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ABUSE OF POWER: IMMIGRATION COURTS AND THE ATTORNEY GENERAL'S REFERRAL POWER

*Julie Menke*¹

ABSTRACT

In June 2018, then Attorney General Jeff Sessions issued Matter of A-B-. This decision vacated the holding of the 2014 Board of Immigration Appeals decision, Matter of A-R-C-G-. In A-R-C-G-, the adjudicator held that, depending on the specific facts of the case, "married women in Guatemala who are unable to leave their relationship" constitutes a particular social group. Membership in a particular social group is one of five ways to qualify for asylum in the United States. Membership is based on a fact specific analysis conducted by an immigration adjudicator. Sessions's decision to vacate Matter of A-R-C-G- had a devastating impact on the viability of asylum claims for individuals fleeing domestic violence.

Matter of A-B- is just one of many instances where the Attorney General has overruled the prior holding of the Board of Immigration Appeals. Immigration courts are housed under the Department of Justice, and as head of the Department, the Attorney General can exercise control over the immigration courts. Under federal regulation, the Attorney General may direct an immigration decision from the Board of Immigration Appeals to herself for review. The referral power then allows the Attorney General to either affirm or overrule decisions from the Board of Immigration Appeals.

Sessions's decision in Matter of A-B- is illustrative of the issues with the Attorney General's referral power. As a political appointee, the Attorney General can refer any case to himself or herself at their discretion and overturn years of precedent. In doing so, the Attorney General interferes with the case-by-case adjudications by the immigration courts. This delegation of power by Congress infringes on the principle of separation of powers, as set out in the Constitution. It is unwise to let a political authority hold so much power over immigration decisions and intrude on the independence of the immigration system. Decisions like Matter of A-B- illustrate how the referral power can be easily abused and manipulated, and why limits need to be placed on the Attorney General's referral power.

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INTRODUCTION

On December 25, 2005, a mother and her three children entered the United States without inspection.² Along with more than 50,000 others that year,³ her purpose in entering was to seek asylum in the United States.⁴ She was a longtime victim of domestic violence in Guatemala—her husband abused her weekly.⁵ He broke her nose.⁶ He burned her after throwing paint thinner on her.⁷ He raped her.⁸ After calling the police several times for help, the officers told her they were unwilling

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2. Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389 (BIA 2014).
 3. *2005 Yearbook of Immigration Statistics* 39, DEP’T OF HOMELAND SECURITY (Nov. 2006), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2005.pdf [<https://perma.cc/4NNH-6NQH>].
 4. Matter of A-R-C-G-, 26 I. & N. Dec. at 389.
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*

to interfere in her marital relationship.⁹ Her attempts to leave the relationship by running away to other cities and family's houses were unsuccessful and resulted in death threats from her husband.¹⁰

After applying for asylum in the United States, an immigration judge ruled the woman, referred to as "C-G-," did not demonstrate sufficient past persecution on account of her particular social group: "married women in Guatemala who are unable to leave their relationship."¹¹ This meant she did not qualify for asylum.¹² C-G- appealed this decision to the Board of Immigration Appeals ("BIA"), which acts as a governing body that oversees immigration judges' decisions.¹³ After reviewing C-G-'s case, the BIA held in *Matter of A-R-C-G-* that, depending on the facts of the specific case, "married women in Guatemala who are unable to leave their relationship" could constitute a particular social group as a basis for asylum in the United States.¹⁴ This was the first published precedential decision affirming the validity of a particular social group of domestic violence victims.¹⁵

Membership in a particular social group is one of five ways to qualify for asylum in the United States.¹⁶ Based on the definition of a refugee,¹⁷ an immigrant qualifies for asylum if they can prove that they have a well-founded fear of persecution *on account of*: race, religion, nationality, membership in a particular social group, or political opinion.¹⁸ Membership in a particular social group is based on a shared characteristic that is either "so fundamental to individual identity or conscience" that the individual should not be required to change, or is a characteristic they cannot change.¹⁹ It must be an "immutable

9. *Id.*

10. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

11. *Id.*

12. *Id.* at 390.

13. *Id.*

14. *Id.* at 388.

15. *Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement*, 128 HARV. L. REV. 2090, 2093 (2015).

16. *Asylum*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> [<https://perma.cc/V4SY-MYK5>].

17. *Refugees and Asylees*, DEP'T OF HOMELAND SECURITY (Apr. 30, 2018), <https://www.dhs.gov/immigration-statistics/refugees-asylees> [<https://perma.cc/YVG9-LF8W>].

18. *Qualifying for Asylum*, POLITICAL ASYLUM USA, <https://www.politicalasylumusa.com/application-for-asylum/> [<https://perma.cc/59B5-Y9PN>].

19. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

characteristic” that is visible to society and particularly defined as a discrete class of persons.²⁰ This ultimately leads to underlying factual questions of the group and the society in question to determine the legal question of a “cognizable particular social group.”²¹

Just four years after the BIA’s decision in *Matter of A-R-C-G*, then-Attorney General Jeff Sessions overruled the holding.²² In *Matter of A-B-*, Sessions held that the BIA in *Matter of A-R-C-G* improperly applied precedent from other BIA rulings and did not properly consider whether C-G-’s persecution was on account of her membership in a particular social group.²³ His ruling effectively limited the availability of asylum to victims of domestic violence.²⁴

Sessions’s authority to overrule BIA decisions and precedent derives from a federal regulation that permits the Attorney General to review BIA decisions.²⁵ Under the regulation, the Attorney General may refer a BIA decision to himself for certification.²⁶ The BIA or Secretary of Homeland Security may also refer a case to the Attorney General for certification.²⁷ This referral power allows the Attorney General to either affirm or overrule immigration decisions acting under his authority as head of the immigration courts, which are housed exclusively under the Department of Justice.²⁸ While a decision from the BIA is appealable

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20. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014).
 21. *See id.* at 227.
 22. *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018).
 23. *Id.* at 319–20.
 24. *Id.* at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”); Stuart Anderson, *The Sessions Asylum Decision: What Are Its Implications?*, FORBES (June 13, 2018), <https://www.forbes.com/sites/stuartanderson/2018/06/13/the-sessions-asylum-decision-what-are-its-implications/#81a1673776bb> [https://perma.cc/RX3J-D8VG].
 25. Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(h)(1) (2019).
 26. 8 C.F.R. §§1003.1(h)(1)(i).
 27. 8 C.F.R. §§1003.1(h)(1)(ii)-(iii) (“The Board shall refer to the Attorney General for review of its decision all cases that . . . the Chairman or a majority of the Board believes should be referred to the Attorney General for review . . . [or] The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.”).
 28. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 846–47 (2016); David Leopold, *Five Chilling Ways Senator Jeff Sessions Could Attack Immigrants as Attorney General*, HUFFINGTON POST (Jan. 6, 2017),

to the federal courts, the adjudication process is reshaped when the Attorney General co-ops a case from the BIA and puts themself between the immigration and the federal courts.²⁹

In this Note, I argue that the power given to the Attorney General to refer cases to themself is an unconstitutional delegation of *judicial* power which infringes on the separation of powers set out in the Constitution. Such a high-ranking political appointee should not be involved in a legal analysis that rests on the interpretation and application of a Congressional standard. I further argue that even if a court is unlikely to rule this power unconstitutional, it is still unwise to let a political authority hold so much power over immigration decisions and intrude on the independence of the immigration courts. Decisions like *Matter of A-B-* illustrate how the referral power can be easily abused and manipulated, and why limits need to be placed on the Attorney General's referral power.

Part I of this Note provides a brief overview of the immigration system and the role of each of the three branches of the federal government in this system.

Part II discusses the Attorney General's referral authority and where the authority to hold such control over immigration decisions comes from. It further analyzes how this power has been used in the past.

