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One Step Forward, Two Steps Back: How Attorney General Review Undermines Our Immigration Adjudication System

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ONE STEP FORWARD, TWO STEPS BACK: HOW ATTORNEY GENERAL REVIEW UNDERMINES OUR IMMIGRATION ADJUDICATION SYSTEM

Emma K. Carroll*

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INTRODUCTION

On June 1, 2011, Mr. E.F.H.L., a native and citizen of Honduras, entered the United States without inspection and subsequently applied for asylum and withholding of removal based on his fear of persecution.¹ After considering only the written application and brief, the immigration judge (IJ) determined that Mr. E.F.H.L. did not demonstrate his prima facie eligibility for relief and thus refused to hold an evidentiary hearing, which would have enabled Mr. E.F.H.L. to present oral testimony and other evidence.² On appeal, the Board of Immigration Appeals (BIA) determined that the IJ erred, concluding instead that applicants for asylum or withholding of removal are entitled to an evidentiary hearing on the merits.³ The BIA explained that the Immigration and Nationality Act, the accompanying regulations, and caselaw from the BIA and circuit courts all supported such a holding.⁴ Thus, in June 2014, the BIA remanded the case to the IJ to conduct a hearing on the merits of Mr. E.F.H.L.'s asylum and withholding of removal applications.⁵ However, upon becoming eligible for a green card based on a relative petition—a preferable form of relief—Mr. E.F.H.L. withdrew his asylum and withholding of removal applications.⁶ As was common practice, the IJ administratively closed Mr. E.F.H.L.'s removal proceedings to allow him to pursue the alternative relief.⁷ Case closed—or so everyone thought.

Then something very strange occurred. Nearly four years after the BIA published its decision, Attorney General Jeff

1. See E-F-H-L-, 26 I. & N. Dec. 319, 319 (B.I.A. 2014). When a case involves an individual fleeing from persecution or applying for humanitarian relief, the case name often uses only the individual's initials in order to protect their identity.

2. *Id.*

3. *Id.* at 324.

4. *Id.* at 320–24.

5. *Id.* at 324.

6. See E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018).

7. *Id.*

Sessions plucked the case out of obscurity and decided to review it himself. In three simple paragraphs, Sessions vacated the BIA decision, determining the decision was effectively mooted when Mr. E.F.H.L. withdrew his applications for relief, and ordered the case to be recalendared and restored to the active docket of the Immigration Court.⁸

The attorney general's decision to review and vacate a case that had been closed for four years was far from a coincidence. To the contrary, it was remarkably strategic. Invoking the basis of mootness enabled Sessions to vacate the BIA's decision in its entirety—not only the portion pertaining to Mr. E.F.H.L., but also the portion entitling asylum applicants to an evidentiary hearing—without having to provide justification for casting aside the evidentiary hearing requirement. Though *Matter of E-F-H-L* was peculiar at the time it was decided, it was merely a harbinger of increasingly aggressive involvement of attorneys general in immigration adjudication. Indeed, over the course of the following three years, the Trump Administration's attorneys general would self-refer sixteen additional cases for review.⁹

8. *Id.*

9. See generally A-B-, 28 I. & N. Dec. 199 (Att'y Gen. 2021) (discussing the “unwilling and unable” legal standard for persecution by non-government actors), *vacated in its entirety* by A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021); Negusie, 28 I. & N. Dec. 120 (Att'y Gen. 2020) (determining the persecutor bar to asylum and withholding of removal does not include a duress exception); A-C-A-A-, 28 I. & N. Dec. 84 (Att'y Gen. 2020) (addressing the standard of review for asylum), *vacated in its entirety* by A-C-A-A-, 28 I. & N. Dec. 351 (Att'y Gen. 2021); Reyes, 28 I. & N. Dec. 52 (Att'y Gen. 2020) (reapplying the categorical analysis for aggravated felonies); O-F-A-S-, 28 I. & N. Dec. 35 (Att'y Gen. 2020) (determining the “under the color of law” standard is the correct legal standard that immigration courts should apply when evaluating claims under the Convention Against Torture); A-M-R-C-, 28 I. & N. Dec. 7 (Att'y Gen. 2020) (inviting briefing on issues including the legal standard for “serious nonpolitical crime” and due process concerns); R-A-F-, 27 I. & N. Dec. 778 (Att'y Gen. 2020) (reiterating the standard of review and legal definition for what qualifies as torture); Thomas & Thompson, 27 I. & N. Dec. 674 (Att'y Gen. 2019) (explaining the legal effect of state-court orders reducing criminal sentences on immigration consequences); Castillo-Perez, 27 I. & N. Dec. 664 (Att'y Gen. 2019) (creating a presumption against individuals with multiple DUI convictions as unable to establish good moral character); L-E-A-, 27 I. & N. Dec. 581 (Att'y Gen. 2019) (discussing the legal issue of particular social groups based on family membership for asylum and withholding of removal), *vacated in its entirety* by L-E-A-, 28 I. & N. Dec. 304 (Att'y Gen. 2021); M-S-, 27 I. & N. Dec. 509 (Att'y Gen. 2019) (holding noncitizens transferred from expedited removal proceedings after establishing a credible fear are not eligible for release on bond); M-G-G-, 27 I. & N. Dec. 475 (Att'y Gen. 2018) (inviting briefing on the eligibility for release on bond); S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (Att'y Gen. 2018) (determining IJs have no inherent authority to terminate or dismiss removal proceedings); L-A-B-R-, 27 I. & N. Dec. 405 (Att'y Gen. 2018) (discussing application of the good-cause standard to a

Agency-head review—an authority by which an agency’s top official may review the decisions of lower-level agency adjudicators—is relatively common within the administrative state.¹⁰ This Comment discusses two primary goals of agency-head review: first, efficiently advancing the policy goals of the executive branch, and second, clarifying legal questions to promote consistent and fair application of the law. However, these goals are not always treated equally. Agency heads are politically appointed, which may cause political priorities to interfere with their role as neutral arbiters.¹¹ Moreover, as appointees rather than electees, they are comparatively insulated from the negative consequences that would ordinarily arise when an elected official’s decision departs from the will of constituents.¹² In turn, this gives agency heads greater freedom to act in a manner that runs contrary to society’s notions of justice. In other words, agency heads are positioned in such a way that policy

request for a continuance); A-B-, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (discussing eligibility requirements for asylum in the context of persecution by private actors), *vacated in its entirety* by A-B-, 28 I. & N. Dec. 307 (Att’y Gen. 2021); Castro-Tum, 27 I. & N. Dec. 271 (Att’y Gen. 2018) (determining IJs and the BIA have no inherent authority to administratively close immigration proceedings), *overruled by* Cruz-Valdez, 28 I. & N. Dec. 326 (Att’y Gen. 2021); E-F-H-L-, 26 I. & N. Dec. 226 (Att’y Gen. 2018) (vacating a case based on mootness grounds because the respondent withdrew his asylum application; also vacating an asylum applicant’s entitlement to an evidentiary hearing).

10. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 144 (2019) (“[F]inal decision-making authority in the agency head remains a touchstone of agency adjudication.”).

11. Even in administrative proceedings, due process demands an impartial decision-maker. See, e.g., *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (“[A] fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts.” (internal quotation marks and citations omitted)).

12. Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 132 (2017) (“The Attorney General’s unique role as bureaucrat and adjudicator, in addition to political appointee, results in the opportunity to exercise power in a manner more obscured to the public and thus less constrained by legislative and political forces. For instance, given that the Attorney General is a political appointee, but not an elected official like the President, she may be both influenced by political considerations but relatively unconstrained by the potential loss of public support.”). *But see* THE FEDERALIST NO. 77, at 517 (Alexander Hamilton) (Jacob Cooke ed., 1961) (advocating for the appointments clause in the Constitution as a means of ensuring political accountability for executive officers and envisioning that “[t]he blame of a bad nomination would fall upon the President singly and absolutely. . . . If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.”).

advancement tends to supersede other important goals, such as consistency and fairness of decisions.¹³

Immigration adjudication is especially vulnerable to this dynamic because of where it is situated within the administrative state—within a cabinet-level agency whose primary focus is law enforcement.¹⁴ The agency that houses the immigration courts is the Department of Justice (DOJ).¹⁵ The attorney general, as the agency head of the DOJ,¹⁶ possesses the authority to review cases decided by the BIA.¹⁷ The attorney general's review authority is nearly unlimited.¹⁸ Exercise of the review power has evolved substantially over time,¹⁹ and though it has been a relatively uncontroversial tool for the majority of its history, in recent years, it has received greater attention with both strong proponents and opponents.²⁰

The attorneys general and acting attorneys general under the Trump Administration employed the self-referral and review authorities more frequently and expansively compared to other

13. See *infra* Part II.

14. See *infra* notes 277–280 and accompanying text.

15. See Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038–39 (Feb. 25, 1983) (to be codified at 8 C.F.R. pt. 3), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/10/02/48%20Fed%20Reg%208038%2002251983.pdf> [<https://perma.cc/LL6Z-WRP3>] (creating the Executive Office of Immigration Review within the DOJ); 8 C.F.R. § 1003.1 (2021) (describing the organizational structure, jurisdiction, and powers of the BIA within the DOJ).

16. *Organizational Chart*, DEP'T OF JUST. (Feb. 5, 2018), <https://www.justice.gov/agencies/chart> [<https://perma.cc/PB7A-C4VN>].

17. 8 C.F.R. § 1003.1(h) (2021).

18. See *infra* notes 49–63 and accompanying text.

19. See generally Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 848–52 (2016).

20. See *id.*; see also SARAH PIERCE, MIGRATION POL'Y INST., *OBSCURE BUT POWERFUL: SHAPING IMMIGRATION POLICY THROUGH ATTORNEY GENERAL REFERRAL AND REVIEW* 16 (2021); Jennifer S. Breen, *Labor, Law Enforcement, and "Normal Times": The Origins of Immigration's Home Within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications*, 42 U. HAW. L. REV. 1 (2019); David A. Martin, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. 1 (2016); Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RES. J. INT'L L. 599 (2020); Shah, *supra* note 12; Jonathan P. Riedel, Note, *Chevron and the Attorney General's Certification Power*, 95 N.Y.U. L. REV. 271 (2020); Nora Snyder, Note, *Matter of A-B-, LGBTQ Asylum Claims, and the Rule of Law in the U.S. Asylum System*, 114 NW. U. L. REV. 809 (2019); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766 (2010).

recent administrations and self-referred seventeen immigration cases in under four years.²¹ This is a substantial increase given the fact that nine prior attorneys general only self-referred a total of twenty-one cases over the course of the preceding sixty-six years.²² The decisions issued by the attorneys general under the Trump Administration drastically altered not only the substantive law and procedural rules for immigration adjudications but also collateral factors, such as interparty dynamics and judicial hyperawareness of factors unrelated to the merits of a case.²³ While the decisions may have advanced President Trump's general policy of curbing immigration, they also tended to cause more confusion than clarity regarding the legal questions with which they dealt. More often than not, they produced, rather than resolved, inconsistencies in application of the law.²⁴ Moreover, the decisions proved to be controversial, and the reviewing courts—and even subsequent attorneys general—often refused to defer to them.²⁵

This Comment analyzes these self-referred attorney general immigration decisions and their subsequent impact on immigration law and practice to ascertain whether the attorney general review authority achieves the goals of agency-head review. Based on these observations, this Comment concludes that the attorney general's review authority over immigration cases must be eliminated because it is inevitably prone to prioritize policy advancement at the expense of ensuring fair and consistent application of the law.

Part I describes the origins of the attorney general's review authority and identifies the main purposes behind such review. Part II examines several cases self-referred by prior attorneys general against the backdrop of the goals of agency-head review. Specifically, it analyzes the extent to which attorney general review achieves the two overarching goals of efficiently advancing executive policy and promoting consistency through clarification of the law. The analysis reveals that while attorney general review may initially appear to advance the executive's immigration policy agenda, such advancement is achieved only at the expense of the other goals, and immigration adjudication is thus

21. *See supra* note 9.

22. *See infra* notes 84–86 and accompanying text.

23. *See infra* notes 142–143, 150 and accompanying text.

24. *See infra* Section II.B.

25. *See infra* Section II.B.

substantially hindered by the collateral dysfunction that attorney general decisions create. Finally, Part III explains why certain proposed reforms to the referral power will still not satisfy the goals of agency-head review because such review is irreconcilably ill-suited to the current immigration adjudication system. In light of that determination, this Comment ultimately calls for the elimination of the attorney general's review authority.

I. THE ORIGINS AND PURPOSES OF THE ATTORNEY GENERAL'S SELF-REFERRAL AUTHORITY

The diverse adjudication schemes that exist within the ever-expanding administrative state are united, if not in structure, by generic end goals inherent to all types of adjudication: achieving accuracy, efficiency, acceptability, and consistency.²⁶ On its face, the organization of the immigration adjudication system²⁷

26. See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1645 (2010) (synthesizing and expanding upon literature on the goals of adjudication). Though these are the four main generic goals, for practical analysis purposes, this Comment narrows the focus by consolidating and reframing them with the policy-advancement goal that is specific to attorney general review (described in further detail in this Part) into two overarching goals: (1) efficiently advancing policy and (2) consistency. I chose to do this not because the goals of accuracy and acceptability are any less important, but rather because they require a different type of research and analysis beyond the scope of this Comment. For example, determining the "accuracy" of self-referred decisions would require deeper research into the records of the cases and the lives of the parties involved. "Acceptability," on the other hand, is reflected at least in part in the Section analyzing consistency, as I describe to what extent the self-referred decisions have been accepted by reviewing courts. For additional explanation on why I selected these goals, see Section I.B, *infra*.

27. This Comment uses "immigration adjudication" to refer to cases in removal proceedings, which are handled within the DOJ's Executive Office of Immigration Review (EOIR) by immigration judges, the Board of Immigration Appeals (BIA), and the attorney general. There are, however, other types of immigration adjudications. For example, the Office of the Chief Administrative Hearing Officer (OCAHO), also located in the DOJ's EOIR, has jurisdiction over employment-related immigration cases (employment of unauthorized noncitizens under 8 U.S.C. § 1324a (2018), unfair employment practices under 8 U.S.C. § 1324b (2018), and document fraud under 8 U.S.C. § 1324c (2018)). The attorney general may review such § 1324a and § 1324c decisions, and the Chief Administrative Hearing Officer must refer cases to the attorney general for review when the attorney general so directs or upon request by the secretary of the Department of Homeland Security (DHS). See 28 C.F.R. § 68.55(a)–(b) (2021). However, since OCAHO's inception in 1986, no attorney general has ever reviewed an OCAHO case. See generally *OCAHO Decisions*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions> [<https://perma.cc/R8W5-K8C7>] (cataloguing

may seem unremarkable when compared with that of other agencies.²⁸ For example, like most other agencies conducting informal adjudications, specialized judges make the initial decision, which may then be appealed to the appellate body within the agency.²⁹ For immigration adjudication of removal cases, the specialized judge is an immigration judge³⁰ (IJ) and the appellate body is the Board of Immigration Appeals (BIA).³¹ In many agencies, the appellate body's decision is final, and adjudication typically ends there (though decisions are commonly judicially reviewable).³² This is usually the case with BIA decisions as

the fifteen volumes of all OCAHO cases, which, if expanded individually, reveal that each decision was either issued by an administrative law judge or the Chief Administrative Hearing Officer, but never by the attorney general).

Additionally, applications and petitions for affirmative immigration benefits, such as visas or citizenship, are handled by the U.S. Citizenship and Immigration Services (USCIS), located in DHS. Noncitizens may appeal the outcomes of these cases to the Administrative Appeals Office (AAO). While decisions of the AAO may be designated as "precedent" only after review by the attorney general, there is not an explicit provision allowing for the attorney general to self-refer USCIS and AAO cases for review or to otherwise issue their own decision. See 8 C.F.R. § 103.3(c) (2021); see also *AAO Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/administrative-appeals/ao-decisions> [<https://perma.cc/T45A-Y9UX>]; *DHS/AAO/INS Decisions*, U.S. DEPT OF JUST., <https://www.justice.gov/eoir/dhs-ao-ins-decisions> [<https://perma.cc/475A-MSMG>] (showing that out of all DHS, AAO, and Immigration and Nationality Services (INS) adjudications between 1960 and 2019, the attorney general either certified or reviewed thirteen of them—at least two of which affirmed the lower adjudicator decision). However, because attorneys general have not exercised their review authority over these cases as aggressively as cases coming from IJs and the BIA, these adjudications are beyond the scope of this Comment.

28. Given the sheer number of federal agencies and the limited scope of this Comment, my research on the subject is not exhaustive. However, scholars have commented on how the "current structure of the [Board of Immigration Appeals] is consistent with the way that intermediate appeals tribunals operate across the spectrum of federal agencies." Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 289 & n.101 (2002); see also *infra* note 32 and accompanying text (providing examples of adjudication structures in other agencies).

29. See MICHAEL ASIMOW, ADMIN. CONF. U.S., ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 1 (ADMIN. 2019) <https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf> [<https://perma.cc/N5M4-P4ML>] ("Typically, these initial decisions [made by the various types of administrative judges] are reviewed by higher-level officials in the adjudicating agency (often the head or heads of the agency).").

30. See 8 C.F.R. § 1003.10 (2021) (regulating IJs).

31. See 8 C.F.R. § 1003.1 (2021) (regulating the BIA).

32. In the Department of Health and Human Services (HHS), for example, once the five-member Departmental Appeals Board reviews the decision of an administrative law judge and issues a precedential decision, the parties cannot appeal

well. Additionally, it is common in the administrative state to vest final review authority in the head of the agency.³³ Such is the case in the immigration context, where the attorney general, as head of the DOJ, retains the authority of final review over immigration cases.³⁴

Though this adjudication structure is perhaps unsurprising, it is not inevitable. There is no one-size-fits-all. Numerous other adjudicative schemes exist within the administrative state—each theoretically tailored to serve the particular purposes of the agency, accounting for the nuanced qualities of the case types and available resources.³⁵ Or so one would hope. As this Comment will demonstrate, the scheme of adjudication may actually undermine the goals of the agency in which it is utilized. In order to lay a framework for understanding whether the authority

to any higher authority within HHS. *See* ASIMOW, *supra* note 29, at 135–37. Similarly, for minor penalties and permitting cases in the Environmental Protection Agency (EPA), EPA attorneys called “regional judicial officers” preside over the hearings. Their decisions may be appealed to the Environmental Appeals Board (EAB), which is the final EPA decisionmaker on administrative appeals. The cases are neither appealable nor reviewable by the EPA administrator. *See id.* at 143–49. Other agencies may have a second or even third round of appellate review. In the Department of Veteran’s Affairs (VA), the VA regional offices make the initial decision in claims cases, which may be reviewed by a decision review officer and then appealed to the Board of Veterans Appeals (BVA). A claimant who loses before the BVA can obtain judicial review from the Court of Appeals for Veterans Claims, which may be further reviewed by the Court of Appeals for the Federal Circuit. *See id.* at 177–82.

33. *See* Walker & Wasserman, *supra* note 10, at 144 (“[F]inal decision-making authority in the agency head remains a touchstone of agency adjudication.”); *see also* Taylor, *supra* note 28, at 290 & n.105 (describing the attorney general’s authority as an agency head to review the decisions of the BIA as an intermediate appeals tribunal as “well grounded in administrative law”).

34. *Organizational Chart*, *supra* note 16; 8 U.S.C. § 1103(a)(1) (2018); 8 C.F.R. § 1003.1(h) (2021).

