eritrea, and Kyrgyzstan.[188] Nationals of Nigeria, Myanmar, Eritrea, and Kyrgyzstan could not immigrate to the United States.[189] Nationals of Sudan and Tanzania were prohibited from entering the United States on one form of legal immigration status, the diversity lottery.[190]

3. New Public Charge Rule

The Trump administration sought to implement an expanded definition of "public charge."[191] Under the INA, someone who is a public charge is inadmissible to the United States, despite otherwise qualifying for a legal immigration status.[192] The rule aimed to make it easier for applicants to qualify as a public charge. The

April 10, 2018 that Chad would be removed from the list. *Chad Has Met Baseline Security Requirements, Travel Restrictions to Be Removed*, U.S. DEP'T HOMELAND SECURITY (Apr. 10, 2018), https://www.dhs.gov/news/2018/04/10/chad-has-met-baseline-security-requirements-travel-restrictions-be-removed.

[180] 3 C.F.R. § 138.

[181] *See* 3 C.F.R. §§ 141–42; *Trump*, 138 S. Ct. at 2405.

[182] *See* 3 C.F.R. § 141; *Trump*, 138 S. Ct. at 2405.

[183] *See* 3 C.F.R. § 142; *Trump*, 138 S. Ct. at 2405–06.

[184] *See* 3 C.F.R. § 143; *Trump*, 138 S. Ct. at 2405.

[185] *See* 3 C.F.R. §§ 141–42.

[186] *See id.* §§ 143–44.

[187] *See id.* § 144.

[188] Proclamation No. 9983, 85 Fed. Reg. 6699, 6701–02 (Feb. 5, 2020).

[189] *Id.* at 6704. An exception existed for Special Immigrants able to establish eligibility "based on having provided assistance" to the U.S. government. *Id.*

[190] *Id.* at 6705.

[191] The Trump administration implemented the rule, but a district court enjoined it in November 2020. Miriam Jordan, *Trump's Public Charge Rule Is Vacated by Federal Judge*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/2020/11/02/us/trump-immigration-public-charge.html.

[192] *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

rule also sought to give adjudicators more discretion to conclude that an applicant is a public charge.[193] The rule changed the public charge calculation from whether "the individual was *likely to become primarily dependent* on the government for subsistence" to whether the applicant is likely to receive any number of "public benefit[s]."[194] In addition to actual receipt of benefits, the new rule instructed adjudicators to consider a variety of other factors—such as age, health, and education—to determine if the individual is likely to receive a public benefit.[195]

The new public charge rule carried the potential to significantly diminish lawful immigration.[196] The rule would decrease immigration by around 30%, according to one estimate.[197] The likely effect of the new rule was evident from an increase in entry refusals under restrictive changes to the Department of State's public charge guidance that predated DHS's rule.[198] During Fiscal Year 2016, the Department of State denied 164 immigrant visas based on public charge grounds.[199] During Fiscal Year 2019, the number denied rose to 11,319.[200]

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[193] *See* Jeanne Batalova et al., *Millions Will Feel Chilling Effects of U.S. Public-Charge Rule that Is Also Likely to Reshape Legal Immigration*, MIGRATION POL'Y INST. (Aug. 2009), https://www.migrationpolicy.org/news/chilling-effects-us-public-charge-rule-commentary; U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL: VISAS § 302.8 (2020), https://fam.state.gov/FAM/09FAM/09FAM030208.html; *see also* Erin Quinn & Sally Kinoshita, *An Overview of Public Charge and Benefits*, IMMIGR. LEGAL RES. CTR. (Mar. 2020), https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge_and_benefits-march2020-v3.pdf (explaining that the new rule encourages officers to use their own discretion in making important decisions about whether a person can immigrate to the United States).

[194] Quinn & Kinoshita, *supra* note 193 (emphasis added). The new rule expanded the definition of public benefit to include more programs. *Id.*

[195] *Id.*

[196] RANDY CAPPS ET AL., MIGRATION POLICY INST., GAUGING THE IMPACT OF DHS' PROPOSED PUBLIC-CHARGE RULE ON U.S. IMMIGRATION 1, 10 (2018), https://www.migrationpolicy.org/sites/default/files/publications/MPI-PublicChargeImmigrationImpact_FinalWeb.pdf.

[197] *New Research: Public Charge Rule and Other Administration Policies Will Reduce Legal Immigration by 30% or More*, NAT'L FOUND. FOR AM. POL'Y 1 (Feb. 24, 2020), https://nfap.com/wp-content/uploads/2020/02/Impact-of-Administration-Policies-on-Legal-Immigration-Levels.DAY-OF-RELEASE.February-2020.pdf.

[198] *Changes to "Public Charge" Instructions in the U.S. State Department's Manual*, NAT'L IMMIGR. L. CTR. (Feb. 8, 2018), https://www.nilc.org/issues/economic-support/public-charge-changes-to-fam/; NATIONAL FOUNDATION FOR AMERICAN POLICY, STATE DEPARTMENT VISA REFUSALS IN FY 2018 FOR IMMIGRANTS AND NONIMMIGRANTS 5 (2019).

[199] *See* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2016 tbl. XX (2016), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf.

[200] *See* U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2019 tbl. XX (2019), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXX.pdf.

4. An Increase in Filing Fees

USCIS attempted to increase filing fees under the Trump administration.[201] USCIS is a user-fee-funded agency. USCIS maintains a fee schedule that assigns fees for processing different application forms.[202] In the fall of 2019, USCIS proposed dramatic increases in fees[203] and issued a final rule in August 2020 that stepped back somewhat from the proposed rule, but still included major fee increases to take effect in October 2020.[204] For example, the fees to file applications in certain popular employment-based categories would rise 21% to 85%.[205] The new fee rule also aimed to implement a filing fee to apply for asylum, which did not previously exist.[206] An increase in fees may prohibit lower-income applicants from applying for legal status. It also may deter employers from applying for legal status for employees. An increase in filing fees would add to the already increased cost and effort of applying due to the bureaucratic hurdles discussed in Part II.C.

E. Responses to the Invisible Wall in Individual Cases

How did immigration attorneys respond to USCIS's "workarounds"? This Part examines available responses in individual cases and presents data on the role of judicial review as a form of external control. Attorneys were dissatisfied with available internal control measures and increasingly sought to access external control through judicial review. For features of the invisible wall that were less amenable to judicial review, the only option was to endure.

1. Available Responses to Denials

When USCIS denies an application for a lawful immigration benefit, filing a lawsuit to challenge the denial is one possible response. The lawsuit response activates an external control mechanism. Other responses, however, take place within the executive branch and potentially could provide an internal administrative law check on initial denials.

There are six options to redress a USCIS denial of an application for legal status. These options are available to respond in individual cases and do not include

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[201] Stuart Anderson, *Judge Blocks USCIS Fee Increases: Here's Why It Happened*, FORBES (Sept. 30, 2020, 12:06 AM), https://www.forbes.com/sites/stuartanderson/2020/09/30/judge-blocks-uscis-fee-increases-heres-why-it-happened/?sh=f5ec236583a8.

[202] FORM-G 1055: FEE SCHEDULE, *supra* note 24.

[203] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 Fed. Reg. 62,280, 62,280 (proposed Nov. 14, 2019) (to be codified in scattered parts of 8 C.F.R.).

[204] U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,788 (Aug. 3, 2020).

[205] *See id.* at 46,791.

[206] *Id.*

policy advocacy efforts. The responses that engage USCIS, and thus internal administrative law, are: (1) refile the same application with USCIS, hoping for a different result from a different adjudicator (not an agency appeal, but rather a "do-over"); (2) file a Motion to Re-open or Reconsider the denial with USCIS; or (3) file an appeal to the Administrative Appeals Office (AAO) within USCIS.[207] There are three external control mechanisms. The option that engages the judiciary is (4) to file a complaint in U.S. district court challenging the denial.[208] An option that engages the legislature is (5) to enlist the help of a congressional office in asking USCIS to reconsider.[209] The final option is (6) to give up on hiring the employee in the United States and to move the job position outside of the United States. This last option is a form of external political control.[210]

Interviewed attorneys reported strong discontent with the administrative review provided by the AAO.[211] Attorneys preferred to refile an application (the "do-over" option) when possible.[212] Attorneys reported appealing to the AAO only when there was no other option because the case could not be refiled.[213] For example, an H-1B application originally filed before the yearly cap is reached could not be refiled because it would not be grandfathered under the cap.

Attorneys reported a dislike of the AAO because of a belief that the AAO was

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[207] Diane M. Butler et al., *Post-Denial Strategies: How to Get from "No" to "Yes"*, 24 BENDER'S IMMIGR. BULL. 1327, 1327 (2019).

[208] *See* 5 U.S.C. § 701 et seq. (2018). An option related to number four is to draft a complaint and send it to the local U.S. Attorney's office in the hope that the case will be re-opened and approved before filing the complaint. Attorney M, *supra* note 39; Attorney O, *supra* note 39; Attorney P, *supra* note 39.

[209] Attorney R, *supra* note 39.

[210] Chen & New, *supra* note 9, at 585; *see also, e.g.*, Attorney J, *supra* note 39 (indicating that some employers are moving jobs to Canada); Attorney W, *supra* note 39 (explaining that companies are assigning more people to Canada and Mexico); *see also* Semuels, *supra* note 81.

[211] Attorney A, *supra* note 39; Attorney B, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney F, *supra* note 39; Attorney G, *supra* note 39; Attorney I, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney L, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney Q, *supra* note 39; Attorney R, *supra* note 39; Attorney U, *supra* note 39; Attorney W, *supra* note 39; Attorney Y, *supra* note 39. Hun Lee and Stephen Yale-Loehr examined 52 federal district court complaints filed against USCIS as a result of H-1B denials. They found that "[m]ost plaintiffs did not file an administrative appeal before suing in federal court." Hun Lee & Stephen Yale-Loehr, *Challenging H-1B Denials in Federal Courts: Trends and Strategies*, 24 BENDER'S IMMIGR. BULL. 1468, 1469 (2019).

[212] Attorney H, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney R, *supra* note 39; Attorney S, *supra* note 39; Attorney U, *supra* note 39; Attorney W, *supra* note 39.

[213] Attorney C, *supra* note 39; Attorney K, *supra* note 39; Attorney S, *supra* note 39.

predisposed to support the underlying USCIS denial.[214] Because the AAO has de novo review over USCIS decisions,[215] attorneys reported that the AAO would affirm on an alternative ground even if there were defects in the USCIS decision.[216]

Attorneys were more enthusiastic about simply refiling the same application again with USCIS, in hope of receiving a different outcome.[217] Despite the fact that this strategy requires paying filing fees again, attorneys reported that they had success getting a different outcome with a different adjudicator.[218] Refiling often was more attractive than filing a Motion to Reopen with USCIS because a Motion to Reopen must be based on new facts, and not an argument that the previous adjudication was faulty.[219] Refiling was more appealing than a Motion to Reconsider because refiling was thought to have a greater chance of success than asking the agency to reverse an existing decision (despite that a de facto reversal is the result of a successful refiling).[220]

Attorneys also lamented the amount of time it took to process an appeal through the AAO. If a denial is appealed to the AAO, the decision is first sent back to the USCIS office that made the original decision for reconsideration.[221] If the application is not approved, then the appeal is forwarded to the AAO.[222] The processing time goal for AAO appeals is 180 days after the USCIS reconsideration, but

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[214] Attorney A, *supra* note 39; Attorney B, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney F, *supra* note 39; Attorney I, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney L, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney Q, *supra* note 39; Attorney R, *supra* note 39; Attorney U, *supra* note 39.

[215] *Chapter 1. The Administrative Appeals Office*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 11, 2018), https://www.uscis.gov/tools/practice-manual/chapter-1-administrative-appeals-office#1.2.

[216] Attorney A, *supra* note 39; Attorney K, *supra* note 39.

[217] *See* Attorney J, *supra* note 39. One attorney expressed growing doubt about the continuing effectiveness of refiling, however. *Id.* He explained that adjudicator "Nancy Nice" quit because she "couldn't take it anymore"; there were fewer adjudicators left who would exercise discretion in favor of foreign nationals. *Id.* Another attorney noted an increasing attractiveness of appealing to the AAO. Attorney N, *supra* note 39.

[218] Perhaps this refiling practice attempts to access some form of resistance among some adjudicators. *See generally* Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627 (2019) (discussing examples of bureaucratic resistance in immigration law).

[219] *Questions and Answers: Appeals and Motions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 8, 2018), https://www.uscis.gov/forms/questions-and-answers-appeals-and-motions; Butler et al., *supra* note 207, at 1327–28.

[220] *See* Attorney U, *supra* note 39; Attorney Q, *supra* note 39.