In Part III, I argue that the referral authority improperly allows the Attorney General to interfere in the impartial immigration judge's decision-making. Intervening in a case-specific adjudication is a judicial function, not a legislative or executive function.³⁰ Overstepping the independent setup of the immigration judges and assuming the jurisdiction of an Article III court is an unconstitutional interpretation of the executive's immigration power.

In Part IV of this note, I supplement this argument to explain that even if a court would uphold the Attorney General's referral authority under the Constitution, it is still unwise to let a political appointee hold such power over immigration decisions.

Finally, in Part V, I conclude that this power needs to be limited in order to prevent further abuse. I propose first that Congress should restrict the Attorney General from referring a case to themself for review on their own initiative. This restriction would allow the

https://www.huffingtonpost.com/entry/five-chilling-ways-senator-jeff-sessions-could-attack-immigrants-as-attorney-general_us_5870022ce4b099cdb0fd2ef7 [https://perma.cc/F7FX-JSDJ].

29. Fatma Marouf, *How Immigration Courts Work*, THE CONVERSATION (June 25, 2018, 6:36 AM) <http://theconversation.com/how-immigration-court-works-98678> [https://perma.cc/C33L-M9L5].

30. Immigration and Nationality Act § 242(a)(5), 8 U.S.C. § 1252(a)(5) (2013).

Attorney General to review a decision only when the BIA or the Department of Homeland Security requests review. Another solution is to limit the Attorney General's standard of review to equal that of the BIA.

PART I: STRUCTURE OF THE IMMIGRATION SYSTEM

Each branch of the federal government plays an important role in the immigration system.³¹ Under Article I of the United States Constitution, the legislative branch has the power “[to] establish a uniform Rule of Naturalization.”³² From this grant of power, Congress has distributed immigration roles and powers amongst each branch of the federal government.³³ The goal was to create an immigration system that is favorable to desired immigrants, such as workers, families and refugees, while simultaneously facilitating the removal of undesirable immigrants, such as those posing national security risks, public charges, or criminals.³⁴

A. The Legislative Branch

Congress has the power to create legislation that is the foundation of U.S. immigration law.³⁵ The modern foundation of immigration law is the Immigration and Nationality Act of 1952 (“INA”).³⁶ This legislation revised earlier immigration statutes and created comprehensive immigration law.³⁷ In addition to passing legislation, Congress holds oversight hearings that review the internal workings of executive immigration agencies.³⁸ This oversight is intended to check the executive branch and ensure the executive is properly enforcing the immigration legislation as Congress prescribed.³⁹

31. See Megan Davy et al., *Who Does What in U.S. Immigration*, MIGRATION POLICY INST. (Dec. 5, 2005), <https://www.migrationpolicy.org/article/who-does-what-us-immigration> [<https://perma.cc/9NFM-MMS5>].

32. U.S. CONST. art. I, § 8, cl. 4.

33. See MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., R43226, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS 1 (2013) (describing the history of Congress's distribution of power among the other two branches).

34. *Id.*

35. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 127 (6th ed. 2011).

36. *Id.* at 128.

37. *Id.*

38. *Id.* at 127.

39. *Id.* at 135-136.

B. The Judicial Branch

The judicial branch has very limited participation in the review of immigration laws and decisions.⁴⁰ The federal courts have upheld, on numerous occasions, the plenary powers of the political branches of government in determining immigration policy and laws.⁴¹ They have cited numerous reasons for their hands-off approach, including the political question doctrine, lack of capacity in the courts to hear more cases, and uniformity.⁴² The judicial branch therefore leaves the legislative and executive branches to determine the majority of immigration law. Congress has, however, reserved the availability of judicial review for constitutional claims and questions of law in immigration cases.⁴³ In addition, the level of judicial review depends on the interests involved.⁴⁴ Of the approximately 300,000 immigration cases heard each year in the immigration courts, only around two percent are appealed to the federal courts.⁴⁵ Of that two percent, on average the federal courts agree to hear a mere eight percent.⁴⁶ Such limited partition by the judicial branch in immigration matters leaves significantly more responsibility to the executive branch.

C. The Executive Branch

As with other areas of law, the executive branch is charged with enforcing the immigration laws Congress creates.⁴⁷ Congress, through statutes, determines what class of non-citizens will or will not be denied admission and removed from the United States.⁴⁸ The executive enforces these statutes and determines who falls into each class based on Congress's guidance.⁴⁹ The executive cannot exceed the bounds of Congress's statutes.⁵⁰ Congress, however, has traditionally given the executive broad powers in creating immigration procedures to enforce

40. *Id.* at 97.

41. Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy*, CENTER FOR IMMIGRATION STUDIES (Feb. 25, 2009), <https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy#2> [<https://perma.cc/5GVR-3GPK>].

42. *Id.*

43. Immigration and Nationality Act § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2013).

44. LEE, *supra* note 33, at 1.

45. Marouf, *supra* note 29.

46. *Id.*

47. WEISSBRODT & DANIELSON, *supra* note 35, at 106–07.

48. *Id.* at 107.

49. *Id.*

50. *Id.*

the laws.⁵¹ The executive therefore has extensive latitude to structure its enforcement procedures however it sees fit.

There are six major executive agencies charged with enforcing immigration laws: the Department of Homeland Security, the Department of State, the Department of Justice, the Department of Labor, the Department of Health and Human Services, and the Social Security Administration.⁵² Congress transferred many of the immigration functions originally delegated to the Attorney General to the Secretary of Homeland Security after the department's creation in 2002.⁵³ This department is now principally charged with enforcing and administering immigration and citizenship benefits.⁵⁴ Up until the creation of the Department of Homeland Security, the Department of Justice was responsible for the majority of immigration functions.⁵⁵ After the creation of this additional department, the Department of Justice has been charged with interpreting and administering federal immigration laws.⁵⁶ The Department of State handles most immigration petitions applied for outside of the United States.⁵⁷ The Department of Labor, Department of Health and Human Services, and the Social Security Administration all play minor roles in enforcing immigration laws.⁵⁸ Collectively, these six agencies work together to enforce the immigration laws created by Congress.

PART II: THE ATTORNEY GENERAL'S REFERRAL AUTHORITY

Immigration courts are housed exclusively under the Department of Justice.⁵⁹ The Executive Office for Immigration Review includes all immigration courts as well as the BIA.⁶⁰ Immigration courts are made up of immigration judges—attorneys appointed by the Attorney

51. *Id.*

52. *Id.* at 109.

53. WEISSBRODT & DANIELSON, *supra* note 35, at 109. *See* Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a).

54. WEISSBRODT & DANIELSON, *supra* note 35, at 109–10.

55. *Id.* at 118.

56. *Id.* at 119. *See also* Homeland Security Act § 1101, 6 U.S.C. § 521 (2012).

57. *See* WEISSBRODT & DANIELSON, *supra* note 35, at 115.

58. *See id.* at 123–26 (describing the roles different departments and administrations play in enforcing immigration laws).