35. The type and significance of the life, liberty, or property interest that an agency deals with determines the process due in the adjudication. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). Thus, the structure of the agency adjudication system is (or should be) structured to fulfill whatever process is required in that particular circumstance. For example, in the case of need-based welfare benefits, the welfare recipient is entitled to a hearing before termination of benefits because the need is dire, termination of the payments would cause great financial distress, and witness credibility may be critical to making a more accurate decision. On the other hand, termination of benefits is permitted before a hearing in the case of disability payments because the need for income is generally less dire and the issues are likely to be based on medical reports rather than credibility determinations, making an oral hearing less necessary. *See* ASIMOW, *supra* note 29, at 31–32; *see also id.* at 78 (noting best practices for type-B adjudications and suggesting that agencies with substantial caseloads should utilize administrative judges to conduct hearings and provide an initial decision before review by an agency head).

serves the goals of immigration adjudication, this Part outlines both the origins and purposes of the attorney general's self-referral power.

A. Origins and Mechanics of Agency-Head Review and Self-Referral in the Immigration Context

An examination of the history and background of the attorney general's power over immigration functions reveals that such authority was originally established to enable greater executive control over immigration policy in order to be more responsive to wartime crises. The federal government did not fully assume immigration enforcement authority until the Act to Regulate Immigration of 1882, which charged the Department of the Treasury with overseeing such laws.³⁶ Congress subsequently transferred immigration functions to the Department of Commerce and Labor in 1903 as a means of safeguarding American workers and wages.³⁷ In 1939, however, President Franklin Roosevelt started enacting a series of Reorganization Plans, which restructured and reorganized several agencies to better deal with and prepare for the impending pressures of war.³⁸ One of

36. Act of Aug. 3, 1882, Pub. L. No. 47-376, 22 Stat. 214.

37. Act of Feb. 14, 1903, Pub. L. No. 57-552, § 4, 32 Stat. 825, 826 ("That the following-named offices, bureaus, divisions, and branches of the public service, now and heretofore under the jurisdiction of the Department of the Treasury, . . . the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration, the immigration service at large, . . . be, and the same hereby are, transferred from the Department of the Treasury to the Department of Commerce and Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named Department . . ."); *id.* § 3 ("That it shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce . . . the labor interests . . . of the United States"); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 4 (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/FNL3-KZG9>] ("Because most immigration laws of the time sought to protect American workers and wages, an Act of February 14, 1903, transferred the Bureau of Immigration from the Treasury Department to the newly created Department of Commerce and Labor.").

38. *See, e.g.*, Message of the President: Reorganization Plan No. 1 of 1939, 4 Fed. Reg. 2727 (1939), *reprinted in* 5 U.S.C. app. at 531 (2008) ("In these days of ruthless attempts to destroy democratic government, it is boldly asserted that democracies must always be weak in order to be democratic at all; and that, therefore, it will be easy to crush all free states out of existence. Confident in our Republic's 150 years of successful resistance to all subversive attempts upon it, whether from without or within, nevertheless we must be constantly alert to the importance of keeping the tools of American democracy up to date. It is our responsibility to make

the 1940 plans transferred immigration functions to the DOJ,³⁹ largely under the assumption that the transfer would be only a temporary means of helping the nation through war.⁴⁰ The attorney general thus acquired all administrative authority over immigration and naturalization laws, including the final say in resolving disagreements in interpretation and application.⁴¹ The transfer of immigration functions reframed immigration as an issue of criminal law enforcement rather than an economic or labor issue.⁴²

The attorney general subsequently created the BIA⁴³—now comprised of twenty-three members⁴⁴—to render final decisions in immigration adjudications, though such decisions have always been subject to the attorney general’s review.⁴⁵ Originally, the attorney general promulgated regulations requiring the BIA to refer certain types of cases to the attorney general for review—namely in cases where a dissent was recorded, cases involving a “question of difficulty,”⁴⁶ cases ordering the suspension

sure that the people’s government is in condition to carry out the people’s will, promptly, effectively, without waste or lost motion.”).

39. Message of the President: Reorganization Plan No. V of 1940 § 1, 5 Fed. Reg. 2223 (June 14, 1940), *reprinted in* 5 U.S.C. § 133v at 161 (1958).

40. *See id.* (President Roosevelt determining that “the startling sequence of international events which has occurred . . . has necessitated a review of the measures required for the Nation’s safety. This has revealed a pressing need for the transfer of the immigration and naturalization functions from the Department of Labor to the Department of Justice. I . . . did not include it in the previous reorganization plans since much can be said for the retention of these functions in the Department of Labor during normal times. I am convinced, however, that under existing conditions the immigration and naturalization activities can best contribute to the national well-being only if they are closely integrated with the activities of the Department of Justice.”); Breen, *supra* note 20, at 31.

41. *See* Message of the President: Reorganization Plan No. V of 1940 § 1, 5 Fed. Reg. 2223 (June 14, 1940), *reprinted in* 5 U.S.C. § 133v at 161 (1958).

42. *See* Breen, *supra* note 20, at 2–3.

43. For a more comprehensive history of the BIA, see generally Gonzales & Glen, *supra* note 19, at 848–49 (2016).

44. 8 C.F.R. § 1003.1(a)(1) (2021).

45. *See* Regulations Governing Departmental Organization and Authority, 8 C.F.R. § 90.2 (1940); Breen, *supra* note 20, at 36.

46. The “question of difficulty” basis of referral predominated in referred cases through the 1950s, possibly because the newly created BIA needed more definitive guidance as the immigration laws were still relatively new and developing. *See* Gonzales & Glen, *supra* note 19, at 860 (suggesting that the “question of difficulty” basis of referral was removed from the statute because “[i]mmigration law has also developed significantly since 1940 and, especially, since the enactment in 1952 of the Immigration and Nationality Act, it is perhaps less important or less necessary for the Board to seek definitive guidance from the Attorney General through his review of the legal questions posed”).

of deportation, or any other “case in which the Attorney General so directs.”⁴⁷ This provision is commonly called the referral, or certification, authority.

Today, the Immigration and Nationality Act (INA) charges both the attorney general and the secretary of the Department of Homeland Security (DHS) with the administration and enforcement of the immigration laws.⁴⁸ Ultimately, however, the “determination[s] and ruling[s] by the Attorney General with respect to all questions of law shall be controlling.”⁴⁹ Since an internal DOJ reorganization in 1983, the BIA and the IJ functions are now both located under the Executive Office for Immigration Review (EOIR) within the DOJ.⁵⁰ The BIA still functions as the appellate body.⁵¹ It is charged with providing “clear and uniform guidance to [DHS], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations” by issuing precedential decisions.⁵² In so doing, the members of the BIA must “exercise their

47. 8 C.F.R. § 90.12 (1940); Breen, *supra* note 20, at 36–37.

48. See 8 U.S.C. § 1103(a), (g) (2018). This division occurred when the 2003 regulations implemented the Homeland Security Act, which created DHS. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Aliens and Nationality: Homeland Security: Reorganization of Regulations, 68 Fed. Reg. 9824 (Feb. 28, 2003); see also sources cited *supra* note 27 (explaining attorney general review for other types of immigration cases arising out of other agencies). The author disavows the use of the word “alien” to describe non-U.S. citizens. Any use of the word “alien” in this Comment is only included when directly quoting another source.

49. 8 U.S.C. § 1103(a)(1) (2018).

50. See Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, *supra* note 15 (creating the EOIR); *Organizational Chart*, *supra* note 16.

51. 8 C.F.R. § 1003.1(d)(1) (2021).

52. *Id.* However, the BIA also issues many (indeed, a majority) non-precedential decisions, which are similar to unpublished cases in Article III courts, intended only to resolve the issues for the parties to the case. See 8 C.F.R. § 1003.1(g)(2)–(3) (2021) (describing how only “[s]elected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security . . . will be published and serve as precedents in all proceedings involving the same issue or issues” and outlining the rigorous procedure involved in order to designate a case as precedent). The attorney general may review a case regardless of whether it is precedential or non-precedential. 8 C.F.R. § 1003.1(h) (2021) (stating that “[t]he Board shall refer to the Attorney General for review of its decision *all* cases that” are directed to be referred by the attorney general, the BIA, or the Secretary of DHS, without any other qualifications (emphasis added)). *Matter of A-B-*, for example, was originally a non-precedential, unpublished decision by the BIA in 2016, and yet Attorney General Jeff Sessions self-referred it for his review. See generally *A-B-*, 27 I. & N. Dec. 227 (Att’y Gen. 2018) (ordering the BIA to refer the case for his review); see also *A-B-*, 28 I. & N. Dec. 307, 308 (Att’y Gen. 2021) (decision by

independent judgment and discretion in considering and determining the cases coming before the Board”⁵³

The BIA’s decisions are administratively final unless the attorney general chooses to review them.⁵⁴ Unlike the original, substance-based iteration of the referral regulation in which the subject matter of the case dictated whether the attorney general could review it, the current regulation is actor-based, in that the attorney general may review any case referred by certain actors.⁵⁵ It states that the BIA shall refer all cases to the attorney general for review that:

- (i) The *Attorney General* directs the Board to refer to him.
- (ii) The *Chairman* or a majority of *the Board* believes should be referred to the Attorney General for review.
- (iii) The *Secretary of Homeland Security*, or specific [designated] officials . . . , refers to the Attorney General for review.⁵⁶

Apart from qualifications regarding who may refer cases to the attorney general for review and the requirement that the decision be issued in writing,⁵⁷ no other restrictions limit this review power. In other words, the attorney general may review any type of case, with any type of disposition, at any time, and for seemingly any purpose.

Attorney General Merrick Garland vacating the prior *A-B-* decisions and noting that “[i]n *A-B- I*, Attorney General Sessions reviewed an unpublished decision of the Board”).

53. 8 C.F.R. § 1003.1(d)(1)(ii) (2021).

54. 8 C.F.R. § 1003.1(d)(7) (2021).

55. Compare 8 C.F.R. § 90.12 (1940) (listing the *types* of cases that must be referred to the attorney general), with 8 C.F.R. § 1003.1(h) (2021) (listing *who* may refer cases to the attorney general for review); see also Breen, *supra* note 20, at 37 (explaining that the regulations were “substantially revised . . . to change the path of Attorney General review from substance-based to actor-based,” and that this “referrer-based structure has remained in place with some amendments over the intervening years”). Because the amendment pertained to organization, delegation of authority, and procedure, Administrative Procedure Act (APA) § 553’s three procedural requirements were deemed inapplicable, so no additional explanation was provided for the amendment. See Miscellaneous Amendments to Chapter, 8 C.F.R. § 90.12 (1947); Gonzales & Glen, *supra* note 19, at 851 (“[N]o rationale was provided for this shift.”).

56. 8 C.F.R. § 1001.3(h)(1)(i)–(iii) (2021) (emphasis added).

57. See 8 C.F.R. § 1001.3(h)(2) (2021).

The attorney general reviews all aspects of referred cases *de novo*, whether the cases present questions of law or fact,⁵⁸ and the attorney general's decision supersedes and overrules any inconsistent BIA precedent.⁵⁹ Their holdings become binding on all immigration adjudicators unless later overruled by the circuit courts of appeals,⁶⁰ the Supreme Court, Congress, or subsequent attorneys general. In very limited circumstances,⁶¹ circuit courts of appeals may subsequently review attorney general decisions, typically under the deferential *Chevron* analysis.⁶² Thus, the attorney general's referral authority has the potential to create sudden and drastic changes in immigration law—a

58. See J-F-F-, 23 I. & N. Dec. 912, 913 (Att'y Gen. 2006) ("I review *de novo* all aspects of the Board's and Immigration Judge's decisions in this case." (internal citations omitted)); A-H-, 23 I. & N. Dec. 774, 779 n.4 (Att'y Gen. 2005).

59. See, e.g., Jean, 23 I. & N. Dec. 373, 374 n.3 (Att'y Gen. 2002) ("This published decision is binding on the BIA and is intended to overrule any BIA decisions with which it is inconsistent.").

60. However, if a circuit court overrules a decision, the overruling is binding only in courts falling within that circuit, while remaining valid in the other circuits.

61. Generally, it appears that federal courts lack jurisdiction to hear "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter" except for those explicitly provided in the INA judicial review provisions. 8 U.S.C. § 1252(g) (2018); 8 C.F.R. § 235.3(b)(1) (2021). The main exceptions are judicial review of constitutional claims, 8 U.S.C. § 1252(a)(2)(D) (2018), or, in the context of expedited removal cases under INA § 235(b)(1), judicial review of habeas corpus proceedings, 8 U.S.C. § 1252(e)(2)(C) (2018), and judicial review of systemic challenges to the legality of a "written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such" expedited removal process, 8 U.S.C. § 1252(e)(3)(A)(ii) (2018). In *Grace v. Whitaker*, for example, the U.S. District Court for the District of Columbia determined that it had jurisdiction to hear the claims of twelve asylum seekers in expedited removal proceedings pursuant to a credible fear determination; the asylum seekers challenged the systemic validity of Attorney General Jeff Sessions's decision in *Matter of A-B-*, asserting that it violated the INA and the APA. See 344 F. Supp. 3d 96, 104–05, 108, 115–17 (D.D.C. 2018), *aff'd in part, rev'd and vacated in part on other grounds*, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

62. See *Xian Tong Dong v. Holder*, 696 F.3d 121, 124 (1st Cir. 2012); *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921–22 (9th Cir. 2006). *But see* Riedel, *supra* note 20, at 292 (noting that while courts have held that *Chevron* deference applies to BIA decisions, the Supreme Court has not "squarely confronted the question" with regard to attorney general-certified opinions). *Chevron* deference is a doctrine developed by the Supreme Court to determine whether judicial deference should be given to administrative actions. See *generally* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The doctrine entails a two-pronged analysis in which a court will defer to the agency's interpretation of a statute if (1) the statute is ambiguous, and (2) the agency's answer is a permissible construction of the statute. *Id.* at 842–43.

reality that has become increasingly apparent in the last two decades.⁶³

B. What's the Point? The Aspirational Goals and Mandated Purposes of Attorney General Review

In light of the generic goals of adjudication, the legislative history of the regulation, and the historical context in which the regulation was enacted, the attorney general's review authority was created to serve two primary purposes: (1) to efficiently control and advance the executive's policy and (2) to promote fair and consistent application of the law. It is important to note, however, that while the former is aspirational, the latter is constitutionally, statutorily, and normatively mandated.⁶⁴

First, delegating the attorney general authority over immigration functions was intended to establish greater executive control over immigration policy.⁶⁵ Indeed, many scholars and commentators have noted that the principal rationale for structuring adjudicative schemes so that the agency head maintains review authority is to enable greater control over policy.⁶⁶ This aligns with the controversial theory of the unitary executive, which posits that the president has unfettered control over the executive branch—a branch that has become increasingly more

63. See *infra* Section II.

64. See *infra* notes 68–70.

65. See Message of the President: Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 14, 1940), reprinted in 5 U.S.C. § 133v at 161 (1958) (“This plan provides for transferring the Immigration and Naturalization Service from the Department of Labor to the Department of Justice. While it is designed to afford more effective control over aliens, this proposal does not reflect any intention to deprive them of their civil liberties or otherwise to impair their legal status. This reorganization will enable the Government to deal quickly with those aliens who conduct themselves in a manner that conflicts with the public interest.”).

66. See, e.g., Russel L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 287 (1996) (“The most important reason for allowing agency heads to retain their review authority is to permit them to control regulatory schemes under their supervision.”); Walker & Wasserman, *supra* note 10, at 175 (asserting that the most salient reason for vesting final decision-making authority with the agency head is that “it ensures agency heads control the regulatory structure they supervise Because adjudication is a primary policy-making vehicle for federal agencies, granting agency-head review authority over adjudication helps to ensure agency-head control over policy development.”); Gonzales & Glen, *supra* note 19, at 897 (analyzing agency-head review in the immigration context specifically and determining that “the review authority has met its promise as an important tool in the executive branch’s quiver of options for advancing its immigration-related goals”).

involved in policymaking.⁶⁷ While policy control and advancement is perhaps the underlying motivation for establishing the attorney general's self-referral authority, achieving that goal is not required by law. In that sense, it is merely aspirational—a goal that exists only because the attorney general serves at the pleasure of the president. This is distinct from what the authority *must* accomplish.

Second, even though the attorney general's authority over immigration functions is undoubtedly vast, the attorney general is still constitutionally,⁶⁸ statutorily,⁶⁹ and normatively⁷⁰ bound

67. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 95–101 (1994) (explaining the transformation of administrative agencies into principal policymakers ever since the New Deal). Lessig and Sunstein's article provides detailed background and insight into the debate surrounding the unitary executive theory.

68. See U.S. CONST. art. II, § 3 (charging the president, and, by extension, the officers of the United States that the president commissions, to "take Care that the Laws be faithfully executed"); cf. *Morrison v. Olson*, 487 U.S. 654, 669 (1988) (noting that it is "the Executive Branch's prerogative," including the attorney general's, "to take care that the Laws be faithfully executed" (internal quotation marks and citation omitted)). Part of that duty to faithfully execute the laws entails ensuring that no person is deprived of life, liberty, or property without due process of law or denied the equal protection of the laws. See U.S. CONST. amend. V, XIV. All persons in the United States, including noncitizens, are entitled to these protections. *E.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." (citations omitted)); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the Constitution is not confined to the protection of citizens These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."). At the core of these protections are the underlying principles of fairness and consistency. See *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) ("Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

69. 8 U.S.C. § 1103(g)(2) (2018) ("The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."). As described in note 68, *supra*, when "carrying out" the INA, the attorney general must take care to make sure it is faithfully executed, which entails the principles of fairness and consistency underlying the due process and equal protection clauses of the U.S. Constitution.

70. Simply put, society generally expects adjudications to be fair and, when they are not, demands reforms to rectify the unfairness. See generally, COMM'N ON IMMIGR., AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION

by the rule-of-law principles of fairness and consistency when creating the immigration adjudication system.⁷¹ Indeed, during the transfer of immigration functions to the DOJ, then-Attorney General Robert Jackson emphasized this obligation to “set up machinery to deal fairly and dispassionately with these cases [of noncitizens] according to the individual merits of the particular situation.”⁷² Accordingly, as the attorney general’s regulatorily created delegate for immigration adjudications, EOIR’s explicit mission statement “is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation’s immigration laws.”⁷³ Likewise, the agency frequently

SYSTEM (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [<https://perma.cc/3WMY-QXCE>]; Tom Jawetz, *Restoring the Rule of Law Through a Fair, Humane, and Workable Immigration System*, CTR. FOR AM. PROGRESS (July 22, 2019, 4:45 AM), <https://www.americanprogress.org/issues/immigration/reports/2019/07/22/472378/restoring-rule-law-fair-humane-workable-immigration-system/> [<https://perma.cc/F75Y-UNHY>] (“This report sets out a framework for immigration policymaking that brings together the two visions of America, with the goal of building a fair, humane, and well-functioning immigration system in which the rule of law is restored.”); see also David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1191 (2016) (“Normative theories of administrative appeal imply that the appeals process should make immigration judges’ decisions more uniform, either by correcting errors or by setting precedent in areas of disagreement.”).

71. See TESS HELLGREN ET AL., INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 5 & n.10 (Jamie Kizzire ed., 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [<https://perma.cc/5BLY-PC8A>] (“By law, the attorney general has a constitutional and statutory obligation to create an immigration court system that works fairly and uniformly.”).

72. Robert H. Jackson, Att’y Gen., Dep’t of Just., Address of Attorney General Robert H. Jackson Welcoming the Immigration and Naturalization Service to the Department of Justice 3 (June 14, 1940) (transcript available on The United States Department of Justice website), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/06-14-1940.pdf> [<https://perma.cc/Q83C-LDZK>].