[221] *AAO Decision Data*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 25, 2019), https://www.uscis.gov/administrative-appeals/aao-decision-data.

[222] *Id.*

the AAO often did not meet that goal.[223] For example, the on-time completion rate of H-1B appeals for the fourth quarter of Fiscal Year 2020 was 34.8%.[224] For all types of appeals, the on-time completion rate for the fourth quarter of 2020 was 37.89%.[225]

Despite its reputation as a rubber stamp, the number of AAO appeals increased during the Trump administration, and the percent of appeals sustained or remanded by the AAO in the H-1B category also increased. The percent of appeals sustained or remanded for Fiscal Year 2019 was 23%, while the percent of appeals sustained or remanded for 2016 was 6%.[226] While the sustained/remand rate at the AAO increased, the number of H-1B denials appealed to the AAO was quite small (1,395 in Fiscal Year 2019), and the AAO upheld denials in the great majority of cases.[227] The number of H-1B petitions denied from Fiscal Years 2015 through 2018 rose from 13,073 to 61,347.[228]

Table C
AAO Appeals: H-1B, Fiscal Years 2015–2019[229]

Fiscal Year	Total Appeals	Appeals Dismissed	Appeals Sustained or Remanded	Percent Sustained or Remanded
2015	529	504	25	5
2016	391	369	22	6
2017	664	598	66	10
2018	972	758	214	22
2019	1395	1068	327	23

Interviewed attorneys reported they turned to federal district courts to review denials under the Trump administration.[230] The AAO is a creature of regulation

[223] *AAO Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 5, 2020), https://www.uscis.gov/administrative-appeals/aao-processing-times.

[224] *Id.*

[225] *Id.*

[226] U.S. CITIZENSHIP & IMMIGRATION SERVS., AAO APPEAL ADJUDICATIONS, https://www.uscis.gov/sites/default/files/document/data/AAO_Data_for_Publishing_Thru_FY19.pdf (last visited Jan. 29, 2021).

[227] *Id.*

[228] USCIS VISA REPORT 2015–2019, *supra* note 86.

[229] U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 226.

[230] Attorney A, *supra* note 39; Attorney B, *supra* note 39; Attorney C, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney I, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney L, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney S, *supra* note 39; Attorney U, *supra* note 39; Attorney V, *supra* note 39.

and the applicable regulation does not require administrative appeal before judicial review.[231] Attorneys commented that federal court litigation was faster than AAO review and provided independent review. Previously, this type of litigation was not prominent in immigration law, and some attorneys commented that immigration lawyers needed to learn how to litigate.[232] To that end, the American Immigration Lawyers Association formed a litigation task force in 2018.[233] The task force was created to give lawyers more confidence to litigate by providing tools such as sample complaints, mentors, and training opportunities.[234]

Attorneys reported that many clients were hesitant to sue, however.[235] Some would rather send the work outside of the United States, particularly to Canada or Mexico, where time zones kept the work close to other employees based in the United States.[236] The hesitancy to sue came from several factors, such as cost, time delay, a fear of retribution from the government in future applications and the award of government contracts, and a desire to avoid perceived potential negative publicity.[237] As one attorney stated, clients did not want to "poke the beast."[238] No attorney pointed to evidence of actual retribution, and some stated that they told their clients that they never saw evidence of such retribution.[239]

For those who did sue, attorneys reported that USCIS would reopen cases and

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[231] There is no statutory mention of the AAO, and there is no regulation that requires exhaustion. *See, e.g.*, 8 C.F.R. § 103.3 (a)(1)(ii) (2020) (stating that denials "may be appealed" to the AAO); *see also* AM. IMMIGRATION COUNCIL, *supra* note 32, at 1.

[232] Attorney F, *supra* note 39; Attorney U, *supra* note 39.

[233] Sinduja Rangarajan, *Trump Has Built a Wall of Bureaucracy to Keep Out the Very Immigrants He Says He Wants*, MOTHER JONES (Dec. 2, 2019), https://www.motherjones.com/politics/2019/12/trump-h1b-visa-immigration-restrictions; *see also* Attorney A, *supra* note 39; Attorney Q, *supra* note 39; Attorney U, *supra* note 39.

[234] Attorney Q, *supra* note 39; *see* Laura D. Francis, *Businesses Challenging Visa Denials Seeing Early Successes*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 4, 2019, 3:01 AM), https://news.bloomberglaw.com/daily-labor-report/businesses-challenging-visa-denials-seeing-early-successes.

[235] Attorney A, *supra* note 39; Attorney C, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney F, *supra* note 39; Attorney G, *supra* note 39; Attorney H, *supra* note 39; Attorney I, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney Q, *supra* note 39; Attorney R, *supra* note 39; Attorney U, *supra* note 39; Attorney V, *supra* note 39; Attorney Y, *supra* note 39. Although, employers may be growing more amenable to litigating. Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney V, *supra* note 39.

[236] Attorney C, *supra* note 39; Attorney E, *supra* note 39; Attorney J, *supra* note 39; Attorney W, *supra* note 39.

[237] Attorney A, *supra* note 39; Attorney C, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney F, *supra* note 39; Attorney G, *supra* note 39; Attorney I, *supra* note 39; Attorney M, *supra* note 39; Attorney Q, *supra* note 39; Attorney U, *supra* note 39; Attorney V, *supra* note 39; Attorney Y, *supra* note 39.

[238] Attorney A, *supra* note 39.

[239] Attorney U, *supra* note 39; Attorney V, *supra* note 39.

approve the underlying applications when it did not want to litigate.[240] Attorneys held mixed feelings about this practice. On the one hand, there was relief at finally achieving a fair result for their client. On the other hand, there was frustration that they could only achieve the result by accessing the federal courts.[241] Additionally, attorneys were frustrated that the settlement practice prevented USCIS's deficiencies from receiving more attention.[242]

2. Available Responses to Invisible Wall Features Other than Denials

Some invisible wall features may not have resulted in a denial but still made legal immigration more difficult. These features affected legal practice and influenced whether a U.S. employer pursued legal status for an employee. Delay led to greater uncertainty and increased frustration of business objectives, even if the application was ultimately approved. Increased procedural hurdles inflated costs. For example, attorneys needed to spend more time responding to an RFE, and employers needed to dedicate staff time to gather information to support the response. A higher de facto burden of proof had similar effects.

The available responses to increased procedural burdens and delay in individual cases where an application was ultimately approved were: (1) live through it and absorb the additional costs; (2) seek external control in the form of mandamus relief; or (3) forgo the process and move the work outside of the United States. No formal internal control mechanisms were available for attorneys to access.

3. The External Control Response: The Judicial Review Data

This Article provides the most exhaustive measure to date of the increase in litigation against USCIS under the Trump administration.[243] This shift to federal court challenges received some industry media attention.[244] Two other analyses

[240] Attorney B, *supra* note 39; Attorney C, *supra* note 39; Attorney D, *supra* note 39; Attorney E, *supra* note 39; Attorney I, *supra* note 39; Attorney J, *supra* note 39; Attorney K, *supra* note 39; Attorney L, *supra* note 39; Attorney M, *supra* note 39; Attorney N, *supra* note 39; Attorney O, *supra* note 39; Attorney P, *supra* note 39; Attorney S, *supra* note 39; Attorney U, *supra* note 39.

[241] Attorney E, *supra* note 39; Attorney J, *supra* note 39; Attorney U, *supra* note 39.

[242] Attorney B, *supra* note 39; Attorney I, *supra* note 39; Attorney U, *supra* note 39 (describing that the Trump administration's attitude was to deny with the understanding that few would sue and then to quickly settle the egregious cases that were brought to a federal court's attention).

[243] For a more thorough description of the methodology, see *infra* Appendix.

[244] Francis, *supra* note 234; Laura D. Francis, *Fed Up with Immigration Backlog, Lawyers Head to the Courts*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 8, 2019, 3:24 AM), https://news.bloomberglaw.com/daily-labor-report/fed-up-with-immigration-backlog-lawyers-head-to-the-courts.

looked specifically at the number of challenges involving applications for H-1B status.[245] This study is more comprehensive. It is not limited to one type of legal status. Also, it looks beyond court opinions in cases and instead collects data from docket sheets, which are the mechanism used by federal courts to document every complaint filed and subsequent actions in each case. The docket sheets give insight into the court system's inputs, revealing attempts to access external control.

This study gathered complaints filed against USCIS under two Nature of Suit codes. A Civil Cover Sheet accompanies each complaint filed in a U.S. district court.[246] The sheet categorizes complaints by type of claim, among other information. Attorneys select one of the Nature of Suit Codes preprinted on the Civil Cover Sheet to categorize the complaint.[247] This Article examines two Nature of Suit Codes, 899 and 465.

Nature of Suit Code 899 (Code 899) covers actions filed under the APA.[248] By examining complaints filed under Code 899 with USCIS or an individual director of USCIS as a defendant, the study calculates the number of complaints filed by year under this code against USCIS.[249] This study looked at cases filed under Code 899 back to 2011 when that code came into service.[250]

Nature of Suit Code 465 (Code 465) applies to immigration actions other than naturalization, habeas corpus, or deportation.[251] Code 465 cases were counted in total and also filtered by cause of action. By counting the complaints filed under Code 465 with an APA-related cause of action (such as 706 for judicial review), the result is the number of complaints filed against USCIS by year with an APA-related cause of action. This study also collected Code 465 complaints filed under a specific mandamus cause of action, a Writ of Mandamus to Adjudicate Visa Petition. This study looked at Code 465 filings back to 2009. Code 465 came into service in 2007.[252]

In 2019, a record number of complaints were filed against USCIS under both Codes 899 and 465, including all causes of action, across all U.S. districts. In 2019,

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[245] Lee & Yale-Loehr, *supra* note 211, at 1468; Rangarajan, *supra* note 83.

[246] U.S. COURTS, CIVIL COVER SHEET JS 44, at 1 (2020) [hereinafter CIVIL COVER SHEET], https://www.uscourts.gov/file/22163/download.

[247] *Id.*

[248] *Id.*; U.S. COURTS, CIVIL NATURE OF SUIT CODE DESCRIPTIONS 8 (2020) [hereinafter NATURE OF SUIT CODE DESCRIPTIONS], https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf.

[249] The number of complaints does not equal the number of claims, as a complaint may contain more than one claim.

[250] Email from Jaculine Koszczuk, Pub. Info. Officer, Admin. Office of the U.S. Courts, to author (Sept. 6, 2019, 2:38 PM) (on file with author).

[251] NATURE OF SUIT CODE DESCRIPTIONS, *supra* note 248, at 5. There is a separate Nature of Suit Code for deportation challenges. *Id.* at 7.

[252] Koszczuk, *supra* note 250.

attorneys filed 227 complaints under Code 899 and 1,234 complaints under Code 465.[253] That is the highest total for each code for the years examined.[254] For Code 899, 2018 and 2019 saw the greatest growth from previous years. From 2013 to 2016, the number of complaints filed under Code 899 varied between 45 to 77.[255] In 2018, however, the number of complaints filed jumped to 118, and then to 227 in 2019.[256] The total number of complaints filed under Code 465, no matter the cause of action, provide a less pronounced pattern. Attorneys filed a record number of cases in 2019 compared to the preceding 10 years, but there were a substantial number of Code 465 complaints filed in 2015 and 2016, predating the Trump administration.[257]

This study filtered Code 465 complaints to reveal Code 465 cases with an APA-related cause of action filed against USCIS or a USCIS director defendant in the five district courts with the most overall Code 465 filings (all causes of action). From 2016 to 2019, there was a 248% increase in Code 465 cases filed with an APA-related cause of action in the top five districts.[258] In 2016, 50 cases were filed. In 2019, 174 cases were filed. During that same period, there was a 195% increase in Code 899 cases (which are by definition APA-related) filed against USCIS or a USCIS director defendant in all districts.[259] In 2016, 77 cases were filed. In 2019, 227 cases were filed.

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[253] *See infra* Figure A.

[254] *Infra* Figure A.

[255] *Infra* Figure A.

