

## The Rise and Fall of Administrative Closure in Immigration Courts

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**ABSTRACT.** Administrative closure is a procedural tool that temporarily removes a case from the active docket or calendar of an immigration judge or the Board of Immigration Appeals. For over three decades, immigration judges used administrative closure as a valuable case-management tool. It provided individuals the opportunity to pursue more promising forms of relief, eliminated unnecessary costs associated with remaining in active removal proceedings, and allowed judges to prioritize other cases. However, in *Castro-Tum*, then-Attorney General Jeff Sessions ended the decades-long practice of administrative closure. This decision has decreased the efficiency of immigration courts, infringed upon the rights of individuals in removal proceedings, and eroded the independence of immigration judges. This Essay surveys the history of administrative closure in the U.S. immigration-court system, analyzes *Castro-Tum*'s consequences, and discusses how a recent Fourth Circuit decision provides a roadmap for attorneys and advocates to revive administrative closure. This Essay concludes by proposing a legislative solution to ensure that the power of administrative closure is expressly granted to immigration judges and the Board of Immigration Appeals.

### INTRODUCTION

Immigration judges and the Board of Immigration Appeals (BIA) use administrative closure to temporarily remove a case from their active docket or calendar. Importantly, administrative closure does not grant a noncitizen permanent relief, result in the issuance of a final order of removal,<sup>1</sup> terminate the case,

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1. Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (B.I.A. 1996) (quoting Amico, 19 I. & N. Dec. 652, 654 n.1 (B.I.A. 1988)).

or provide any immigration status.<sup>2</sup> Rather, administrative closure “is merely an administrative convenience” reserved for “appropriate situations.”<sup>3</sup>

Nonetheless, this procedural tool has greatly benefited noncitizens in removal proceedings (respondents) and the courts for over three decades. Administrative closure gives respondents the opportunity to pursue more promising forms of relief, eliminates unnecessary costs associated with remaining in active removal proceedings, and allows judges to prioritize other cases while the respondent awaits the resolution of other pending matters that would make removal proceedings obsolete.<sup>4</sup> Because of these benefits, administrative closure has become a “tool used to regulate proceedings,” “manage an Immigration Judge’s calendar,” and prioritize cases effectively and efficiently.<sup>5</sup>

In May 2018, despite numerous objections and warnings from immigration judges, practitioners, and advocates,<sup>6</sup> then-Attorney General Jeff Sessions issued his decision in *Castro-Tum* finding that immigration judges “lack a general authority to administratively close cases,” because no regulation expressly or unambiguously grants such authority.<sup>7</sup> This decision has decreased the efficiency of immigration courts<sup>8</sup> and infringed upon the rights of noncitizens in removal

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2. W-Y-U-, 27 I. & N. Dec. 17, 18 (B.I.A. 2017).

3. *Amico*, 19 I. & N. Dec. at 654 n.1.

4. See Brief of Amici Curiae Tahirih Justice Center et al. at 6, *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018) (No. A 206-842-910).

5. Avetisyan, 25 I. & N. Dec. 688, 694 (B.I.A. 2012).

6. E.g., Amici Curiae Brief of Retired Immigration Judges and Former Members of the Board of Immigration Appeals, *Castro-Tum*, 27 I. & N. Dec. 271 (No. A 206-842-910) [hereinafter Brief of Retired Judges]; Request to Appear as Amici Curiae and Amicus Curiae Brief at 10-14, *Castro-Tum*, 27 I. & N. Dec. 271 [hereinafter Brief of IRTP]; Email from A. Ashley Tabaddor, President, Nat’l Ass’n of Immigration Judges, to Hon. Jefferson B. Sessions, U.S. Att’y Gen. 5 (Jan. 30, 2018) (on file with the American Immigration Lawyers Association, Doc. No. 18051752) [hereinafter Letter from NAIJ].

7. *Castro-Tum*, 27 I. & N. Dec. at 281. For a discussion on the narrow circumstances in which administrative closure is still available, see *infra* Part II.

8. See *Immigration Court Backlog Jumps While Case Processing Slows*, TRAC IMMIGR. (June 8, 2018), <https://trac.syr.edu/immigration/reports/516> [<https://perma.cc/9XN5-SAVS>] [hereinafter *Immigration Court Backlog Jumps*]; *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536> [<https://perma.cc/7X7H-CAZP>] [hereinafter *Immigration Court Backlog Surpasses*]; *Immigration Court Backlog Tool: Pending Cases and Length of Wait by Nationality, State, Court, and Hearing Location*, TRAC IMMIGR., [https://trac.syr.edu/phptools/immigration/court\\_backlog](https://trac.syr.edu/phptools/immigration/court_backlog) [<https://perma.cc/453M-YCPD>] [hereinafter *Immigration Court Backlog Tool*]; *infra* Section III.A.

proceedings.<sup>9</sup> Observing these consequences, advocates and practitioners have called for widespread action to rectify the decision.<sup>10</sup>

In August 2019, the Fourth Circuit made the first significant attempt to answer these calls by expressly rejecting *Castro-Tum* and finding that the power of immigration judges and the BIA to “exercise their independent judgment and discretion” and “take any action . . . appropriate and necessary” to adjudicate the cases before them<sup>11</sup> “unambiguously confer[ed] upon [immigration judges] and the BIA the general authority to administratively close cases.”<sup>12</sup> But because the decision is binding only on immigration courts and decisions by the Board within the Fourth Circuit’s jurisdictional reach,<sup>13</sup> more widespread action is needed. There are currently several legislative proposals that aim to reform the immigration-court system.<sup>14</sup> Any such legislation should expressly and unambiguously give immigration judges the general authority to administratively close cases. This inclusion is necessary to defeat the reasoning in *Castro-Tum* that, although immigration judges had successfully used administrative closure for decades,<sup>15</sup> such general authority had not been officially codified.<sup>16</sup> Accordingly, legislation should rectify *Castro-Tum* and memorialize immigration judges’ authority to grant administrative closure.<sup>17</sup>

Part I of this Essay discusses the history of administrative closure in the U.S. immigration-court system. Part II then provides a brief discussion of the *Castro-Tum* decision, and Part III analyzes the decision’s negative effects on the efficiency of the immigration courts and on the rights of noncitizens in removal proceedings. Part IV concludes this Essay by discussing the Fourth Circuit’s

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9. See *infra* Section III.B.

10. See, e.g., AM. IMMIGRATION LAWYERS ASS’N, AILA DOC. NO. 19021900, FOIA REVEALS EOIR’S FAILED PLAN FOR FIXING THE IMMIGRATION COURT BACKLOG 2, 5 (2019), <https://www.aila.org/PolicyBriefEOIRPlan> [<https://perma.cc/34ER-5ANQ>] [hereinafter AILA, EOIR’S FAILED PLAN] (discussing *Castro-Tum*’s severe consequences and calling for reform of the immigration-court system).

11. 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii) (2019).

12. *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019); see *infra* Section IV.A.

13. See *Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) (“We are not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States. . . . Where we disagree with a court’s position on a given issue, we decline to follow it outside the court’s circuit. But, we have historically followed a court’s precedent in cases arising in that circuit.”); see *infra* notes 141 and accompanying text.