73. Exec. Off. for Immigr. Rev., *About the Office*, U.S. DEPT JUST., <https://www.justice.gov/eoir/about-office> [<https://perma.cc/4CNH-M5CL>]; see also Board of Immigration Appeals, Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8035, 8039 (Feb. 25, 1983) (creating EOIR and explaining that the “realignment will place similar quasi-judicial functions within a single organization and will result in a more effective and efficient operation of the Department’s immigration judicial review programs”). The BIA similarly emphasizes that it reviews appeals to ensure “that the immigration laws receive fair and uniform application.” Exec. Off. for Immigr. Rev., *The Board of Immigration Appeals*, U.S. DEPT JUST., <https://www.justice.gov/eoir/board-of-immigration-appeals-bios> [<https://perma.cc/FQ88-GA67>].

invokes these values to justify proposed rules.⁷⁴ Thus, although the attorney general provided no explicit reason when establishing (and subsequently amending) the self-referral authority,⁷⁵ ensuring the consistency and fairness of adjudications was presumably among the top purposes.⁷⁶ The original, substance-based iteration of the regulation suggests as much, given that all cases that had to be referred to the attorney general for review were those that presented a heightened risk of inconsistency or unfairness.⁷⁷ Certainly, fairness and consistency are among the generic goals for *any* type of adjudication, even outside of the immigration context.⁷⁸

C. *The Increasing Exercise of Attorney General Self-Referral*

Even in light of these two underlying goals of policy advancement and ensuring uniform application of the law, exercise of the attorney general's review authority has varied over time, and debates over the propriety of the authority have ensued.

74. See, e.g., *Motions to Reopen and Reconsider; Effect of Removal*, 85 Fed. Reg. 75,942, 75,955 (Nov. 27, 2020) (“The proposed rule would help ensure the fairness and integrity of immigration proceedings by setting out requirements for reopening proceedings . . .”); *id.* at 75,953 (asserting that the proposed rule promotes “consistency, uniformity, and finality in immigration proceedings”); *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588, 81,588 (Dec. 16, 2020) (“The Department proposed multiple changes to the processing of appeals to ensure the consistency, efficiency, and quality of its adjudications.”). See generally Memorandum from Jefferson Sessions, Att’y Gen., to the Exec. Off. for Immigr. Rev. (Dec. 5, 2017), <https://www.justice.gov/opa/press-release/file/1015996/download> [<https://perma.cc/6JCC-E3KW>] (“In accordance with the law, we are prioritizing the completion of cases and developing performance measures to ensure that EOIR’s mission of fairly, expeditiously, and uniformly administering the immigration laws is fulfilled.”).

75. See *supra* Section I.A; *Regulations Governing Departmental Organization and Authority*, 5 Fed. Reg. 3502, 3502–05 (Sept. 4, 1940) (codified at 8 C.F.R. § 90.2 (1940)) (providing only the authority for enacting the regulations but no explanation).

76. Cf. Walker & Wasserman, *supra* note 10, at 177 (“[A]gency-head review of adjudicatory outcomes helps ensure that agency policy preferences are consistently applied and that similarly situated parties receive similar results across decision-makers.”); Weaver, *supra* note 66, at 290 (“A second reason why agency heads like to review adjudicative decisions is to ensure consistency of result.”).

77. That is, cases when a dissent was recorded, cases involving a “question of difficulty,” cases ordering the suspension of deportation, or any other case that the attorney general directs. See 8 C.F.R. § 90.12 (1940).

78. E.g., Legomsky, *supra* note 26, at 1645 (listing accuracy, efficiency, acceptability, and consistency as the generic goals of adjudication after synthesizing and expanding upon literature on the goals of adjudication).

Former Attorney General Alberto Gonzales, who served during the Bush Administration, co-authored an article with Patrick Glen, Senior Litigation Counsel with the Office of Immigration Litigation in the DOJ. In it, they provided a comprehensive review of the history of the review power and advocated for more robust use of the referral authority in future administrations.⁷⁹ Gonzales and Glen asserted that the referral authority is an effective means of promptly advancing the policies of the executive by providing clear and definitive guidance on difficult or ambiguous areas of the law.⁸⁰ This assertion has been met with some skepticism, however. Immigration law scholar Bijal Shah, for example, reevaluated many of the cases examined by Gonzales and Glen and came to the opposite conclusion: that the exercise of the attorney general review has disrupted the development of immigration law by unsettling judicial doctrine and suspending or altering long-standing practices and application of statute.⁸¹

In any case, at the time Gonzales and Glen published their article in 2016, analysis of the decisions that were specifically self-referred was necessarily limited due to the simple fact that attorneys general had seldom invoked the self-referral authority. From the time of its inception in 1947⁸² to 2001, though the attorneys general had collectively reviewed 117 immigration cases,⁸³ only seven of those had been self-referred.⁸⁴ The frequency picked up post-9/11, with the attorneys general during the Bush Administration self-referring ten cases, almost all of

79. See generally Gonzales & Glen, *supra* note 19.

80. See, e.g., *id.* at 896–98. The authors do note, however, that not all policy advancement is amenable to resolution through adjudication. See *id.* at 896.

81. See Shah, *supra* note 12, at 143. See generally Breen, *supra* note 20; Martin, *supra* note 20.

82. Though attorney general review technically began in 1940, contemporaneously with the transfer of immigration function to the DOJ, 1947 is the year when the regulation took the contemporary, actor-based form rather than the original, substance-based form and when the self-referral authority began. See *supra* Section I.A and sources cited *supra* note 55.

83. See Riedel, *supra* note 20, at 316–24.

84. During the Truman Administration, Attorney General J. Howard McGrath self-referred *Matter of C*-, 4 I. & N. Dec. 130 (Att’y Gen. 1950). During the Eisenhower Administration, Attorney General Herbert Brownell Jr. self-referred *Matter of B*-, 6 I. & N. Dec. 713 (Att’y Gen. 1955); *Matter of R-S*-, 7 I. & N. Dec. 271 (Att’y Gen. 1956); and *Matter of L-R*-, 7 I. & N. Dec. 318 (Att’y Gen. 1957). During the Kennedy Administration, Attorney General Robert F. Kennedy self-referred *Matter of P*-, 9 I. & N. Dec. 293 (Att’y Gen. 1961), and *Matter of S- & B-C*-, 9 I. & N. Dec. 436 (Att’y Gen. 1961). And during the Clinton Administration, Attorney General Janet Reno self-referred *Matter of N-J-B*-, 21 I. & N. Dec. 812 (Att’y Gen. 1997). See also Breen, *supra* note 20, at 39–41.

which dealt with either criminal convictions or applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).⁸⁵ Exercise of the review authority dropped off again during the Obama Administration, as his attorneys general self-referred only four cases.⁸⁶ Thus, the pool of self-referred cases as of 2016 was rather meager, totaling only twenty-one self-referred cases over sixty-six years.⁸⁷

However, the attorneys general under the Trump Administration appear to have heeded Gonzales and Glen's call to make more assertive use of the self-referral authority. Trump's attorneys general self-referred a record-shattering seventeen cases over just three years—nearly as many cases as had been self-referred during the preceding six-and-a-half decades.⁸⁸ At the time of writing, under the Biden Administration, Attorney General Merrick Garland seems to be keeping pace, having self-referred five cases within the first ten months (albeit, so far, only to undo the work of his predecessors).⁸⁹ As such, there now exists

85. During the Bush Administration, Attorney General John Ashcroft self-referred *Matter of Y-L-, A-G-, & R-S-R-*, 23 I. & N. Dec. 270 (Att'y Gen. 2002); *Matter of Jean*, 23 I. & N. Dec. 373 (Att'y Gen. 2002); and *Matter of D-J-*, 23 I. & N. Dec. 572 (Att'y Gen. 2003). Attorney General Alberto Gonzales decided the self-referred cases of *Matter of J-F-F-*, 23 I. & N. Dec. 912 (Att'y Gen. 2006), and *Matter of S-K-*, 24 I. & N. Dec. 289 (Att'y Gen. 2007). Attorney General Michael Mukasey decided the self-referred cases of *Matter of J-S-*, 24 I. & N. Dec. 520 (Att'y Gen. 2008) (originally self-referred by Gonzales); *Matter of A-T-*, 24 I. & N. Dec. 617 (Att'y Gen. 2008); *Matter of R-A-*, 24 I. & N. Dec. 629 (Att'y Gen. 2008); *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008) (originally self-referred by Gonzales); and *Matter of Compean, Bangaly & J-E-C-*, 24 I. & N. Dec. 710 (Att'y Gen. 2009).

86. During the Obama Administration, Attorney General Eric Holder self-referred *Matter of Compean, Bangaly & J-E-C-*, 25 I. & N. Dec. 1 (Att'y Gen. 2009); *Matter of Dorman*, 25 I. & N. Dec. 485 (Att'y Gen. 2011); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (Att'y Gen. 2015). Attorney General Loretta Lynch self-referred *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 796 (Att'y Gen. 2016).

87. To be sure, Gonzales and Glen were promoting a more robust use of the referral power in general, not exclusively self-referral. See Gonzales & Glen, *supra* note 19, at 914–15. However, given the fact that the authors were advocating the referral authority as a useful tool for future administrations to advance policy and that the BIA judges are more independent from the president, their argument seems to implicitly focus on self-referral as the primary method. See, e.g., *id.* at 919–20.

88. Compare *supra* note 9 (listing the seventeen cases self-referred between 2018 and 2021 during the Trump Administration), with *supra* notes 84–86 (listing a total of twenty-one cases collectively self-referred by Attorneys General McGrath, Brownell, Kennedy, Reno, Ashcroft, Gonzales, Mukasey, Holder, and Lynch between 1950 and 2016).

89. See generally *A-B-*, 28 I. & N. Dec. 307 (Att'y Gen. 2021) (vacating and remanding the *A-B-* decisions issued by Attorney General Sessions and Acting Attorney General Rosen); *L-E-A-*, 28 I. & N. Dec. 304 (Att'y Gen. 2021) (vacating and

a more substantial pool of cases to analyze the scope of impact of self-referred cases, which the following Sections will examine.

II. SELF-REFERRAL'S FAILURE TO ADVANCE THE GOALS OF AGENCY-HEAD REVIEW

This Part will evaluate several of the more notable and representative self-referred attorney general decisions⁹⁰ under the framework of the aforementioned goals of (A) efficiently advancing the executive's immigration policy and (B) promoting fair and consistent results through clarification of the law. While self-referred decisions do tend to advance the executive's policy agenda by implementing virtually instantaneous changes to immigration law, they often do so through indirect, opaque means. Moreover, when self-referral is motivated primarily by policy advancement, it undermines the obligatory purpose of achieving fair and uniform application of the law.

A. (In)Efficiently Advancing Policy

On a superficial level, the attorney general's self-referral authority may appear to efficiently advance the executive's immigration policy agenda. The executive has several channels available to advance policies—although the extent to which a method has been officially sanctioned is often inversely correlated with efficiency.⁹¹ Among the Trump Administration's slew

remanding the *L-E-A* decision issued by Attorney General Barr); *Cruz-Valdez*, 28 I. & N. Dec. 326 (Att'y Gen. 2021) (overruling Attorney General Barr's *Castro-Tum* decision); *A-C-A-A-*, 28 I. & N. Dec. 351 (Att'y Gen. 2021) (vacating the *A-C-A-A-* decision issued by Attorney General Barr); *Negusie*, 28 I. & N. Dec. 399 (Att'y Gen. 2021) (self-referring the case for review and staying the BIA's proceedings). At the time of writing, *Matter of Negusie* is still pending Attorney General Garland's final decision.

90. Immigration scholar Bijal Shah has conducted a similar analysis of attorney general-reviewed cases that were decided before the Trump Administration. *See generally* Shah, *supra* note 12, at 143–53. This Comment, therefore, focalizes primarily on the cases decided during the Trump Administration, and to a lesser extent, the Biden Administration. However, this Comment will go to print before the end of President Biden's first year, and thus will likely not document all the self-referred attorney general decisions that arise during his Administration.

91. For example, the highest legal authority of the United States, the Constitution, directly sanctions legislation but requires a rigorous and cumbersome process before a bill can become a law. *See generally* U.S. CONST. art. I. By contrast, agency notice-and-comment rulemaking, an authority delegated by Congress to certain agencies, is not referenced in the Constitution, but rather is authorized and governed by the APA and constitutes a less intense and generally quicker process

of immigration-related campaign promises, curbing immigration—both legal and illegal—was at the forefront.⁹² The self-referral authority was frequently used to advance that policy—sometimes explicitly and at other times more covertly. This Section will examine self-referred decisions that aimed to advance the executive policy goal of bridling immigration while masquerading as an attempt to increase the efficiency of adjudication.

1. Inefficiency of Immigration Adjudications

The Trump Administration sought to hamper immigration by limiting the discretion and docket-management tools available to IJs. The Trump attorneys general self-referred six cases to specifically address procedural issues—a novel use of the referral authority, which had previously been used primarily to address substantive legal questions.⁹³ In this line of cases, the attorneys general under the Trump Administration purported to increase the efficiency of immigration proceedings by reining in the discretion of IJs and the BIA in their docket-management strategies. These cases restricted the authority of IJs to grant a continuance,⁹⁴ to administratively close a case,⁹⁵ to grant motions to dismiss or terminate a case,⁹⁶ and even prohibited the BIA from relying on the parties' stipulations in their analysis of

than passing legislation. *See generally* 5 U.S.C. §§ 551–59 (2018). Quicker still is adjudication, but it has often been criticized as a disfavored or even improper method for policy advancement. *See, e.g.*, William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking* 1980 DUKE L.J. 103, 107 (“An examination of the text of the Administrative Procedure Act and its legislative history reveals that Congress intended rulemaking to be a mandatory process for development of law and policy, deliberately excluding adjudication as an alternative lawmaking procedure.”).

92. *See, e.g.*, Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [<https://perma.cc/EB8G-DXRC>] (“[B]y endorsing legal immigration cuts, a move he has long supported, Mr. Trump returned to a theme that has defined his short political career.”).

93. *See* Gonzales & Glen, *supra* note 19, at 860 (noting that the attorney general-review power has been used to institute substantive policy changes since at least the 1950s); Breen, *supra* note 20, at 61 (explaining how the use of the attorney general self-referral to institute procedural changes is a relatively new development that began during the Trump Administration).

94. *See* L-A-B-R-, 27 I. & N. Dec. 405 (Att’y Gen. 2018).

95. *See* Castro-Tum, 27 I. & N. Dec. 271 (Att’y Gen. 2018), *overruled by* Cruz-Valdez, 28 I. & N. Dec. 326 (Att’y Gen. 2021).

96. *See* S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (Att’y Gen. 2018).

issues for asylum cases on appeal.⁹⁷ Though procedural in nature,⁹⁸ these modifications to immigration law may nevertheless indirectly restrict immigration by making it too cumbersome and costly for many immigrants to withstand the lengthy case-processing in immigration court.

For example, in *Matter of L-A-B-R*, Attorney General Sessions created a new balancing test that heightened the “good cause” standard used to determine when an IJ may grant a continuance, making it more challenging for individuals to secure such continuances in their cases.⁹⁹ Continuances are vital case management tools for IJs to ensure that cases are resolved fairly and justly because they enable IJs to stay a case while the immigrant obtains counsel or waits for a decision on a collateral application for relief before U.S. Citizenship and Immigration Services (USCIS), which has notoriously lengthy processing times.¹⁰⁰ In justifying the change, Sessions described the good-cause requirement as “an important check on immigration judges’ authority that reflects the public interest in expeditious enforcement of the immigration laws, as well as the tendency of unjustified continuances to undermine the proper functioning of our immigration system.”¹⁰¹ At the same time, he also asserted that IJs must issue a written decision demonstrating engagement with the balancing test or else risk the continuance being vacated if appealed to the BIA.¹⁰²

Having to issue a written decision for something as routine as a continuance will either slow down the processing of cases, thus exacerbating the backlogs, or deter IJs from granting continuances even where good cause exists—such as needing time to find a lawyer or allowing a recently retained lawyer more time

97. See generally *A-C-A-A*, 28 I. & N. Dec. 84 (Att’y Gen. 2020), vacated by *A-C-A-A*, 28 I. & N. Dec. 351 (Att’y Gen. 2021).

98. The other two self-referred cases dealing with procedural issues concerned IJs holding bond hearings for certain nonimmigrants screened from expedited removal proceedings. The first case, *Matter of M-G-G*, was rendered moot when the respondent was removed to Guatemala. See *M-G-G*, 27 I. & N. Dec. 475 (Att’y Gen. 2018). However, the second case, *Matter of M-S*, essentially dealt with the same question, thus enabling Attorney General Barr to nevertheless issue an opinion on the matter. See *M-S*, 27 I. & N. Dec. 509 (Att’y Gen. 2019).

99. See *L-A-B-R*, 27 I. & N. Dec. 405 (Att’y Gen. 2018).

100. See George Tzamaras & Belle Woods, *Trump Administration Further Undermines Judicial Independence*, AM. IMMIGR. LAW. ASS’N (Aug. 17, 2018), <https://www.aila.org/advo-media/press-releases/2018/trump-administration-further-undermines-judicial> [<https://perma.cc/CPE4-XKNV>].

101. *L-A-B-R*, 27 I. & N. Dec. at 406.

102. See *id.* at 418–19.

to prepare. Consequently, this decision seems as though it actually cuts against the policy goal of efficient adjudication. It may, however, advance the underlying primary policy goal of increasing rates of deportation—even in situations where the noncitizen may be eligible for relief.¹⁰³

Shortly after restricting the authority to grant a continuance, Attorney General Sessions stripped IJs and the BIA of their authority to administratively close a case in his decision of *Matter of Castro-Tum*.¹⁰⁴ The practice of administrative closure has been used by IJs and the BIA for the past three decades as an important docket-management tool to pause removal proceedings in appropriate circumstances, such as to allow noncitizens to pursue relief from removal outside of immigration court or to ensure a fair hearing for noncitizens with significant mental competency issues.¹⁰⁵ Expressing displeasure with the uptick in administratively closed cases and describing the practice as “encumber[ing] the fair and efficient administration of

103. American Immigration Lawyers Association (AILA) President Anastasia Tonello notes:

People who are eligible for permanent residence . . . may be deported unjustly if the judge is blocked from granting them a continuance. Justice cannot be dispensed on an assembly line, but *Matter of L-A-B-R* seeks to do just that by pressuring judges to deny continuances and move cases rapidly through the system without due regard for potential relief.

Tzamaras & Woods, *supra* note 100. At particularly high risk of unjust deportation are victims of criminal activity awaiting U-visas; victims of human trafficking awaiting T-visas; and battered spouses, children, or parents applying for a green card under the Violence Against Women Act (VAWA), because processing times for those cases range anywhere from one to nearly five years. Specifically, the average processing time for T Nonimmigrant Status is 18.5 to 31 months, *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/28K3-QRBX>] (select “I-914 Application for T Nonimmigrant Status”); then select “Vermont Service Center”), 58.5 to 59 months for U Nonimmigrant Status, *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/28K3-QRBX>] (select “I-918 Petition for U Nonimmigrant Status”); then select “Vermont Service Center”), or 19 to 24.5 months for VAWA self-petitioners, *Check Case Processing Times*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/28K3-QRBX>] (select “Form I-360 Petition for Amerasian Widow(er), or Special Immigrant”); then select “Vermont Service Center”). For additional discussion of how the self-referral decisions advanced the policy goal of curbing immigration, see *infra* Section II.A.1.

104. See *Castro-Tum*, 27 I. & N. Dec. 271 (Att’y Gen. 2018), *overruled by Cruz-Valdez*, 28 I. & N. Dec. 326 (Att’y Gen. 2021).