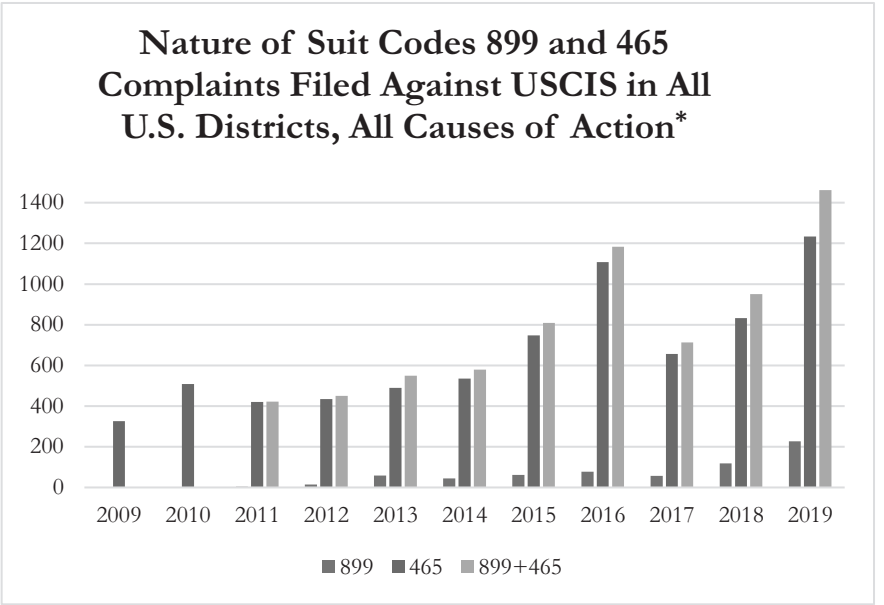
[256] *Infra* Figure A.

[257] *Infra* Figure A.

[258] The Eastern District of New York, the Central District of California, the Southern District of New York, the Northern District of Illinois, and the District for the District of Columbia have the largest number of Code 465 filings. *See infra* Figure C.

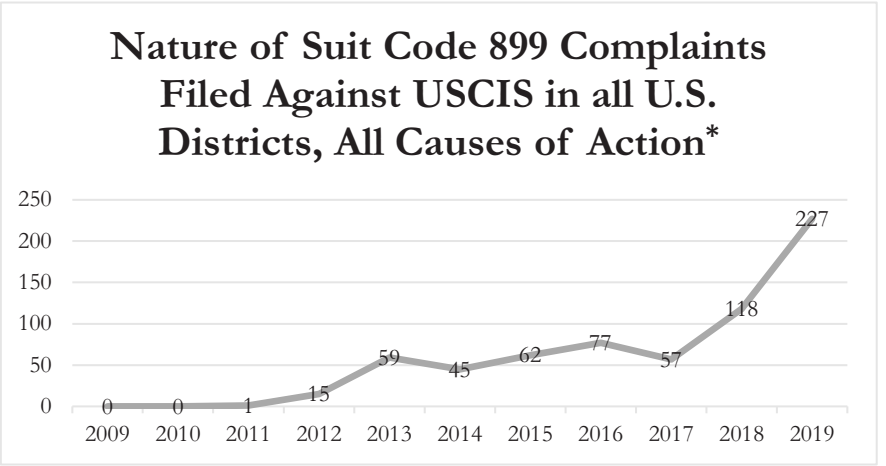
[259] *See infra* Figure B.

Figure A



*Code 899 entered service in 2011.

Figure B



* Code 899 entered service in 2011.

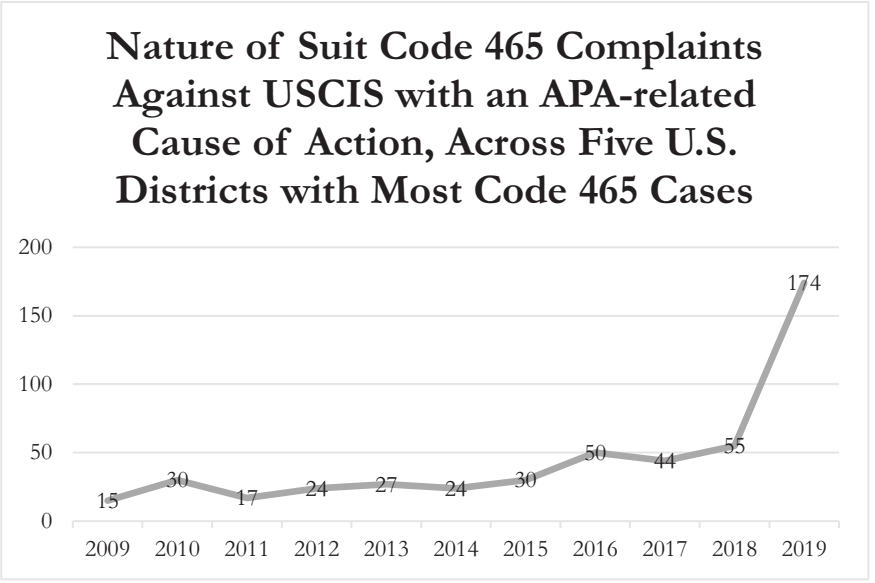
The project focused on the five federal district courts with the most Code 465 filings with any cause of action: the Eastern District of New York, the Central District of California, the Southern District of New York, the Northern District of Illinois, and the District for the District of Columbia. The study examined Code 465 cases only in these five districts because it is impossible to simultaneously search causes of action across multiple districts. It is impossible because districts may use

differing identifiers for the same cause of action. Therefore, the project individually examined complaints at the cause of action level for the top five receiving districts.

Filtering Code 465 cases into APA-related and mandamus causes of action reveals a steady increase in complaints filed under an APA-related cause of action. One big increase occurred between 2018 and 2019.[260] In the top five districts in 2018, 55 APA-related Code 465 cases were filed. In 2019, 174 were filed. There was also a sustained increase in the number of complaints filed between 2015 and 2016, rising from 30 to 50.[261] However, the number of complaints filed more than tripled from 2018 to 2019. In the United States District Court for the District of Columbia, the number of Code 465 cases with an APA-related cause of action rose from 9 in 2016 to 109 in 2019.[262] Among the top five districts, the majority of recent Code 465 APA-related complaints were filed in the District Court for the District of Columbia.

The mandamus-related Code 465 cases reveal a different pattern, one where the numbers under the Trump administration are not as exceptional. The number of mandamus actions peaked in 2015.[263] In 2019, however, the second largest number of mandamus cases during the study period were filed.[264]

Figure C



260 *See infra* Figure C.

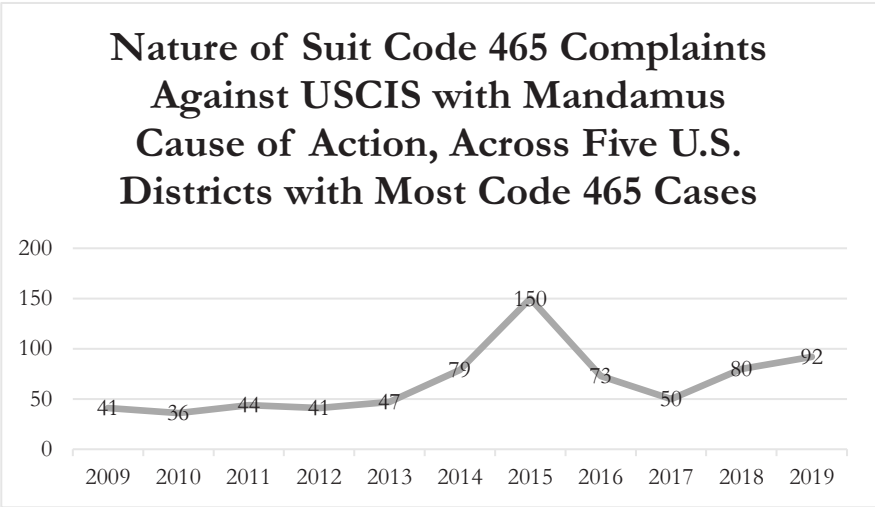
261 *See infra* Figure C.

262 *See infra* Appendix Table B.1.

263 *See infra* Figure D.

264 *Id.*

Figure D



There are more complaints against USCIS under the Trump administration, especially in APA-related causes of action, as represented by Code 899 and the filtered Code 465 cases. The number of complaints filed, however, is still small compared to the number of denials. The number of denials of H-1B applications alone was 69,543 in Fiscal Year 2019.[265] The number of complaints filed against USCIS under Code 465 with an APA-related cause of action in the top 5 districts was 490 over the 10 years.[266] The number of Code 899 complaints filed against USCIS across all districts over the 10 years was 661.[267]

In addition to examining the number of complaints filed per year, this Article examines whether the data support a litigation practice mentioned by attorneys during interviews for this study. Attorneys reported that when a case challenging a denial was filed in federal court, it often prompted USCIS to reconsider its denial.[268] USCIS would reverse course and approve the application, ending the litigation. Testing the frequency of this observed practice required examining individual docket sheets to determine whether the government defended a complaint. Because the District for the District of Columbia received so many of the APA-related complaints filed against USCIS under both Codes 899 and 465, this study examined each docket sheet gathered from the District of Columbia.

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[265] USCIS VISA REPORT 2015–2019, *supra* note 86.

[266] *See supra* Figure C.

[267] *See supra* Figure B.

[268] *See supra* note 240 and accompanying text.

For this study's purposes, the government defended a complaint if it filed a dispositive motion, such as a motion to dismiss, a motion for summary judgment, or an answer to the complaint. The study included motions to transfer in the dispositive motion category under the theory that the government was not immediately pursuing a settlement if it undertook the effort to attempt to transfer the case to another district. The study did not classify motions for extensions of time to answer as dispositive. If the government did not file a dispositive motion and the complaint was dismissed voluntarily or by stipulation, then for purposes of this study the government did not defend it.

There is support in the study data for attorneys' reports that the government did not defend complaints filed against USCIS during the Trump administration.[269] From 2017 to 2019 in the District for the District of Columbia, USCIS defended 36% of the Code 899 cases examined as a part of this study (32 of 89).[270] For the Code 465 APA cases during 2017 to 2019, the government defended 50% of the cases filed in the District for the District of Columbia examined as a part of this study (63 of 126).[271] For the total number of Code 465 and Code 899 cases filed in the District of Columbia during 2017 to 2019, the government defended 44% of the cases (95 of 215).[272]

It is unclear whether the defend rate during the Trump administration is an anomaly. For the Code 899 cases, there were few cases filed under that Nature of Suit Code before the Trump administration. The defend rate for cases filed in the District of Columbia in 2013 was 100%, for example, but there was only one case filed.[273] The defend rate for 2017 was 30%, as the government defended 3 of 10 cases.[274] In 2015, the government defended 5 of 6 cases, or 83%.[275] Similarly, there were few Code 465 APA-related cases before the Trump administration. For example, in 2011, the government defended 2 of 2 lawsuits filed, or 100%.[276] In 2016, the government defended 5 of 9 cases, or 56%.[277] In 2012, the government defended 0 of 1 case filed, or 0%.[278]

Two things are clear: (1) more cases were filed and (2) the executive branch used the federal courts to some extent to sift through the strength of administrative

[269] Because assigned Nature of Suit and Cause of Action codes are not fixed at the time of filing, it is possible that this search excludes some cases that may at some later point be reclassified under the codes that are the subject of this study.

[270] *See infra* Appendix Table A.

[271] *See infra* Appendix Table C.

[272] *See infra* Appendix Table A; *infra* Appendix Table C.

[273] *See infra* Appendix Table A.

[274] *See infra* Appendix Table A.

[275] *See infra* Appendix Table A.

[276] *See infra* Appendix Table C.

[277] *See infra* Appendix Table C.

[278] *See infra* Appendix Table C.

decisions. Executive branch quality control happened when an applicant sought judicial review. Judicial review is designed to provide quality control, but internal control mechanisms also must provide quality control. Under the invisible wall, quality control shifted to the realm of external control.[279]

III. THE DANGER OF INTERNAL AGENCY CONTROL

The invisible border wall was the product of internal agency control. It was not imposed by external control; no statute or judicial order demanded it. Agency action directed and coordinated from the White House constructed the invisible wall. It represents a failure of internal administrative law and illustrates concerns with centralized, executive branch control over agencies.

There is a difference between internal and external administrative law. Professors Gillian Metzger and Kevin Stack explain that "internal administrative law is created within the agency or the executive branch, whereas external administrative law comes from Congress and the courts."[280] Internal administrative law includes organizational, procedural, and policy choices that are generated within an agency, centralized executive branch measures that govern agency conduct (either applicable to one agency, some agencies, or all agencies), and processes governing interagency activities.[281]

Some features of internal administrative law are only subject to internal agency controls.[282] Others are subject to external control. Congress is one potential source of external control over internal administrative law. Congress has oversight powers and the ability to alter delegations to agencies.[283] Congressional oversight powers

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[279] This phenomenon is not new to immigration law. Attorney General John Ashcroft implemented "streamlining" reforms at the Board of Immigration Appeals that produced fewer reasoned decisions. The streamlining was credited with contributing to the increase in the number of petitions for judicial review filed. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3–5, 8, 23–27 (2005).

[280] Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 163, 165 (Nicholas R. Parrillo ed., 2017).

[281] Metzger & Stack, *supra* note 4, at 1252–56.