14. See *infra* notes 145-147 and accompanying text.

15. See *infra* Part I.

16. *Castro-Tum*, 27 I. & N. Dec. 271, 292 (A.G. 2018) (No. A 206-842-910); see *infra* notes 62-67 and accompanying text.

17. See *infra* Section IV.B.

decision in *Romero v. Barr* and proposing legislation that would nationally reverse Sessions's decision in *Castro-Tum*.

## I. THE RISE OF ADMINISTRATIVE CLOSURE

Immigration statutes and regulations do not specifically articulate a general authority to administratively close cases,<sup>18</sup> except in a narrow set of circumstances.<sup>19</sup> The practice of administrative closure began in the 1980s based on a Department of Justice (DOJ) memorandum that listed administrative closure as an option available to immigration judges when a person failed to appear at a hearing.<sup>20</sup> Throughout the next three decades, a common understanding emerged: the general authority to administratively close cases flowed from regulations granting immigration judges and the BIA the inherent powers to “exercise their independent judgment and discretion” and to “take any action consistent with their authorities under the [Immigration and Nationality] Act and regulations that is appropriate and necessary for the disposition of . . . cases.”<sup>21</sup> Over the next two decades, the BIA defined the scope and proper use of administrative closure.

### A. Early Limitations on Administrative Closure

The BIA first addressed administrative closure in 1988 in *Amico*.<sup>22</sup> After the respondent failed to appear at his scheduled deportation hearing, the immigration judge, over the objections of the Immigration and Naturalization Service

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18. *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018) (“Although [administrative closure] is regularly used, it is not described in the immigration statutes or regulations.”); *Vahora v. Holder*, 626 F.3d 907, 917 (7th Cir. 2010) (“[A]dministrative closure is not a practice specified in the statute, nor is it mentioned in the current regulations.”).

19. *Castro-Tum*, 27 I. & N. Dec. at 276; see *infra* note 60 and accompanying text.

20. See *Castro-Tum*, 27 I. & N. Dec. at 273 (citing Memorandum from William R. Robie, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges 1 (Mar. 7, 1984), <https://www.justice.gov/sites/default/files/eoir/legacy/2001/09/26/84-2.pdf> [<https://perma.cc/6UB8-9J99>]).

21. 8 C.F.R. § 1003.10(b) (2019); see *id.* § 1240.1(a)(1)(iv) (2019) (granting immigration judges the authority in removal proceedings to take “any action consistent with applicable law and regulations as may be appropriate”). The BIA has similar authority. See *id.* § 1003.1(d)(1)(ii) (2019) (stating that the BIA may “take any action consistent with their authorities under the [Immigration and Nationality] Act and the regulations as is appropriate and necessary for the disposition of the case”).

22. 19 I. & N. Dec. 652 (B.I.A. 1988).

(INS), granted administrative closure instead of issuing an in absentia order.<sup>23</sup> An in absentia order, which is issued to individuals who fail to appear at a scheduled hearing after receiving written notice of it, would have mandated the respondent's deportation and made him ineligible for certain forms of immigration relief for a ten-year period.<sup>24</sup> On appeal, the BIA found that administrative closure was inappropriate under the circumstances because it would allow a respondent to simply fail to appear for purposes of avoiding a final order of removal.<sup>25</sup> Accordingly, the BIA remanded the case with instructions to enter a final order in absentia<sup>26</sup> and clarified that immigration judges could not administratively close a case if the law required a different action or otherwise prohibited administrative closure.<sup>27</sup>

In 1990, the BIA again addressed administrative closure in the cases *Lopez-Barrios*<sup>28</sup> and *Munoz-Santos*.<sup>29</sup> As in *Amico*, both cases involved respondents who failed to appear at hearings and immigration judges who granted administrative closure instead of issuing in absentia orders.<sup>30</sup> The INS again objected to administrative closure. Following its precedent in *Amico*, the BIA held that administrative closure was inappropriate<sup>31</sup> and added that administrative closure "should not be used if it is opposed by either party to the proceedings."<sup>32</sup> The BIA reaffirmed this holding in its 1996 decision *Gutierrez-Lopez*.<sup>33</sup>

The BIA did not address administrative closure again for almost two decades. During this time, the rulings in *Gutierrez-Lopez*, *Munoz-Santos*, and *Lopez-Barrios* became known as an "absolute veto power" that was used, usually to the government's advantage, to oppose and override a grant of administrative closure, even when there was no justification for the opposition.<sup>34</sup>

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23. 8 U.S.C. § 1229a(b)(5) (2018) (instructing immigration judges to order an individual in removal proceedings removed if the individual fails to appear at a scheduled hearing after receiving written notice of the hearing).
  24. 8 U.S.C. § 1182(a)(9)(A)(ii) (2018).
  25. *Amico*, 19 I. & N. Dec. at 654. The BIA issued an almost identical decision in *Rosales* on the same day. 19 I. & N. Dec. 655 (B.I.A. 1988).
  26. *Amico*, 19 I. & N. Dec. at 654.
  27. Kristin Bohman, Note, Avetisyan's *Limited Improvements Within the Overburdened Immigration Court System*, 85 U. COLO. L. REV. 189, 198 (2014).
  28. 20 I. & N. Dec. 203 (B.I.A. 1990).
  29. 20 I. & N. Dec. 205 (B.I.A. 1990).
  30. *Munoz-Santos*, 20 I. & N. Dec. at 206; *Lopez-Barrios*, 20 I. & N. Dec. at 204.
  31. *Munoz-Santos*, 20 I. & N. Dec. at 208; *Lopez-Barrios*, 20 I. & N. Dec. at 204.
  32. *Munoz-Santos*, 20 I. & N. Dec. at 207; *Lopez-Barrios*, 20 I. & N. Dec. at 204.
  33. 21 I. & N. Dec. 479 (B.I.A. 1996); see Avetisyan, 25 I. & N. Dec. 688, 692-93 (B.I.A. 2012).
  34. *Avetisyan*, 25 I. & N. Dec. at 692.

*B. Administrative Closure Becomes an Individualized Evaluation*

The BIA revisited administrative closure in the 2012 case *Avetisyan*.<sup>35</sup> The BIA began by criticizing its previous cases that had limited judicial discretion,” stating that

the rule [that both parties must consent] . . . directly conflicts with the delegated authority of the immigration judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case.<sup>36</sup>

To further justify this criticism, the BIA compared the rule to the idea, formerly rejected by several federal circuit courts and the BIA itself, “that a party to proceedings may exercise absolute veto power over the authority of an immigration judge or the Board to act in proceedings involving motions to reopen or requests for continuances.”<sup>37</sup> The BIA held that

neither an Immigration Judge nor the Board may abdicate the responsibility to exercise independent judgment and discretion in a case by permitting a party’s opposition to act as an absolute bar to administrative closure of that case when circumstances otherwise warrant such action. . . . [T]he Immigration Judges and the Board have the authority, in the exercise of independent judgment and discretion, to administratively close proceedings under appropriate circumstances, even if a party opposes.<sup>38</sup>

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35. *Id.* at 688.