105. See *Immigr. Rights Proj., AM. CIV. LIBERTIES UNION FOUND., Administrative Closure Post-Castro-Tum Practice Advisory 2–3* (2019), <https://www.aclu.org/other/practice-advisory-administrative-closure-post-castro-tum> [<https://perma.cc/T6WP-LFGD>].

immigration cases,”¹⁰⁶ Sessions held that there is no general authority for administrative closure, but rather IJ and BIA authority is limited to situations “where a previous regulation or settlement agreement has expressly conferred it.”¹⁰⁷ The regulations give IJs and the BIA broad authority when deciding individual cases before them, charging them to “exercise their independent judgment and discretion” and enabling them to “take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary” for the disposition of the cases.¹⁰⁸ Nevertheless, Sessions repeatedly asserted that “immigration judges [and] the Board can exercise power only if the Attorney General delegates it. They cannot arrogate power to themselves by seizing it and relying on the Attorney General’s lack of express disapproval.”¹⁰⁹ He alleged that disallowing administrative closure encourages “more accountability, by resulting in a final, transparent order” from the IJ.¹¹⁰

Castro-Tum may have succeeded insofar as it reduced the number of administrative closures. During the 2016 fiscal year, before Trump took office, 36,616 cases were administratively closed.¹¹¹ In 2019, by contrast, just one year after *Castro-Tum*, only 448 cases were administratively closed, which is the lowest number since 1984.¹¹² However, the case did not achieve the stated goal of improving the “fair and efficient administration of immigration cases.”¹¹³ Rather, the decision was expected to result in 350,000 closed, non-priority cases returning to the courts’ already overloaded dockets.¹¹⁴ No doubt, in a backhanded way, this does serve to achieve Trump’s overarching policy goal of curbing immigration by increasing the number of people susceptible to deportation and by forcing people to withdraw their

106. *Castro-Tum*, 27 I. & N. Dec. at 272.

107. *Id.* at 281.

108. 8 C.F.R. § 1003.10(b) (2021) (describing IJ authority); 8 C.F.R. § 1003.1(d)(1)(ii) (2021) (describing BIA authority).

109. *Castro-Tum*, 27 I. & N. Dec. at 291.

110. *Id.*

111. See EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: INACTIVE BUT PENDING CASES BY FY OF ADMINISTRATIVE CLOSURE 1 (2021), <https://www.justice.gov/eoir/page/file/1307016/download> [<https://perma.cc/XSW3-8GY5>].

112. See *id.*

113. *Castro-Tum*, 27 I. & N. Dec. at 272; see also text accompanying *supra* note 106.

114. See Lisa Riordan Seville & Adiel Kaplan, *AG Barr Using Unique Power to Block Migrants from U.S., Reshape Immigration Law*, NBC NEWS (July 31, 2019, 2:30 AM), <https://www.nbcnews.com/politics/immigration/ag-barr-using-unique-power-block-migrants-u-s-reshape-n1036276> [<https://perma.cc/CQQ5-UAFX>].

applications for immigration benefits, as they run out of time and resources while awaiting the adjudication of their case during the lengthy backlog.¹¹⁵

Thus, these decisions deprived IJs of some of their most relied-upon docket-management tools. Unsurprisingly, this did not lead to greater efficiency within the courts. If anything, it appears that proceedings became *less* efficient. For example, the number of pending cases in EOIR at the end of fiscal year 2020 increased 140 percent since 2016, from 521,493 pending cases to 1,252,028 pending cases at the close of fiscal year 2020.¹¹⁶ This cannot solely be attributed to an increase in new cases, given that the initial receipts in EOIR have increased by an average of only 19 percent each year.¹¹⁷

Similarly, the backlog cannot be solely attributed to available resources because, even though there has been an increase in resources, case completions have remained stable. Indeed, in response to the increase of receipts, the government has hired more IJs each year since 2015, and the total number of IJs has increased by 80 percent since 2016.¹¹⁸ Additionally, the number of courtrooms has increased from 337 in 2016 to 474 by the end of fiscal year 2020.¹¹⁹ One would think that the increased number of courtrooms and IJs would enable a higher completion rate and decrease the backlog. However, the number of total completions each year has remained relatively stable since 2008.¹²⁰ From 1983 until approximately 2008, the number of completed cases per month was roughly equivalent to the number of initial

115. See *infra* Section II.A.1 for additional discussion on this topic.

116. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: PENDING CASES, NEW CASES, AND TOTAL COMPLETIONS, (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1242166/download> [<https://perma.cc/U5R7-FEET>]. For reference, the number of pending cases increased by 180 percent over the eight years of the Obama Administration. *Id.*

117. The initial receipts increased by 29.23 percent between 2016 and 2017, by 7.06 percent between 2017 and 2018, and by 72.65 percent between 2018 and 2019, and decreased by 33.67 percent between 2019 and 2020. *Id.*

118. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: IMMIGRATION JUDGE (IJ) HIRING (2020), <https://www.justice.gov/eoir/page/file/1242156/download> [<https://perma.cc/98SQ-MMP3>].

119. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: NUMBER OF COURTROOMS (2020), <https://www.justice.gov/eoir/page/file/1248526/download> [<https://perma.cc/D99Y-ZS89>].

120. EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: PENDING CASES, NEW CASES, AND TOTAL COMPLETIONS, *supra* note 116.

receipts.¹²¹ Since 2009, however, the number of initial receipts per month has always exceeded the number of completions,¹²² contributing to the backlog. The disparity has especially grown since 2017.¹²³ The completion rate was lowest in 2019, when EOIR completed only 51 percent as many cases as it had received.¹²⁴ Similarly, the backlog for the BIA increased disproportionately to the increase in appeals filed.¹²⁵ These data plausibly suggest that the increasing inefficiency is at least in part attributable to the procedural changes implemented in these self-referred cases and their accompanying memoranda. They certainly did not *improve* efficiency, as they purportedly aspired to do. While this might achieve the covert goal of inconveniencing immigrants and pushing them out of the system through attrition, it does not achieve the stated goal of “fair and efficient” administration of the law.¹²⁶

2. Efficiency of Advancing Policy

Although the Trump Administration’s use of the self-referral power made the immigration system less efficient overall, it succeeded in furthering the president’s immigration-related policy goals. As part of the Trump Administration’s overarching policy goal to curb immigration, the Administration specifically sought to curtail humanitarian forms of relief, such as withholding of removal, protection under the CAT, and especially asylum.¹²⁷ The attorneys general accordingly exercised their self-

121. See EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS 2 (2020), <https://www.justice.gov/eoir/page/file/1139176/download> [<https://perma.cc/S3HD-7HAS>].

122. *Id.*

123. *Id.*

124. *Id.* at 1.

125. The number of appeals pending increased by 661 percent between 2016 and the end of fiscal year 2020 while the number of appeals filed increased by only 219 percent. See EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: CASE APPEALS FILED, COMPLETED, AND PENDING (2020), <https://www.justice.gov/eoir/page/file/1248501/download> [<https://perma.cc/E8QY-G68H>].

126. Castro-Tum, 27 I. & N. Dec. 271 (Att’y Gen. 2018), *overruled by* Cruz-Valdez, 28 I. & N. Dec. 326 (Att’y Gen. 2021); see also text accompanying *supra* note 106.

127. *E.g.*, *Trump Immigration Plans: Supreme Court Allows Asylum Curbs*, BBC NEWS (Sept. 12, 2019), <https://www.bbc.com/news/world-us-canada-49669811> [<https://perma.cc/2HT2-QF3P>] (“The Supreme Court has allowed the government to severely limit the ability of migrants to claim asylum. . . . Curbing migration levels has been a key goal of Donald Trump’s presidency and forms a major part of his bid for re-election in 2020.”).

referral authority in step with this target rather than relying exclusively on notice-and-comment rulemaking, a process that agencies often perceive as frustratingly slow.¹²⁸ Sixty-seven percent of the attorney general-reviewed cases that reached a final decision during the Trump Administration dealt with a noncitizen who was fleeing persecution and seeking relief in the form of asylum, withholding of removal, or protection under the CAT.¹²⁹

Perhaps the most notorious of all the self-referred attorney general cases during the Trump Administration were *Matter of A-B* and *Matter of L-E-A*, both of which narrowly redefined what qualifies as a “particular social group” for asylum and withholding of removal purposes. Essentially, to qualify for asylum or withholding of removal, applicants must show that they were persecuted on account of a protected ground.¹³⁰ Membership in a “particular social group” is one of the possible protected

128. See, e.g., Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 531 (2005) (“Several agencies have turned to adjudication out of sheer frustration with the rulemaking process” and its “slow pace.”); see also Gonzales & Glen, *supra* note 19, at 898 (“Attorney General review is more efficient and certain than regulatory reform, while providing nearly identical benefits in the form of clear guidance on policy issues.”); Kim Bellware, *On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That’s a Problem.*, WASH. POST (Mar. 5, 2020), <https://www.washingtonpost.com/immigration/2020/03/05/william-barr-certification-power/> [<https://perma.cc/N9UZ-8UHB>] (quoting retired immigration judge, J. Traci Hong, who stated that “[c]ertifying a case is a way for the attorney general to stamp his or her own views on immigration law – and it’s the quickest way to do it” (internal quotation marks omitted)).

129. E.g., *A-B*, 28 I. & N. Dec. 199 (Att’y Gen. 2021) (asylum); *Negusie*, 28 I. & N. Dec. 120 (Att’y Gen. 2020) (asylum, withholding of removal, and CAT); *A-C-A-A*, 28 I. & N. Dec. 84 (Att’y Gen. 2020) (asylum); *O-F-A-S*, 28 I. & N. Dec. 35 (Att’y Gen. 2020) (CAT); *M-S*, 27 I. & N. Dec. 509 (Att’y Gen. 2019) (asylum); *R-A-F*, 27 I. & N. Dec. 778 (Att’y Gen. 2020) (CAT); *L-E-A*, 27 I. & N. Dec. 581 (Att’y Gen. 2019) (asylum); *A-B*, 27 I. & N. Dec. 316 (Att’y Gen. 2018) (asylum); *L-A-B-R*, 27 I. & N. Dec. 405 (Att’y Gen. 2018) (three consolidated cases to deal with the issue of granting continuances, one of which was an asylum seeker); *E-F-H-L*, 26 I. & N. Dec. 226 (Att’y Gen. 2018) (asylum). Although the attorneys general under Trump self-referred seventeen cases, two never resulted in a substantive decision. See *A-M-R-C*, 28 I. & N. Dec. 7 (Att’y Gen. 2020); *M-G-G*, 27 I. & N. Dec. 475 (Att’y Gen. 2018) (case rendered moot when respondent was removed to Guatemala). Therefore, I consider attorneys general who served in the Trump Administration to have only decided fifteen cases, and that is the number I used when calculating the 67 percent figure.

130. See 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (“The burden of proof is on the applicant to establish that . . . race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”).

grounds, along with race, religion, nationality, and political opinion.¹³¹ Caselaw endorses a case-by-case approach for such determinations.¹³² However, the language used in the decisions of the Trump attorneys general suggest a more categorical approach.¹³³ For example, in *Matter of A-B-*, Attorney General Sessions stated that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”¹³⁴ Similarly, in *Matter of L-E-A-*, Attorney General William Barr asserted that family units will unlikely qualify as a particular social group.¹³⁵

Empirical and anecdotal evidence suggest that *A-B-* and *L-E-A-* directly contributed to the increasing denials of asylum applications, especially where the applicants had experienced

131. *Id.* However, neither the statute nor the regulations define what qualifies as a particular social group. Thus, the conception of a particular social group has developed primarily through caselaw.

132. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (analyzing the BIA’s interpretation of particular social group and according “deference as [the BIA] gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication” (internal quotation marks and citations omitted)); *M-E-V-G-*, 26 I. & N. Dec. 227, 242 (B.I.A. 2014) (“[S]uch a social group determination must be made on a case-by-case basis.”); *Acosta*, 19 I. & N. Dec. 211, 227 (B.I.A. 1985) (“The issue of whether an alien’s facts demonstrate [the particular social group factors] is one that ordinarily must be decided on a case-by-case basis.”), *overruled on other grounds by Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

133. Indeed, in June of 2021, when President Biden’s Attorney General, Merrick Garland, vacated the *Matter of A-B-* decisions issued during the Trump Administration, he noted, “*A-B- I* threatens to create confusion and discourage careful case-by-case adjudication of asylum claims.” *A-B-*, 28 I. & N. Dec. 307, 309 (Att’y Gen. 2021).

134. *A-B-*, 27 I. & N. Dec. 316, 320 (Att’y Gen. 2018).

135. *See L-E-A-*, 27 I. & N. Dec. 581, 596 (Att’y Gen. 2018) (“The term ‘particular social group’ may not receive such an elastic and unbound meaning that it includes all immediate-family units, regardless of whether the applicant’s proposed family is particular and socially distinct in his society.”). A classic example of persecution based on family membership is the Russian Imperial Romanov family. Bolshevik revolutionaries killed not only Emperor Nicholas II but also his wife and their five children. Brigit Katz, *DNA Analysis Confirms Authenticity of Romanovs’ Remains*, SMITHSONIAN MAG. (July 17, 2018), <https://www.smithsonianmag.com/smart-news/dna-analysis-confirms-authenticity-remains-attributed-romanovs-180969674> [<https://perma.cc/2HDV-TX2D>]. While the Bolsheviks persecuted Nicholas on account of his political opinion, they most likely persecuted his wife and children simply due to their affiliation with the Romanov family—persecution on account of family membership. *L-E-A-*, 27 I. & N. Dec. 40, 44 (B.I.A. 2017) (noting that the endangerment and killing of the Romanov family is a “classic example of a persecutor whose intent, for at least one central reason, was to overcome the protected characteristic of the immediate family”).

gender or gang-based violence.¹³⁶ For example, denial rates for EOIR asylum cases spiked right after Sessions's *A-B-* was published in June 2018, then again after Barr's *L-E-A-* was published in July 2019.¹³⁷ Additionally, a former immigration judge reported that many courts "are essentially doing six to eight *A-B-* cases in a slot and saying 'this is an *A-B-* case' and not allowing testimony and just plowing through."¹³⁸ This is true notwithstanding the fact that the language describing what is generally unlikely to qualify as a particular social group is dicta rather than a binding legal standard.¹³⁹

Although these spikes tapered off somewhat following the initial issuance of the decisions, asylum denial rates remained high through the duration of the Trump Administration. For example, between fiscal years 2009 and 2016, the denial rate for asylum applications before EOIR remained relatively consistent, ranging between 22.73 percent and 28.49 percent.¹⁴⁰ For

136. See, e.g., Snyder, *supra* note 20, at 844–46.

137. See PIERCE, *supra* note 20, at 16 ("Of 50 unpublished BIA decisions on domestic violence and related claims over the course of twelve months [following *A-B-*], the BIA denied 37 and remanded 13."); see also Syracuse Univ., *Record Number of Asylum Cases in FY 2019*, TRACIMMIGRATION, <https://trac.syr.edu/immigration/reports/588/> [<https://perma.cc/Q4Z6-PJP4>] ("The graph indicates that asylum denial rates rose during the initial months of the Trump Administration, but stabilized shortly thereafter. Starting in June 2018, however, denials began climbing again after former Attorney General Sessions strictly limited the grounds on which immigration judges could grant asylum."); *id.* fig.4 (showing asylum denial rate at approximately 62 percent in May 2018 and approximately 69 percent in July 2018—a roughly 7 percent increase between the months directly before and after *A-B-*. The denial rate rose slightly more modestly after *L-E-A-* from approximately 69 percent in June 2019 to approximately 71 percent in August 2019. Given that the denial rate had an already high starting point, this increase may nevertheless be significant); Syracuse Univ., *Asylum Denial Rates Continue to Climb*, TRACIMMIGRATION (2020), fig.4, <https://trac.syr.edu/immigration/reports/630/> [<https://perma.cc/9PYP-9PW7>] (showing the denial rates were substantially higher for asylum applicants from Guatemala, Honduras, El Salvador, and Mexico compared to other countries).

138. HELLGREN ET AL., *supra* note 71, at 25.

139. See, e.g., *Matter of A-B- and Matter of L-E-A-: Information and Resources*, NAT'L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/matter-b-and-matter-l-e-information-and-resources> [<https://perma.cc/J5UA-TE5J>] ("While [*A-B-*] gives the impression that these claims [involving harm by non-state actors] are foreclosed, nearly all the damaging language is dicta . . . Like *A-B-*, [*L-E-A-*] has a narrow holding and does not change the law . . .").

140. See EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: ASYLUM DECISION RATES (2020), <https://www.justice.gov/eoir/page/file/1248491/download> [<https://perma.cc/EFF7-MSQY>].

fiscal year 2020, however, the denial rate for asylum applications drastically rose to 54.55 percent.¹⁴¹

In contrast to *A-B-* and *L-E-A*, where the decisions explicitly referenced substantive changes to immigration law, on occasion the method of curbing humanitarian relief was more indirect and covert—such as by instilling hyperawareness and fear in adjudicators of public rebuke or negative performance evaluations¹⁴² so that they are more inclined to deny relief.¹⁴³ In *Matter of R-A-F-*, for example, Attorney General Barr merely reiterated the same standard of review and legal standard for what qualifies as torture that the BIA had already articulated in a precedential decision issued by a three-member panel less than two years earlier.¹⁴⁴

Even though the BIA had already articulated the correct legal standards in an earlier precedential decision, Attorney General Barr self-certified this unpublished case because he determined that the BIA member improperly merged her analysis of

141. *Id.*

142. In December of 2017, Attorney General Sessions issued a memorandum informing EOIR employees of new performance measures and metrics for IJs. *See generally* Memorandum from Jefferson Sessions, Att’y Gen., to the Exec. Off. for Immigr. Rev., Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest (Dec. 5, 2017), <https://www.justice.gov/eoir/page/file/1356096/download> [<https://perma.cc/EA98-SM8C>].

143. The National Association of Immigration Judges explained why these EOIR plans to include numeric and time-based performance metrics would create increased delays and backlogs. It also explained how IJs were originally exempted from performance evaluations “because of the decisional independence they need to fairly and impartially decide the matters before them.” *See* A. ASHLEY TABADDOR, NAT’L ASS’N OF IMMIGR. JUDGES, BY THE NUMBERS: WHY QUOTAS ON IMMIGRATION JUDGES WILL ADVERSELY IMPACT THE COURT’S BACKLOG 2, https://www.naij-usa.org/images/uploads/publications/By_the_Numbers_-_3-13-18.pdf [<https://perma.cc/6F3D-LWB9>].

144. *Compare* *R-A-F-*, 27 I. & N. Dec. 778, 779–80 (Att’y Gen. 2020) (“While the immigration judge’s prediction as to what would likely happen to the respondent if removed may have been a factual determination that the Board reviews only for clear error, whether that predicted outcome satisfies the regulatory definition of torture constitutes a legal judgment subject to *de novo* review, as it necessarily involves applying the law to decided facts. . . . On remand, . . . the Board should keep in mind that, to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering.” (internal quotations, citations, and alterations omitted)), *with* *J-R-G-P*, 27 I. & N. Dec. 482, 484 (B.I.A. 2018) (“An Immigration Judge’s findings regarding the specific intent of individuals who may harm an applicant for protection under the Convention Against Torture in the country of removal, as well as what may or may not happen to the applicant in that country in the future, are findings of fact that we review for clear error. . . . For an act to constitute ‘torture’ it must be *specifically intended* to inflict severe physical or mental pain or suffering.” (internal quotations and citations omitted)).

the factual and legal questions of the claim and should have considered *de novo* whether the harms the applicant¹⁴⁵ was likely to face upon return would rise to the level of torture.¹⁴⁶ In reality, however, the BIA member correctly stated both the correct *de novo* standard of review¹⁴⁷ and the correct legal standard for torture¹⁴⁸ in her adjudication, even though she included language that the IJ's determination involved "no clear error."¹⁴⁹ Although the BIA member could have perhaps more clearly articulated which standard of review she applied when reaching each of her conclusions, it is not blatantly obvious that she applied the wrong standard of review, as the attorney general asserted. Even if the BIA member had made an egregious mistake, the damage would have been minimal and confined to the instant case considering that this was an unpublished, non-precedential decision. The main purpose behind *R-A-F*-, therefore, seems not to advance policy on CAT eligibility but rather to publicly rebuke the IJ and BIA member in order to send a message.¹⁵⁰ In other words, this decision appears to advance the

145. Mr. R.A.F. was a Mexican national in his seventies. He applied for deferral of removal under the CAT as the only remaining form of relief available to him. See *R-A-F*-, 27 I. & N. Dec. 778, 778–79 (Att'y Gen. 2020). The IJ determined that Mr. R.A.F. established that he would more likely than not be institutionalized and tortured if returned to Mexico due to his numerous mental and physical ailments and, thus, granted deferral of removal. See *id.* at 779. Discerning no clear error in this determination, the BIA affirmed. *Id.*

146. See *id.* at 779–80.

147. See *R-A-F*-, A-809, Dec. B.I.A. 1 (Sept. 11, 2019) (unpublished decision), <https://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/posts/the-case-behind-the-case-matter-of-r-a-f> [<https://perma.cc/3XMM-RBVA>] (follow "Here is a link" hyperlink to access) ("We review the findings of fact made by the Immigration Judge . . . for clear error. We review all other issues *de novo*, including questions of law, judgment, discretion." (internal citations omitted)).