[282] *Id.* at 1263–66; *see also* Christopher J. Walker & Rebecca Turnbull, *Operationalizing Internal Administrative Law*, 71 HASTINGS L.J. 1225, 1227–28 (2020); Walker, *supra* note 10, at 1624–25 (identifying seven categories of administrative action that mainly exist without judicial review: "(1) agency guidance and regulation by compliance; (2) agency enforcement discretion; (3) informal agency adjudication; (4) formal agency adjudication; (5) agency rulemaking with *Chevron* policy space; (6) agency legislative drafting assistance; and (7) agency budgeting and appropriations").

[283] *See* Metzger & Stack, *supra* note 4, at 1243–44.

on their own, however, do not change agency policy. Congress needs to take affirmative action, such as imposing budgetary restraints or changing the nature of a delegated authority. Because Congress is not nimble in its lawmaking function, Congress usually is not a fast-moving response to an abuse of internal agency control.

Judicial review is also a source of external control. Some facets of internal administrative law, however, are insulated from judicial review. For example, agency actions that do not constitute final agency action are not subject to judicial review.[284] Also, if Congress committed an action to the agency's discretion, that action is not reviewable in court.[285] Even if judicial review is available, it requires a plaintiff, and one is not always willing. There is no external judicial control if no one files a lawsuit to challenge the action.[286] Even if there is a plaintiff, courts play a role only after agency choices have been implemented.[287] Because judicial review occurs after agency choices have been implemented, those choices affect regulated parties for some time, even if not indefinitely and even if ultimately ruled unlawful.[288]

As Metzger and Stack highlighted, and as Professor Jerry Mashaw did before them,[289] internal administrative law is an essential administrative law feature.[290] Internal administrative law, Metzger and Stack argued, is key to both managerial function and political accountability.[291] Viewed optimistically, internal administrative law is a positive force that allows agencies to be better; it encourages agencies to act consistently, predictably, and reasonably.[292] According to this perspective, agencies, not courts, are in the best position to govern what agencies do.[293]

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[284] 5 U.S.C. § 704 (2018).

[285] 5 U.S.C. § 701(a)(2) (2018); Heckler v. Chaney, 470 U.S. 821, 834–35 (1985) (examining the APA's preclusion of judicial review for agency actions that are "committed to agency discretion by law" and holding that if there is not meaningful law to apply to an agency's discretionary decisions, then there is no standard for a court to apply to judge the agency's decisions).

[286] *Cf.* Metzger & Stack, *supra* note 4, at 1263–64.

[287] *Id.* at 1264.

[288] *Id.* For discussion of the limits of procedural due process in ensuring agency accuracy, see David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 20–25 (2020).

[289] *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (analyzing internal administrative law in the context of social security disability benefits); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (detailing the history of American administrative law).

[290] Professor Christopher Walker and Rebecca Turnbull have argued that internal administrative law has a "critical safeguarding role with respect to agency actions that often escape judicial review." Walker & Turnbull, *supra* note 282, at 1229.

[291] Metzger & Stack, *supra* note 4, at 1265.

[292] Ames et al., *supra* note 288, at 28–30.

[293] *Id.* at 29.

Metzger and Stack argued that the development of judicial review of agency action (an external control) has stunted internal administrative law's growth and has stifled its potential effectiveness in promoting agency accountability.[294] An example they employ is a court-created test that identifies a true agency guidance document. A true guidance document rightfully is enacted with truncated procedures. If the document is actually a legislative rule that the agency should have promulgated through more robust procedures, a court will invalidate the agency's shortcut. The court will ask if the agency intended to bind itself through the guidance document.[295] If it did, that is an indication that the rule should have been formulated through more robust procedures. Metzger and Stack argued that this test stunts the growth of internal administrative law because agency officials are wary of taking managerial control and appearing to cabin the discretion of agency employees.[296] If they did, it would look like the agency intended the guidance document to bind the agency. Their actions would face a greater risk of being declared void via external control.

Metzger and Stack recommended reforms to strengthen internal administrative law. Congress, the courts, and the executive branch all have roles to play in their reform proposals. They recommended congressional action, including a new statutory mandate that guidance documents that bind internally do not necessarily run afoul of procedural requirements.[297] Metzger and Stack called for the creation of "strong internal monitors" and other investigations into agency operations.[298] They called on the courts to "foster" internal administrative law rather than continuing doctrines that prevent agencies from implementing managerial control.[299] Metzger and Stack also argued that reform measures from within the executive branch "will prove critical to any project of fostering internal administrative law."[300]

Metzger and Stack acknowledged that internal administrative law "can be abused" and that "[t]here is much room for improvement in how presidents have administered their internal law."[301] The authors cited to needed improvements in transparency, including a need to communicate justifications and reasons for internal choices better and a need to further develop the role of precedent in making those internal choices.[302] Metzger and Stack called on the then-newly formed

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[294] Metzger & Stack, *supra* note 4, at 1278–81.

[295] *Id.* at 1280.

[296] *Id.* at 1280–81.

[297] *Id.* at 1291.

[298] *Id.* at 1294.

[299] *Id.* at 1295.

[300] *Id.* at 1297.

[301] *Id.* at 1266, 1297.

[302] *Id.* at 1297–1301.

Trump administration to "strengthen internal administrative law" by helping agencies to develop their own internal administrative law practices. They thought the administration should avoid using internal administrative law in a way that fails to incorporate "internal constraints and legality values," which the authors view as "important checks against abuse of executive power."[303] The authors advised that legitimacy requires agency self-policing to encourage agency behavior that satisfies the basic rule of law principles of "regularity, coherence, and justification."[304] Metzger and Stack called on agencies to avoid behavior that undermines the rule of law. Instead, "an essential element for fostering internal administrative law will be for agencies to ensure that their internal law meets the highest standards of transparency and reasoned elaboration."[305]

Part of the study of internal administrative law is White House centralized control over executive branch agencies. This line of inquiry focuses on the proper role of the president in exerting control over administrative agencies (versus an agency policing itself independent of White House direction). Justice Kagan's seminal work on this topic appeared in 2001.[306] Scholarly discussion about the strength of Justice Kagan's arguments as applied to the Trump administration is developing.[307]

Justice Kagan, during her time as a law professor, identified an era of "presidential administration" based on her analysis of executive branch centralized agency control through the Clinton administration.[308] Justice Kagan documented this new era and argued in favor of centralized control.[309] Justice Kagan argued that centralized agency control—the presidential administration she identified—promotes accountability and effectiveness and should be encouraged.[310] Justice Kagan did note, however, that she did not believe that centralized control was appropriate in adjudication.[311]

Justice Kagan recognized that "presidential displacement" of statutes through centralized control of agencies would "raise[] . . . serious concerns" relating to the rule of law.[312] She emphasized that centralized control may only operate within the

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[303] *Id.* at 1301.

[304] *Id.* at 1303.

[305] *Id.* at 1304.

[306] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[307] *See, e.g.*, Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 516 (2018); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 554 (2018); Daniel A. Farber, Presidential Administration Under Trump 1–2 (Aug. 8, 2017) (unpublished manuscript), https://ssrn.com/abstract=3015591.

[308] Kagan, *supra* note 306, at 2246–50.

[309] *Id.* at 2331–46.

[310] *Id.* at 2384.

[311] *Id.* at 2362.

[312] *Id.* at 2349.

bounds of delegated discretion. She recognized a danger of "lawlessness."[313] She recommended the courts as a solution to such abuse. She asserted that the courts could serve as an effective, albeit imperfect, counterbalance to abuses of centralized control.[314] Justice Kagan also argued that Congress could use its "self-help mechanism" by providing more specific delegations of authority.[315]

The Trump administration's construction of the invisible border wall reveals the dangers of internal administrative law. As Metzger and Stack feared, the Trump administration abused its internal control powers because its centralized control of USCIS did not promote rule of law values. Contrary to Justice Kagan's analysis, centralized control did not promote accountability and effectiveness with respect to the administration of the legal immigration selection system. Through its centralized control, the White House expanded the powers of USCIS in opaque ways and was not forthright about its multifaceted actions to suppress legal immigration. It is ironic that this cautionary tale exists within the Trump administration, which, in contexts outside of immigration law, pledged to curtail agency power.[316]

A. The Limits of Internal Administrative Law

The invisible border wall was the product of centralized internal agency control and no mechanisms of internal administrative law stopped its creation. The White House directed the construction of the wall. The Buy American, Hire American executive order was a mood-enhancing directive that was intended to guide agency employees away from facilitating legal immigration. The processing delays, an increase in the de facto burden of proof, narrowed interpretations of law by guidance documents, and a decrease in customer service were all the products of centralized internal control contained in that executive order. Even President Trump's anti-immigrant rhetoric was a form of internal agency control as it educated agency employees on the White House perspective. The "workarounds" were meant to change agency behavior to comply with the White House's directives.

While changing agency policy from administration to administration is not inherently objectionable, and presidents have long exercised policymaking authority in immigration law,[317] the Trump administration centralized control over USCIS in ways that did not promote rule of law values. Tales of an "invisible" wall do not

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[313] *Id.*

[314] *Id.* at 2350.

[315] *Id.* at 2351.

[316] *See* Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 101 (2017).

[317] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466, 474 (2009) [hereinafter *The President and Immigration Law*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 113 (2015) [hereinafter *The President and Immigration Law Redux*].

invoke notions of regularity, coherence, predictability, and transparent justification. Instead, the invisible wall promoted uncertainty in adjudication and sought to work around the statute. Also, a major feature of the wall was to keep stakeholders in the dark through disengagement with advocacy groups and decreased customer service efforts.[318]

The invisible wall was, as its name suggests, shrouded in mystery. It was not transparent. The adjudicator mood changes, the slow-down in adjudication, the increased time and expense it took to prepare an application for legal status, the requirement to review extension applications de novo, the increased filing fees—all the aspects of the "sand in the gears"—were enacted piecemeal and quietly, without a specific explanation that connected all the actions to a desire to impede the granting of immigration benefits allowed under the INA.[319] Immigration attorneys knew about these centralized internal control efforts and were able to piece the puzzle together, but immigration attorneys are a small part of the general public. Immigration attorneys were able to see the "venom" in the policies as a whole, but the Trump administration did not bundle all the pieces together to educate the public about its policy goals and the effects of its policies.

Interviewed immigration attorneys expressed a sense that the Trump administration's invisible wall purposefully seized upon internal agency controls to implement the will of the White House to thwart statutes.[320] Accounts of actions of senior administration officials support this view. In their book *Border Wars*, journalists Julie Hirschfeld Davis and Michael D. Shear reported that forces within the Trump administration, led by Stephen Miller, the president's senior policy advisor, pushed to lower legal immigration through mechanisms of internal agency control.[321] The book recounts instances where Miller became impatient with the implementation of the "workarounds" at USCIS.[322] While then USCIS Director Frances Cissna did implement many of the White House's desired internal controls, such as rewriting the agency's mission statement and implementing some "workarounds," Cissna pushed back to some extent. According to the book, Miller pushed Cissna to ignore rule of law values:

> [Cissna] repeatedly told Miller that he was limited in what he could do to make immigration tougher. He had no more right to bypass the law than his predecessors did when they moved unilaterally to weaken the rules during previous administrations. For Miller, it was a kind of betrayal. Regulations took forever. Memos suggesting aggressive action went nowhere. Presidential

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318 *See supra* Part II.C.

319 As Professor Chen and Zachary New have observed, the invisible wall was a "bureaucratic barrier that [was] hard to see, understand, and redress." Chen & New, *supra* note 9, at 550.

320 *See supra* Part II.C.

321 DAVIS & SHEAR, *supra* note 11, at 92–104.

322 *Id.* at 102–03.

> directives were tied up in endless legal debates. Miller, channeling Trump himself, had a maximalist view of executive power, arguing that whatever the president said must be obeyed, regardless of whether it was lawful, practical, or moral.[323]

The book recounts a similar sentiment specific to asylum applicants:

> Cissna, the head of USCIS, had become intransigent. Miller kept telling Cissna that he needed to effect a "culture change" at USCIS, where Miller believed the asylum officers were a bunch of saps who would approve anyone. But Cissna would push back, saying that his people were just following the standards laid out in the law; he couldn't just snap his fingers and make them start rejecting people.[324]

These are specific examples of the potential abuse of centralized internal controls identified by Metzger and Stack. Cissna was fired in May 2019, after less than two years on the job.[325] Reporting concluded that he was fired because he was not implementing desired internal controls fast enough.[326]

Another example of the Trump administration's failure to promote rule of law values in its internal control is its lack of commitment to good government. Interviews with immigration attorneys reveal a sense that the Trump administration was not invested in the operational success of USCIS.[327] If USCIS is not operating efficiently or transparently, that works in favor of a policy goal to limit grants of legal immigration status. If the Trump administration ignored or encouraged operational failure or dysfunction, that is a use of internal controls that does not promote rule of law values. It also works against Justice Kagan's conclusion that presidential control would encourage accountability and effective administration.