59. Leopold, *supra* note 28.

60. *Id.*

General to serve as adjudicators in immigration proceedings.⁶¹ Unlike Article III judges under the judicial branch, immigration judges serve as adjudicators for the executive branch.⁶² They are unlike administrative law judges in other executive agencies, which are certified, appointed, and supervised by independent agencies under the Administrative Procedure Act of 1946.⁶³ Administrative law judges are afforded decisional independence protections under the Administrative Procedure Act to ensure impartial and fair proceedings.⁶⁴ They are not monitored or rewarded by the agencies they act under, and therefore are not beholden to the interests of those agencies.⁶⁵ Immigration judges are not appointed under the Administrative Procedure Act, but instead by the Attorney General to act as their delegates in immigration cases.⁶⁶

If the decision of an immigration judge is appealed, it generally goes to the BIA for review.⁶⁷ The BIA consists of twenty-one appointed immigration judges⁶⁸ that review lower immigration judges' decisions.⁶⁹ The Attorney General, as head of the Department of Justice, oversees these immigration courts and the "judges" within each court.⁷⁰ These judges, as individual employees of the United States Department of Justice, act as the Attorney General's agents and rule on immigration cases.⁷¹

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61. *Immigration Judge*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/tools/glossary/> [<https://perma.cc/W868-78VJ>] (click the "Immigration Judge" hyperlink).
 62. *See id.*; *Judicial Oversight v. Judicial Independence*, TRAC IMMIGRATION, https://trac.syr.edu/immigration/reports/194/include/side_4.html [<https://perma.cc/9K2K-WDFE>] ("Unlike a United States District Court judge, an immigration judge's authority is not derived from Article III of the Constitution, which establishes the Judicial Branch. Article III grants United States District Court judges, United States Appellate Court judges and United States Supreme Court judges the highest degree of judicial independence — their appointments are made for life-tenure and must be confirmed by the U.S. Senate.").
 63. *See generally* 5 U.S.C. § 3105 (2012).
 64. *See* 5 U.S.C. § 557.
 65. WILLIAM N. ESKRIDGE JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION* 761(2014).
 66. 8 C.F.R. § 1003.10(a).
 67. *Board of Immigration Appeals*, DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> [perma.cc/S56J-775B].
 68. *Id.*
 69. Leopold, *supra* note 28.
 70. 8 U.S.C. § 1103(g) (2012).
 71. Leopold, *supra* note 28.

In addition to their power over immigration judges, the Attorney General also has the power to unilaterally overrule precedent decisions of the BIA.⁷² The Attorney General may review a decision from the BIA under three circumstances.⁷³ The Attorney General may refer a case to himself, or may review a case at the request of the BIA or the Secretary of Homeland Security.⁷⁴ In reviewing a BIA decision, the Attorney General may either affirm the decision or vacate it and issue their decision in place of the BIA's.⁷⁵

The Attorney General receives this referral power from federal regulation, in accordance with the broad immigration powers Congress delegated to the executive branch.⁷⁶ 8 U.S.C. § 1103(g)(2) states that the Attorney General shall "review such administrative determinations in immigrations proceeding . . . as the Attorney General determines to be necessary."⁷⁷ This delegation of power allows the Attorney General to review BIA decisions when seen fit, even if neither the BIA nor the Secretary of Homeland Security requests review.⁷⁸ While this power is not exercised often,⁷⁹ its effect substantially impacts a wide variety of immigration cases.⁸⁰

Unlike decisions by the BIA, which are confined to *de novo* review of questions of law and *clearly erroneous* review of facts, the Attorney General has *de novo* review of *all* aspects of the BIA's decisions.⁸¹ They are not confined to reviewing legal or factual errors.⁸² They additionally are not bound by precedent from the immigration courts regarding law or fact in the underlying proceedings.⁸³

Under the INA, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."⁸⁴ A referral decision by the Attorney General therefore is binding on the

72. 8 C.F.R. §§1003.1(h)(1)(i)-(iii).

73. *Id.*

74. *Id.*

75. Feere, *supra* note 40.

76. See WEISSBRODT & DANIELSON, *supra* note 35, at 123–26.

77. 8 U.S.C. § 1103(g)(2) (2009).

78. 8 C.F.R. §§1003.1(h)(1)(i)-(iii).

79. Laura Trice, *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, 1771 (2010) (the Attorney General averaged "only about 1.7 certified decisions annually between 1999 and 2009").

80. *Id.*

81. Matter of J-F-F-, 23 I. & N. Dec. 912, 913 (A.G. 2006).

82. *Id.*

83. Gonzales, *supra* note 28, at 856.

84. 8 U.S.C. § 1103(a)(1) (2009).

government and the parties and overrules any inconsistent prior BIA precedent.⁸⁵ Judicial review is available under certain circumstances for the Attorney General's decisions.⁸⁶ Upon review, an Attorney General's decision is entitled to deference consistent with the *Chevron* framework.⁸⁷

The Attorney General may elect to refer a BIA case to herself that contains issues immigration courts are struggling to uphold consistently.⁸⁸ The Attorney General may also choose to strategically select cases for review to advance the presidential administration's immigration agenda.⁸⁹ Because the Attorney General's decision is binding throughout the immigration courts, they courts must follow any clarification or new standard the Attorney General establishes.⁹⁰ Any prior BIA rulings inconsistent with the Attorney General's decision are then overruled.⁹¹

PART III: CONSTITUTIONALITY OF THE ATTORNEY GENERAL'S REFERRAL DECISIONS

The delegation of self-referral power to the Attorney General allows them to review BIA decisions when seen fit.⁹² Intervening in a case specific adjudication, however, is a judicial, not legislative or executive, function.⁹³ The Attorney General overstepping the independent setup of the immigration judges—and assuming the role of an Article III court—is an unconstitutional interpretation of the executive's

85. Gonzales, *supra* note 28, at 856.

86. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, 1625 (15th ed. 2016).

87. Gonzales, *supra* note 28, at 857; *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 842–43 (1984) (establishing that the framework for judicial review of executive interpretation of administrative rules is a two-part test deciding whether Congress has “directly spoken to the precise question at issue,” and if it has, whether the intent of Congress is clear or the agency's interpretation is a permissible construction of the statute).

88. Gonzales, *supra* note 28, at 842.

89. *Id.* at 920.

90. See 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, 11 (2016).

91. Gonzales, *supra* note 28, at 841.

92. *Id.* at 842.

93. Immigration and Nationality Act § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2005).

immigration power.⁹⁴ In reviewing immigration decisions, Article III courts should therefore not give *Chevron* deference to such improper decisions by the Attorney General.

A. Delegation, Deference and the Attorney General's Referral Power

The Constitution granted Congress the authority to create immigration law.⁹⁵ Through various laws and acts, Congress has delegated certain legislative powers to the executive branch to develop immigration law.⁹⁶ This raises the question of how much power Congress has the authority to delegate. The non-delegation doctrine concerns the relationship between Congress's legislative powers and administrative agencies taking on those powers.⁹⁷ The doctrine, in essence, prohibits Congress from delegating its legislative powers to the executive branch.⁹⁸ The Supreme Court, however, held in *J.W. Hampton v. United States* that Congress can delegate quasi-legislative powers to an executive agency.⁹⁹ This is conditioned on Congress giving the agency an "intelligible principle" to base their regulations on.¹⁰⁰ This intelligible principle is a general provision that allows the agency to fill in the details and conform to Congress's intent.¹⁰¹

The Supreme Court has further developed the law controlling how Congress may delegate quasi-legislative authority, how the executive may use that authority, and how courts should review such delegation.¹⁰² In the 1984 landmark case *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, the Court established the *Chevron* doctrine.¹⁰³ It set forth a two-part legal test for judicial review, where courts must defer to an agency's reasonable interpretation of ambiguous statutory provisions.¹⁰⁴ The court must first determine if Congress

94. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

95. U.S. CONST. art. I § 8 cl. 4.

96. WEISSBRODT & DANIELSON, *supra* note 35, at 106-07.

97. See *Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

98. See Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 361 (2017).

99. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

100. See *id.*

101. See *id.* at 406.

102. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629.

103. *Chevron*, 467 U.S. at 843-44.