148. *Id.* ("The federal regulations define torture, in pertinent part, 'as any act by which severe pain or suffering . . . is intentionally inflicted on a person . . .'").

149. *R-A-F*-, 27 I. & N. Dec. at 779.

150. Former immigration judge Jeffrey Chase hypothesizes as much, noting that

individual BIA appellate judges have felt safe affording relief in sympathetic cases in unpublished decisions where the outcome is generally known only to the parties involved. . . . The legacy of such action will be fully felt the next time a single judge at the BIA has the opportunity to affirm a similarly sympathetic grant of relief, but will instead choose not to do so out of fear and self-preservation. This is not how justice should be afforded to our country's most vulnerable population.

Jeffrey S. Chase, *The Real Message of Matter of R-A-F*-, JEFFREYCHASE.COM: OPS./ANALYSIS ON IMMIGR. L. (Mar. 1, 2020), <https://www.jeffreyschase.com/blog/2020/3/1/the-real-message-of-matter-of-r-a-f> [<https://perma.cc/5JC9-38F2>]; cf. Bellware, *supra* note 128 ("The decision to intervene in a Mexican national's

overarching goal of limiting grants of humanitarian relief, not by explicitly altering the substance of the law but rather by instilling fear and hyperawareness of extrajudicial factors into adjudicators so that they are less inclined to grant relief in borderline cases. In any case, whether through explicit or covert and manipulative means, grants of humanitarian relief did indeed decline during the Trump Administration.¹⁵¹

In the same vein as *R-A-F*, *Matter of A-C-A-A* seemed primarily motivated as a rebuke to the BIA, this time for relying on stipulations.¹⁵² Attorney General Barr once again reiterated the standard of review, accused the BIA of affirming a grant of asylum “without meaningfully considering any of the elements of the respondent’s asylum claim,”¹⁵³ and asserted that the BIA “has a duty to conclude that the respondent has satisfied all of the statutory requirements to qualify for asylum before affirming an immigration judge’s grant of asylum,” including the facts to which both parties had stipulated.¹⁵⁴ Though not a change in the substantive law of asylum, this case nevertheless stacked the deck against asylum seekers through changes in adjudication procedure by essentially telling BIA members to look beyond the issues raised by the Government to try and find reasons not to grant asylum.

In sum, the attorney general’s self-referral authority plays a role in advancing policy only insofar as the self-referred decisions bind IJs and the BIA to relatively immediate, specific behavior. However, in the broader scheme, the decisions likely had

otherwise unremarkable asylum case is a warning to immigration board members that even their unpublished decisions are being scrutinized, former immigration judge Jeffrey Chase told *The Washington Post* via email.”).

151. See *supra* notes 140–141 and accompanying text. However, it is important not to overestimate the policy advancement directly attributable to these attorney general decisions. Indeed, the Trump Administration employed numerous other methods apart from attorney general review to advance its immigration policy—including a slew of executive orders, memoranda, and new regulations. See SARAH PIERCE & JESSICA BOLTER, *MIGRATION POL’Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY* (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [<https://perma.cc/2R4J-DQQS>] (providing a comprehensive catalogue of more than four hundred executive actions the Trump Administration had undertaken through July 2020). As such, it is likely that while the decisions played a role in advancing policy, they did so only in tandem with a larger scheme of changes.

152. See generally *A-C-A-A*, 28 I. & N. Dec. 84 (Att’y Gen. 2020), *vacated by A-C-A-A*, 28 I. & N. Dec. 351 (Att’y Gen. 2021).

153. *Id.* at 91.

154. *Id.* at 93.

a more nuanced impact on policy. As discussed above, by reining in adjudicator discretion as an indirect way to curb immigration, the attorneys general issued a number of opinions that actually undercut the purported goal of increasing efficiency, leading instead to increased backlogs. Additionally, self-referred cases run the risk of employing more indirect, covert, and therefore arguably inappropriate tactics to advance policy. This undermines faith and trust in the immigration adjudication system. Finally, as explained in further detail below, subsequent litigation in the federal courts stymied whatever advancement these decisions achieved.¹⁵⁵ In fact, during the Biden Administration, Attorney General Merrick Garland self-referred and then vacated the *A-B*, *L-E-A*, and *A-C-A-A* decisions issued by the Trump attorneys general and also overruled *Castro-Tum* in another self-referred decision.¹⁵⁶ Indeed, time has revealed that attorney general cases that attempt to alter immigration law the most often face the greatest judicial backlash, as observed in several attorney general cases from prior administrations.¹⁵⁷

B. Promoting Consistency Through Clarification of the Law

A primary goal of agency-head review, and of adjudication more generally, is to produce consistent results by articulating clear interpretations of the law.¹⁵⁸ Indeed, Attorney General Sessions presaged his forthcoming invocation of the self-referral power in a 2017 memorandum to EOIR: “I, too, anticipate clarifying certain legal matters in the near future that will remove impediments to judicial economy and the timely administration of justice.”¹⁵⁹ Consistency in the legal system is essential for many reasons: consistency creates substantively fairer

155. See *infra* Section II.B.2.

156. See generally *A-B*, 28 I. & N. Dec. 307 (Att’y Gen. 2021); *L-E-A*, 28 I. & N. Dec. 304 (Att’y Gen. 2021); *A-C-A-A*, 28 I. & N. Dec. 351 (Att’y Gen. 2021); Cruz-Valdez, 28 I. & N. Dec. 326 (Att’y Gen. 2021) (overruling *Castro-Tum*, 27 I. & N. Dec. 271 (Att’y Gen. 2018)).

157. See, e.g., Shah, *supra* note 12, at 146–49 (describing how federal courts largely rejected attorney general cases that attempted to alter legislative standards during the Clinton and Bush Administrations); Gonzales & Glen, *supra* note 19, at 874 (“Although the referral authority can be an effective way to announce a policy that will govern immigration adjudicators, it also unsurprisingly has the potential to generate significant controversy . . .”).

158. See *supra* Section I.B.

159. Memorandum from Jefferson Sessions, *supra* note 74, at 1.

outcomes; promotes certainty, predictability, stability, and efficiency; and lends itself to greater acceptance of outcomes by the parties and the general public.¹⁶⁰ Thus, consistency is a bedrock principle that enables other adjudication goals to be achieved. However, it is also important to note that a uniform application of the law does not compel a mechanical application of the law. To the contrary, for results to be both consistent and fair, an appropriate amount of discretion may be required—enough to account for the nuances of a case not explicitly referenced in the law, yet not so much as to enable improper bias to enter into the adjudicator's judgment. In other words, to truly achieve similar treatment of similarly situated individuals, adjudicators must strike a delicate balance between uniformly applying the law and exercising discretion where appropriate—a task that requires a level of expertise and finesse with immigration law lacking in attorneys general.

Utilizing this understanding of consistency that incorporates fairness, agency-head review must promote consistency on two planes: affirmatively resolving inconsistencies while consciously refraining from creating inconsistencies. As the cases below demonstrate, self-referred attorney general cases rarely accomplish this goal.

1. Resolving Inconsistencies

Attorney general self-referral rarely succeeds in resolving inconsistencies in the immigration system, not only because it is seldom invoked with that purpose in mind but also because when it is, it is in a context where some inconsistency may be appropriate. Immigration adjudication is unfortunately notorious for producing inconsistent results—often attributed to the structure of the immigration courts.¹⁶¹ Having a centralized adjudicator like the attorney general to review cases and rectify inconsistencies might seem logical at first blush.¹⁶² However,

160. See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 425–27 (2007).

161. See, e.g., HELLGREN ET AL., *supra* note 71, at 6 (“[T]he structure of the immigration courts remains fundamentally and irreparably flawed.”); see also Hausman, *supra* note 70; Legomsky, *supra* note 160; Andrew I. Schoenholtz, Jaya Ramji-Nogales, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

162. Indeed, scholars have noted that vesting centralized review authority in an agency head is a structural way to achieve consistency. See, e.g., Walker &

resolving inconsistencies does not appear to have been a top priority for the Trump attorneys general, as only three out of the seventeen self-referred cases explicitly invoked the need to promote consistency as the driving motivation behind self-certifying a case.¹⁶³

*Matter of Thomas & Thompson*¹⁶⁴ is a quintessential example of inconsistency in immigration adjudication where one might expect the agency head to step in. Mr. Thomas and Mr. Thompson were similarly situated individuals with opposite case outcomes.¹⁶⁵ Both men came from the Caribbean but had been living in the United States for decades.¹⁶⁶ They were both convicted under the same state statute for the same crime in the same state and received the same sentence, and both had their sentences reduced to a few days short of a year.¹⁶⁷ Yet the BIA deemed that Mr. Thomas was removable while Mr. Thompson was not. This disparity was caused by BIA caselaw, which had adopted three separate tests to determine the legal effect of state-court orders retroactively reducing an immigrant's sentence, distinguishing the immigration consequences based on

Wasserman, *supra* note 10, at 177 (“[A]gency-head review of adjudicatory outcomes helps ensure that agency policy preferences are consistently applied and that similarly situated parties receive similar results across decision-makers.”); Weaver, *supra* note 66, at 290 (“A second reason why agency heads like to review adjudicative decisions is to ensure consistency of result.”).

163. See *Thomas & Thompson*, 27 I. & N. Dec. 674, 679 (Att’y Gen. 2019) (“I certified these cases to address these inconsistencies and to clarify the appropriate treatment under the INA.”); *Castillo-Perez*, 27 I. & N. Dec. 664, 672 (Att’y Gen. 2019) (“[T]his opinion recognizes a rebuttable presumption that will promote the consistent application of the immigration laws.”); A-B-, 27 I. & N. Dec. 316, 331 (Att’y Gen. 2018) (“Although the Board has articulated a consistent understanding of the term ‘particular social group,’ not all of its opinions have properly applied that framework.”) (discussed in greater detail in Section II.B.2, *infra*). *But see Negusie*, 27 I. & N. Dec. 347, 379 (Att’y Gen. 2018) (explaining that the parameters the majority of Supreme Court Justices placed on the duress exception for the persecutor bar to asylum “will be hard to apply in a consistent manner”). Although *Negusie* does raise consistent application as a concern, resolving inconsistencies was not the primary purpose for referring those two cases. The attorney general in *Matter of Negusie* disagreed with the Supreme Court’s interpretation of the statute and thus set forth a different interpretation. *Negusie*, 27 I. & N. Dec. at 379. At the time of writing, *Matter of Negusie* is pending yet again before the attorney general—this time Attorney General Garland. See generally *Negusie*, 28 I. & N. Dec. 399 (Att’y Gen. 2021). There is a good chance, then, that Attorney General Garland will overrule Sessions’s *Negusie* decision and instead adopt the Supreme Court’s interpretation, which is more favorable toward noncitizens.

164. See *Thomas & Thompson*, 27 I. & N. Dec. 674.

165. See *id.*

166. *Id.* at 678–79.

167. *Id.*

whether the order “vacated,” “modified,” or “clarified” the sentence.¹⁶⁸ The BIA thus disregarded the “clarification” of Mr. Thomas’s sentence, making his conviction a removable offense, while it accepted the “modification” of Mr. Thompson’s sentence, rendering him no longer removable.¹⁶⁹

Attorney General Barr consolidated these similar cases and self-referred them to clarify the legal effect that judicial alteration of a criminal conviction or sentence has on immigration consequences.¹⁷⁰ He asserted that the BIA’s three tests were inconsistent with each other and caused similarly situated noncitizens to experience disparate outcomes,¹⁷¹ as manifested in the outcomes of Mr. Thomas’s and Mr. Thompson’s cases. In a purported effort to promote uniformity in the law and resolve “inconsistencies among the states’ crazy quilt of widely disparate state rehabilitative and diversionary arrangements,”¹⁷² Barr overruled three precedential BIA cases and held that only one of the prior tests should apply in all circumstances.¹⁷³ Thus, he held that regardless of whether a court order modifies, clarifies, or otherwise alters the term of imprisonment, “such alterations will have legal effect of immigration purposes if they are based on a procedural or substantive defect in the underlying criminal proceeding, but not if they are based on reasons unrelated to the merits, such as rehabilitation or immigration hardship.”¹⁷⁴ It seems logical that this decision may have successfully clarified a legal standard to resolve inconsistent application of the law for similarly situated individuals, but it has not yet withstood the test of time to know for certain. Regardless, *Matter of Thomas & Thompson* is certainly an anomaly in that it is perhaps the only case out of seventeen self-referred cases during the Trump

168. *Id.* at 675.

169. *Id.* at 678–79.

170. *See id.* The length of a sentence for a noncitizen’s criminal conviction can impact what forms of immigration relief or benefits they may be eligible for. In Mr. Thomas’s and Mr. Thompson’s cases, for example, their crime of conviction, considered a “crime of violence,” only rises to the level of an “aggravated felony” for immigration purposes if the term of imprisonment is one year or longer. 8 U.S.C. § 1101(a)(43)(F) (2018). The INA bars noncitizens convicted with an “aggravated felony” from most forms of relief or protection from removal. *E.g.*, 8 U.S.C. § 1227(a)(2)(A) (2018). Thus, noncitizens commonly seek post-conviction relief through state-court orders reducing their sentences.

171. *See Thomas & Thompson*, 27 I. & N. Dec. at 677.

172. *Id.* at 683 (internal quotations and citations omitted).

173. *See id.* at 680.

174. *Id.*

Administration to have successfully identified a blatant inconsistency and come remotely close to resolving it through an attempted clarification of the law.

At other times, attorneys general have invoked “consistency” as a facade for eroding adjudicator discretion in instances where such discretion is appropriate. For example, one of the rare instances where a Trump attorney general explicitly invoked consistent application of immigration laws to justify self-referring a case was *Matter of Castillo-Perez* in the “good moral character” context.¹⁷⁵ However, the decision reflects a superficial, mechanical conception of consistency that fails to incorporate fairness. In 2018, acting Attorney General Matthew Whitaker referred this unpublished BIA case to himself to address the issue of whether an individual with multiple DUI convictions can establish the “good moral character” element required for certain immigration benefits, such as cancellation of removal.¹⁷⁶ “Good moral character” is an intentionally nebulous term of art that is not defined in the INA except to say what it is *not*, which leaves the rest of the determination of what *is* good moral character up to the discretion of the adjudicator on a case-by-case basis.¹⁷⁷ The statute, regulations, and caselaw all recognize the fact-intensive nature of determining good moral character and therefore permit the adjudicator discretion to weigh all of the factors that could not possibly have been comprehensibly listed in the law.

Ultimately, Attorney General Barr issued the decision and concluded that evidence of two or more DUI convictions establishes a rebuttable presumption that an applicant for cancellation of removal does not have good moral character, making the applicant ineligible for such relief.¹⁷⁸ He also held that efforts to reform or rehabilitate after a conviction are not enough to overcome the presumption.¹⁷⁹ Though Barr acknowledged that

175. See *Castillo-Perez*, 27 I. & N. Dec. 664, 672 (Att’y Gen. 2019) (“[T]his opinion recognizes a rebuttable presumption that will promote the consistent application of the immigration laws.”).

176. See *Castillo-Perez*, 27 I. & N. Dec. 495 (Att’y Gen. 2018).

177. 8 U.S.C. § 1101(f) (2018) (“No person shall be regarded as, or found to be, a person of good moral character who” falls into one of the enumerated, categorical bars.); 8 C.F.R. § 316.10(a)(2) (2021) (“In accordance with section 101(f) of the [INA], the Service shall evaluate claims of good moral character on a case-by-case basis taking into account the elements enumerated in this section and the standards of the average citizen in the community of residence.”).

178. See *Castillo-Perez*, 27 I. & N. Dec. 664, 665 (Att’y Gen. 2019).

179. *Id.* at 671–72.

multiple DUIs may not conclusively negate good moral character, he also noted that it would be “unusual” for an individual to establish that multiple convictions were an “aberration” and that he or she still had good moral character.¹⁸⁰ In other words, while *Castillo-Perez* purports to resolve inconsistencies, in reality, it whittles down adjudicator discretion where it may be most appropriate by creating an additional, near-categorical bar. Rather than promote consistency and fairness, this may have the opposite effect of treating dissimilarly situated individuals similarly. Ultimately though, not enough time has passed since publication of *Castillo-Perez* to gauge the case’s impact on consistency.

Moreover, not all attorney general cases that explicitly aim to resolve inconsistencies succeed. In the 2008 case *Matter of Silva-Trevino*, for example, Bush Attorney General Michael Mukasey attempted to “establish a uniform framework for ensuring that the [INA’s] moral turpitude provisions are fairly and accurately applied.”¹⁸¹ However, the decision utterly failed, resulting instead in a circuit split. Mukasey altered the analytical approach for determining whether a crime involves “moral turpitude” such that more crimes fell into that category (thus precluding certain immigration benefits).¹⁸² The decision proved controversial, and several circuits rejected the new framework, forcing IJs and the BIA to apply different standards in different jurisdictions, which only added to the confusion.¹⁸³ Although

180. *Id.* It is also worth noting that “good moral character” applies not only in the cancellation-of-removal context but also for obtaining certain affirmative benefits, the applications of which are adjudicated by USCIS. See *Policy Alert: Implementing the Decisions on Driving Under the Influence Convictions on Good Moral Character Determinations and Post-Sentencing Changes*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 10, 2019), <https://www.uscis.gov/sites/default/files/policy-manual/updates/20191210-AGOnDUIAndSentencing.pdf> [<https://perma.cc/K9BH-5Y94>]; *Policy Manual Vol. 12 Part F Ch. 5 § K*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2021), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5> [<https://perma.cc/E663-G73J>]. This is one example of how attorney general review of decisions can impact immigration adjudication beyond EOIR, where the review authority is directed.

181. *Silva-Trevino*, 24 I. & N. Dec. 687, 688 (Att’y Gen. 2008).

182. Crimes involving moral turpitude can sometimes make a noncitizen deportable, inadmissible, or barred from certain forms of relief. See KATHY BRADY, IMMIGRANT LEGAL RES. CTR., ALL THOSE RULES ABOUT CRIMES INVOLVING MORAL TURPITUDE (2021), https://www.ilrc.org/sites/default/files/resources/all_those_rules_cimt_june_2021_final.pdf [<https://perma.cc/79YJ-QS58>] (summarizing the rules in the INA governing crimes involving moral turpitude).

183. See Bellware, *supra* note 128 (referencing a point made by Dana Leigh Marks, president emeritus at the National Association of Immigration Judges who

circuit splits over BIA decisions occur as well, one of the primary purposes of having a centralized adjudicator, such as the attorney general, is to resolve, not produce, such inconsistency. Consequently, Obama Attorney General Eric Holder vacated the 2008 decision in order to allow the BIA “to develop a uniform standard for the proper construction and application” of the INA.¹⁸⁴ Indeed, rather than resolve inconsistencies, attorney general decisions often add fuel to the flame,¹⁸⁵ as explained in the following Section.