Professor Nina Rabin has observed that much of the invisible wall involved internal control over discretion within immigration adjudication.[328] According to Rabin, the Trump administration "explicitly rejected oversight and transparency regarding when favorable discretion is to be exercised."[329] To the contrary, the Obama

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[323] *Id.* at 287.

[324] *Id.* at 382.

[325] Geneva Sands & Priscilla Alvarez, *Trump's Citizenship and Immigration Services Director Out*, CNN: POLITICS (May 24, 2019, 7:27 PM), https://www.cnn.com/2019/05/24/politics/l-francis-cissna-citizenship-and-immigration-services/index.html (quoting Cissna as writing that he submitted his resignation at the request of President Trump).

[326] *Id.* ("There has been 'growing frustration' in the administration that USCIS was 'not moving fast enough, going far enough' with the authorities it has, according to an administration official. Last fall, Cissna got in a shouting match on a conference call with a senior White House official, who was urging Cissna to take a stronger stance on illegal immigration and asylum reform, according to a source familiar with the situation.").

[327] *See supra* Part II.C.

[328] *See generally* Rabin, *supra* note 9.

[329] *Id.* at 141.

administration took steps to use internal controls to direct the use of prosecutorial discretion.[330] Interviewed attorneys expressed a similar sentiment to Rabin's in that they observed that discretion was only used against foreign nationals.[331] Continuously negative discretion theoretically is a policy choice, but one that does not promote rule of law values, especially given that the Trump administration was not transparent about whether that was indeed its policy.

Agency resistance to abusive centralized internal control is possible but is not guaranteed, nor will it always be effective. The interactions between Miller and Cissna reflect some friction between political appointees, one in the White House and one housed within an executive branch agency. Resistance also could originate from individuals with oversight responsibilities. For example, Congress established the office of the USCIS Ombudsman to be a check on both the actions of USCIS and White House efforts to exert centralized control.[332] Under the Trump administration, however, the ombudsman's office did not insist on promoting rule of law values in the case of the invisible wall.

The USCIS Ombudsman reports to DHS and does not report to anyone within USCIS.[333] Congress formulated the office to serve as an independent watchdog over USCIS.[334] The office accepts inquiries on individual cases and provides suggestions for general operational improvements.[335] Congress designed this office to serve as a form of internal control distinct from USCIS but still located within DHS.

President Trump's first choice to lead the Ombudsman's office was Julie Kirchner. Ombudsman Kirchner joined the Trump administration from her position as Executive Director of the Federation for American Immigration Reform (FAIR), a prominent restrictionist organization that has long advocated for reductions in legal immigration.[336] The Southern Poverty Law Center lists FAIR as a hate group.[337]

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[330] *Id.* at 146–47; *see The President and Immigration Law Redux*, *supra* note 317, at 139–41 (analyzing President Obama's efforts to centralize immigration prosecutorial discretion).

[331] *See supra* Part II.C.

[332] 6 U.S.C. § 272(b)–(c) (2018).

[333] *Id.* § 272(a) ("Within the Department [of Homeland Security], there shall be a position of Citizenship and Immigration Services Ombudsman . . . . The Ombudsman shall report directly to the Deputy Secretary. The Ombudsman shall have a background in customer service as well as immigration law.").

[334] *See id.* § 272(b)–(c).

[335] *Id.* § 272(b).

[336] Geneva Sands, *Immigration Hardliner Resigns from Department of Homeland Security*, CNN: POLITICS (Oct. 28, 2019, 7:15 PM), https://www.cnn.com/2019/10/28/politics/julie-kirchner-resigns/index.html.

[337] *Federation for American Immigration Reform*, SOUTHERN POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform (last visited Jan. 29, 2021).

The Ombudsman's 2019 Report to Congress discussed the implementation of the 2017 Buy American, Hire American executive order.[338] The report failed to promote rule of law values. First, it repeated the directive of the executive order to only award H-1B status to those who are the most skilled or highest paid.[339] There is no discussion whether that interpretation is consistent with congressional intent. In fact, the statute does not contain a "most skilled" or "highest paid" requirement. Instead, the report provided the opinion that the current statutory regime "ha[s] proven largely inadequate in protecting the interests of U.S. workers."[340] Second, the report called upon USCIS to usurp the role of Congress. It called out two features of the *statute* as making the H-1B program weak: the exemptions to the annual cap on admissions and the authorization to extend the six-year limit in H-1B status for those waiting for a green card quota slot to become available.[341] The report suggested that "[a]bsent legislative action that fortifies labor market protections," agencies should act to provide that protection.[342] The report called on agencies to act as Congress in the absence of congressional action on a policy choice that the ombudsman preferred. It raised the Buy American, Hire American executive order above the statute. The ombudsman's office, intended to act as a type of internal control, failed to do so.[343]

Internal administrative law failed to promote rule of law values in the case of the invisible border wall. There were no internal controls in place that stopped the centralized control that built the wall. The executive branch's control over USCIS was robust. There were no offices or actors within USCIS who could or would effectively insist on internal control in compliance with the rule of law. The Ombudsman's Office argued for a further deterioration of rule of law values to make legal immigration more difficult. After USCIS's director did object to some aspects of the wall's construction, he was fired. Therefore, the invisible wall illustrates a deep flaw in internal administrative law, as USCIS could not (or would not, in the case of the ombudsman) protect itself from abusive centralized control.

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[338] CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, ANNUAL REPORT 2019 33–35 (2019), https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2019-annual-report-to-congress.pdf.

[339] *Id.* at 33.

[340] *Id.* at 36.

[341] *Id.* at 29, 36.

[342] *Id.* at 36. The Ombudsman did acknowledge, however, that adding a labor market test as a requirement for hiring under the H-1B program would require legislative action. *Id.* at 40.

[343] President Trump exercised centralized control over inspector general offices outside of the immigration context as well. *See, e.g.*, Lisa Lambert & Makini Brice, *Trump Removes Top Coronavirus Watchdog, Widens Attack on Inspectors General*, REUTERS (Apr. 7, 2020, 9:44 AM), https://www.reuters.com/article/us-health-coronavirus-usa-inspector-gene/trump-removes-top-coronavirus-watchdog-widens-attack-on-inspectors-general-idUSKBN21P2OM.

The invisible wall also calls into question Justice Kagan's claim that presidential administration is something that should be encouraged. As other scholars have discussed, the Trump administration presents thorny challenges to achieving Justice Kagan's ideals.[344] Justice Kagan did recognize, however, that presidential control "likely will . . . evolve in ways that raise new issues and cast doubt on old conclusions."[345] Perhaps Justice Kagan did not envision a form of presidential control so untethered from rule of law values. Justice Kagan also cautioned against centralized control over adjudication.[346] While the invisible wall often involves the creation of generalized policies and practices and thus implicates rulemaking, the aim of the invisible wall is to reach more "no" results in individual adjudications. In that respect, perhaps some of Justice Kagan's concerns about centralized control over adjudication spill over.

Justice Kagan also recognized that presidential administration is different from lawlessness. Ignoring or thwarting congressional will is not administration pursuant to congressional delegation. Congress traditionally holds the power to structure the legal immigration system.[347] Congress delegated much of the authority to enforce its selection system to DHS, and not to the president.[348] Therefore, the Trump administration's heavy-handed centralized control may violate congressional intent.

Another divergence from congressional intent is that the invisible wall gave the president too much *ex ante* control over immigration selection. Professors Adam Cox and Cristina Rodríguez have emphasized the difference between the president's *ex post* control over the enforcement of immigration law (through actions such as prosecutorial discretion over who should be deported) and the president's *ex ante* control over the immigration selection system (congressional choices about who is eligible for legal status).[349] At times the distinction is blurred, but Cox and

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[344] Kovacs, *supra* note 307, at 515, 563–65 (arguing that the presidency reached a new "pinnacle" in the rise of the unitary executive under the Trump administration in ways that cast doubt on whether presidential administration enhances accountability); Mashaw & Berke, *supra* note 307, at 551 (concluding that the risks of presidential administration are understated); Farber, *supra* note 307, at 3 (explaining that "the Trump Administration deviates from Kagan's expectations for presidential administration in some disturbing ways").

[345] Kagan, *supra* note 306, at 2385.

[346] President Trump also asserted extensive centralized control over a different type of immigration adjudication. The Trump administration tightened its grip over the administration of the immigration courts, whose immigration judges decide whether individuals will be removed (deported) from the United States. *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 20–34 (2018).

[347] *The President and Immigration Law*, *supra* note 317, at 460 n.2.

[348] One exception is INA section 212(f), which is the statutory source of the travel bans. 8 U.S.C. § 1182(f) (2018). For a discussion of the debate over presidential involvement in agency discretionary action when Congress delegated discretion to an agency, and not the president, see Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH L. REV. 683, 728–34 (2016).

[349] *The President and Immigration Law*, *supra* note 317, at 533.

Rodríguez have highlighted Congress's traditional control over the *ex ante* decisions.[350] Because the invisible border wall is a form of *ex ante* control over immigration selection, the Trump administration crossed a line from merely exercising delegated powers to thwarting the grant of legal immigration opportunities provided by Congress. This did not comport with rule of law values and distinguishes President Trump's actions from the type of presidential administration that Justice Kagan envisioned.

The failure of internal administrative law, including the danger of centralized control, is especially problematic when considering the available responses to the invisible wall in individual cases.[351] Of the six available responses, three involve reengaging with USCIS: (1) refiling the same application with USCIS, hoping for a different adjudicator; (2) filing a Motion to Re-open or Re-consider; or (3) filing an appeal with the AAO. All of these methods are subject to the same risk of abuse of power as the initial decision-maker at USCIS. These methods do not provide protection from policymakers who ignore rule of law values in exercising internal control. When refiling, the new adjudicator is a person with the same position as the original adjudicator, and the second adjudicator is subject to the same centralized policies as the first. While luck may result in the second try landing on the desk of an adjudicator who is more willing to exercise independent judgment, the fairness of an adjudication should not rest on luck. Filing a Motion to Re-open or Re-consider also puts the decision in front of adjudicators who are just as subject to the abuse of internal controls. Similarly, the AAO is located within USCIS and is not independent. While it increased its rate of reversal of some USCIS decisions, its reputation among attorneys remained that of a rubber stamp. Additionally, the Trump administration could have further abused internal controls by placing pressure on the AAO to lower its reversal rate.

The increased push for external control in the form of judicial review is also a sign that internal administrative law failed. Attorneys accessed external control because they did not have confidence that internal agency operations would provide correction. Additionally, external control provided some relief; it fixed some of the administration's errors. While judicial review is not enough on its own, external controls proved more effective than internal controls. In fact, as the data reveal, even the government relied on external controls to ameliorate the effects of the invisible wall. The government sifted through the increased number of complaints filed in district courts to decide which to defend and which should be sent back to USCIS

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[350] *Id.* Writing before the Trump administration, Cox and Rodríguez argued for greater presidential *ex ante* control over immigration law. *Id.* at 533–35. Cox and Rodríguez suggested that "we ought to think seriously about leveling executive discretion up by delegating the President more control over our immigrant admissions system." *Id.* at 538.

[351] This Article focuses on responses in individual cases. As far as broader advocacy efforts, Chen and New reported that efforts against the invisible wall have been "quiet" in comparison to efforts against other Trump immigration policies. Chen & New, *supra* note 9, at 550.

for reconsideration. Internal administrative law failed to demand that this sifting occur within the agency. Instead, there was increased pressure on the federal courts to provide quality control.

Centralized internal agency control that does not honor rule of law values built the invisible wall. It was not transparent, it caused great uncertainty, worked against congressional intent, and it did not promote the humane application of law. No agency backstop was able to prevent its construction. Internal administrative law left applicants with little agency-based recourse.

B. The Limits of External Control

Internal administrative law did not stop the construction of the invisible wall. External control measures were partially effective in ameliorating the invisible wall's effects. Three of the options to respond to a USCIS denial in individual cases involve external control. Filing a complaint in U.S. district court challenging the denial engages the judiciary.[352] An option that engages the legislature is to contact a congressional office to ask USCIS to reconsider. A more political form of external control is to move employment outside of the United States.

The legislative option is not a formalized process, but rather an ad hoc process where an attorney or an individual foreign national reaches out to a congressional office for help.[353] This is not a transparent process. How congressional offices choose which individuals to help and how much effort to put into each case is unclear. Individuals may have access to congressional offices that are more or less sympathetic. Also, congressional control over USCIS in this context is not absolute. USCIS does not have to follow the orders of a congressional office in response to a case inquiry.[354] Additionally, it is unclear whether congressional offices have the required resources for this response path to carry substantial weight. However, if enough congressional offices advocate on a particular issue or if a particularly powerful member of Congress takes action, it is possible that such external action could persuade USCIS to change course.