104. *Id.* at 842-44.

implicitly delegated authority to the executive to interpret a statute.¹⁰⁵ If the court finds Congress has delegated authority, it must next determine whether the executive's interpretation of the statute is reasonable.¹⁰⁶ To determine reasonableness, the court must analyze whether the agency's action was based on a permissible construction of the statute, even if the court would interpret the statute otherwise.¹⁰⁷

The Supreme Court has held that *Chevron* deference applies in the immigration context.¹⁰⁸ It has additionally noted that judicial deference to the executive branch in immigration proceedings is particularly important.¹⁰⁹ It has further held that the BIA, vested with the Attorney General's discretion and authority, should be accorded *Chevron* deference "when it gives ambiguous statutory terms meaning through a process of case-by-case adjudication."¹¹⁰

Judicial review is available for questions of law regarding BIA or Attorney General decisions.¹¹¹ An Article III court must defer to a *reasonable* interpretation of an *ambiguous* immigration statute.¹¹² In the context of immigration, this statute refers to Congress's delegation of immigration authority to the executive branch through the INA.¹¹³ If the court finds the INA to be *unambiguous* and the executive's interpretation in contradiction with the statute, the court will enforce Congress's clear intent as expressed in the statute and disregard the executive's interpretation.¹¹⁴ Additionally, if the executive's interpretation of the statute is not reasonable, courts are not required to give it *Chevron* deference.¹¹⁵ In the immigration context, if the BIA or Attorney General depart from or change their interpretation of the

105. *Id.* at 844.

106. *Id.* at 843-44.

107. *Id.* at 433.

108. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

109. *INS v. Abudu*, 485 U.S. 94, 110 (1988).

110. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. at 424 (recognizing the BIA's role and explaining that its case-by-case law-making adjudications deserve *Chevron*-style deference).

111. See Stephen Legomsky, *Fear and Loathing in Congress and the Courts; Immigration and Judicial Review*, 78 TEXAS L. REV. 1615 (2000).

112. Jill Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L. J. 99, 116 (2018).

113. See 8 U.S.C. § 1103 (2012).

114. Family, *supra* note 112.

115. *Chevron*, 467 U.S. at 844.

INA, the new interpretation may be entitled to deference if supported by a principled reason and explanation for the change.¹¹⁶

Another factor of judicial review in immigration cases arises when a federal court interprets a statute and the Attorney General or BIA later interprets the statute in a different manner from the courts.¹¹⁷ The Supreme Court's holding in *Brand X* requires courts to defer to an executive agency's reasonable interpretation of a statute, overruling the court's prior interpretation.¹¹⁸ Courts have held that this applies to BIA and Attorney General decisions just as with other executive agency decisions.¹¹⁹ A BIA or Attorney General decision in conflict with a court's interpretation then applies prospectively, not retroactively to immigration decisions.¹²⁰

B. Unconstitutional Delegation of Power to the Attorney General

The Attorney General's self-referral power calls into question whether the Attorney General can interfere in the immigration court's impartial adjudication—a judicial, not executive, function. The Constitution does not permit an executive official to intervene in the adjudication process by a neutral decision-maker and turn legal interpretative decisions into political decisions.¹²¹ Instead, a more appropriate avenue for the Attorney General to exercise their power is through rulemaking. Rulemaking, unlike case-by-case adjudication, does not rely on the legal analysis of a sole adjudicator but instead considers the input and concerns of experts in the particular field

116. *Valdiviezo-Galdamez v. Att'y Gen. of the U.S.*, 663 F.3d 582, 608 (3d Cir. 2011).

117. *Family*, *supra* note 112, at 106.

118. *Id.* (citing *Nat'l Cable & Telecomms. Assn v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).

119. *S.E.R.L. v. Att'y Gen. of the U.S.*, 894 F.3d 535, 555 (3d Cir. 2018).

120. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016). In accordance with *Brand X*, the Tenth Circuit addressed the problem of an "executive agency, exercising delegated legislative authority, seek[ing] to overrule a judicial precedent interpreting a congressional statute." *Id.* at 1143 (emphasis removed). The Tenth Circuit held that executive agencies can overrule prior judicial precedent, but that "does not necessarily mean their decisions must or should presumptively apply retroactively to conduct completed before they take legal effect." *Id.* at 1148. In his concurring opinion, now Supreme Court Justice Gorsuch additionally explained "*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id.* at 1149 (Gorsuch, J., concurring).

121. *Id.* at 1150.

through the notice and comment process.¹²² In the event that the Attorney General does use their self-referral power, Article III courts should not grant these improper decisions *Chevron* deference.

Legal interpretation of a statute can be achieved through one of three methods.¹²³ First, Congress itself could determine the meaning of the statute and the executive follows that meaning in deciding immigration cases.¹²⁴ Second, if Congress leaves the statute ambiguous without additional guidance, it could instead give the executive branch the authority to use the quasi-legislative formal rulemaking process to make a determination.¹²⁵ If a formal rulemaking requirement is not explicit in the statute, the executive could instead choose to implement informal notice and comment rulemaking to determine the statute's meaning.¹²⁶ Third, without further guidance from Congress, the executive branch could use case-by-case adjudication to interpret the ambiguous statute instead of notice-and-comment rulemaking.¹²⁷

For example, in *Matter of A-B-*, then-Attorney General Jeff Sessions analyzed whether “married women who are unable to leave their relationship” qualifies as a particular social group under the INA.¹²⁸ What constitutes a “particular social group” is a question of law requiring legal interpretation.¹²⁹

Congress has left the term “particular social group” ambiguous and has given no further guidance.¹³⁰ This leaves the executive branch to use either informal rulemaking or adjudication to determine its meaning.¹³¹ If the executive branch instigated rulemaking proceedings, they would conduct a public notice-and-comment period to determine whether “married women who are unable to leave their marriage” is the kind of “particular social group” that Congress had in mind when

122. ESKRIDGE ET AL., *supra* note 65, at 719. Rulemaking is additionally more neutral since it applies across-the-board as opposed to only applying in a particular case like adjudications. *See Gutierrez-Brizuela*, 834 F.3d at 1150.

123. *See* ESKRIDGE ET AL., *supra* note 65, at 83, 716–17.

124. *See id.* at 90.

125. *See id.* at 716.

126. *See id.* at 717.

127. *See id.* at 761.

128. *Matter of A-B-*, 27 I. & N. Dec. 316, 319 (A.G. 2018).

129. *See id.* at 327–28.

130. *Matter of Acosta*, 19 I. & N. Dec. at 232–33 (B.I.A. 1985), (“Congress did not indicate what is understood [particular social group] to mean, nor is its meaning clear in the Protocol.”).

131. *See* ESKRIDGE ET AL., *supra* note 65, at 716–17, 761 (discussing the authority of the executive branch to interpret a statute absent Congressional determination).

granting asylum.¹³² The result would either include or exclude that class of persons from the statutory language. If the executive instead elected to interpret “particular social group” through adjudication, immigrants would argue for their membership in a particular social group in individual cases.¹³³ The immigration judge then decides whether the immigrant presented sufficient evidence of a “particular social group” to qualify for asylum.¹³⁴

In interpreting the phrase “particular social group,” the executive branch uses immigration judges to perform case-by-case adjudications to interpret the phrase.¹³⁵ The immigration judge interprets the meaning of particular social group based on prior immigration cases and precedent.¹³⁶ This decision is appealable to the BIA and then can be appealed to the federal courts.¹³⁷

This traditional adjudication process is reshaped when the Attorney General replaces the BIA’s decision with their own interpretation. In *Matter of A-B*, Sessions referred the case to himself from the BIA, at his own discretion.¹³⁸ He then interpreted the group “married women who are unable to leave their relationship” and broadly concluded that,

132. *See id.* at 717.

133. *See id.* at 161.

134. *See id.* at 183–84 (explaining that administrative law courts have the power to issue decisions with the effect of law). *See also* *Matter of A-B*, 27 I. & N. Dec. 316, 326–27 (A.G. 2018) (discussing the need for the administrative law court to interpret the decidedly ambiguous phrase of “particular social group”).