2. Maintaining Consistency—Refraining from Creating Confusion

Apart from resolving inconsistencies—something that Trump’s attorneys general did very little of—the other half of the battle in promoting consistency is making sure that the guidance does not itself *cause* inconsistency. In this regard, the self-referred cases fell short, not only during the Trump Administration but during prior administrations as well.¹⁸⁶ Indeed, many of the decisions actually rocked the boat where the law had been well-settled and consistently applied across the circuits, thus producing confusion and inconsistencies. The primary causes of these newly created inconsistencies included a failure to articulate clear guidance and an attempt to advance drastic policy changes through adjudication rather than rulemaking.

The most drastic changes occurred in *Matter of A-B-* and *Matter of L-E-A-*, discussed above,¹⁸⁷ both of which narrowly

currently presides over immigration cases, that when circuit courts overturn attorney general decisions, “that can result in judges not knowing what guidance to follow”).

184. Silva-Trevino, 26 I. & N. Dec. 550, 553 (Att’y Gen. 2015).

185. David Hausman discussed the normative expectation that theories of appeal and adjudication imply that appeals processes should increase consistency, but his research found that the BIA and courts of appeals reviewing immigration cases fail to promote uniformity. See Hausman, *supra* note 70. Section II.B.2 *infra* will show that the failure to promote uniformity extends even to the attorney general’s review.

186. See Shah, *supra* note 12, at 143 (suggesting, after having reviewed attorney general-reviewed cases prior to the Trump Administration, that “exercise of the referral and review mechanism has in fact disrupted the development of immigration law and policy. More specifically, many recent Attorney General decisions can be understood to have unsettled of [sic] judicial doctrine; suspended the long-term application of statute; or altered the agency’s own longstanding practices, including by virtue of partisan employment of the tool.”).

187. See *supra* Section II.A.2.

redefined what qualifies as a “particular social group” for asylum and withholding of removal purposes. Historically, adjudicators have been exhorted to employ a case-by-case analysis when deciding asylum applications.¹⁸⁸ However, the language used in the decisions of the Trump attorneys general imposes a more categorical approach upon adjudicators. For example, in *Matter of A-B-*, Attorney General Sessions stated that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”¹⁸⁹ Although the decision gives the impression that it forecloses asylum claims involving private actors, the holding is actually very narrow because “nearly all the damaging language is dicta,” and, thus, “a matter of optics, not law.”¹⁹⁰

Unfortunately, narrow holdings surrounded by strongly worded dicta are a recipe for confusion and disparate interpretations,¹⁹¹ as demonstrated by the conflicting adjudications that happened after Attorney General Sessions issued *Matter of A-B-*. While many IJs cited *A-B-* dicta to decline relief, others interpreted the decision narrowly and continued to grant asylum or withholding grants from cases involving domestic violence.¹⁹² By contrast, the BIA’s “treatment of *Matter of A-B-* has been overwhelmingly unfavorable to asylum seekers.”¹⁹³ Inconsistency returned at the circuit court level, as many of the circuits interpreted *Matter of A-B-* narrowly as not categorically precluding victims of private criminal activity.¹⁹⁴ The D.C.

188. See *supra* notes 132–133 and accompanying text; see also *A-B-*, 28 I. & N. Dec. 307, 309 (Att’y Gen. 2021).

189. *A-B-*, 27 I. & N. Dec. 316, 320 (Att’y Gen. 2018).

190. NAT’L IMMIGRANT JUST. CTR., PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF A-B- 1 (2019), <https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-after-matter-b> [<https://perma.cc/XT7X-BMT2>].

191. See Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 220 (2010) (noting the difficulty in distinguishing between holding and dicta and suggesting that “confusion in the application is inevitable”).

192. The Center for Gender and Refugee Studies’ database of asylum cases shows that in the year following the *Matter of A-B-* decision, at least 170 asylum or withholding grants from cases involving domestic violence were granted, while at least 145 were denied. See Kate Jastram & Sayoni Maitra, *Matter of A-B- One Year Later*, 18 SANTA CLARA J. INT’L L. 48, 73–74 (2020), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1235&context=scujil> [<https://perma.cc/68RE-6VF4>].

193. *Id.* at 71.

194. *E.g.*, *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (remanding the case of a domestic-violence survivor because it found that the BIA erred in using *Matter of A-B-* to categorically reject the applicant’s social group); *Diaz-Reynoso v.*

Circuit even went so far as declaring that *A-B*'s heightened standard—requiring the applicant prove that the government “condoned” or was “completely helpless” to prevent private violence—was arbitrary and capricious.¹⁹⁵ Interestingly, in what appears to be a last-ditch effort of the Trump Administration to restore the legal force of *A-B* after its poor reception—and rejection—in the circuits, acting Attorney General Jeffrey Rosen issued a second *A-B* decision in January of 2021, essentially reiterating the stance in Sessions's decision even though no new legal or factual issues had arisen.¹⁹⁶

In any case, regardless of the intent of the actual holdings, *Matter of A-B* produced inconsistencies in the application of the particular social group determination, not only horizontally between IJs and between the circuit courts but also vertically between IJs, the BIA, and the circuit courts. *Matter of A-B* is a clear example of a self-referred “decision [that] injected further confusion and discord”¹⁹⁷ rather than providing clear, unifying legal guidance.

Similarly, Attorney General William Barr's handling of *Matter of L-E-A* created confusion where none existed before. In that case, Attorney General Barr asserted that family units will likely not qualify as a particular social group.¹⁹⁸ Before Barr's

Barr, 968 F.3d 1070 (9th Cir. 2020) (holding that *Matter of A-B* did not announce a new categorical exception for victims of domestic violence or other private criminal activity); see also Jastram & Maitra, *supra* note 192, at 59–66 (analyzing how the federal courts have interpreted, applied, and, in many cases, bypassed *Matter of A-B*).

195. See *Grace v. Barr*, 965 F.3d 883, 900 (D.C. Cir. 2020). The district court had declared *Matter of A-B* and the concomitant USCIS policies unlawful, vacated them, and permanently enjoined applications of the policies in credible-fear proceedings. See generally *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). On appeal, the D.C. Circuit Court affirmed the district court's determination with regard to the “completely helpless” standard, but it vacated the portions of the injunction that pertained to application of the circularity rule and the issue of particular social group. See *Grace v. Barr*, 965 F.3d at 906, 909.

196. *A-B*, 28 I. & N. Dec. 199 (Att'y Gen. 2021); see also Kevin A. Gregg, *The State of Asylum Law After Trump—and What's Next*, LAW360 (Feb. 8, 2021, 5:49 PM), <https://www.law360.com/articles/1352757> [<https://perma.cc/Q98F-2P56>] (“[T]he Trump Administration concluded where it began, with Rosen supplementing *Matter of A-B* to hold, essentially, that Sessions' view of the ‘unable or unwilling to protect’ standard and nexus requirement trumps any contrary view from any circuit court of appeals.”).

197. Cf. Jastram & Maitra, *supra* note 192, at 80 (“Contrary to the Attorney General's claim to clarify asylum law, his decision injected further confusion and discord in an already complex area of the law.”).

198. See *L-E-A*, 27 I. & N. Dec. 581, 596 (Att'y Gen. 2019) (“The term ‘particular social group’ may not receive such an elastic and unbound meaning that it

declaration, the BIA had first explicitly recognized that family can constitute a cognizable particular social group in 1985.¹⁹⁹ Even as the BIA's analysis of what constitutes a particular social group evolved across the years, it continued to affirm that family units could be cognizable.²⁰⁰ Additionally, the First,²⁰¹ Second,²⁰² Fourth,²⁰³ Sixth,²⁰⁴ Seventh,²⁰⁵ and Ninth²⁰⁶ Circuits had all explicitly accepted family groups as cognizable particular social groups.

Attorney General Barr invited the parties and interested amici to brief the issue of "whether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group' based on the alien's membership in a family unit."²⁰⁷ In response, DHS (i.e. the government, arguing for the removal of Mr. L.E.A.) made modest arguments, stating that the attorney general "is not *required* to recognize membership in a family unit as membership in a

includes all immediate-family units, regardless of whether the applicant's proposed family is particular and socially distinct in his society.").

199. See *Acosta*, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985) (noting that particular social groups "may encompass persecution seeking to punish either people in a certain relation . . . to one another or people of like class or kindred interests, such as shared ethnic, cultural, or . . . family background . . ."), *overruled in part on other grounds* by *Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

200. See, e.g., *C-A-*, 23 I. & N. Dec. 951, 959 (B.I.A. 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.").

201. See *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014) ("The law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more."); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (stating that there is "no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family").

202. See *Vumi v. Gonzales*, 502 F.3d 150, 154–55 (2d Cir. 2007) ("[T]he Board has held unambiguously that membership in a nuclear family *may* substantiate a social-group basis of persecution.").

203. See *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (recognizing that every circuit to consider the question "has held that family ties can provide a basis for asylum," and that "the family provides a prototypical example of a particular social group").

204. See *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (acknowledging that "membership in the same family . . . is widely recognized by the caselaw").

205. See *Iliev v. INS*, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (noting that "other circuits have found that a family is perhaps the most easily identifiable 'particular social group' that could serve as the basis for persecution").

206. See *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (explaining that even under the BIA's "refined framework, the family remains the quintessential particular social group").

207. *L-E-A-*, 27 I. & N. Dec. 494, 494 (Att'y Gen. 2018).

particular social group,”²⁰⁸ but that claims for protection based on membership in a particular social group “require rigorous, individualized, case-by-case analysis.”²⁰⁹ Indeed, DHS even acknowledged that “[i]t would be inappropriate for the Department, and ill-advised for the Attorney General, to interpret the ambiguous statutory language to require that any specific family-based particular social group either is not or is universally cognizable.”²¹⁰ Instead, DHS urged the attorney general to “find that there is no universal definition of a ‘family’ for purposes of analyzing ‘membership in a particular social group,’ given the potentially varying meanings . . . among different societies.”²¹¹

Nevertheless, against the advice from all parties, the attorney general overturned nearly three decades of precedent that was widely accepted by the circuit courts and concluded that “[t]he average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be . . . recognized [by society at large]”²¹² and thus would not qualify as a particular social group. He did not stop there, adding that “[t]he term ‘particular social group’ may not receive such an elastic and unbound meaning that it includes all immediate-family units, regardless of whether the applicant’s proposed family is particular and socially distinct in his society.”²¹³ This sweeping language exceeded even what DHS had argued for. As *L-E-A* made its way up to the circuit courts, they responded with varying degrees of acceptance, causing inconsistent application and early signs of a circuit split.²¹⁴

208. U.S. Dep’t of Homeland Sec. Brief on Referral to the Att’y Gen. at 6, *L-E-A*, 27 I. & N. Dec. 581 (2019) (original in all capital letters) (emphasis added), <https://cliniclegal.org/resources/asylum-and-refugee-law/matter-l-e-attorney-general-certification-legal-documents-dhs-0> [<https://perma.cc/22DC-AXT8>] (click “Click to Download Resource”; then follow “AG-DHS-brief.pdf” hyperlink to download).

209. *Id.* at 12 (original in all capital letters).

210. *Id.* at 13–14.

211. *Id.* at 16.

212. *L-E-A*, 27 I. & N. Dec. 581, 594 (Att’y Gen. 2019).

213. *Id.* at 596.

214. For example, the Third Circuit followed *Romero v. Attorney General United States*, 972 F.3d 334, 342 (3d Cir. 2020). Similarly, the Ninth Circuit cited to *Matter of L-E-A* as the required framework for analyzing social groups. See *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1090 (9th Cir. 2020). The Second Circuit, by contrast, has noted that the cognizability of social groups defined by family membership is an issue “with respect to which the approaches of the BIA and of our Court are currently in a state of flux” and thus declined to discuss the issue for the time being. *De Artiga v. Barr*, 961 F.3d 586, 593 (2d Cir. 2020). The Eleventh Circuit has likewise declined to decide whether this decision is entitled to deference. See *Perez-*

Attorney General Sessions's self-referral of *Matter of Castro-Tum*, discussed in Section II.A.1 above, provides yet another example of an attorney general referral creating a circuit split in interpretation. For example, the Fourth Circuit concluded that the Attorney General's interpretation of the regulations warranted neither *Auer* deference²¹⁵ (because the regulation unambiguously gives IJs and the BIA broad authority to administratively close cases) nor *Skidmore* deference²¹⁶ (because Sessions's interpretation did not possess the power to persuade).²¹⁷ Likewise, in an opinion authored by now-Supreme Court Justice Amy Coney Barrett, the Seventh Circuit overruled *Castro-Tum*, holding that the regulations provide a "single right answer," which the Attorney General may not amend "under the guise of interpreting" to hold a contradictory meaning.²¹⁸ The Third Circuit followed this decision as well.²¹⁹ By contrast, the Second Circuit accepted that *Castro-Tum* foreclosed the option of administrative closure,²²⁰ and while the Sixth Circuit originally upheld *Castro-Tum*,²²¹ it later ruled to the contrary that IJs and

Sanchez v. U.S. Att'y Gen., 935 F.3d 1148, 1158 n.7 (11th Cir. 2019). However, in other cases, the Eleventh Circuit seems to suggest conflicting views. For example, in *Andres-Diego v. U. S. Attorney General*, the court assumed without deciding that an applicant's family-membership particular social group is cognizable, even in light of the Attorney General's decision. See *Andres-Diego v. U.S. Att'y Gen.*, 805 Fed. Appx. 973, 977 n.3 (11th Cir. 2020). By contrast, in *Warsame v. U.S. Attorney General*, the Eleventh Circuit remanded a case back to the BIA to determine whether an applicant's social group claim was cognizable in light of *L-E-A-*. *Warsame v. U.S. Att'y Gen.*, 796 Fed. Appx. 993, 1006 (11th Cir. 2020).

215. *Auer* deference is the term used to describe the level of deference federal courts owe to an agency adjudicator when the agency is interpreting its own ambiguous regulation. See generally *Auer v. Robbins*, 519 U.S. 452 (1997), *abrogated in part by Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). This doctrine, developed by the Supreme Court, requires federal courts to defer to the agency's interpretation when the regulation is both ambiguous and not clearly erroneous or inconsistent with the regulation. *Id.*

216. *Skidmore* deference is the level of deference federal courts owe to an agency's interpretation of a statute that it administers. See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). This judicial doctrine allows a federal court to defer to an agency's interpretation of a statute according to the agency's power to persuade. *Id.*

217. *Romero v. Barr*, 937 F.3d 282, 294 (4th Cir. 2019).

218. *Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020) (internal quotations and citations omitted).

219. *Arcos Sanchez v. U.S. Att'y Gen.*, 997 F.3d 113 (3d Cir. 2021).

220. See *Doe v. United States*, 915 F.3d 905, 909 n.2 (2d Cir. 2019).

221. See *Hernandez-Serrano v. Barr*, 981 F.3d 459, 466 (6th Cir. 2020) ("In summary, therefore, we agree with the Attorney General [in *Matter of Castro-Tum*] that [the INA] does not delegate to IJs or the Board 'the general authority to suspend indefinitely immigration proceedings by administrative closure.'").

the BIA do have the authority to administratively close cases.²²² Dana Leigh Marks, current IJ and president emeritus at the National Association of Immigration Judges, described this dynamic as “being whipsawed between these radical departures in past precedent that aren’t necessarily sustained long term.”²²³

However, in an apparent effort to restore some consistency, Attorney General Merrick Garland has undone several of these changes. In June 2021, Attorney General Garland vacated not only *Matter of L-E-A*.²²⁴ and both Sessions’s and Rosen’s decisions in *Matter of A-B*.²²⁵ but also Attorney General Barr’s related self-referred decision *Matter of A-C-A-A*.²²⁶ Additionally, in July 2021, he issued another self-referred decision, *Matter of Cruz-Valdez*, which overruled *Matter of Castro-Tum*.²²⁷ These cases follow the whiplash procedural pattern of reversal shown in *Silva-Trevino*.²²⁸

These attorney general decisions self-referred thus far during the Biden Administration have a similar underlying theme and reasoning. In vacating *A-B*-, Garland acknowledged that the decision “attempted to set forth a comprehensive statement of the requirements . . . to establish that an applicant suffered persecution on account of membership in a particular social group,”²²⁹ but that in reality, it “discourage[d] careful case-by-case adjudication of asylum claims” and “spawned confusion among courts”—and string-cited several cases illustrating this

222. See *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991–93 (6th Cir. 2021).

223. Bellware, *supra* note 128. Marks gave this quote to the Washington Post speaking in her role as president emeritus of the National Association of Immigration Judges, not in her role as an IJ.

224. *L-E-A*-, 28 I. & N. Dec. 304 (Att’y Gen. 2021).

225. *A-B*-, 28 I. & N. Dec. 307 (Att’y Gen. 2021).

226. See generally *A-C-A-A*-, 28 I. & N. Dec. 351 (Att’y Gen. 2021). Barr’s *Matter of A-C-A-A*-, which relied on the particular-social-group analysis articulated in the now-vacated *A-B*- and *L-E-A*- decisions, had essentially chastised the BIA for accepting the parties’ stipulations rather than “meaningfully reviewing each element of an asylum claim before affirming such a grant.” See generally *A-C-A-A*-, 28 I. & N. Dec. 84 (Att’y Gen. 2020); see also *supra* notes 152–154 and accompanying text.

227. *Cruz-Valdez*, 28 I. & N. Dec. 326 (Att’y Gen. 2021). Additionally, Attorney General Garland self-referred *Matter of Negusie* in October 2021. See generally *Negusie*, 28 I. & N. Dec. 399 (Att’y Gen. 2021). Although the case is still pending attorney general review at the time of writing, Garland will likely overrule or vacate his predecessor’s opinion in this matter as well.

228. See *supra* notes 181–184 and accompanying text; *infra* note 254 and accompanying text.

229. *A-B*-, 28 I. & N. Dec. 307, 308 (Att’y Gen. 2021).

chaotic development.²³⁰ Accordingly, Attorney General Garland vacated Sessions's and Rosen's *A-B*-s in their entirety, ordered IJs and the BIA to follow pre-*A-B*- precedent, and "concluded that the issues should instead be left to the forthcoming rule-making, where they can be resolved with the benefit of a full record and public comment."²³¹ Similarly, when vacating *L-E-A*-, Attorney General Garland noted that Attorney General Barr's analysis was a departure from existing law and thus determined that "rulemaking is the preferable administrative process for considering these issues."²³² Likewise, Garland justified overruling *Castro-Tum* because it "departed from long-standing practice" and three courts of appeals had already rejected it.²³³ He thus "restore[d] administrative closure pending . . . notice-and-comment rulemaking."²³⁴ Garland articulated a slightly stronger criticism of his predecessor's decision in *Matter of A-C-A-A*-, noting that, insofar as the prior decision appeared to prohibit reliance on stipulations, it departed not only from the BIA's "longstanding practice," but also the regulations and BIA practice manual, which "expressly contemplate the use of . . . stipulations" and consequently "significantly expand[ed] the scope of issues that [would] need to be briefed on appeals to the [BIA]."²³⁵ He thus restored the "traditional approach" to "ensure efficient adjudication by focusing the immigration courts' limited resources on the issues that the parties actually contest rather than those on which they agree."²³⁶

Silva-Trevino, *A-B*-, *L-E-A*-, *Castro-Tum*, and *A-C-A-A*- are not the only attorney general cases that have fallen prey to this "partisan tug-of-war," as aptly christened by Bijal Shah.²³⁷ In *Matter of Compean*, Attorney General Holder vacated Attorney General Mukasey's self-referred decision, which had overruled the longstanding *Lozada* framework for determining ineffective-assistance-of-counsel motions. Holder reasoned that, when implementing a "complex framework in place of a well-established and longstanding practice," rulemaking was a more appropriate

230. *Id.* at 309.