The district court option is the external control that will result in an order that binds USCIS, if the challenge is successful. As the data show, immigration attorneys filed more lawsuits challenging USCIS's decisions in individual cases under the Trump administration. Interviews with attorneys reveal that immigration lawyers mobilized to build capacity within their community to file more court challenges. Immigration lawyers reported success in filing these lawsuits, but the number of

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[352] A related option is to draft a complaint and send it to the local U.S. Attorney's office in hopes that the case will be re-opened and approved before filing the complaint.

[353] Attorney R, *supra* note 39.

[354] *See* Lautaro Grinspan, *Is Your Immigration Case Taking Too Long? Your Congressional Representative Can Step In*, MIAMI HERALD (Jan. 14, 2020, 8:39 AM), https://www.miamiherald.com/news/local/immigration/article239103788.html.

lawsuits remained low relative to the number of denials. Also, lawyers reported that USCIS would settle cases instead of litigating cases that would result in positive precedent. The data provide some support for the existence of that practice.

There was success in challenging the Trump administration's narrowed interpretations of the immigration statutes. As discussed above, district courts invalidated both USCIS's new interpretation requiring a very specific bachelor's degree to qualify for H-1B status and the narrow interpretation of the availability of H-1B status to those employed by IT consulting companies.[355] The ITServe litigation purposefully involved a mass litigation campaign—the filing of tens of similar complaints—to gain the attention of the court and to make it more difficult for USCIS to settle the cases.[356]

In both of these cases, the plaintiffs were successful in moving the issues out of the realm of internal control and into the realm of external judicial review. In one case, the court held that USCIS's interpretation of its own regulation did not deserve deference, and in the other the court held that USCIS's actions were reviewable despite the fact that they were formulated pursuant to a guidance document. While both cases were successful in ameliorating the effects of the invisible wall, courts often will defer to agency interpretations and will not review guidance documents. Also, no case could possibly use external control to stop the creation of the policies in the first place or to stop them from operating for some period. For example, the ITServe litigation settlement occurred in 2020, two years after the agency memorandum it challenged took effect.[357]

Other facets of the invisible wall may be more difficult to move to the external control realm, no matter the number of complaints filed. Agency choices regarding the distribution of agency resources, the amount of time it takes to adjudicate, and the number of RFEs issued are harder for external review to reach due to restrictions on review of agency discretionary actions[358] and on review of agencies' procedural rules.[359]

The limits of judicial review in the case of the invisible wall works against Justice Kagan's prediction that courts could provide an adequate check against abuses of centralized control. Even where judicial review is available, it will always carry the weaknesses inherent in relying on litigation to achieve agency control. Plaintiffs have to decide to sue (they have to be willing and they have to have resources) and capable lawyers have to be available to litigate.[360] Judicial review takes time and only occurs

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[355] *See supra* Part II.C.3.

[356] *See supra* Part II.C.3.

[357] *See* Settlement Agreement, *supra* note 137, at 6–7.

[358] *See* 5 U.S.C. § 701(a)(2) (2018).

[359] Notice and comment rulemaking is not required for agency rules of procedure. 5 U.S.C. § 553(b)(3)(A) (2018).

[360] Professor Rabin detailed the work-intensive nature of litigation. Rabin, *supra* note 9, at

after policies have taken effect. Also, judicial resources are limited. Appropriate internal controls could prevent a surge of cases in federal courts.

The final option for addressing the invisible border wall in individual cases is to give up on hiring the employee in the United States and to move the job position outside of the United States. This is a form of external control in the sense that stakeholders maneuver to avoid agency adjudication to achieve business goals. This stakeholder action theoretically could cause a change in agency behavior if it would result in political pressure to keep these jobs within the United States. There may be no effective external pressure, however, if the movement of jobs outside of the United States serves the administration's larger policy goal of less immigration to the United States.

C. How to Control Internal Control?

Internal administrative law failed to prevent the construction of the invisible border wall. Internal administrative law, therefore, failed to provide adequate checks. It did not insist on internal controls that promote rule of law values. This failure left immigration attorneys with an inadequate arsenal of responses to the invisible wall in individual cases. Many of the responses rely on access to good faith internal control protection mechanisms that either did not exist or did not function. Triggering external control, such as judicial review, was an option to address some aspects of the invisible wall, but as the discussion above illustrates, it was not a cure-all.

As Metzger and Stack have argued, a robust system of internal administrative law is a key component of administrative law. Metzger and Stack asserted that internal administrative law should be reinforced from the inside and not only subject to new external controls.[361] The experience of the invisible wall illustrates a need for improvements to internal administrative law, some of which should be reinforced or enforced through external actors. Metzger and Stack's arguments are driven by a concern that external control plays too large a role in internal administrative law and often is an impediment to the development of internal administrative law.[362] The invisible wall, however, is a lesson in what can happen when internal administrative law fails to self-police and external control is the only hope. Even the existence of an internal monitor, such as the USCIS Ombudsman's Office, is not a guarantee that internal controls will be implemented in a way that promotes rule of law values. Concerns about transparency, lack of reasoned elaboration, and a lack of respect for

153–64. Similarly, Chen and New argued that individual litigation is important, but that more would be necessary to adequately respond to the invisible wall. Chen & New, *supra* note 9, at 579–85.

[361] Metzger & Stack, *supra* note 4, at 1291; *see also* Watts, *supra* note 348, at 727 (arguing for a coordinated response to presidential control that engages external and internal controls).

[362] *See id.* at 1292.

the statute and for precedent are internal administrative law concerns that are evident in the invisible wall.[363] The Trump administration emphasized centralized control and quick policy change at the expense of rule of law values, as Metzger and Stack feared.[364] The invisible wall contributed to the "distrust of administrative governance" that prevents external actors from trusting internal administrative law.[365] The invisible wall indeed promoted the conception that "[t]he forces of internal administration act in an unprincipled self-aggrandizing fashion."[366]

How could internal administrative law at USCIS be strengthened to increase adherence to rule of law values? Reforms are possible, but a prerequisite to those reforms is a presidential administration that will implement reforms and operate in good faith compliance with rule of law values. If an administration is motivated to circumvent statutory mandates, other external control, or even established means of internal control, that makes the job of internal administrative law more difficult.

This Article assumes that centralized internal control as a principle is constitutional and defers any argument to the contrary. It also assumes that centralized control, when in compliance with rule of law values, is at least sometimes desirable.[367] How can the law demand good faith adherence to rule of law values in the context of centralized agency control?

As discussed above, judicial review is not an ideal fix. Judicial review may provide some relief if the president violates congressional intent. Judicial review, however, will not be sought in every case. As the interviews with attorneys reveal, many employers were hesitant to sue. Also, even when judicial review deems presidential control to be out of line with the statute, that review comes after the administration has already implemented its improper policy for some time. Congress could play a role, as Justice Kagan acknowledged, by tailoring its delegations to narrow the ability of the president to centralize control. This solution is not perfect either, however. If a president is determined to ignore the intent of Congress, then the specificity of the delegation may not matter. Also, pieces of the invisible wall are less about interpretations of statutes and are more focused on gumming up bureaucratic operations.

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[363] *Id.* ("There is much room for improvement in how presidents have administered their internal law.").

[364] *See id.* at 1301.

[365] *See id.* at 1304.

[366] *See id.* at 1306.

[367] Professor Ming Chen has argued that centralized control is justified when it promotes coherence, consistency, and coordination. Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 365–71 (2017). When the president is acting as an administrator in chief, concerned about "procedural soundness and administrative effectiveness," the president is on solid ground for claiming a centralized power over agencies. *Id.* at 351. At its core, Chen's argument seeks adherence to rule of law values. The invisible wall shows the opposite. The president was fixed on policy goals at all costs and was willing to weaken bureaucratic operations to reach that goal.

The agency itself could play a role in fighting back against centralized directives. There is evidence of some pushback from USCIS to some aspects of the invisible wall, but it appears that the president's appointment and removal powers hold great weight against agency resistance.

We are therefore left at an unsatisfactory juncture. To have justifiable centralized control, we need the president to adhere to rule of law values. A president's failure to adhere to rule of law values may lack complete redress, barring a new constitutional understanding that forbids centralized control unless the president adheres to rule of law values. If internal administrative law is ultimately directed by the president himself, then it is impossible for internal administrative law on its own to protect against presidential abuses of centralized control. External controls may help but are not ideal. What should happen next?

The mere existence of an internal administrative law quality control mechanism does not guarantee its effectiveness. In their study of a quality control program at the Board of Veterans' Appeals, David Ames, Cassandra Handan-Nader, Daniel E. Ho, and David Marcus found the program to be an "all-but-meaningless measure of decisional quality" and to have "failed."[368] Their case study found, similar to these findings on the invisible wall, that internal control mechanisms were not a reliable form of control and that theories of internal administrative law need to be more nuanced.[369]

Because internal administrative law lacks inherent protections against abuse, and centralized adherence to rule of law values is not guaranteed, external controls always will be necessary to safeguard adherence to rule of law principles. The authors of the study of the quality control program at the Board of Veterans' Appeals reached a similar conclusion. The authors argued that external control actors (Congress and the courts) need to "prompt agencies to design and administer successful quality assurance initiatives"[370] and that judicial review "can facilitate, rather than hinder, the development of effective internal administrative law."[371]

In the context of the invisible wall, that prompting could come from Congress. Congress could amend the INA to provide statutory commands addressing the exercise of discretion. Additionally, Congress could reform the AAO by making it more independent and giving it a statutory mission. Another possibility integrates a reform proposed by Metzger and Stack. They suggested conditioning judicial deference to agency decisions at least partially based on the quality of the internal administrative law practiced by the agency.[372] Under the Trump administration, USCIS would have received little to no deference.

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[368] Ames et al., *supra* note 288, at 7.

[369] *Id.* at 57–67.

[370] *Id.* at 7.

[371] *Id.* at 68.

[372] Metzger & Stack, *supra* note 4, at 1295–96; *see also* Watts, *supra* note 348, at 737–40

Another possible external control mechanism is the public. Professor Ming H. Chen and Zachary New acknowledged that the "traditional overseers and watchmen" did not prevent construction of the invisible wall.[373] Chen and New recommended informing the public to energize public reaction against the invisible wall.[374] Mobilization would have brought more awareness of the invisible wall and would have eased efforts in favor of its deconstruction, according to Chen and New.

But there must also be better quality control mechanisms within agencies themselves. While a higher quality control mechanism may not resolve all internal administrative law problems, it could help. The agencies are the first line of defense, as the agency will have early notice of abusive centralized control. Prioritizing rule of law values points to guiding principles for internal control reform at USCIS. As Metzger and Stack explained, "an essential element for fostering internal administrative law will be for agencies to ensure that their internal law meets the highest standards of [rule of law values]."[375] Here are suggested guiding principles for USCIS:

- USCIS's adjudicatory standards, procedures, and interpretations of law should be formulated and applied to promote values of clarity, predictability, timeliness, fidelity to existing law, and equal treatment.
- USCIS's adjudicatory standards, procedures, and interpretations of law should be formulated with an eye to increase the protection of human rights.
- USCIS's exercises of discretion should promote clarity, predictability, equal treatment, and human rights.
- The formulation of USCIS policies should be open and transparent, with clear policy rationales adopted.
- USCIS must insist on fidelity to its statutory mission and competence in its operations.

(discussing the role of standards of review in influencing agency behavior).

[373] Chen & New, *supra* note 9, at 584.

[374] Chen and New proposed other reforms to ease the negative effects of the invisible wall. First, they argued that increased litigation was necessary. *Id.* at 579. Not only was there a need for more individual actions, but there was also a need for impact litigation. *Id.* at 580. Chen and New also envisioned a larger role for states and localities in challenging and shining a light on problems caused by the invisible wall. Third, they argued that USCIS needed more resources and needed to rethink its procedural operations to fix some of its adjudication problems. *Id.* at 580–81. Fourth, Chen and New argued that USCIS must reevaluate some of its national-security-focused policies to determine if those policies serve legitimate goals. *Id.* at 582. Fifth, they argued that USCIS should shift away from its newly adopted enforcement focus and move back to its original customer service mission. *Id.* at 583–84.

[375] Metzger & Stack, *supra* note 4, at 1304.

These principles are all in line with rule of law values. Internal administrative law can help encourage adherence to these values. For example, USCIS could self-police to make sure it is complying with these guiding principles. That self-policing will only be effective, however, if the president allows it to be effective.

IV. CONCLUSION

This project helps to fill two voids. First, it contributes to the scholarly endeavor to study internal administrative law by illustrating how the invisible border wall presents a major challenge to theories that champion the benefits of internal agency control. The construction of the invisible border wall reveals abuses of executive power. The Trump administration exercised its centralized internal control over USCIS, the main immigration benefits granting agency, in ways that denigrate rule of law values. Second, this Article contributes to an understanding of President Trump's policies that worked against legal immigration and frustrated access to immigration benefits supplied by Congress under the INA. It compiles data that shed light both on the nature of the invisible wall and on the external control response to it.