135. *See* *Matter of A-B*, 27 I. & N. Dec. at 326–27.

136. *Id.* at 318-20.

137. Marouf, *supra* note 29.

138. *Practice Advisory: Applying for Asylum After Matter of A-B*, National Immigrant Justice Center 7 (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf> [perma.cc/9DQM-DLZT] (“A-B-’s case was initially heard and denied by Immigration Judge Couch at the Charlotte Immigration Court, a court that is notorious for its harsh attitude towards asylum seekers. Judge Couch has a greater than 85 percent denial rate in asylum cases. In A-B-’s case, he made adverse findings on nearly all elements of her asylum claim. On appeal, the BIA reversed on all grounds, found A-B-’s claim similar to that of A- R-C-G-, determined she was eligible for asylum, and remanded the case for issuance of a decision after background checks were completed. On remand, Judge Couch did not follow the BIA’s order, but instead attempted to certify the case to the BIA, asserting that A-R-C-G-’s viability was no longer clear. At some point thereafter, Attorney General Sessions learned of the decision, certified the case to himself”).

generally, no person under that category meets the definition of “particular social group” and therefore cannot qualify for asylum.¹³⁹

The INA sets forth a legal right for certain individuals to obtain asylum, subject to judicial oversight.¹⁴⁰ It does not, however, state that the Attorney General may adopt rules determining when asylum should be granted.¹⁴¹

As the head of an executive agency, the Attorney General must have the power to make the legislative determination of what this phrase means.¹⁴² The Constitution gives judicial power to the “Supreme Court of the United States, and to such lower Courts as Congress may establish.”¹⁴³ Judges, acting as neutrals with no involvement in the political sphere, then interpret statutes in the context of specific factual situations.¹⁴⁴ The executive branch may exercise this judicial power when applying a statute to specific facts through quasi-judicial adjudicators.¹⁴⁵ These adjudicators, such as immigration judges, are independent arbitrators subject to judicial oversight.¹⁴⁶ If the immigration judge has misinterpreted the INA or otherwise incorrectly applied law, it is for the federal courts to review.¹⁴⁷

The Constitution ousts the Attorney General from exercising this power and ousts Congress from conferring the authority.¹⁴⁸ When the Attorney General certifies a case to themselves, the case-by-case adjudication becomes a tool for a purely executive officer to use to win political points from the President who appointed them.¹⁴⁹ The

139. Matter of A-B-, 27 I. & N. Dec. at 340.

140. 8 U.S.C. § 1158 (2019).

141. *Id.*

142. *See generally* ESKRIDGE ET AL., *supra* note 65, at 130–33 (discussing agency interpretation and execution of law).

143. U.S. CONST. art. III, § 1.

144. Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL’Y 87, 95 (1984).

145. *See* ESKRIDGE ET AL., *supra* note 65, at 183–84.

146. *See id.* *See* 8 C.F.R. § 1003.10.

147. U.S. CONST. art. III, § 1. *See also* ESKRIDGE ET AL., *supra* note 65, at 761–62.

148. ESKRIDGE ET AL., *supra* note 65, at 719 (discussing that agency decisions are subject to judicial review).

149. *See* Gonzales & Glen, *supra* note 28, at 847 (“‘This certification power, though sparingly used, is a powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent.’ This authority . . . gives the Attorney General the ability ‘to assert control over the BIA and effect profound changes in legal doctrine’”) (quoting Joseph Landau, *Doma and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 640 n. 89 (2012); Laura S. Trice, *Adjudication by*

separation of powers in the federal government, however, does not permit an executive official to intervene in the adjudication process and turn legal interpretative decisions into political decisions.¹⁵⁰

In Justice Powell's concurrence in *I.N.S. v. Chada*, he argues that the House of Representatives' use of a one-House veto is a violation of separation of powers.¹⁵¹ He found that the House's action was ". . . clearly adjudicatory. The House did not enact a general rule; rather it made its own determination . . . [i]t thus undertook the type of decision that traditionally has been left to other branches."¹⁵² Justice Powell argues that by simply reviewing the Immigration and Naturalization Service's findings, Congress assumed a function ordinarily entrusted to the federal courts.¹⁵³

The same principle of separation of powers inherently applies when the executive intervenes in the exercise of judicial power by the courts.¹⁵⁴ The executive branch can perform quasi-legislative or quasi-judicial functions, but only through quasi-legislative or quasi-judicial processes respectively.¹⁵⁵ The executive can make law through the quasi-legislative processes of rulemaking or adjudication.¹⁵⁶ Unlike the case-by-case adjudications, rulemaking applies across the board and does not rely on the legal analysis of a sole adjudicator, making it an overall more neutral legal interpretative process.¹⁵⁷

When the Attorney General becomes the adjudicator, it additionally calls into question what deference the courts should give the decision.¹⁵⁸ While courts should always consider the decision of the

Fiat: The Need for Professional Safeguards in Attorney General Review of Board of Immigration Appeals Decisions, 85 N.Y.U. L. REV. 1766, 1771 (2010)).

150. See U.S. CONST. art. III, § 1.

151. *I.N.S. v. Chada*, 462 U.S. 919 (1983). *I.N.S. v. Chada* concerned a provision in the INA that authorized either House of Congress to invalidate the executive branch's suspension of an individual's deportation. *Id.* The House used this provision to overrule the executive's suspension of Chada's deportation. *Id.*

152. *Id.* at 964-65.

153. *Id.*

154. See Michael C. Dorf, *Can Trump Interfere with the Courts and Judges?*, NEWSWEEK (Feb. 6, 2018, 11:49 AM), <https://www.newsweek.com/can-trump-interfere-courts-and-judges-800340> [perma.cc/9DQM-DLZT].

155. See ESKRIDGE ET AL., *supra* note 65, at 716-17.

156. See *id.* at 761

157. *Id.* at 719.

158. See *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an

lower courts, Article III courts should not necessarily afford immigration adjudication decisions by the Attorney General *Chevron* deference.¹⁵⁹ The Supreme Court has held that Article III courts should give immigration decisions *Chevron* deference when the executive “gives ambiguous statutory terms meaning through a process of case-by-case adjudication.”¹⁶⁰ The Attorney General, however, is not a formal adjudicator like the immigration judges and does not consistently take part in the case-by-case adjudications.¹⁶¹ Instead, the Attorney General steps in when they see fit and disrupts the case-by-case process the immigration courts use to give ambiguous statutory terms meaning.¹⁶² Article III courts, therefore, should not give *Chevron* deference to the decisions of the head of an executive agency who improperly intervenes in a quasi-judicial proceeding as opposed to creating law through the more neutral notice-and-comment rulemaking.

PART IV: WHY THE ATTORNEY GENERAL’S REFERRAL POWER IS OTHERWISE IMPROPER

Even if a court would not find the Attorney General’s use of the referral power unconstitutional, it is still otherwise improper. The Attorney General’s interference threatens the immigration judge’s independence from political influence and inserts a non-impartial, non-judicial actor into the case-by-case adjudication process.

administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

159. See Stephen W. Manning, *Judicial Deference in Immigration Cases*, IMMIGRATION LAW GROUP PC (2012), <http://www.ilgrp.com/wp-content/uploads/2012/07/Judicial-Deference-Article.pdf> [<https://perma.cc/843F-LCDS>].
160. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987).
161. See Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. 129, 130 (2017) (“ . . . this [referral power] was commonly used prior to 1956 to summarily affirm or deny decisions made by agency adjudicators in the Board of Immigration Appeals..However..it has been employed relatively rarely since then —albeit with greater regularity during the George W. Bush era than during several previous administrations, and the Obama presidency since.”).
162. *Id.* at 143 (“[E]xercise 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 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.”).