36. *Id.* at 693; *see supra* note 21 and accompanying text.

37. *Avetisyan*, 25 I. & N. Dec. at 693. In the context of motions to reopen, the BIA discussed several cases in which the circuit courts criticized its decision in *Velarde*, 23 I. & N. Dec. 253, 256-57 (B.I.A. 2002), which listed “the Government’s lack of opposition to the motion” as a factor for granting the motion. *Avetisyan*, 25 I. & N. Dec. at 693. (“The courts indicated that permitting DHS to unilaterally block . . . a motion to reopen interfered with the Board’s exercise of its independent judgment and discretion.”) (citing *Ahmed v. Mukasey*, 548 F.3d 768, 772 (9th Cir. 2008); *Melnitsenko v. Mukasey*, 517 F.3d 42, 50-52 (2d Cir. 2008); and *Sarr v. Gonzales*, 485 F.3d 354, 363-64 (6th Cir. 2007)). In the context of requests for continuances, the BIA discussed the circuit courts’ approval of its decision in *Hashmi*, 24 I. & N. Dec. 785, 790-91 (B.I.A. 2009), in which it stated that “unsupported DHS opposition does not carry much weight and that an Immigration Judge should evaluate the DHS’s objection considering the totality of the circumstances.” *Avetisyan*, 25 I. & N. Dec. at 693 (citing *Hashmi*, 24 I. & N. Dec. at 791).

38. *Avetisyan*, 25 I. & N. Dec. at 694.

In doing so, the BIA explicitly overruled *Gutierrez-Lopez* and related cases.<sup>39</sup>

The BIA further held that the decision to grant administrative closure “involves an assessment of factors that are particularly relevant to the efficient management of the resources of the Immigration Courts and the Board.”<sup>40</sup> These factors included

(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome . . . when the case is recalendared before the Immigration Judge or the appeal is reinstated before the Board.<sup>41</sup>

While the BIA stated that the decision to administratively close a case “must be evaluated under the totality of the circumstances,”<sup>42</sup> it offered two examples of when it *may* be appropriate to administratively close a case: one, for spouses of lawful permanent residents who are in the process of naturalization, and two, for individuals who have appealed the denial of a visa petition but the BIA has not yet adjudicated the appeal.<sup>43</sup> The BIA also offered examples of when it would *not* be appropriate to administratively close a case: one, when a possible event outside the pending case is “purely speculative . . . such as a possible change in law or regulation”; two, when that event might not occur “within a period of time reasonable under the circumstances”; and three, when that event “may or may not affect the course of an alien’s immigration proceedings.”<sup>44</sup>

Five years after *Avetisyan*, the BIA again addressed administrative closure in *Matter of W-Y-U*.<sup>45</sup> In this case, the Department of Homeland Security (DHS) requested administrative closure. The individual in removal proceedings objected because administrative closure would prevent him from pursuing his timely filed application for asylum.<sup>46</sup> The immigration judge sided with DHS,

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39. *Id.*

40. *Id.*

41. *Id.* at 696.

42. *Id.*

43. *Id.*

44. *Id.*

45. 27 I. & N. Dec. 17 (B.I.A. 2017).

46. *Id.* at 17.

reasoning that administrative closure was appropriate because it reserved the court's "limited adjudication resources to resolve actual cases in dispute."<sup>47</sup> On appeal, the BIA recognized the immigration judge's concerns regarding the most efficient use of the court's resources, but ultimately found that such concerns were "secondary to a party's interest in having a case resolved on the merits."<sup>48</sup> Additionally, the BIA concluded that there was an actual case in dispute<sup>49</sup> because a noncitizen in removal proceedings has a right to seek relief from persecution, and if an application for asylum were successful, the respondent would be eligible for lawful status, whereas administrative closure provided no legal status whatsoever.<sup>50</sup> Accordingly, the BIA clarified its decision in *Avetisyan* and held that "the primary consideration for an Immigration Judge in determining whether to administratively close or recalendar proceedings is whether the party opposing the administrative closure has provided a persuasive reason for the case to proceed and be resolved on the merits."<sup>51</sup>

After the decisions in *Avetisyan* and *W-Y-U-*, immigration judges routinely granted administrative closure when an outstanding action or event was relevant to the necessity or merits of the removal proceedings.<sup>52</sup> Examples include the processing of a visa petition<sup>53</sup> or the appeal of a criminal conviction, which, if successful, would render the removal proceedings moot.<sup>54</sup> Further, under the Obama Administration, DHS often allowed – and even recommended – administratively closing "non-priority" cases as a tool to preserve government resources.<sup>55</sup>

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47. *Id.* at 18.

48. *Id.* at 18-19.

49. *Id.* at 19.

50. *Id.* at 20.

51. *Id.*

52. *Avetisyan*, 25 I. & N. Dec. at 692.

53. See, e.g., Hashmi, 24 I. & N. Dec. 785, 790-91 (B.I.A. 2009) (discussing factors to consider when adjudicating a continuance request if the respondent is the beneficiary of a pending visa petition).

54. See, e.g., Montiel, 26 I. & N. Dec. 555, 558 (B.I.A. 2015) (granting a joint motion to administratively close a case where direct appeal of the respondent's criminal conviction was pending, and the respondent would not be subject to removal proceedings if he prevailed on that direct appeal).

55. See Memorandum from Riah Ramlogan, Acting Principal Legal Advisor, Immigration & Customs Enf't, to Office of the Principal Legal Advisor Attorneys 2 (Apr. 6, 2015), [https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance\\_eoir\\_johnson\\_memo.pdf](https://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance_eoir_johnson_memo.pdf) [<https://perma.cc/4LEG-Q47G>] (directing ICE attorneys to "generally seek administrative closure or dismissal of cases [DHS] determines are not priorities"); Memorandum from Peter S. Vincent, Principal Legal Advisor, Immigration & Customs Enf't, to All Chief Counsel, Office of the Principal Legal Advisor, Exec. Office for Immigration Review 3 n.5 (Nov. 17,



## II. THE FALL OF ADMINISTRATIVE CLOSURE: *MATTER OF CASTRO-TUM*

In *Castro-Tum*, the respondent did not appear at his scheduled merits hearing and, rather than issue an in absentia order, the immigration judge administratively closed the case over the objections of DHS.<sup>56</sup> The BIA granted DHS's appeal and remanded the case with instructions for the immigration judge to enter an in absentia order if the respondent failed to appear at a final hearing.<sup>57</sup> Although the BIA decision followed precedent, then-Attorney General Sessions certified the case to himself on January 4, 2018 to review the general authority of immigration judges to administratively close cases.<sup>58</sup>

On May 17, 2018, Sessions issued his decision in *Castro-Tum*, holding that immigration judges lack the general authority to grant administrative closure.<sup>59</sup> Instead, Sessions asserted that immigration judges can administratively close cases only in the narrow situations explicitly authorized by statutes, regulations,

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2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf> [<https://perma.cc/PY6R-ZH2L>] (stating that "ICE attorneys may agree to the administrative closure" as an exercise of prosecutorial discretion).