The Trump administration conducted an opaque movement against legal immigration comprised of quiet policy choices that together added up to what USCIS called "workarounds." These workarounds were executive branch maneuvers around the legislative statute. These workarounds were the product of centralized agency control. Through executive orders, more informal directives, and President Trump's own anti-immigrant rhetoric, the White House directed USCIS. Its centralized direction did not comply with rule of law values because it was not transparent, worked against legislative intent, resulted in great uncertainty in the interpretation and application of law, and did not promote effective governance. At best, the Trump administration was content to allow the adjudication of immigration benefits to be a roller coaster of dysfunctional uncertainty. At worst, the Trump administration purposefully steered the system to act in a way directly contrary to congressional intent.

Internal administrative law failed to prevent the construction of the invisible border wall. It failed to stop the Trump administration from abusing its centralized internal control over USCIS. Data collected for this Article show an increase in complaints filed against USCIS in federal court. Immigration lawyers sought more external control, as evidenced by a nearly 200% increase in the number of complaints filed in one category, and an almost 250% increase in another. While the external control of judicial review provided some relief to some aspects of the invisible border wall, judicial review had trouble reaching all aspects of the invisible wall. Reform of internal administrative law is necessary but, for agency self-policing to work, the White House must act in good faith to promote rule of law values. In the

case of the invisible wall, the White House was able to easily surmount any internal agency defenses.

Prioritizing rule of law values leads to guiding principles for internal control reform at USCIS. These principles would lead USCIS to increase the protection of human rights, to be more faithful to its statutory mission, and to increase competence in its operations. These guiding principles, however, must be implemented by an executive branch with fidelity to rule of law values and must be backed up by external controls.

V. APPENDIX

A. Judicial Review Data Collection

To investigate the judicial review response to the invisible wall, this study examined docket sheets maintained on Bloomberg Law, which is equivalent to searching on PACER, but allows for more filtering possibilities. The project is focused on lawsuits filed against USCIS.[376]

When a civil complaint is filed in a United States District Court, it is accompanied by a Civil Cover Sheet that provides information about the case.[377] The Civil Cover Sheet requires both a Nature of Suit Code and a description of the cause of action. Options for the Nature of Suit Code are pre-printed on the Civil Cover Sheet. The form provides space for a description of the cause of action.

This project is focused on two Nature of Suit Codes, 899 and 465. The Administrative Office of the United States Courts describes Code 899 as applicable to an "[a]ction filed under the Administrative Procedures Act, 5 U.S.C. § 701, or civil actions to review or appeal a federal agency decision."[378] The Administrative Office of the United States Courts describes Code 465 as applicable to "[a]ction[s] (Immigration-related) that do not involve Naturalization Applications or petitions for Writ of Habeas Corpus, such as complaints alleging failure to adjudicate an application to adjust immigration status to permanent resident."[379] Because the invisible wall is about limiting legal immigration (and not about deportation), these are the two Nature of Suit Codes most likely to encompass the most relevant cases. One

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[376] Other agencies are involved in the adjudication of immigration benefits, but USCIS is the agency solely devoted to the adjudication of benefits for legal status. The Department of State adjudicates applications for permission to travel to the United States and has decision-making authority over limited applications for legal status that do not require the involvement of USCIS. *See, e.g.*, *E-1 Treaty Traders*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 29, 2020), https://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders (describing that those outside of the United States applying for E nonimmigrant status do so by applying for a visa directly from the Department of State, bypassing USCIS). The Department of Labor plays a role in many employment-based applications by fulfilling its mission to protect the U.S. labor market. *Wage and Hour Division Administered Immigration Programs*, U.S. DEP'T LAB. WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/immigration (last visited Jan. 29, 2021). The Department of Labor's involvement is a prerequisite to further processing through USCIS. CBP, a part of DHS, makes the ultimate decision whether to admit a person appearing at a U.S. port of entry. *Immigration Inspection Program*, U.S. CUSTOMS & BORDER PROTECTION (Sept. 1, 2020), https://www.cbp.gov/border-security/ports-entry/overview#. CBP officers also adjudicate certain applications for TN nonimmigrant status. *TN NAFTA Professionals*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 29, 2020), https://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals (noting the application is made at the border, bypassing USCIS).

[377] CIVIL COVER SHEET, *supra* note 246, at 1.

[378] NATURE OF SUIT CODE DESCRIPTIONS, *supra* note 248, at 8.

[379] *Id.* at 5.

exception is naturalization. Naturalization cases have their own Nature of Suit Code, 462, and are not a subject of this study.[380] The two codes included in the study, 465 and 899, represent a significant portion of legal immigration other than naturalization.

This data collection method does have some drawbacks, but none that significantly discount the use of the data. One challenge is that reliance on a Civil Cover Sheet inherently requires reliance on the information, including any errors, included on the Civil Cover Sheet. [381] For example, attorneys may select other Nature of Suit Codes besides the codes studied here, even if the Nature of Suit Codes studied here would be accurate. A second challenge is that selection of a Nature of Suit Code and/or a cause of action may not be fixed. This information could be changed during the life cycle of the lawsuit. Consequently, replication of this research may result in slightly different calculations. A third challenge is that counting complaints does not necessarily equal the number of claims filed. A complaint could contain one or more plaintiffs with more than one claim. The fourth challenge is that the number of complaints filed does not necessarily equal the number of complaints contemplated. For example, attorney interviews revealed that at times attorneys drafted complaints and announced an intention to sue, followed by a reopening of the USCIS denial and approval of the application for legal status.[382]

1. Nature of Suit Code 899

Code 899 encompasses more than immigration cases. It includes all actions filed under the APA, no matter the type of agency action challenged. To narrow down to cases involving USCIS, this study identified lawsuits filed under Code 899 from January 1, 2009 until December 31, 2019 where at least one defendant was either USCIS or one of the individual directors of USCIS during that time.[383] Code 899 did not go into service until September 2011.[384] Appendix Figure A displays the number of complaints filed per year, as identified in this study.

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[380] *See id.*

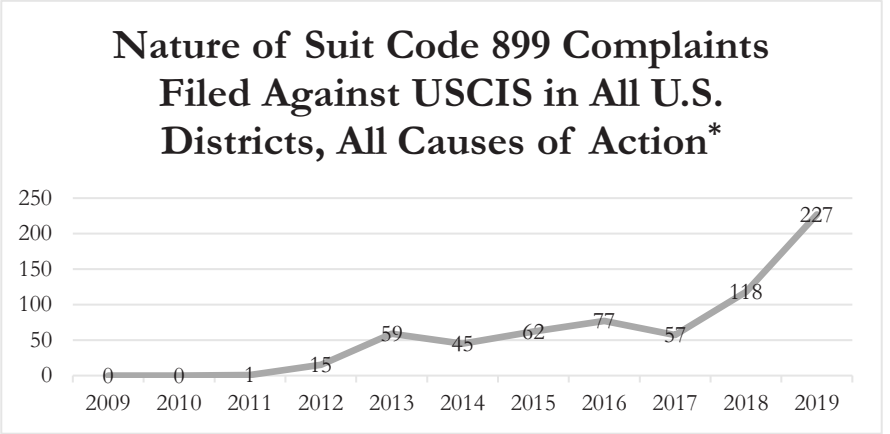
[381] *Cf.* Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 MICH. ST. L. REV. 997, 1008 (2017). Boyd and Hoffman concluded that nature of suit codes are more reliable when the lawsuit focuses on one substantive area of law. The complaints examined in this study are likely to focus on one substantive area.

[382] Attorney M, *supra* note 39; Attorney O, *supra* note 39; Attorney P, *supra* note 39.

[383] This study identified docket sheets where the defendant is "USCIS" or "United States Citizenship and Immigration Services" or "Koumans" or "Cuccinelli" or "Cissna" or "Mayorkas" or "Rodriguez" or "Scialabba" or "Gonzalez." Mark Koumans briefly served as director of USCIS at the end of 2019. Maria Sacchetti, *Ken Cuccinelli Said Goodbye to USCIS, Taking on a Bigger Homeland Security Role. But He's Back.*, WASH. POST (Dec. 13, 2019, 4:15 PM), https://www.washingtonpost.com/immigration/ken-cuccinelli-said-goodbye-to-uscis-taking-on-a-bigger-homeland-security-role-but-hes-back/2019/12/13/06b401da-1d01-11ea-8d58-5ac3600967a1_story.html.

[384] Koszczuk, *supra* note 250.

Appendix Figure A



*Code 899 Entered Service in 2011.

The district courts with the most Code 899 filings with a USCIS-related defendant during the entire period are the District for the District of Columbia with 138 complaints, the Southern District of Texas with 72 complaints, the Southern District of New York with 46 complaints, the Northern District of Illinois with 42 complaints, and the Eastern District of Michigan with 38 complaints. During the first three years of the Trump administration, 402 complaints were filed against USCIS or a USCIS director defendant. During the 10-year study period, 661 complaints were filed. Thus, 61% of the 10-year total number of complaints were filed during the first three years of the Trump administration.

In the District for the District of Columbia, the study reviewed the Code 899 docket sheets filed during the years 2009–2019 that appeared in the search. The District for the District of Columbia was the focus because it had the highest number of relevant filings during the period. Each docket sheet was examined to determine whether the government defended the case. For purposes of this study, the government defended the case if it filed a dispositive motion, such as a motion to dismiss, a motion for summary judgment, or an answer to the complaint. Motions to transfer were categorized as dispositive because the government was not immediately pursuing a settlement if it undertook the effort to attempt to transfer the case to another district. Motions for extensions of time to answer are not dispositive for this study's purposes. If the government did not file a dispositive motion and the complaint was dismissed voluntarily or by stipulation, then for purposes of this study the government did not defend the complaint.[385] Any mandamus cases that

[385] This study does not inquire into the reason behind a voluntary dismissal and assumes that voluntary dismissals are motivated by USCIS's positive reconsideration of the application for a legal immigration benefit. The study makes this assumption because applicants for legal

appeared in the search were removed because this aspect of the data collection aimed to examine whether non-mandamus claims (i.e., not claims of delay) were defended.

The search began with 138 cases filed between 2013 and 2019 (no cases matching the search criteria appeared before 2013). Sixteen cases were eliminated because they are mandamus cases. Four cases were eliminated because upon inspection the cases did not involve USCIS or a USCIS director defendant. Two cases were removed because it was impossible to tell from the available docket sheet whether the government defended the case. Two cases were removed because it was too early to know whether the government would defend the case due to a stay or requests for extensions of time to answer the complaint.

Of the remaining 114 cases,[386] the government defended 42 of the 114 cases through the study period (2013–2019), or 37%. During 2017–2019, 89 of the 114 cases were filed, or 78%. The government defended 32 of the 89 cases, or 36%. In 2019, the government defended 17 of 53 cases, or 32%. In 2018, the government defended 12 of 26 cases, or 46%. In 2017, the government defended 3 of 10 cases, or 30%. In 2016, the government defended 2 of 10 cases, or 20%. In 2015, the government defended 5 of 6 cases, or 83%. In 2014, the government defended 2 of 8 cases, or 25%. In 2013, the government defended 1 of 1 case, or 100%.

immigration benefits have little motivation to voluntarily dismiss based on a fear of losing. The voluntary dismissal would only allow the original denial to take effect.

[386] The study's cases could include impact facial challenges to policies. Most, however, are challenges in individual cases.

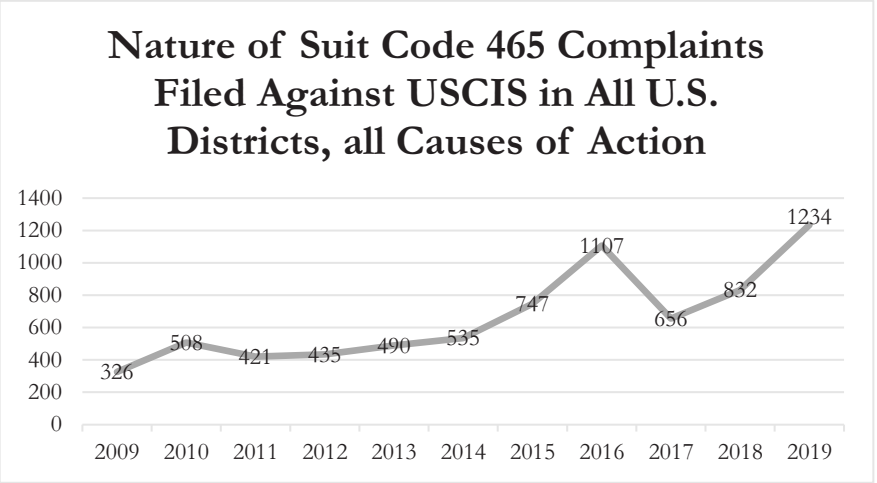
Appendix Table A
Percentage of Defended Code 899 Cases Against USCIS, District for the District of Columbia (Total= 114 Cases)

Year	# Filed	# Defended	% Defended
2019	53	17	32%
2018	26	12	46%
2017	10	3	30%
2016	10	2	20%
2015	6	5	83%
2014	8	2	25%
2013	1	1	100%
2012	0		
2011	0		
2010	0		
2009	0		

2. Nature of Suit Code 465

As explained above, Code 465 is reserved for immigration actions that do not involve naturalization, habeas corpus, or deportation. Code 465 includes, for example, mandamus claims and claims under the APA. Appendix Figure B reflects the number of complaints filed under Code 465 with USCIS or a USCIS director defendant in all district courts for the years 2009–2019. Figure B includes complaints filed under all causes of action in all district courts.