A. *The Attorney General is a Political Appointee*

The referral power allows a purely executive official to take control of a quasi-judicial adjudication process.¹⁶³ Unlike immigration judges and the BIA, the Attorney General is a political appointee.¹⁶⁴ The Attorney General changes with each new administration and their actions reflect the positions of the sitting President.¹⁶⁵ This strong connection to the President brings in outside political influence that can have negative consequences for the integrity of the immigration system.¹⁶⁶

As scholars have noted, a succeeding Attorney General can vacate the decision of a prior Attorney General,¹⁶⁷ creating disunity with the switch of every administration.¹⁶⁸ In 2009, then-Attorney General Michael Mukasey certified a case and created a procedural framework allowing the BIA to reopen proceedings based on a claim of ineffective assistance of counsel.¹⁶⁹ His decision overruled the lower immigration court's holding and prior BIA standards that held to the contrary.¹⁷⁰ This "midnight agency adjudication" occurred in the transition between President Bush's and President Obama's administrations.¹⁷¹ Such adjudications have been described as "attempt[s] to entrench a particular policy choice in anticipation of a presidential transition

163. *See id.* at 153.

164. *Id.* at 132. *See also* U.S. CONST. art. II, § 2, cl. 2.

165. *See generally* *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, Dept. of Justice, <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general> [<https://perma.cc/KTG8-H965>] (discussing how the change of a president affects the Attorney General position).

166. *See* Shah, *supra* note 161, at 143 (discussing how the referral and review mechanism causes disruption to the immigration system and interferes with the evolution of immigration law).

167. *See* Laura S. Trice, *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, 1771 (2010) (discussing the ability of the Attorney General to swiftly vacate and reverse precedent).

168. *See* Shah, *supra* note 161, at 145–46 (exemplifying how quickly the Attorney General can change immigration law precedent under a new appointment, disrupting the natural evolution of the law).

169. *See* Gonzales & Glen, *supra* note 28. *See also* Shah, *supra* note 161, at 145–46.

170. *See* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. 18, 23–24 (2016) (“*Compean* and *Silva-Trevino* each overturned settled BIA precedent . . .”).

171. *Id.*

[g]iven the known or possibly different policy preferences of the incoming administration.”¹⁷²

Attorney General Mukasey’s decision was vacated that same year—soon after the transition from President Bush to President Obama.¹⁷³ After taking office, the next Attorney General, Eric Holder, initiated rulemaking proceedings to give the issue proper participation from all interested parties.¹⁷⁴ He then reinstated the prior standards until the proper changes could be made following the rulemaking process.¹⁷⁵ The result was a back-and-forth in immigration policy over the course of just one year, disrupting the natural progression of policies through the case-by-case adjudication of the impartial immigration courts.¹⁷⁶

While the Attorney General’s decision can be appealed for judicial review, this rarely occurs.¹⁷⁷ Additionally, the Attorney General’s review power is more expansive than those of an Article III judge reviewing a BIA decision.¹⁷⁸ The Attorney General has *de novo* review of *all* aspects of the BIA decisions and is not confined to legal or factual error.¹⁷⁹ This gives the Attorney General the freedom to produce additional facts and briefing and is not confined to what the agency has decided in the underlying proceedings.¹⁸⁰ The result is a political executive appointee reviewing BIA decisions and interpreting the law with greater discretion, rather than leaving the decision to judicial review on appeal by a party to the case.¹⁸¹

172. *Id.* at 24 (quoting Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 599 (2003)).

173. *Id.*

174. *Id.* at 26.

175. *Id.*; Matter of Compean, Bangaly & J-E-C-, 25 I. & N. Dec. 1, 3 (AG 2009).

176. See Shah, *supra* note 161, at 143–52.

177. Marouf, *supra* note 29 (“Immigrants may further appeal decisions made by the Board of Immigration Appeals to the U.S. Courts of Appeals, the court one level below the Supreme Court. Very few can afford to do so. Of the roughly 300,000 immigration cases heard each year, only 2 percent are appealed to a federal judge. In 2016, 5,240 immigration appeals were filed with the federal appellate courts. On average, nationwide, just 8 percent of those appeals are granted.”).

178. KURZBAN, *supra* note 86, at 1556.

179. J-F-F-, 23 I. & N. Dec. 912, 913 (AG 2006). See also Trice, *supra* note 167, at 1773 (discussing the Attorney General’s power to engage in *de novo* review, superseding immigration judges and the BIA).

180. Gonzales & Glen, *supra* note 28, at 856.

181. See Shah, *supra* note 161, at 153 (“ . . . the Attorney General has interrupted the development of immigration law by the judiciary, altered

The immigration judges and BIA members are in a better position to make immigration decisions impacting the life of so many immigrants.¹⁸² Experienced immigration judges are well aware of the laws and practice of immigration law, as they adjudicate immigration cases daily.¹⁸³ To become one of the 21 members of the BIA,¹⁸⁴ you must be appointed by the Attorney General.¹⁸⁵ The Attorney General, on the other hand, is more susceptible to improperly applying immigration precedent.¹⁸⁶ They are not necessarily experts in immigration law and instead, as chief lawyer of the federal government, oversee a wide variety of Department matters.¹⁸⁷ The Attorney General is not required to have experience in immigration before becoming head of the Department of Justice.¹⁸⁸

While the Attorney General has staff that can advise them in the area of immigration,¹⁸⁹ a political appointee such as the Attorney

legislative standards, and restructured the agency's own application of immigration policy, often with partisan interest in mind.").

182. See Trice, *supra* note 167, at 1773–74, 1782 (discussing the Attorney General's tendency to skirt due process in immigration proceedings).
183. See Maria Sacchetti, *Immigration Judges' Union Calls for Immigration Court Independent from Justice Department*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?noredirect=on&utm_term=.76d3f580575d [<https://perma.cc/6F8X-Q423>].
184. *Board of Immigration Appeals*, DEPT. OF JUSTICE (Oct 15, 2018), <https://www.justice.gov/eoir/board-of-immigration-appeals> [<https://perma.cc/S56J-775B>].
185. Andrew R. Arthur, *DOJ to Expand the Board of Immigration Appeals*, CENTER FOR IMMIGRATION STUDIES, (March 1, 2018) <https://cis.org/Arthur/DOJ-Expand-Board-Immigration-Appeals> [<https://perma.cc/L55X-9EHV>].
186. See, e.g. *Practice Advisory: Applying for Asylum After Matter of A-B*, *supra* note 138, at 8 (“Compounding matters is the Attorney General’s chronic conflation of asylum elements throughout the decision. By blending persecution with nexus, nexus with PSG, and PSG with persecution, the decision makes parsing the elements tricky and establishing asylum eligibility more daunting than the statute, regulations, and case law require the process to be.”).
187. See *About the Office*, DEPT. OF JUSTICE, <https://www.justice.gov/ag/about-office> [<https://perma.cc/Y7JF-NLA4>].
188. See *Id.*
189. See, e.g., *Bido v. State*, 56 A.3d 104, 109 (R.I. 2012) (“[A]nother member of the attorney general’s staff would have handled [the] extradition.”).

General is not well suited to decide immigration cases.¹⁹⁰ Due to the complexity of the vast immigration laws and legal precedent, the Attorney General is at risk of incorrectly applying legal precedent.