56. See *Castro-Tum*, A206 842 910, at \*1 (B.I.A. Nov. 27, 2017).

57. See *id.* at \*2.

58. *Castro-Tum*, 27 I. & N. Dec. 271, 272 (A.G. 2018). Under the INA, the Attorney General is required to, among other things, "establish such regulations . . . [and] review such administrative determinations in immigration proceedings . . . [that] the Attorney General determines to be necessary for carrying out" the laws related to immigration and naturalization. 8 U.S.C. § 1103(g)(2) (2018); *Castro-Tum*, 27 I. & N. Dec. at 281. Additionally, the BIA is required, by regulation, to "refer to the Attorney General for review of its decision all cases that . . . the Attorney General directs the Board to refer to him." 8 C.F.R. § 1003.1(h)(1)(i) (2019). When the Attorney General directs the BIA to "refer" its decision for his review, this is known as the "certification procedure." *Castro-Tum*, 27 I. & N. Dec. at 281.

59. *Castro-Tum*, 27 I. & N. Dec. at 282-83.

or settlement agreements.<sup>60</sup> As a result, Sessions explicitly overruled *Avetisyan* and *W-Y-U*.<sup>61</sup>

In making his decision, Sessions primarily relied on the fact that there is no statutory or regulatory basis for administrative closure,<sup>62</sup> and concluded that immigration judges, the BIA, and the federal courts have merely “assumed” and “inferred” that the authority exists in the general power of immigration judges and the BIA to manage their cases.<sup>63</sup> According to Sessions, a general case-management power does not confer authority to grant administrative closure.<sup>64</sup> Rather, Sessions found that this power “permit[ted] only more limited actions, like delaying the scheduling of certain cases to prioritize others.”<sup>65</sup> Further, because regulations explicitly grant immigration judges the authority to use other docket-management tools, such as continuances,<sup>66</sup> Sessions found that immigration judges lacked implicit authority to issue administrative closure, which would “render[] the continuance regulation unnecessary.”<sup>67</sup>

Finally, Sessions stated that administrative closure hindered “the expeditious enforcement of our immigration laws” and “the fair and efficient administration of immigration cases.”<sup>68</sup> To support this assertion, Sessions provided Executive Office for Immigration Review (EOIR) statistics showing a “dramatic” increase

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60. *Id.* at 271-72, 293. These exceptions include the following: (1) individuals seeking T nonimmigrant visas pursuant to the Victims of Trafficking and Violence Prevention Act and 8 C.F.R. § 1214.2(a) (2019); (2) individuals seeking V nonimmigrant visas pursuant to the Legal Immigration Family Equity (LIFE) Act and 8 C.F.R. § 1214.3 (2019); (3) certain Nicaraguan and Cuban nationals pursuant to 8 C.F.R. § 1245.13(d)(3)(i) (2019), certain Haitian nationals pursuant to 8 C.F.R. § 1245.15(p)(4)(i) (2019), and certain Vietnamese, Cambodian, and Laotian nationals under 8 C.F.R. § 1245.21(c) (2019); (4) Salvadorans and Guatemalans covered by the settlement agreement in *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 805 (N.D. Cal. 1991), and 8 C.F.R. §§ 1240.62(b)(1)(i), (2)(iii), 1240.70(f)-(h) (2019); and (5) class members in *Barahona-Gomez v. Ashcroft*, 243 F. Supp. 2d 1029 (N.D. Cal. 2002). Notably, most of these exceptions apply only to individuals who have been in the United States since the 1990s.

61. *Castro-Tum*, 27 I. & N. Dec. at 271.

62. *Id.* at 283, 292.

63. *Id.* at 271-72, 285-87 (discussing 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii), 1240.1(a)(1)(iv), (c) (2019)); see 8 C.F.R. §§ 1003.9(b)(3), 1003.1(a)(2)(i)(C) (2019).

64. *Castro-Tum*, 27 I. & N. Dec. at 271, 285-87 (A.G. 2018).

65. *Id.* at 286.

66. 8 C.F.R. §§ 1003.29, 1240.6 (2019).

67. *Castro-Tum*, 27 I. & N. Dec. at 289.

68. *Id.* at 273, 290.

in the number of administratively closed cases between 2012 and 2018.<sup>69</sup> According to Sessions, *Avetisyan*'s "unwieldy" test contributed to this increase.<sup>70</sup> Sessions concluded by clarifying that all administratively closed cases "may remain closed unless DHS or the respondent requests recalendar[ing]."<sup>71</sup> This, according to Sessions, would properly alleviate the risk of "overwhelm[ing] the immigration courts and undercut[ing] the efficient administration of immigration law."<sup>72</sup>

Then, after ending the decades-long practice of administrative closure, Sessions affirmed the BIA's original decision to remand the case to the immigration judge to issue a new Notice of Hearing and, if the respondent failed to appear, issue a final order in absentia.<sup>73</sup> Thus, instead of correcting the BIA's decision, Sessions merely used the case as a pretext to eliminate administrative closure and unilaterally rewrite immigration law.<sup>74</sup>

### III. THE AFTERMATH OF CASTRO-TUM

Sessions's decision to eliminate general administrative closure has (A) dramatically increased the backlog of immigration cases, (B) weakened due process and fundamental fairness in the immigration courts, and (C) undermined the independence of immigration judges.

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69. *Id.* at 273 (stating that between fiscal years 2012 and 2018, a total of 215,285 cases were administratively closed while 283,366 cases were administratively closed in the prior thirty-two years).

70. *Id.*

71. *Id.* at 293.

72. *Id.*

73. *Id.* at 294.

74. Matthew Archambeault, *The Repercussions of How the Administration Has Handled Matter of Castro-Tum*, THINKIMMIGR. (Aug. 14, 2018), <https://thinkimmigration.org/blog/2018/08/14/the-repercussions-of-how-the-administration-has-handled-matter-of-castro-tum> [<https://perma.cc/9A53-ZDVD>]; see also AM. IMMIGRATION LAWYERS ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 3 (2018), <https://www.aila.org/dueprocess#PDF> [<https://perma.cc/4RTR-CZRN>] [hereinafter AILA, RESTORING INTEGRITY AND INDEPENDENCE] ("Under the previous administration, Attorneys General Eric Holder and Loretta Lynch employed this power only four times over the course of eight years. In just the last year, Attorney General Sessions has certified six cases to himself and issued five decisions that are transforming immigration law in ways that run contrary to decades of judicial practice and established law. Overall, the decisions are aimed at minimizing the role of judges in immigration courts by restricting their authority to manage their dockets or make decisions based on the facts of the case.").