Appendix Figure B



For Code 465, five districts had the largest number of filings from January 1, 2009 until December 31, 2019, factoring in all causes of action: the Eastern District of New York, the Central District of California, the Southern District of New York, the Northern District of Illinois, and the District for the District of Columbia. The study focused on these five districts for further data collection because they had the greatest number of total filings under Code 465.

To narrow down by cause of action, the study employed two searches. One search focused on Code 465 cases with a cause of action under the APA, such as 5 U.S.C. §§ 551 and 702. The other focused on Code 465 cases with a cause of action under 8 U.S.C. § 1329, Writ of Mandamus to Adjudicate Visa Petition.

The Code 465 APA search results show how many complaints were filed in the particular district under Code 465 with an APA-related cause of action. Because identifiers for causes of action are not uniform across all district courts, the searches were individualized to each district court.[387] It is not possible to search causes of action across districts. Once the search is run in each district, however, it is possible to add the totals from each district.

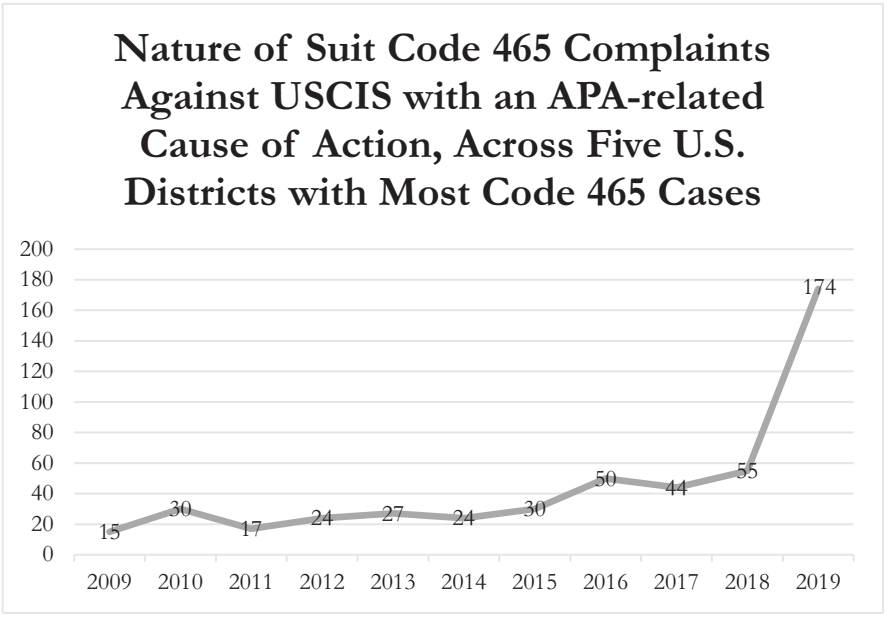
Across the five districts, from January 1, 2009 until December 31, 2019, there were a total of 490 complaints filed under Code 465 with an APA-related cause of action with USCIS or a USCIS director defendant.[388] Fifty-six percent of those complaints, 273, were filed from 2017–2019, the first three years of the Trump administration. The District for the District of Columbia had the largest increase within a district. During 2016–2019, 129 complaints were filed under Code 465

[387] For example, the U.S. District Court for the Eastern District of New York employs cause of action code "701jr" while other districts do not.

[388] Code 465 went into service during December 2007. Koszczuk, *supra* note 250.

with an APA-related cause of action and with USCIS or a USCIS director defendant in the District Court for the District of Columbia. The total number of complaints filed in the District for the District of Columbia from 2009 to 2019 is 151. The filings during the first three years of the Trump administration represent 85% of the 10-year total. The year-by-year totals in each of the five districts are illustrated in Appendix Figure C and Appendix Tables B.1–B.5.

Appendix Figure C



Appendix Table B.1
Code 465 Complaints Against USCIS with an APA-Related Cause of Action, District for the District of Columbia

Year	Number of Complaints Filed
2019	109
2018	16
2017	4
2016	9
2015	7
2014	0
2013	2
2012	1
2011	2
2010	0
2009	1

Appendix Table B.2
Code 465 Complaints Against USCIS with an APA-Related Cause of Action, District for the Eastern District of New York

Year	Number of Complaints
2019	26
2018	18
2017	21
2016	24
2015	9
2014	7
2013	10
2012	10
2011	6
2010	17
2009	11

Appendix Table B.3
Code 465 Complaints Against USCIS with an APA-Related Cause of Action, District for the Central District of California

Year	Number of Complaints
2019	16
2018	13
2017	11
2016	9
2015	6
2014	11
2013	8
2012	6
2011	4
2010	4
2009	1

Appendix Table B.4
Code 465 Complaints Against USCIS with an APA-Related Cause of Action, District for the Southern District of New York

Year	Number of Complaints
2019	11
2018	4
2017	5
2016	6
2015	6
2014	2
2013	2
2012	1
2011	5
2010	5
2009	2

Appendix Table B.5
Code 465 Complaints Against USCIS with an APA-Related Cause of Action, District for the Northern District of Illinois

Year	Number of Complaints
2019	12
2018	4
2017	3
2016	2
2015	2
2014	4
2013	5
2012	6
2011	0
2010	4
2009	0

In the District for the District of Columbia, the study reviewed all APA-related Code 465 docket sheets for cases filed during the years 2009–2019 against USCIS or a USCIS director defendant. Each docket sheet was examined to determine whether the government defended the case. The study focused on the District for the District of Columbia because that district saw the most dramatic rise in complaints filed. For purposes of this study, the government defended a complaint if it filed a dispositive motion, such as a motion to dismiss, a motion for summary judgment, or an answer to the complaint. The study classified motions to transfer in the dispositive motion category under the theory that the government was not immediately pursuing a settlement if it undertook the effort to attempt to transfer the case to another district. Motions for extensions of time to answer were treated as not dispositive. If the government did not file a dispositive motion and the complaint was dismissed voluntarily or by stipulation, then for purposes of this study the government did not defend the complaint.

The number of cases included in the search is 151. This search produced cases filed from 2009 to 2019. Three cases were eliminated because it was too early to tell whether the government would defend due to a stay or requests for extensions of time to answer the complaint. Of the remaining 148 cases,[389] the government defended 76 cases, or 51%. During 2017 to 2019, the government defended 63 of 126 cases, or 50%. For 2019, the government defended 58 of 106 cases, or 55%.

[389] In calculating the defended rate, related cases were counted individually.

For 2018, the government defended 4 of 16 cases, or 25%. For 2017, the government defended 1 of 4 cases, or 25%. For 2016, the government defended 5 of 9 cases, or 56%. For 2015, the government defended 4 of 7 cases, or 57%. In 2014, there were no cases filed. In 2013, the government defended 1 of 2 cases, or 50%. In 2012, the government defended 0 of 1 case filed, or 0%. In 2011, the government defended 2 of 2 cases filed, or 100%. In 2010, no cases were filed. In 2009, the government defended 1 of 1 case filed, or 100%.

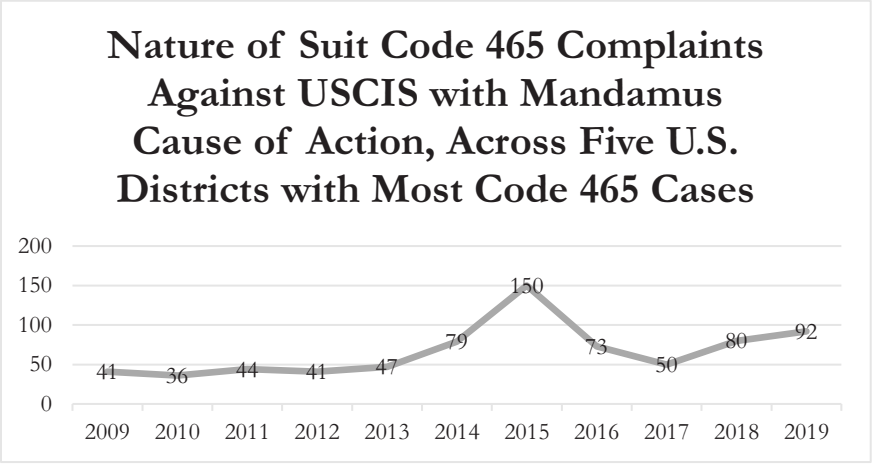
Appendix Table C
Percentage of Defended Code 465 Cases Against USCIS with an APA-Related Cause of Action, District for the District of Columbia (Total = 148 Cases)

Year	# Filed	# Defended	% Defended
2019	106	58	55%
2018	16	4	25%
2017	4	1	25%
2016	9	5	56%
2015	7	4	57%
2014	0	-	-
2013	2	1	50%
2012	1	0	0%
2011	2	2	100%
2010	0	-	-
2009	1	1	100%

As for the mandamus complaints, as explained above, the focus turned to a different cause of action under Code 465: "1329; Mandamus to Adjudicate Visa Petition." This cause of action was examined in the top five districts with the most Code 465 filings including all causes of action: the Eastern District of New York, the Central District of California, the Southern District of New York, the Northern District of Illinois, and the District for the District of Columbia. In each of these districts, the study searched for the mandamus cause of action where USCIS or a USCIS director was listed as a defendant. There were 733 complaints filed with the mandamus cause of action against USCIS or a USCIS director defendant across these five districts from January 1, 2009 until December 31, 2019. Thirty percent,

or 222, were filed during the first three years of the Trump administration. Appendix Figure D and Appendix Tables D.1–D.5 reflect the numbers of Code 465 cases with a mandamus cause of action.

Appendix Figure D



Appendix Table D.1
Code 465 Complaints Against USCIS with Mandamus Cause of Action, District for the Eastern District of New York

Year	Number of Complaints Filed
2019	14
2018	16
2017	8
2016	9
2015	7
2014	2
2013	0
2012	0
2011	1
2010	0
2009	1

Appendix Table D.2
Code 465 Complaints Against USCIS with Mandamus Cause of Action, District for the Central District of California

Year	Number of Complaints Filed
2019	44
2018	38
2017	36
2016	41
2015	123
2014	66
2013	37
2012	33
2011	37
2010	30
2009	39

Appendix Table D.3
Code 465 Complaints Against USCIS with Mandamus Cause of Action, District for the Southern District of New York

Year	Number of Complaints Filed
2019	2
2018	1
2017	1
2016	4
2015	2
2014	0
2013	0
2012	0
2011	0
2010	0
2009	0

Appendix Table D.4
Code 465 Complaints Against USCIS with Mandamus Cause of Action, District for the Northern District of Illinois

Year	Number of Complaints Filed
2019	10
2018	11
2017	3
2016	11
2015	5
2014	8
2013	8
2012	6
2011	6
2010	6
2009	1

Appendix Table D.5
Code 465 Complaints Against USCIS with Mandamus Cause of Action, District for the District of Columbia

Year	Number of Complaints Filed
2019	22
2018	14
2017	2
2016	8
2015	13
2014	3
2013	2
2012	2
2011	0
2010	0
2009	0

B. Attorney Interviews

The study interviewed 25 immigration attorneys. The attorneys interviewed mainly practice business immigration law, focusing on employment-based legal immigration. The study employed the snowball technique to contact lawyers for interviews. The interviews consisted of open-ended questions about what the phrase "invisible wall" means to the attorneys and how their practice is different, if at all, under the Trump administration. If the interviewee reported differences, the interviewer asked about how those differences were affecting their practice. The study also inquired about techniques used to blunt the effects of the invisible wall, including litigation in federal court. The interviews took place in January and February of 2020.

The interviewed attorneys represent diverse geographic areas of the United States and a variety of firm sizes. The lawyers include some of the most well-respected immigration attorneys in the United States. The attorney interviews are anonymous; attorneys are referred to by code.