In *Matter of A-B-*, for example, Sessions applied a standard that differed from previous immigration law precedent established by immigration judges and the BIA.¹⁹¹ He held that an asylum seeker fleeing persecution from a non-governmental actor must show that the government either “condoned” the persecution or was “completely helpless” to stop it.¹⁹² This interpretation differs from prior interpretations from the BIA, as first defined in *Matter of Acosta*.¹⁹³ Under the *Matter of Acosta* standard, an asylum applicant must instead show that the government is “unable or unwilling” to protect them.¹⁹⁴

Just months after the issuance of *Matter of A-B-*, a federal judge in the District of Columbia overturned parts of *A-B-* in *Grace v. Whitaker*.¹⁹⁵ This case arose from a challenge to the application of *Matter of A-B-* in the context of credible fear interviews.¹⁹⁶ The federal judge held the Sessions’s holding in *Matter of A-B-* was arbitrary and capricious “because there is no legal basis for an effective categorical ban on domestic violence and gang-related [asylum] claims” and the decision constituted an unexplained change to the long-standing recognition of the individualized analysis required by the INA.¹⁹⁷ The judge also found that Sessions’s departure from the long-standing “unwilling or unable” standard, as established in *Matter of Acosta*, was not a permissible construction of the persecution requirement that had

190. See Trice, *supra* note 167, at 1790 (discussing the likelihood for the Attorney General to erroneously apply the complex law).

191. *Matter of A-B-*, 27 I. & N. Dec. 316, 319 (B.I.A. 2018).

192. See *id.* at 337; Jennifer Chang Newell, *Federal Judge Blocks Trump’s Policy Gutting Asylum for People Fleeing Domestic and Gang Violence*, ACLU (Dec. 19, 2018, 1:00 PM) <https://www.aclu.org/blog/federal-judge-blocks-trumps-policy-gutting-asylum-people-fleeing-domestic-and-gang-violence> [<https://perma.cc/9TTU-U3FE>].

193. See *Matter of Acosta*, 19 I. & N. Dec. 211, 235 (BIA 1985).

194. *Id.* at 222 (“[H]arm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”).

195. *Grace v. Whitaker*, 344 F.Supp. 3d 96, 126-27 (D.D.C. 2018).

196. *Id.*; *Practice Advisory: Applying for Asylum After Matter of A-B-*, *supra* note 138, at 15 (explaining that credible fear interviews are “the initial asylum screening required for asylum seekers who request asylum at a U.S. port of entry or are apprehended within a certain distance of the border.”).

197. *Grace*, 344 F. Supp. 3d at 125-26.

long been settled.¹⁹⁸ This is not the first time a federal court has overturned an Attorney General's decision or declined to follow an Attorney General's interpretation of the INA.¹⁹⁹

The political nature of the Attorney General's position additionally raises due process concerns for individuals in cases before the Attorney General. Procedural due process under the Constitution requires that every individual be given notice, an opportunity to be heard, and a decision by a *neutral decision maker* before being deprived of a protected interest.²⁰⁰ This requires impartiality on the part of those acting in judicial or quasi-judicial capacities, such as arbitrators.²⁰¹ In the immigration context, courts have held that this includes impartial review "throughout all phases of [the] proceedings."²⁰² This includes review before an immigration judge, the BIA, or—on the rare occasion it occurs—before the Attorney General.²⁰³

While the immigration judges and the BIA on their own are considered impartial and neutral towards each immigrant's case, the position the Attorney General holds raises impartiality concerns.²⁰⁴ As a political appointee, the Attorney General maintains a strong affiliation with the President and the rest of their administration.²⁰⁵ They act as the President's agent to advance the administration's political agenda.²⁰⁶ An Attorney General can change prior precedent to align with the new administration's ideals by simply referring a case to himself and vacating the prior interpretation or holding.²⁰⁷ For

198. *Id.* at 130 ("[the unable or unwilling standard] was settled at the time the Refugee Act was codified, and therefore the Attorney General's condoned or complete helplessness standard is not a permissible construction.").

199. *See* Shah, *supra* note 161, at 155-65.

200. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 271 (1970).

201. *Id.* at 271.

202. *Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 213 (3d Cir. 2017).

203. *See id.*

204. *See The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, SOUTHERN POVERTY LAW CENTER 3 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [perma.cc/E8YY-FE7N].

205. *See* David A. Graham, *Ratcliffe's Withdrawal Reveals Trump Still Doesn't Understand Appointments*, THE ATLANTIC (Aug. 2, 2019, 2:35 PM), <https://www.theatlantic.com/ideas/archive/2019/08/whom-do-political-appointees-serve/595342/> [https://perma.cc/XY6E-E88N].

206. *See* Jeffrey Bartash, *Attorney General Jeff Sessions's Resignation Letter Reveals Trump Told him to Step Down*, MARKETWATCH (Nov. 7, 2018, 3:31 PM), <https://www.marketwatch.com/story/attorney-general-jeff-sessions-resignation-letter-reveals-trump-asked-him-to-step-down-2018-11-07> [https://perma.cc/B5GR-QAUF].

207. 8 C.F.R. §§ 1003.1(h)(1)(i)-(iii) (2019).

example, when Sessions vacated *Matter of A-R-C-G-*, he made it harder for foreign victims of domestic violence to obtain asylum in the United States—in accordance with the Trump administration’s policy of restricting immigration to the United States.²⁰⁸ To avoid political abuse, immigration decisions should be left to the neutral immigration judges and BIA to decide, rather than the politically affiliated Attorney General.

B. Intrusion on the Independence of the Immigration System

The Attorney General’s referral power also interferes with the independence of the immigration system.²⁰⁹ Under the executive branch, both immigration judges and administrative law judges perform quasi-judicial functions in case-by-case adjudication.²¹⁰ But the judges in the immigration courts are not like administrative law judges.²¹¹ Administrative law judges are certified, appointed, and supervised by independent agencies under the Administrative Procedure Act, ensuring autonomy for the judges and limiting inference by the agency to control the judges.²¹² Immigration judges are instead appointed by the Attorney General to act as delegates.²¹³ While these judges already lack the decisional independence guaranteed to other administrative judges, the ability of the Attorney General to certify a case creates an unnecessary layer of review.²¹⁴

Even as agents of the Attorney General, the BIA acts as an independent reviewer of immigration judge decisions.²¹⁵ As long-term employees of the Department of Justice that don’t change with each administration, the BIA is not swayed by political considerations.²¹⁶ The BIA’s decisions are not reflections of each administration’s views on immigration policy, but instead are neutrally decided based on prior BIA precedent.²¹⁷

208. Newell, *supra* note 192.

209. Peter J. Levinson, *Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 650 (1981).

210. 8 C.F.R. § 1003.10 (2019).

211. 8 C.F.R. § 1003.10 (2019); 5 U.S.C. § 3105 (1978).

212. 5 U.S.C. § 3105 (1978).

213. 8 C.F.R. § 1003.10 (2019).

214. Levinson, *supra* note 209, at 648–50.

215. *Board of Immigration Appeals*, DEPT. OF JUSTICE, (Oct 15, 2018)

<https://www.justice.gov/eoir/board-of-immigration-appeals>
[<https://perma.cc/GGP8-RA4V>].