A. *Administrative Closure Promoted the Efficient Management of the Immigration Courts*

Even before *Castro-Tum*, experts and practitioners viewed administrative closure as an important tool for increasing immigration courts' efficiency. An April 2017 report commissioned by EOIR specifically recommended that EOIR work with DHS to implement a policy allowing administrative closure in cases awaiting adjudication in other agencies or courts.<sup>75</sup> The report explained how "external dependencies" – factors outside of EOIR's control – constrict the daily functioning of immigration courts.<sup>76</sup> These external dependencies include ballooning caseloads, immigration trends, changing administrative policies regarding prioritization of cases, and delays in biometric screenings and actions by other immigration agencies.<sup>77</sup>

In a letter to Sessions predating his decision in *Castro-Tum*, the National Association of Immigration Judges (NAIJ) urged Sessions "to protect the efficient and fair adjudication of cases in the Immigration Court by affirming the authority of . . . Immigration Judges to use administrative closure as an effective docket management tool."<sup>78</sup> The NAIJ stressed that "[i]n the complex interaction between the Immigration Judge, [DHS], [ICE], [USCIS], and sometimes state courts and other authorities," administrative closure allowed judges to complete more cases by focusing on cases that were truly ripe for review while external factors hampering other cases were resolved.<sup>79</sup> Eliminating the power to administratively close cases, according to the NAIJ, would sharply increase the immigration-court backlog.<sup>80</sup>

A group of BIA members and retired immigration judges also expressed support for administrative closure. They submitted an amicus brief explaining that "[i]mmigration [j]udges . . . need . . . administrative closure[] to ensure the efficient use of judicial resources and to minimize backlog."<sup>81</sup> The group predicted that "[s]tripping the Immigration Judges of the power to order administrative

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75. BOOZ ALLEN HAMILTON & EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, LEGAL CASE STUDY: SUMMARY REPORT 26 (2017), <https://www.aila.org/casestudy> [<https://perma.cc/C4GQ-6U33>] [hereinafter BOOZ ALLEN REPORT]; see also AILA, EOIR'S FAILED PLAN, *supra* note 10, at 1 (examining EOIR's "failed plan" for reducing the immigration courts' case backlog).

76. BOOZ ALLEN REPORT, *supra* note 75, at 26.

77. *Id.*

78. Letter from NAIJ, *supra* note 6, at 1.

79. *Id.* at 2.

80. *Id.* at 3 ("Thus, denial of administrative closure . . . will contribute to the huge backlog currently clogging the court's docket.").

81. Brief of Retired Judges, *supra* note 6, at 7.

closure w[ould] only impede efficiency in the adjudication of removal proceedings.”<sup>82</sup>

*Castro-Tum* has led to the exact outcome many feared: a severe increase in the immigration-court backlog.<sup>83</sup> When President Trump assumed office in January 2017, the immigration-court backlog was 542,411 cases.<sup>84</sup> At the end of May 2018, just after Sessions issued his decision in *Castro-Tum*, the immigration-court backlog had already increased by thirty-two percent, reaching what was, at the time, a record 714,067 cases.<sup>85</sup> By the end of September 2018, the immigration-court backlog increased to 768,257 cases – an increase of almost 55,000 cases in just four months.<sup>86</sup> By September 2019, the backlog reached 1,023,767 cases – an increase of over 250,000 cases in just one year.<sup>87</sup>

### B. Administrative Closure Protected the Rights of Individuals in Removal Proceedings

The Fifth Amendment guarantees noncitizens in removal proceedings the right to due process.<sup>88</sup> Although deportation is not a criminal proceeding, the Supreme Court has recognized “[t]hat deportation is a penalty – at times a most serious one” and that deportation “deprives [a person] of the right to stay and live and work in this land of freedom.”<sup>89</sup> As such, immigration judges must exercise “[m]eticulous care” to ensure that the proceedings “meet the essential standards of fairness.”<sup>90</sup> Thus, an immigration judge’s “decision to proceed immediately or to defer decision can affect an individual’s liberty and thus infringe

82. *Id.* at 7–8.

83. AILA, EOIR’S FAILED PLAN, *supra* note 10, at 1.

84. *Immigration Court Backlog Jumps*, *supra* note 8.

85. *Id.* (explaining that, before May 2018, “what appear[ed] to be driving the burgeoning backlog [wa]s the lengthening time it now takes to schedule hearings and complete proceedings in the face of the court’s over-crowded dockets,” and that “[w]hile the Justice Department, including Attorney General Sessions and court administrators, have implemented a number of new policies with the announced aim of speeding case dispositions, their efforts thus far have not had the desired result and appear to have actually lengthened completion times so that these have risen to new all-time highs.”).

86. *Immigration Court Backlog Tool*, *supra* note 8.

87. *Id.*

88. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings”); *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903); *Brief of Retired Judges*, *supra* note 6, at 14 (citing *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

89. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

90. *Id.*

upon areas that courts often are called upon to protect.”<sup>91</sup> Additionally, statutes and regulations entitle noncitizens in removal proceedings to full and fair hearings of their claims, including notice of the charges against them and a reasonable opportunity to present evidence to defend themselves from deportation.<sup>92</sup>

Before *Castro-Tum*, immigration judges could use administrative closure as a tool to guarantee due-process rights in pending removal proceedings, particularly in situations where a pending outside action would make the removal proceedings obsolete.<sup>93</sup> These situations included

(1) administrative closure of a case of an unaccompanied minor when his/her application for asylum is pending before USCIS; (2) administrative closure of a case of a minor applying for special immigration juvenile status before a state court; (3) administrative closure of a case with a U visa application for which the USCIS has found the alien is *prima facie* eligible; or (4) administrative closure of a matter in which a visa petition for an immediate relative has been filed for which an alien appears *prima facie* eligible.<sup>94</sup>

For example, for an individual with a pending U visa application or an appeal of a criminal conviction, an immigration judge could close the case if he or she deemed it necessary and appropriate to allow the individual a reasonable opportunity to defend against deportation. Without administrative closure, some noncitizens cannot fully pursue forms of relief for which they would otherwise be eligible.<sup>95</sup>

After *Castro-Tum*, immigration judges can no longer fully consider “due process or principles of fairness and humanitarianism.”<sup>96</sup> The large immigration-court backlog overwhelms immigration judges, resulting in subpar performance

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91. Brief of Retired Judges, *supra* note 6, at 14 (citing *Vahora v. Holder*, 626 F.3d 907, 918 (7th Cir. 2008)).

92. *See, e.g.*, 8 U.S.C. §§ 1229a(b)(1), (4) (2018); 8 C.F.R. §§ 1240.1(c), 1240.10(a)(4) (2019); *see also* *Agyeman v. I.N.S.*, 296 F.3d 871, 876-77 (9th Cir. 2002) (“An alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf” (citations omitted)).

93. Letter from NAIJ, *supra* note 6, at 2-3.

94. *Id.* at 2.

95. *Id.* at 3. *See infra* notes 121-128 and accompanying text.