231. *Id.*

232. *L-E-A*-, 28 I. & N. Dec. 304, 305 (Att'y Gen. 2021).

233. *Cruz-Valdez*, 28 I. & N. Dec. 326, 328–29 (Att'y Gen. 2021).

234. *Id.* at 329.

235. *A-C-A-A*-, 28 I. & N. Dec. 351, 352 (Att'y Gen. 2021) (internal quotation marks and citations omitted).

236. *Id.*

237. Shah, *supra* note 12, at 164.

method for reforming *Lozada* because it would “afford all interested parties a full and fair opportunity to participate and ensure that the relevant facts and analysis are collected and evaluated.”²³⁸ The same type of reversal occurred with *Matter of R-A*, where Bush Attorney General Mukasey remanded the decision of Clinton Attorney General Janet Reno.²³⁹ Additionally, the attorney general cases from prior administrations faced backlash from the judiciary²⁴⁰ comparable to those decided during the Trump Administration. And the tug-of-war is probably not over. It is only one year into the Biden Administration as this Comment goes to print, and already the attorney general has self-referred four cases vacating or overruling five decisions from the prior administration.²⁴¹ This number will likely increase during the remaining years of the administration—and even the administrations to come.

In sum, the attorney general’s self-referral authority is more prone to creating, rather than resolving, inconsistencies. Indeed, attorney general review is seldom invoked to resolve inconsistencies in the first place. Even when the self-referred cases purport to promote uniform application of the law, they do so only in a hollow and mechanical fashion that undercuts the principle of fairness. Moreover, attorneys general have created inconsistencies where none existed before they interjected themselves into the adjudication process with a political, policy-oriented focus—a problem that extends back through at least the past five administrations, from Clinton to Biden. This utterly contravenes one of the foundational purposes of agency-head review: promoting consistent application of the law.

These cases demonstrate that the self-referral authority used in the current immigration adjudication system falls far short of the aspirations for agency-head review. More often than not, the cases did not advance the stated purposes but rather indirectly advanced policy by creating dysfunction. Moreover, they routinely failed to provide clear, unifying guidance and

238. *Compean*, 25 I. & N. Dec. 1, 2 (Att’y Gen. 2009).

239. *See R-A*, 24 I. & N. Dec. 629 (Att’y Gen. 2008); *R-A*, 22 I. & N. Dec. 906 (Att’y Gen. 2001); *see also* Shah, *supra* note 12, at 164–65 (providing a table explaining these “partisan tug-of-war” cases).

240. *See, e.g.*, Shah, *supra* note 12, at 155–63 (providing tables documenting the judicial response to several attorney general decisions from the Clinton, Bush, and Obama Administrations).

241. *See supra* note 89 and accompanying text.

generated confusion, rejection, and inconsistencies. Put simply, self-referral is not working, and something has to change.

III. THE SELF-REFERRAL POWER IS NOT SALVAGEABLE

The Trump Administration's unprecedented exploitation of the attorney general self-referral authority has prompted many proposed reforms to limit the seemingly unrestrained exercise of administrative power. Although such reforms would likely be an improvement to the power as it currently stands, this Comment joins forces with the voices already advocating for the elimination of self-referral in the immigration context altogether.²⁴²

A. *Self-Referral by the Attorney General Is Not a Victimless Process*

Behind each of these cases, often reduced to mere initials, lies a real human being—a life whom the attorney general uses as a vessel for advancing a political agenda at the expense of the individual's interests in due process, reliance, and finality in their case outcome. Others have already extensively commented on these concerns,²⁴³ so this Comment will not delve much

242. See, e.g., HELLGREN ET AL., *supra* note 71, at 26 (“Effective reform to address the attorney general’s abuse of power must include safeguards to insulate immigration judges from political pressures as well as mechanisms to curb and correct procedural injustices” including “creat[ing] an independent Article I court outside the attorney general’s control.”); Letter from Danny Alicea, Chair, Immigr. & Nat’y L. Comm. to Merrick Garland, Att’y Gen. 2 (May 21, 2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/ag-opinions-and-board-of-immigration-appeals-decisions> [<https://perma.cc/Y86B-RB7B>] (noting the abuse of the referral power and urging Attorney General Garland to “transform the immigration courts into a truly independent system not vulnerable to abuse of power by future Attorneys General”); Alison Peck, *Free the Immigration Courts from DOJ to Take Politics out of Immigration Cases*, AMERICAN CONST. SOC’Y: EXPERT FORUM (May 4, 2021), <https://www.acslaw.org/expertforum/free-the-immigration-courts-from-doj-to-take-politics-out-of-immigration-cases/> [<https://perma.cc/BYA6-DLGM>] (calling for the creation of independent, Article I immigration courts because “[a]s long as DOJ controls the immigration courts, the attorney general and EOIR retain the power to impose restrictions not only on what immigration judges say and do outside their courtrooms . . . but on what they say and do within them – an affront to immigration justice itself”).

243. See, e.g., Riedel, *supra* note 20, at 274–75 & n.9 (explaining how the referral and review power “often has sustained criticism for potential abuse” and collecting writings where authors have discussed due process concerns); see also Shah, *supra* note 12, at 136 (“And yet, to the extent [attorney general review] furthering the agency’s immigration interests are achieved and maintained at the expense of

further. Suffice it to say, the public has a strong interest in both the fairness of immigration cases and in the finality of completed proceedings,²⁴⁴ and attorney general review contravenes those interests.

Matter of R-A-, referenced in Section II.B.2 above, is the case of Rody Alvarado Peña,²⁴⁵ a Guatemalan woman who applied for asylum after experiencing relentless abuse from her husband.²⁴⁶ She described how her husband threatened, beat, and raped her almost daily, including throwing a machete at her, pistol-whipping her, dislocating her jaw, and kicking her in the genitalia so that she bled for eight days.²⁴⁷ An IJ granted her asylum application in September 1996;²⁴⁸ the BIA vacated in June 1999 and allowed Ms. Alvarado Peña to voluntarily depart;²⁴⁹ Attorney General Janet Reno subsequently vacated that BIA decision in January 2001 and directed the BIA on remand to stay reconsideration until after the publication of a proposed rule;²⁵⁰ Attorney General John Ashcroft self-referred the case, and in January 2005, directed the BIA once again to reconsider its decision “in light of the final rule”;²⁵¹ and in September 2008, Attorney

procedural transparency, due process, and of independent decision-making, exercise of the referral and review power runs counter to administrative decision-making norms and may even be unconstitutional.”); PIERCE, *supra* note 20, at 3 (noting that even though the review power may allow attorneys general to efficiently exercise policy control, “there have always been questions about whether referral and review violates the due process rights of the immediate parties in a case, as well as about the soundness and broad acceptance of the decisions, given the extraordinary power it concentrates in the hands of the nation’s chief law enforcement officer”); Menke, *supra* note 20, at 622 (discussing procedural due process concerns).

244. See, e.g., *INS v. Abudu*, 485 U.S. 94, 107 (1988) (“There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.”); *Compean*, 24 I. & N. Dec. 710, 714 (Att’y Gen. 2009) (claiming to balance “the strong public interest in the fairness and accuracy of removal proceedings with the strong public interest in the finality of completed proceedings” when establishing a new legal framework), *vacated on other grounds by Compean*, 25 I. & N. Dec. 1 (Att’y Gen. 2009); *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 FR 81,588, 81,591 (Dec. 16, 2020) (pointing to “the strong interest in finality” in justifying a proposed rule to withdraw the BIA’s delegated authority to review cases by self-certification).

245. See *Matter of R-A-*, CTR FOR GENDER & REFUGEE STUD., <https://cgrs.uchastings.edu/our-work/matter-r-a-> [<https://perma.cc/GWN8-2PUW>].

246. See generally *R-A-*, 22 I. & N. Dec. 906 (Att’y Gen. 2001). Note that the attorney general’s decision attaches the BIA’s 1999 decision in the case.

247. See *id.* at 908–09.

248. See *id.* at 907.

249. See *id.* at 927.

250. See *id.* at 906.

251. *R-A-*, 23 I. & N. Dec. 694 (Att’y Gen. 2005).

General Mukasey self-referred the case, lifted the stay, and, given that the proposed rule was never made final, remanded to the BIA, directing it to “proceed as it sees fit with its reconsideration of *Matter of R-A*”²⁵² Although the BIA declined to publish a precedential opinion in the case, it remanded the case to an IJ, who, after fourteen years of back-and-forth legal proceedings between the BIA and three attorneys general, finally granted Ms. Alvarado Peña asylum in 2009.²⁵³

Similarly, the attorney general’s self-referral authority protracted Mr. Silva-Trevino’s case an additional eleven years before the BIA was finally permitted to issue a final decision.²⁵⁴ For Mr. E-F-H-L-, the attorney general’s self-referral authority reopened his case even though it had been administratively closed for four years,²⁵⁵ and the BIA has yet to render a final decision in his case—meaning that his case has been ongoing for over a decade at the time of writing. Ms. A-B- and Mr. L-E-A-, whose cases were first decided in December 2015²⁵⁶ and September 2013,²⁵⁷ respectively, have been yanked back and forth between the decisions of the IJ, BIA, and two attorneys general and have likewise not received a final decision in their cases at the time of writing.

Exercise of the attorney general’s self-referral authority substantially prolongs the cases of the noncitizens involved by leading to unexpected vacatur, reversals, and sometimes reinstatement or re-reversals—completely contrary to the public’s

252. See generally *R-A*, 24 I. & N. Dec. 629, 630 (Att’y Gen. 2008).

253. *CTR FOR GENDER & REFUGEE STUD.*, *supra* note 245.

254. DHS initiated removal proceedings against Mr. Silva-Trevino in November 2005. After an IJ initially ruled against Mr. Silva-Trevino, the BIA reversed in an unpublished decision, which was vacated and remanded by Attorney General Mukasey, which, in turn, was vacated and remanded by Attorney General Holder. See Alexander J. Segal, *Attorney General Vacates 2008 AG Decision Silva-Trevino I (Article from 2015)*, MYATTORNEYUSA (Oct. 17, 2016, 2:30 AM), <http://myattorneyusa.com/immigration-blog/attorney-general-vacates-2008-ag-decision-in-silva-trevino-i-article-from-2015> [<https://perma.cc/W77R-TF6Z>] (describing the history of the *Silva-Trevino* case). The BIA did not issue a final decision in Mr. Silva-Trevino’s case until October 2016. See generally *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).

255. See *supra* notes 1–8 and accompanying text.

256. See *A-B-*, 27 I. & N. Dec. 316, 321 (Att’y Gen. 2018) (“In December 2015, the immigration judge denied all relief and ordered the respondent removed to El Salvador.”).

257. *L-E-A-*, 27 I. & N. Dec. 40 (B.I.A. 2017) (“In a decision dated September 10, 2013, an Immigration Judge found the respondent removable and denied his applications for asylum and withholding of removal and his request for protection under the [CAT] . . .”).

strong interest in the finality of such cases.²⁵⁸ This differs from policy advancement through rulemaking or legislation, which generally impact the litigants prospectively. For example, a noncitizen who was granted asylum under one regime of caselaw, regulations, or laws will not have that status later revoked if the law changes in such a matter that they would not have qualified had they applied after the change. Rather, the decision in their case is final, they retain that status, and only those who apply under the new regime would be denied relief. In contrast, the lives of the individuals whose cases the attorney general reviews are subsumed into the policy-making process and subject to the often-capricious whims of political appointees as they await a final decision in their cases. Putting the merits of any single immigration policy aside, the exercise of attorney general review harms the reliance, due process, and finality interests of the noncitizens whose cases are selected for review beyond what normally occurs through legislation or rulemaking. Legislation and rulemaking impact individuals through the substance of the policy changes, for better or for worse, while attorney general review additionally impacts certain individuals through the process itself. It is not a victimless process, and the status quo is unacceptable.

B. The Inadequacy of Proposed Reforms

Regardless of where one falls politically, there is little doubt that the Trump Administration's expansive employment of the self-referral authority has revealed the potential impact that future attorneys general may exert over immigration law. Many who view the Trump Administration's use of the power as abusive nevertheless assert that agency-head review is useful, and future abuse can be avoided through reforms—primarily procedural in nature—rather than outright elimination.²⁵⁹ Some proposed reforms to the referral power include requiring the attorney general to explicitly clarify the questions to be considered and allow time for briefing by parties and amici;²⁶⁰ applying

258. See *supra* note 244 and accompanying text.

259. See, e.g., PIERCE, *supra* note 20, at 23–24.

260. See *id.*; Martin, *supra* note 20, at 17; Trice, *supra* note 20, at 1768; Shah, *supra* note 12, at 139; see also David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 931 (1965) (suggesting the difference between inviting amicus curiae briefs and opportunity to comment after notice of rulemaking is not substantial in terms of

lesser deference to certified opinions than what is owed under *Chevron*;²⁶¹ limiting the attorney general's standard of review;²⁶² and only allowing the attorney general to review cases referred by the BIA or DHS.²⁶³ However, even if these proposed changes had been implemented before President Trump assumed office, they would have likely done very little to prevent the aforementioned outcomes.

Requiring briefing, for example, would likely be a mere cosmetic reform that fails to stymie abuse. Indeed, the Trump attorneys general *did* invite briefing from both parties and interested amici in at least ten of the seventeen self-referred cases, including the cases viewed as most controversial, such as *Matter of A-B* and *Matter of L-E-A*.²⁶⁴ In fact, the attorneys general even explicitly addressed the arguments raised in amici briefs in several of the decisions.²⁶⁵ Even so, the briefing appears to have had little to no impact on the outcome of the decisions. Although

opportunity for comment, and that "there is no reason why [amicus briefs] cannot fulfill any perceived need for general reaction to a proposed policy").

261. See Riedel, *supra* note 20, at 301.

262. See Menke, *supra* note 20, at 627 (suggesting that, rather than being able to review all aspects of a case *de novo*, the attorney general should have similar standards of review as the BIA—i.e., *de novo* review for questions of law and clearly erroneous review for factual issues).

263. See *id.* at 625–26.

264. *Negusie*, 28 I. & N. Dec. 120 (Att'y Gen. 2020); *Reyes*, 28 I. & N. Dec. 52 (Att'y Gen. 2020); *A-M-R-C*, 28 I. & N. Dec. 7 (Att'y Gen. 2020); *Thomas & Thompson*, 27 I. & N. Dec. 674 (Att'y Gen. 2019); *Castillo-Perez*, 27 I. & N. Dec. 664 (Att'y Gen. 2019); *L-E-A*, 27 I. & N. Dec. 581 (Att'y Gen. 2019); *Matter of M-G-G*, 27 I. & N. Dec. 475 (Att'y Gen. 2018); *Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018); *A-B*, 27 I. & N. Dec. 316 (Att'y Gen. 2018); *L-A-B-R*, 27 I. & N. Dec. 405 (Att'y Gen. 2018).

265. See, e.g., *Negusie*, 28 I. & N. Dec. at 143 ("The respondent has raised several additional arguments in support of a duress exception to the persecutor bar, but none is persuasive."); *Thomas & Thompson*, 27 I. & N. Dec. at 685 ("The respondents first argue that requiring immigration judges to assess the reasons that a state court altered a criminal alien's sentence would require them to act as factfinders in matters of state criminal law with which they have limited familiarity."); *L-E-A*, 27 I. & N. Dec. at 581 ("Before turning to the merits, I address several threshold arguments raised by the respondent about my authority to review this case."); *A-B*, 27 I. & N. Dec. at 323–24 ("The respondent argues that I lack the authority to certify the Board's decision because it did not reacquire jurisdiction following its remand to the immigration judge. . . . Both the respondent and certain amici also raise due process concerns with my certification of this matter."); *Castro-Tum*, 27 I. & N. Dec. at 281 ("After certifying this case, I received a party submission from DHS and fourteen amicus briefs spanning over five hundred pages. DHS and one amicus argue that no statute or regulation authorizes general administrative-closure authority. Most other amici contend that immigration judges and the Board implicitly possess this authority . . .").

the amicus briefs overwhelmingly supported the noncitizens, all but one of the self-referred decisions came out against them.²⁶⁶ In at least one instance, Attorney General Sessions even ignored DHS's proposed standard in favor of a harsher one.²⁶⁷ If it is true that the cases were cherry-picked for the very purpose of advancing a particular policy, as many have theorized and there is probable cause to suspect, it is likely that the outcomes were predetermined.²⁶⁸ In such instances, requiring supplemental briefing provides insufficient protection against abuse, as it can create a facade of meaningful participation.

Likewise, limiting the attorney general's standard of review to "clearly erroneous" for questions of fact would not have changed the outcomes. Upon review, with the exception of perhaps *E-F-H-L-*, all of the self-referred decisions spoke exclusively to questions of law.²⁶⁹ The factual determinations of the IJs and the BIA were simply never at issue. Similarly, having the circuit courts apply something less than *Chevron* deference to self-referred decisions would more or less maintain the status quo of what they already seem to be doing in practice. It also would likely not deter blatant policy reversals or obscure statutory interpretations given that only a very small fraction of immigration cases is appealed to the circuit courts,²⁷⁰ making it unlikely that even meritorious challenges will be raised. Additionally, the appeals process is slow and tedious, and by the time a case makes its way up to a federal court, even if a court vacates the decision, a significant amount of damage may have already

266. *Matter of O-F-A-S-*, 28 I. & N. Dec. 35 (Att'y Gen. 2020), was the sole case that favored the noncitizen. Given that Attorney General Barr did not invite briefing for this case, the favorable outcome was apparently not achieved through party participation.

267. See *supra* notes 208–214 and accompanying text.

268. See, e.g., *PIERCE*, *supra* note 20, at 23.

269. See *supra* note 9.

270. In their seminal research on access to justice for immigrants, law professors Ingrid V. Eagly and Steven Shafer found that out of over 1.2 million deportation cases decided between 2007 and 2012, only 37 percent of all immigrants secured legal representation, and that "[a]mong similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal." Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 2, 9 (2015). While more than half of represented immigrants appeal if they lose, only 3 percent of unrepresented immigrants appeal to the BIA. Hausman, *supra* note 70, at 1193. Petitions for review of BIA decisions are even rarer. *Id.* at 1196 (noting that "[p]etitions for review of final removal orders are rare" and explaining that before 2002, fewer than 5 percent of all cases resulted in a petition for review).

been caused in the interim as the respondent remains ineligible for certain immigration benefits. Indeed, preventative measures are preferable to remedies after the fact, particularly in the immigration context where a respondent may face deportation.

Out of all of those proposed reforms, eliminating the self-referral authority while maintaining attorney general review²⁷¹ when a case is referred by the BIA or DHS comes closest to achieving agency-head review goals. This is due to the simple reason that it would likely limit the scope of attorney general review to those cases where it is most appropriate, thus reducing the likelihood of abuse. As demonstrated in *Thomas & Thompson* and *Castillo-Perez*, attorney general decisions are most effective and accepted when the issue at hand is especially nebulous or has been applied in a blatantly inconsistent manner. By contrast, as demonstrated in the majority of the other cases, attorney general decisions are much more controversial and thus less effective when they attempt to utterly change policy by upsetting long-standing precedent. BIA and DHS have little incentive to refer a case for review unless confusion, actual circuit splits, or egregious inconsistencies exist. In other words, the attorney general would still be able to efficiently provide policy guidance and clarification—but only when such clarification is actually needed.

Indeed, such a reform has already been implemented for the BIA. Interestingly, the BIA used to have a similar certification authority mirroring that of the attorney general by which either an IJ, the DHS, or the BIA itself could refer cases to the BIA for review.²⁷² However, rules proposed during the Trump Administration amended the regulation so that it no longer permits the BIA to self-certify a case.²⁷³ Ironically, the agency explained that the withdrawal of this authority was

271. However, it is likely that such a restriction on the attorney general's discretionary review authority would be unconstitutional. See *infra* notes 276, 293 and accompanying text.