216. Levinson, *supra* note 209, at 648.

217. Gonzales & Glen, *supra* note 28, at 850.

Immigration judges are aware of the dangers of political influence in the immigration system.²¹⁸ In 2018, The National Association of Immigration Judges called for the independence of immigration courts from the Justice Department.²¹⁹ The Association requested that Congress make the immigration court an independent Article I court, similar to the United States Tax Court.²²⁰ The judges cited pressure from the Trump Administration to decide cases faster and imposing production quotas, which some judges argue undermines the “judicial independence and immigrants’ rights to a fair hearing.”²²¹

Unlike the routine, case-by-case analysis used by the BIA and immigration judges, the Attorney General selects each case as a policy-making device,²²² allowing them to leave a profound impact on the immigration system.²²³ In the majority of cases the Attorney General refers to himself, the result favors deportation and only a minority of results benefit the immigrant.²²⁴ Additionally, in only approximately thirty percent of cases where the Attorney General has reviewed and issued a written decision has the Attorney General affirmed the BIA’s decision.²²⁵ In all other instances, the Attorney General has either vacated or reversed the BIA’s decision.²²⁶

Agency head control over their delegates is not a concept exclusive to the Attorney General and the immigration system.²²⁷ It is a decisive tool executives can use to efficiently create consistency across agencies.²²⁸ In the immigration context, however, as some scholars have

218. Sacchetti, *supra* note 183.

219. *Id.*

220. *Id.*

221. *Id.*

222. Trice, *supra* note 79, at 1771.

223. *Id.*

224. Shah, *supra* note 161, at 146.

225. Gonzales & Glen, *supra* note 28, at 859.

226. *Id.*

227. Taylor, *supra* note 171, at 19 (“In a number of administrative contexts including removal proceedings, adjudicators who decide contested cases ‘are employees of the very agency whose caseload they adjudicate...[And thus] potentially subject to the supervision and control of one of the interested parties. And it is typical that their decisions can be referred for review by the agency head.’”) (quoting Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 480 (2007)).

228. See Gonzales & Glen, *supra* note 28, at 849–852.

argued, these decisions are better left to the independent and experienced immigration judges.²²⁹

PART V: LIMITING THE ATTORNEY GENERAL'S SELF-REFERRAL POWER

The Attorney General's referral power raises concerns regarding a lack of guidelines and process. Immigration judges and the BIA follow a process by which cases naturally progress through the immigration courts.²³⁰ The Attorney General, however, can overturn long-standing BIA precedent without the same safeguards.²³¹ The Attorney General can review any case where the BIA has rendered a decision.²³² The only other requirement placed on this authority is that the Attorney General's decision must "be stated in writing and shall be transmitted to the BIA or secretary, as appropriate."²³³

Proponents of the self-referral power argue that the procedure allows the Attorney General to establish definitive interpretations of immigration law and efficiently implement executive branch immigration policy.²³⁴ While the ability of the Attorney General to review cases *sua sponte* may increase efficiency, it is easily subject to abuse, as seen most recently in *Matter of A-B*.²³⁵

One way to curb the Attorney General's control over immigration courts is to restrict the ability of the Attorney General to refer a case to himself for review *on their own initiative*. This would allow the Attorney General to review a decision only when the BIA or the

229. See *The AG's Certifying of BIA Decisions*, Jeffrey S. Chase (Mar. 29, 2018) <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions> [<https://perma.cc/9Z5F-RDKP>] ("[The BIA] members all come to the Board with far more expertise and experience in the field of immigration law than the AG possesses . . . [T]he strongest arguments for agency head review-inter-decisional consistency, and agency control . . . over policy-don't translate well to the process of deciding asylum applications, for example.").

230. See U.S. DEPT. OF JUST., IMMIGRATION COURT PRACTICE MANUAL 1-2 (2016).

231. *Id.* at 9.

232. 8 C.F.R. § 1003.1(h)(1) (2019).

233. 8 C.F.R. § 1003.1(h)(2) (2019).

234. Gonzales & Glen, *supra* note 28, at 841 ("This procedure permits the Attorney General to adjudicate individual immigration cases and thereby provide a definitive interpretation of law or institute new policy-based prescriptions to guide immigration officials in the future...the history of its invocation establishes it as a powerful tool through which the executive branch can assert its prerogatives in the immigration field.").

235. *Matter of A-B*, 27 I. & N. Dec. 316 (AG 2018).

Department of Homeland Security requests review.²³⁶ In the past, the BIA requested the majority of cases reviewed by the Attorney General.²³⁷ Presently, out of the past twenty-six decisions reviewed by the Attorney General, one has been referred from the BIA, fourteen have been self-certified by the Attorney General, and eleven have been referred by the Department of Homeland Security (or the former Immigration and Naturalization Service).²³⁸ By restricting the power to review a case *sua sponte*, the Attorney General could no longer interfere with the natural progression of immigration cases unless called upon by their delegates or the Department of Homeland Security.

Even with a restriction on the self-referral power, the Attorney General could still clear up inconsistencies amongst the BIA and immigration courts. The BIA or Department of Homeland Security may request certification of a case that adjudicators are struggling to uphold consistently.²³⁹ Because the Attorney General's decision is binding throughout the immigration courts, any clarification or new standard the Attorney General implements creates a consistent standard for the immigration judges to follow.²⁴⁰ Any prior BIA rulings inconsistent with the Attorney General's decision would then be overruled.²⁴¹

Additionally, restricting the Attorney General's referral power would not leave the executive branch without reasonable pathways to implement their immigration policies. The executive branch would still be able to implement immigration policy through executive orders or through the traditional rulemaking process.²⁴² Unlike case-by-case adjudication, the rulemaking process applies across-the-board, as opposed to only applying in a particular case like adjudications.²⁴³ Rulemaking is more neutral than adjudication as it does not rely on the legal analysis of a sole adjudicator but instead considers the input and concerns of experts in the particular field through the notice and comment process.²⁴⁴

236. 8 C.F.R. §§ 1003.1(h)(1)(ii)-(iii) (2019).

237. Gonzales & Glen, *supra* note 28, at 859.

238. *Id.*

239. 8 C.F.R. §§ 1003.1(h)(1)(ii)-(iii) (2019).

240. Martin, *supra* note 90.

241. Gonzales & Glen, *supra* note 28, at 856.

242. *Id.* at 898.

243. ESKRIDGE, *supra* note 65, at 719.

244. *Id.* ("Section 553 of the APA requires the agency to notify the public that it is considering a proposed rule, and to invite public comments. Only after reviewing the public comments can the agency issue a final rule, which is subject to judicial review to weed out any requirement that federal judges find to be 'arbitrary and capricious.'").

Another solution to the Attorney General's control over the immigration courts is to limit the Attorney General's standard of review.²⁴⁵ While decisions by the BIA are confined to *de novo* review of questions of law and *clearly erroneous* review of facts, the Attorney General has *de novo* review of *all* aspects of the BIA decisions and is not confined to review of legal or factual errors.²⁴⁶ This gives the Attorney General the freedom to produce additional facts and briefing and is not confined to what the agency has decided in the underlying proceedings.²⁴⁷ In this appellate role, it would make sense for the Attorney General to have similar standards of review as the BIA has in reviewing immigration judge decisions.

CONCLUSION

In June 2018, then-Attorney General Jeff Sessions used his referral power to advance the Trump administration's policy of restricting immigration to the United States. His decision in *Matter of A-B* overruled a BIA decision that granted asylum to female victims of domestic violence.²⁴⁸ Using his referral power, Sessions interrupted the progression of immigration decisions granting asylum relief to victims of domestic violence.²⁴⁹

The Attorney General's referral power is a unique control of power over the immigration system. As a political appointee, the Attorney General can refer any case to themselves at their own discretion and overturn years of precedent.²⁵⁰ In doing so, the Attorney General interferes with the case-by-case adjudications by the immigration judges and the BIA. A purely executive official is then performing a quasi-judicial function. This ability of a political appointee to interfere in the independent immigration process raises constitutional and policy concerns. It is unwise to allow a political appointee hold such power, which should be limited in order to prevent further abuse.

245. See Shah, *supra* note 161.

246. *Matter of J-F-F-*, 23 I. & N. Dec. 912, 913 (AG 2006).

247. Gonzales, *supra* note 28, at 856.

248. *Matter of A-B-*, 27 I. & N. Dec. at 316.

249. See, e.g., *In re R-A-*, 23 I. & N. Dec. 694 (AG 2005); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Matter of L-R-*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/our-work/matter-l-r> [<https://perma.cc/8D6G-HGXJ>].

250. 8 C.F.R. §§ 1003.1(h)(1)(ii)–(iii) (2019).