96. Cf. AM. IMMIGRATION LAWYERS ASS’N, AILA POLICY BRIEF: IMPOSING NUMERIC QUOTAS ON JUDGES THREATENS THE INDEPENDENCE AND INTEGRITY OF COURTS 4 (2017), <https://www.aila.org/infonet/aila-policy-brief-imposing-numeric-quotas-judges> [<https://perma.cc/N8RJ-AJW8>] [hereinafter AILA, NUMERIC QUOTAS] (discussing the imposition of numeric quotas in immigration courts as part of “a clear design to speed up the deportation of more people with little regard for due process or principles of fairness and humanitarianism”).

and adjudications, confusion and delay among agencies, and the deprivation of due process for individuals whose fates depend on the outcomes of their removal proceedings, such as asylees who face persecution or torture upon removal.<sup>97</sup> *Castro-Tum* made clear that the executive branch “wants every case to move as fast as possible toward deportation regardless of the specific circumstances”<sup>98</sup> and “with little regard for due process or principles of fairness and humanitarianism that have long been the foundation of America’s immigration policy.”<sup>99</sup>

### C. Administrative Closure Maintained the Independence of Immigration Judges

Sessions’s decision in *Castro-Tum* highlights a fundamental issue in immigration courts: the lack of independent immigration judges.<sup>100</sup> In 1973, the DOJ officially recognized the title “immigration judge” and authorized immigration judges to wear judicial robes,<sup>101</sup> signaling that the DOJ understood the significance of immigration proceedings and intended such proceedings to take place before neutral arbiters.<sup>102</sup> Immigration regulations also enshrine this judicial independence and impartiality.<sup>103</sup>

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97. See, e.g., AILA, EOIR’S FAILED PLAN, *supra* note 10, at 1; Letter from NAIJ, *supra* note 6, at 1-3; cf. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”).

98. Press Release, Am. Immigration Lawyers Ass’n, Attorney General’s Concerted Effort to Strip Immigration Judges of Judicial Independence Continues (Sept. 19, 2018), <https://www.aila.org/advo-media/press-releases/2018/attorney-generals-concerted-effort-to-strip> [https://perma.cc/8GGS-S75U].

99. AILA, NUMERIC QUOTAS, *supra* note 96. See generally AM. IMMIGRATION LAWYERS ASS’N, POLICY BRIEF: RECOMMENDATIONS FROM INDEPENDENT STUDY OF IMMIGRATION COURTS CONTRADICT DOJ POLICY CHANGES (Apr. 23, 2018), <https://www.aila.org/infonet/independent-study-of-courts-contradict-doj-policy> [https://perma.cc/CZ43-NN93] (highlighting the contradictions between policy recommendations generated by an independent firm at DOJ’s request after a year-long study of the U.S. immigration-court system between 2016 and 2017, and the actual policy changes that DOJ implemented in the immigration-court system between 2017 and 2018).

100. AM. IMMIGRATION LAWYERS ASS’N, POLICY BRIEF: FACTS ABOUT THE STATE OF OUR NATION’S IMMIGRATION COURTS 1 (May 14, 2019), <https://www.aila.org/advo-media/aila-policy-briefs/aila-policy-brief-facts-about-the-state-of-our> [hereinafter AILA, FACTS ABOUT THE STATE OF OUR NATION’S IMMIGRATION COURTS].

101. Immigration Judge, 38 Fed. Reg. 8,590, 8,590 (Apr. 4, 1973); see Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts”*, 33 GEO. IMMIGR. L.J. 261, 290 (2019).

102. Brief of Retired Judges, *supra* note 6, at 9 n.1 (citing Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 673 (2006)).

103. 8 C.F.R. §1003.10(b) (2019) (“In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent

However, the U.S. government has gradually eroded the independence of immigration judges.<sup>104</sup> *Castro-Tum* is a prime example. Before this decision, immigration judges maintained the roles of “independent adjudicators with the authority to take a broad range of actions to appropriately manage the cases before them,”<sup>105</sup> which included the inherent authority to manage their own dockets and calendars.<sup>106</sup> Administrative closure was a docket-management tool incidental to this inherent authority.<sup>107</sup> By stripping immigration judges and the BIA of the power to administratively close cases, Sessions ignored this longstanding inherent authority, increased the distinction between immigration judges and federal judges, and signaled that immigration judges do not have the same level of independence.

Additionally, the independence of the immigration judges depends on the whims of the executive branch. The Attorney General appoints immigration judges, who serve as DOJ employees.<sup>108</sup> They are members of the executive branch, not the judicial branch. As such, the Attorney General can fire immigration judges or relocate them to another court at any time.<sup>109</sup> Because of their at-will employment status, immigration judges are sometimes considered “government attorneys” who risk their jobs if they act contrary to the desires of the administration and the Attorney General.<sup>110</sup> These judges may be forced to make

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judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”).

104. See AILA, RESTORING INTEGRITY AND INDEPENDENCE, *supra* note 74.

105. Brief of Retired Judges, *supra* note 6, at 10 (citing *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 889 (9th Cir. 2018)).

106. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); Brief of Retired Judges, *supra* note 6, at 8-13; Letter from NAIJ, *supra* note 6.

107. *Ali v. Quarterman*, 607 F.3d 1046, 1047 n.2 (5th Cir. 2010) (citation omitted); *Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (citation omitted); see also *CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 250 (5th Cir. 2006) (referring to administrative closure as a “case-management tool”); *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir. 1999) (stating that administrative closure “is used in various districts throughout the nation in order to shelve pending, but dormant, cases” and “endorses[ing] the judicious use of administrative closings by district courts in circumstances in which a case, though not dead, is likely to remain moribund for an appreciable period of time”).

108. 8 C.F.R. § 1003.10(a) (2019); *Fact Sheet: Immigration Courts*, NAT’L IMMIGR. F. (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts> [<https://perma.cc/M8VG-Q8C5>].

109. *Fact Sheet: Immigration Courts*, *supra* note 108.

110. AILA, FACTS ABOUT THE STATE OF OUR NATION’S IMMIGRATION COURTS, *supra* note 100, at 1.



decisions that they know are not legally or morally sound<sup>111</sup> to avoid being reprimanded or fired.<sup>112</sup>

In fact, this was the fate of Immigration Judge Morley, who presided over *Castro-Tum*. In his decision, Sessions remanded the case to Judge Morley to rehear within fourteen days. At the subsequent hearing, Judge Morley continued the case for two months to allow time to locate the respondent and give him proper notice to appear. After this decision, Assistant Chief Immigration Judge Jack Weil notified Judge Morley that “management” had removed Judge Morley from the case, as well as all other cases he had administratively closed.<sup>113</sup> Additionally, Judge Weil stated that Judge Morley had unprofessionally criticized Sessions’s decision, and that the decision allowed Judge Morley only two options: terminate the case or order the respondent removed.<sup>114</sup> This was despite the fact that Judge Morley believed such an order may be a violation of the law,<sup>115</sup> and provided legal authority and reasoning for his decision to continue the case: to provide the respondent the due process owed to him under the law. Judge Weil then took over the case<sup>116</sup> and, at the next hearing, ordered the respondent removed in absentia.<sup>117</sup>

Sessions’s decision in *Castro-Tum* and Judge Morley’s subsequent firing threaten the independence and integrity of the immigration-court system. They send the message that immigration judges must act as puppets for the executive branch, rather than as independent and impartial arbiters, if they wish to retain their jobs.<sup>118</sup> Immigration courts should be instruments of justice, not tools used

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111. See, e.g., Mimi Tsankov, Nat’l Ass’n of Immigration Judges, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ*, AM. IMMIG. LAWYER’S ASS’N 4 (Aug. 8, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/76937> [<https://perma.cc/MVR7-MCL9>].