272. See 8 C.F.R. § 1003.1(c) (2020) (“The Commissioner, or any other duly authorized officer of [DHS], any Immigration Judge, or the [BIA] may . . . certify such [appellate] case to the [BIA]. The [BIA] in its discretion may review any such case by certification . . .”).

273. See 8 C.F.R. § 1003.1(c) (2021) (“The Secretary, or any other duly authorized officer of DHS, or an immigration judge may in any [appellate] case . . . certify such case to the [BIA] for adjudication.”).

due to concerns over the lack of standards for such certifications, the lack of a consistent application of . . . utilizing self-certification, the potential for lack of notice of the BIA's use of certification authority, the overall potential for inconsistent application and abuse of this authority, and the strong interest in finality.²⁷⁴

As the discussion in Part II demonstrates, this same logic extends to the attorney general's self-referral authority.

Nevertheless, even this reform does not go far enough to maximize the success of agency-head review—for the foundational issue with the referral authority is not the procedure. The real problem with agency-head review in the immigration context lies with the one doing the reviewing—the attorney general.

C. The Attorney General Should Not Oversee Immigration Adjudication

Even with amended regulations or statutes limiting the attorney general's review authority, it is unlikely that agency-head review will effectively advance policy or yield sufficiently consistent results within the current immigration adjudication system. The Trump Administration highlighted what was an already problematic adjudication scheme. As demonstrated above, for every attorney general decision that might be deemed a "success," there are a handful of others that fail—and not only fail, but leave a path of destruction and chaos in their wake. It has become increasingly apparent that attorney general review is not conducive to achieving the goals of agency-head review for immigration adjudication.²⁷⁵

This Comment does not argue that immigration adjudication could never benefit from agency-head review (indeed, it may be constitutionally mandated)²⁷⁶—only that it cannot, so long as

274. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588, 81,591 (Dec. 16, 2020).

275. See *supra* Part II.

276. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (holding that when an inferior officer's decisions are unreviewable by the agency head, it violates the Appointments Clause of the U.S. Constitution and that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch"). IJs and BIA members, like the Administrative Patent Judges in *Arthrex*, are "inferior officers" in that they are appointed by the agency head, rather than nominated by the President and confirmed by the Senate, as is required for principal executive officers. See U.S. CONST. art. II, § 2, cl. 2. Under *Arthrex*,

it is situated in the DOJ where the attorney general is the head. One or the other has to go—they cannot coexist. The circumstances giving rise to the attorney general’s self-referral authority combined with qualities unique to the DOJ make agency-head review in the immigration context stand apart from the authority in other agencies. For one, it is unusual to have the prosecutorial and adjudicative functions lodged in the same agency, let alone vested ultimately in the same individual.²⁷⁷ The DOJ is unique from the other cabinet-level agencies in that the essence of its mission is law enforcement and prosecution,²⁷⁸ whereas, for other agencies, enforcement is only incidental and subsidiary to their primary missions.²⁷⁹ Perhaps unsurprisingly, many commentators and advocates have taken issue with the fact that the nation’s chief law enforcement officer—and the one overseeing representation of the government in opposition

then, to ensure political accountability and to comport with the Appointments Clause, the decisions of IJs and the BIA likely must be reviewable by the agency head, who *was* nominated by the president and confirmed by the Senate. See *Arthrex*, 141 S. Ct. at 1983 (“History reinforces the conclusion that the unreviewable executive power exercised by [Administrative Patent Judges] is incompatible with their status as inferior officers.”); *id.* at 1982 (“Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor attribute the Board’s failings to those whom he *can* oversee . . . APJs accordingly exercise power that conflicts with the design of the Appointments Clause to preserve political accountability.” (internal quotation marks and citations omitted)); see also U.S. CONST. art. II, § 2, cl. 2.

277. See Taylor, *supra* note 28, at 288 (stating that, although agency-head review and agency authority to represent the government in court are both common features of executive branch administration, it is unusual that these two functions are lodged in the same agency and can be exercised together).

278. The mission of the DOJ is “[t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.” *About DOJ: Our Mission Statement*, U.S. DEP’T JUST. (emphasis added), <https://www.justice.gov/about> [<https://perma.cc/FHY6-2HW2>]. Note that the mission does not extend to non-Americans—i.e., the DOJ makes no promises regarding the fair and impartial administration of justice for immigrants.

279. Apart from the attorney general, there are fourteen other cabinet-level executive department heads: the secretaries of the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Labor, State, Transportation, Treasury, and Veterans Affairs. See The Biden-Harris Administration, *The Cabinet*, WH.GOV, <https://www.whitehouse.gov/administration/cabinet/> [<https://perma.cc/XW65-9B92>].

to the immigrant—also has the authority to adjudicate immigration cases.²⁸⁰

Additionally, for those agencies that employ agency-head review, such review is typically either automatically employed in every case²⁸¹ or otherwise initiated by one of the parties of the case through an appeal.²⁸² It appears that discretionary *self-referral* power like that of the attorney general is comparatively rare, particularly when the party of the case may not appeal.²⁸³

280. See, e.g., Shah, *supra* note 12, at 137 (expressing concern over “due process problems inherent in allowing an enforcement agency sole authority to invoke the upper-level administrative adjudication of immigration rights”); Legomsky, *supra* note 26, at 1674; Riedel, *supra* note 20, at 282–83 (acknowledging the certification power’s ability to engender conflicts of interest); Menke, *supra* note 20, at 622 (noting how the attorney general’s position as a political appointee raises impartiality concerns); Trice, *supra* note 20, at 1774 (noting how advocates speculate that “the Attorney General may receive inappropriate assistance from the Office of the Immigration Litigation [OIL] in cherry-picking cases for certification that present facts favorable to OIL’s prosecutorial agenda or the Attorney General’s political objectives”); Letter from Fifty-Four Orgs. to U.S. House of Representatives Advocating for an Independent Immigration Court, NAT’L ASS’N OF IMMIGR. JUDGES (Feb. 18, 2020), https://www.naij-usa.org/images/uploads/publications/54_Organizations_Sign_On_in_Support_of_Independent_Immigration_Court.pdf [<https://perma.cc/YEH4-LMDQ>] (explaining how the current adjudication structure creates an “inherent conflict of interest” and lamenting how the Trump Administration has “weaponized the certification authority”).

281. For example, within the Department of Agriculture, examiners in Perishable Agricultural Commodities Act (PACA) hearings prepare reports in the form of a final order for the signature of the secretary of Agriculture, which is not served upon the parties until signed. See ASIMOW, *supra* note 29, at 110–13.

282. For example, in the Department of Energy, an administrative law judge provides the initial hearings and drafts the agency decision. Depending on the type of case, a party may appeal to the director of the Office of Hearings and Appeals, and in some instances may appeal directly to the secretary of Energy. See *id.* at 127–33.

283. The scheme that seems to resemble the attorney general’s discretionary self-referral power most closely is employed by the administrator of the Center for Medicare and Medicaid Services (CMS). A reviewing officer of CMS makes the initial determination concerning the amount that Medicare will pay to reimburse providers of services. Providers can appeal an unfavorable contractor decision to the Provider Reimbursement Review Board (PRRB) if the dispute is for \$10,000 or more. These PRRB decisions are then subject to the discretionary review by the administrator or deputy administrator of CMS by the administrator’s own motion or by request from a party. Such decisions may then become subject to judicial review. See *id.* at 173–76. Just as EOIR is one of many subcomponents of the DOJ, CMS is merely a subcomponent of the Department of Health and Human Services, headed by the secretary of HHS. See *HHS Organizational Chart*, HHS.GOV (July 14, 2021), <https://www.hhs.gov/about/agencies/orgchart/index.html> [<https://perma.cc/FLR9-8CKF>]. While discretionary review is granted to the administrator of CMS, it is not granted to the secretary, the top agency head. See ASIMOW, *supra* note 29, at 174. In the immigration context, the equivalent might be granting the self-

The regulations provide no means for a nonimmigrant to request attorney general review.²⁸⁴

Given the circumstances in which the attorney general's authority was established—during the exigencies of war²⁸⁵—control over policy appears to have been envisioned as the primary goal, superior to the other adjudication goals.²⁸⁶ As this Comment has revealed, when policy advancement is the driving motivation behind the referral of cases, the duty of achieving fair and uniform application of the law suffers. Since the attorney general's position is inherently prosecutorial and policy-driven, such a result is inevitable.

Moreover, the training and expertise of the adjudicator are key factors that foster consistency²⁸⁷—qualities that attorneys general lack when it comes to immigration. Generally speaking, the better the training, the more consistent the outcomes because “[t]o the extent that training enhances the quality of the decision making, it reduces that component of inconsistency attributable to sloppiness or simple inadvertence.”²⁸⁸ Similarly, expertise aids in achieving consistent outcomes because familiarity with the issues reduces the incidence of inadvertent deviations from established law and practice.²⁸⁹ Attorneys general are not experts or specialists in immigration.²⁹⁰ Rather, as the title itself implies, they are *generalists* when it comes to the law. Immigration is an inherently and increasingly complex area of

referral power to the chief appellate immigration judge rather than to the attorney general.

284. Attorney General J. Howard McGrath, appointed by President Truman, has been the only attorney general to have entertained the request of a nonimmigrant to review a BIA decision. See Breen, *supra* note 20, at 39–40. He nevertheless ultimately denied the relief sought. See C, 4 I. & N. Dec. 130 (Att’y Gen. 1950).

285. See *supra* notes 38–42 and accompanying text.

286. Compare Section II.A, with Section II.B.

287. See Legomsky, *supra* note 160, at 433–34.

288. *Id.* at 433.

289. See *id.* at 440.

290. See, e.g., *Attorney General: William Pelham Barr*, U.S. DEP’T OF JUST., <https://www.justice.gov/ag/bio/attorney-general-william-pelham-barr> [<https://perma.cc/F73E-CARV>] (describing Attorney General Barr’s experience prior to serving as attorney general, which notably lacked any immigration-related experience); *Attorney General: Jeff Sessions*, U.S. DEP’T OF JUST., <https://www.justice.gov/ag/bio/attorney-general-jeff-sessions> [<https://perma.cc/V246-3YV4>] (describing Attorney General Sessions’s career prior to serving as attorney general, which likewise lacked any immigration-related experience); see also Riedel, *supra* note 20, at 301 & n.192 (“[N]ot a single Attorney General since 1953 has ever had a career in immigration law prior to nomination, let alone held an adjudicatory position within the immigration bureaucracy.”).

law where expertise is perhaps the most important factor in promoting consistency.²⁹¹ Certainly, the attorneys general, especially in recent times, receive advice from immigration experts who likely do a majority, if not all, of the drafting of the self-referred decisions. This setup provides little consolation, however, because it lends itself to an ends-driven approach. In this framework, the immigration experts are used not as a safeguard for ensuring just, consistent outcomes but rather to implement a policy agenda in a manner that at least somewhat sounds in legal foundation.²⁹²

Getting rid of the superfluous layer of review by the attorney general will not resolve all of the problems in immigration adjudication. But it will at least be one less factor contributing to the chaos. If immigration courts remain in the DOJ, at the very least, the attorney general review authority should be eliminated.²⁹³ A better option and one more likely to comport with the Constitution, however, would be to transfer immigration courts to an agency whose head possesses more expertise in immigration law and who is not simultaneously charged as the nation's chief law enforcement officer, so that the lower-level adjudicators, too, will be less vulnerable to the political pressures

291. See, e.g., Legomsky, *supra* note 26, at 441 (describing the INA as spanning “more than five hundred pages and . . . supplemented by hundreds of pages of administrative regulations issued by [at least four Departments] as well as thousands of administrative and judicial decisions. Perhaps more important, it is organizationally intricate. Passed in 1952 and amended countless times, the Act is a ‘hideous creature’ whose ‘excruciating technical provisions . . . are often hopelessly intertwined.’ It is not unusual for one provision to be qualified by other provisions located in distant reaches of the same statute.” (internal citations omitted)).

292. See, e.g., Bellware, *supra* note 128 (quoting Holly Cooper, co-director of the Immigration Law Clinic at the University of California at Davis who, when discussing the Justice Department’s efforts to speed up the immigration process, stated, “You’re seeing a lot of really sloppy decision-making done expeditiously with no regard to the individual’s rights” (internal quotation marks omitted)); Nick Miroff & Josh Dawsey, *The Adviser Who Scripts Trump’s Immigration Policy*, WASH. POST (Aug. 17, 2019), <https://www.washingtonpost.com/graphics/2019/politics/stephen-miller-trump-immigration/> [<https://perma.cc/FM8U-6QAL>] (explaining how Trump’s senior advisor and orchestrator of his Administration’s immigration policy, Stephen Miller, “translat[es] the president’s frustrations and grievances into exalted language and policy prescriptions . . . Miller’s restrictionist immigration agenda has lent a degree of intellectual and ideological coherence to the gut-level animus that fuels Trump, furnishing a policy framework for the president’s ‘Make America Great Again’ message.”).

293. However, as described above, this adjudication scheme would likely conflict with the Appointments Clause of the Constitution. See *supra* note 276. To rectify this constitutional problem, IJs and the BIA would likely need to be nominated by the President and confirmed by the Senate to ensure political accountability.

dictated by a law-enforcement framework. An even better and frequently proposed option is to transform immigration courts into independent Article I courts—legislative courts where the judges are not political appointees.²⁹⁴ As other immigration experts, scholars, and commentators have already extensively analyzed the pros and cons of such a reform, this Comment will not rehash those arguments here. Suffice it to say, whether by transferring immigration functions or curtailing the attorney general’s power, the self-referral authority must be eliminated by any means possible.

CONCLUSION

The use of the attorney general self-referral authority under the Trump Administration ended nearly as bizarrely as it began. Less than one week before the Administration ended, acting Attorney General Jeffrey Rosen decided *Matter of A-B*²⁹⁵—the same case already self-referred, reviewed, and remanded by Attorney General Sessions just a few years prior. After the case was remanded by Sessions, the BIA had apparently re-decided the case on June 30, 2020.²⁹⁶ Without going into any detail regarding the BIA’s decision, raising any new legal or factual issues, nor explaining specific errors in the BIA’s decision, Rosen vacated and remanded the case yet again.²⁹⁷ Indeed, rather than a true adjudication directed toward the actual parties, the second iteration of *A-B* more closely resembled an advisory opinion where Rosen claimed to “provide additional guidance concerning three recurring issues in asylum cases involving applicants who claim persecution by non-governmental actors on account of the applicant’s membership in a particular social group”²⁹⁸ In what appears to be an effort to restore the legal force of *A-B* at the eleventh hour, Rosen did little more than rebuff the circuit court decisions that rejected Sessions’s 2018 *A-B* decision and reiterate that the attorney general chose the “best interpretation

294. See, e.g., Legomsky, *supra* note 26, at 1639–40 n.7 (collecting reports and writings that support this reform).

295. *A-B*, 28 I. & N. Dec. 199 (Att’y Gen. 2021).

296. See *id.* at 199. The BIA’s 2020 decision appears not to have been published.

297. *Id.*

298. *Id.* at 200.

of the statute.”²⁹⁹ This duplicative decision demonstrates the attorney general’s implicit recognition that the legitimacy and efficacy of the self-referred decisions rest on volatile grounds. Indeed, the fact that Attorney General Garland swept in and vacated both *A-B*-decisions in their entirety—as well as three other attorney general decisions and another likely in the works—highlights this volatility.³⁰⁰ And what is to stop a future attorney general from revisiting the cases yet again?

The attorney general’s review authority was established at a time where immigration law was more consolidated and less complicated—a time where the exigencies of war categorized immigration as a national security issue first and foremost and made efficient executive control over policy the absolute top priority. Despite drastic changes and increasing complexity in immigration law, the attorney general has retained review authority in circumstances that do not warrant its exercise.

The authority has gotten out of hand. The self-referred decisions from the attorneys general during the Trump Administration aptly demonstrate the failure of the referral authority to accomplish the goals of agency-head review. Although the decisions often had an immediate impact on immigration policy, such changes were largely superficial, hindering the underlying functioning of immigration adjudication. While some decisions provided clearer guidance on legal standards to resolve inconsistencies, most of them muddied the waters, exacerbating the inconsistent application of the law.

Although the Trump Administration may have utilized the self-referral in an unprecedentedly aggressive manner, the failure to efficiently advance policy, promote consistency, and yield accepted decisions is not confined just to the faults of Attorneys General Sessions, Whitaker, Barr, and Rosen. The failure of self-referral existed even under prior administrations—it was simply less apparent since the power was less frequently utilized. Unfortunately, the failure of self-referral is likely to persist in future administrations as well. Although the Biden Administration has so far expressed a preference for rule-making over

299. *Id.* at 213 (“As explained above, I understand that existing case law in certain circuits may conflict with my conclusions In my view, however, those decisions were made without the benefit of clear and controlling interpretations of the [statute] With this in mind, I have exercised my discretion in choosing what I view as the best interpretation of the statute.”).

300. *See supra* notes 89, 156–157, 224–227 and accompanying text.

attorney general review of immigration cases,³⁰¹ it has also indicated a reluctance to dispense of, or even modify, the review authority.³⁰²

The fact that an attorney general can opt not to use the self-referral authority does not resolve the problem. As long as the authority exists, even if lying dormant, it is a ticking time bomb waiting to explode chaos in immigration adjudication once exercised. The deficiencies are inherent to the position. When an adjudicator is primarily motivated by policy advancement and law enforcement, it undercuts the consistency and legitimacy of the outcomes. Additionally, lack of expertise in the subject matter contributes to convoluted, conflated “guidance” that exacerbates dysfunction. These are qualities inherent to the position of the attorney general and cannot simply be rectified through modifications to the statutory and regulatory review authority.

The attorney general’s review authority is irreconcilably ill-suited to advance the ideal of an immigration adjudication “machinery [that] deal[s] fairly and dispassionately with these cases [of noncitizens] according to the individual merits of the particular situation.”³⁰³ Now that the deficiencies of the referral authority have been brought to light and modifications seem unlikely to rectify the problems, immigration adjudication ought to be removed from the purview of the attorney general. On its face, attorney general review may create the impression of taking steps toward enhancing immigration adjudication. In reality, for every step forward, there are two steps back. Attorney general

301. See A-B-, 28 I. & N. Dec. 307, 309 (Att’y Gen. 2021) (“I have concluded that the issues should instead be left to the forthcoming rulemaking”); L-E-A-, 28 I. & N. Dec. 304, 305 (Att’y Gen. 2021) (noting that “the preferable administrative process for reconsidering the existing approach to a complex immigration-law question of great importance is generally rulemaking” (internal alterations, quotation marks, and citations omitted)); Cruz-Valdez, 28 I. & N. Dec. 326, 329 (Att’y Gen. 2021) (“[I]t is appropriate to overrule [*Castro-Tum*] in its entirety and restore administrative closure pending . . . notice-and-comment rulemaking.”).

302. In a footnote to a self-referred decision, Attorney General Garland asserted, “Of course, agencies also have discretion to announce new principles in an adjudicative proceeding rather than a rulemaking. This ability to set policy in a case-by-case fashion allows an agency to develop principles over time as it gains experience with a particular problem, and also for the agency to adjust those principles to meet particular, unforeseeable situations.” L-E-A-, 28 I. & N. Dec. at 308 n.2 (internal citations and quotation marks omitted).

303. Robert H. Jackson, Att’y Gen., Dep’t of Just., Address of Attorney General Robert H. Jackson Welcoming the Immigration and Naturalization Service to the Department of Justice 3 (June 14, 1940), <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/06-14-1940.pdf> [<https://perma.cc/GU6J-EDJD>].

review undermines the proper functioning of immigration adjudication. The authority must be eliminated.