112. See Press Release, Am. Immigration Lawyers Ass’n, Immigration Judges Spotlight DOJ Hijacking of Court Independence (Aug. 8, 2018), <https://www.aila.org/advo-media/press-releases/2018/immigration-judges-spotlight-doj-hijacking> [<https://perma.cc/P9J5-Y3DH>].

113. *Id.* In August 2018, Judge Morley and the National Association of Immigration Judges filed a formal grievance against the Chief Immigration Judge for, among other things, “[t]aking personnel action against an immigration judge for his refusal to obey an order that would require him to violate a law, rule, or regulation.” Tsankov, *supra* note 111, at 2 (citing 5 U.S.C. § 2302(b)(9)(D) (2018)).

114. Tsankov, *supra* note 111, at 3.

115. See 8 C.F.R. § 1003.9(c) (2019) (prohibiting the Chief Immigration Judge from directing the result of a pending matter assigned to another immigration judge).

116. Tsankov, *supra* note 111, at 2-4.

117. Archambeault, *supra* note 74.

118. See generally Brief of Retired Judges, *supra* note 6 (arguing that the Immigration and Nationality Act specifically grants immigration judges the authority to exercise independent judgment and discretion).

to further an enforcement agenda. The current reality is troubling: as one immigration judge said candidly, immigration judges are essentially hearing “death penalty cases . . . in [a] traffic court setting[.]”<sup>119</sup> with no way to fight back without losing their jobs.

#### IV. REVIVING ADMINISTRATIVE CLOSURE

Against this backdrop, it is clear that if there is any hope for the survival of administrative closure in immigration courts, it must be secured through the efforts of individuals and groups outside the executive branch.

##### A. *The Fourth Circuit Sets the Stage for Revival in Romero v. Barr*

On August 29, 2019, the Fourth Circuit made the first major attempt to revive administrative closure. In *Romero v. Barr*,<sup>120</sup> the Fourth Circuit faced one of the most common fact patterns to which immigration judges have historically granted administrative closure. In 2013, DHS placed Jesus Zuniga Romero into removal proceedings for being unlawfully present in the United States.<sup>121</sup> At that time, Romero was also the beneficiary of a pending Form I-130 that his wife, a U.S. citizen, had filed.<sup>122</sup> If the government approved the form, Romero could receive lawful permanent resident status once he attended an interview at the U.S. Consulate in Honduras.<sup>123</sup> However, because Romero was “unlawfully present” in the United States for more than one year, he would be barred from reentering the United States for ten years if he left to attend the interview.<sup>124</sup> While Romero could apply for a waiver of his unlawful presence,<sup>125</sup> he was ineligible for the waiver while in pending removal proceedings “unless the removal proceedings [we]re administratively closed.”<sup>126</sup> Therefore, Romero could only

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119. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014, 9:29 AM EDT), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> [<https://perma.cc/2XGB-K4ZG>]; see also Last Week Tonight, *Immigration Courts: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 1, 2018), <https://www.youtube.com/watch?v=9fBoGBwJ2QA> (showing video of Immigration Judge Dana Leigh Marks).

120. 937 F.3d 282 (4th Cir. 2019).

121. *Id.* at 286; see 8 U.S.C. § 1182(a)(9)(B)(ii) (2018).

122. *Romero*, 937 F.3d at 286.

123. *Id.*

124. See 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2018).

125. *Id.* § 1182(a)(9)(B)(v); 8 C.F.R. § 212.7(e) (2019).

126. 8 C.F.R. § 212.7(e)(4)(iii) (2019).

obtain lawful permanent resident status if his removal proceedings were administratively closed.

After the government approved the Form I-130, Romero requested administrative closure to allow him to apply for and receive the necessary waiver.<sup>127</sup> At the final hearing in March 2017, the immigration judge denied Romero's request, finding that his case did not fulfill any of the *Avetisyan* factors.<sup>128</sup> However, the BIA disagreed and found that Romero fulfilled "several if not all" of the factors and ordered that his case be administratively closed to allow him to apply for the waiver, attend the interview, and obtain lawful permanent resident status.<sup>129</sup> In December 2017, DHS filed a motion to reconsider, which was still pending when *Castro-Tum* was decided in May 2018.<sup>130</sup> The BIA granted DHS's motion in June 2018 because *Castro-Tum* "precluded the BIA from exercising any general administrative closure authority."<sup>131</sup> As a result, the BIA dismissed Romero's case and ordered Romero removed to Honduras.<sup>132</sup>

Romero appealed to the U.S. Court of Appeals for the Fourth Circuit, which held that *Castro-Tum* should not be afforded deference under *Auer*<sup>133</sup> or *Skidmore*<sup>134</sup> for several reasons.<sup>135</sup> First, the court found that 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously granted immigration judges and the BIA a general authority to administratively close cases because the phrase "'may take any action . . . appropriate and necessary for the disposition' of a case"<sup>136</sup> literally and plainly "encompass[ed] actions of whatever kind appropriate for the resolution of a case . . . includ[ing] docket management actions such as administrative closure," as long as they were made in appropriate and necessary circumstances.<sup>137</sup> According to the Fourth Circuit, such circumstances were clearly

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127. *Romero*, 937 F.3d at 236.

128. *Id.* at 287.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Auer v. Robbins*, 519 U.S. 452 (1997) (stating that courts should defer to an agency's interpretation of its own regulation so long as the regulation is ambiguous, the interpretation is reasonable, and the new interpretation does not create unfair surprise).

134. *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944) (stating that the weight courts should give an agency's interpretation depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

135. *Romero*, 937 F.3d at 292.

136. 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b) (2019).

137. *Romero*, 937 F.3d at 292-93 (citing 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b) (2019)).

defined and delineated in *Avetisyan*.<sup>138</sup> Second, the court found that even if the regulations *were* ambiguous, Sessions’s interpretation amounted to an “unfair surprise.”<sup>139</sup> After conducting an in-depth analysis of administrative closure, including its historical purposes and framework, the court refused to follow *Castro-Tum*, vacated the BIA’s decision, and remanded the case back to the BIA.<sup>140</sup>

*Romero v. Barr* is the federal judiciary’s first attempt to correct *Castro-Tum*. But while the Fourth Circuit’s decision binds immigration courts and Board decisions within its jurisdiction, it is merely persuasive to other courts, and the Board is free to disregard *Romero* when reviewing appeals from immigration courts outside of the Fourth Circuit.<sup>141</sup> Until other circuits rule on this issue, immigration judges and the BIA in other jurisdictions are still bound by Sessions’s ruling in *Castro-Tum*.<sup>142</sup>

Immigration practitioners and advocates should study and use the Fourth Circuit’s reasoning to bring similar challenges in other jurisdictions. But while such litigation may revive administrative closure in some jurisdictions, it does not provide a holistic solution and risks giving rise to a circuit split.<sup>143</sup> Such a

138. *Id.* at 293.

139. *Id.* at 295-96 (discussing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), and several decisions from other circuit courts that refused to defer to agency interpretation when the interpretation amounted to “unfair surprise” and departure from decades-long practices and settled expectations).

140. *Id.* at 297.

141. *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) (“We are not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States . . . . Where we disagree with a court’s position on a given issue, we decline to follow it outside the court’s circuit. But, we have historically followed a court’s precedent in cases arising in that circuit.” (citing *Georgia Dep’t of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Torres*, Interim Decision 3010 (B.I.A. 1986); *Herrera*, 18 I. & N. Dec. 4 (B.I.A. 1981); *Patel*, 17 I. & N. Dec. 597 (B.I.A. 1980))). See Press Release, Am. Immigration Lawyers Ass’n, AILA: Fourth Circuit Strikes Down Attorney General Opinion, Restores Fundamental Power to Immigration Judges (Aug. 30, 2019), <https://www.aila.org/advo-media/press-releases/2019/aila-fourth-circuit-strikes-down-attorney-general> [<https://perma.cc/6MSC-WJKQ>] [hereinafter AILA, Press Release]. The states that fall under the Fourth Circuit’s jurisdiction are Maryland, North Carolina, South Carolina, Virginia, and West Virginia. *About the Court*, U.S. CT. APPEALS 4TH CIR., <http://www.ca4.uscourts.gov/about-the-court> [<https://perma.cc/Q8VP-P3B6>].

142. AILA, Press Release, *supra* note 141.

143. In fact, while no other circuit court has been presented with the direct task of ruling on the merits of *Castro-Tum*, several circuits have either accepted the ruling or refused to comment on the merits in dicta. See, e.g., *Niang v. Barr*, 779 F. App’x 26, 28-29 (2d Cir. 2019) (“Moreover, the Attorney General’s decision in *Matter of Castro-Tum* . . . now precludes the [immigration judge] or BIA from granting administrative closure except in specific circumstances not relevant here.”); *Caballero-Martinez v. Barr*, 920 F.3d 543, 550 n.2 (8th Cir. 2019) (stating that “*Avetisyan*’s continued validity has been called into question by *Matter of Castro-Tum*” but

split would further damage the consistency and efficiency of immigration courts across the country and risk prompting the Supreme Court to resolve the split unfavorably.

*B. Legislators Must Take Center Stage to Revive Administrative Closure*

For a long-lasting and widespread solution, Congress—rather than the courts or the executive—must act.<sup>144</sup> Federal legislation can best guarantee the administrative-closure power across all jurisdictions and regardless of the administration and political party in charge of the executive branch. Several legislative efforts are currently underway to reform the immigration-court system.<sup>145</sup> These include proposals to restructure the immigration-court system into an Article I court system similar to the U.S. Bankruptcy Courts<sup>146</sup> and to create statutory protections for immigration judges against being removed or disciplined without good cause.<sup>147</sup>

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finding that “resolving the question of whether the BIA properly denied administrative closure is not necessary to the resolution of this case”); *Doe v. United States*, 915 F.3d 905, 910 n.2 (2d Cir. 2019) (citing *Castro-Tum* to support the assertion that “[t]he fact that [the petitioner’s] deportation proceedings have been administratively stayed does not alleviate the[] legal consequences, as [the petitioner] is still unable to apply for citizenship and remains subject to mandatory removal at any moment if the Government removes the stay”); *Dhakal v. Sessions*, 895 F.3d 532, 537 n.8 (7th Cir. 2018) (discussing a case that predated *Castro-Tum*, in which the BIA held that the parties could agree to administratively close proceedings, and stated that the case at issue presented the court “with no occasion to comment on the merits of *Matter of Castro-Tum*”).

144. *Cf. Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018) (“[I]t is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal . . .”).
145. *E.g.*, Immigration Court Improvement Act of 2019, S. 663, 116th Cong.; AM. IMMIGRATION LAWYERS ASS’N, STOP THE CORRUPTION OF USCIS AND EOIR MISSIONS ENSURE FAIRNESS AND CONSISTENCY IN ALL IMMIGRATION DECISIONS 2 (Aug. 2018), <https://www.aila.org/advocacy-media/tools/advocacy-made-easy/stop-the-corruption-of-uscis-and-eoir-missions> [<https://perma.cc/7VV7-BUBQ>] [hereinafter AILA, FAIRNESS AND CONSISTENCY] (delineating what Congress can do to restore due process in immigration courts, including introducing legislation that reverses *Castro-Tum*); AM. IMMIGRATION LAWYERS ASS’N BD. OF GOVERNORS, RESOLUTION ON IMMIGRATION COURT REFORM (2018) (proposing an outline of the basic features that should be included in Article I immigration courts) [hereinafter AILA, RESOLUTION ON IMMIGRATION COURT REFORM].
146. U.S. CONST. art. I, § 8, cl. 9. While immigration judges are executive-branch employees, they are not Article I judges. Article I courts are created by Congress, while the current immigration-court system has been completely created, controlled, and administered by the executive branch. See AILA, FACTS ABOUT THE STATE OF OUR NATION’S IMMIGRATION COURTS, *supra* note 100, at 1.
147. Immigration Court Improvement Act of 2019, S. 663, 116th Cong.; AILA, FAIRNESS AND CONSISTENCY, *supra* note 145, at 2; AILA, RESOLUTION ON IMMIGRATION COURT REFORM, *supra* note 145.

Any legislative proposals, however, should also explicitly and unambiguously grant the general authority of administrative closure to immigration judges and the BIA. After all, Sessions rested his decision in *Castro-Tum* on the assertion that such general authority was not explicitly codified.<sup>148</sup> Specifically, any proposed legislation should clarify that the independence of immigration judges includes the general power of administrative closure, codify the definition and purpose of administrative closure, and delineate the correct procedures for granting administrative closure. Moreover, it should explicitly address and memorialize the requirement that immigration judges grant administrative closure using their own independent judgment and do so in furtherance of efficiency and fairness in immigration proceedings.

Such legislation would ensure that immigration judges have the authority of general administrative closure, and that such authority is part of the independent and neutral nature of their duties. Moreover, it would improve the efficiency and integrity of the immigration courts, as well as protect vulnerable noncitizens in removal proceedings who deserve to have the U.S. immigration system treat their cases with care and respect.

## CONCLUSION

*Castro-Tum* has several negative consequences for the immigration-court system. It contributes to an unprecedented backlog in immigration courts, decreases the efficiency of the immigration-court system, weakens the independence of immigration judges, and undermines the rights of noncitizens in removal proceedings.

The Fourth Circuit has provided a framework that other circuits should adopt. But Congress can provide a more widespread, permanent solution to rectify the severe consequences of *Castro-Tum*. Legislation that expressly grants immigration judges and the BIA the general authority to administratively close cases will not only improve the efficiency and restore the independence of immigration courts, but also help ensure that due process and fairness undergird all removal proceedings.

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148. See *Castro-Tum*, 27 I. & N. 271, 287-91 (A.G. 2018) (No. A 206-842-910).

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