Building Legal Walls: Limiting Attorney General Referral Authority Over Immigration Cases

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I. INTRODUCTION

President Trump has yet to make good on his campaign promise to build a border wall along the United States-Mexico border.[1] In the meantime, though,

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[1] *See* Peter Baker & Glenn Thrush, *Trump Is 'Not Happy' with Border Deal, but Doesn't Say if He Will Sign It*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/us/politics/border-wall-deal.html [https://perma.cc/8UGQ-UK7D] (noting

his administration has been building legal walls.[2] Stalled negotiations over the fate of Deferred Action for Childhood Arrivals (DACA), the lift of Temporary Protected Status (TPS) for natives of certain countries, Attorney General case certification in twelve cases, and the now-rescinded "child separation policy" have all contributed to President Trump's campaign-promised overhaul of United States immigration law.[3] While public backlash has stalled some of these measures,[4] the executive branch has nevertheless employed its authority to shape policy in a variety of ways.[5] One way includes the creation of binding precedent in immigration law by the Attorney General under the referral authority, which permits the Attorney General to adjudicate individual immigration cases and set policy unilaterally.[6]

The Attorney General's use of the referral authority historically has been the subject of much controversy, and this holds true in the present context.[7] When an Attorney General uses the referral authority, criticism generally follows and stems from the significant potential for an Attorney General's abuse of this authority.[8] Specifically, critics argue that the Attorney General sets executive policy through a process that lacks procedural safeguards protecting

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that President Trump capitulated to ending the government shutdown without receiving funding for the border wall at issue).

[2] David Bier, *Trump Builds His Wall Against Legal Immigrants*, HILL (July 19, 2018), http://thehill.com/blogs/congress-blog/homeland-security/397873-trump-builds-his-wall-against-legal-immigrants [https://perma.cc/AN7Q-3TFN] (compiling the immigration polices the Trump Administration has used to curb both legal and illegal immigration).

[3] Sarah Almukhtar et al., *How Trump's Policy Change Separated Migrant Children from Their Parents*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/interactive/2018/06/20/us/border-children-separation.html [https://perma.cc/BW7E-H89B]; Catherine E. Shoichet, *Immigration, Trump and You: 5 Things Happening Now, and Why They Matter*, CNN (Jan. 25, 2018), https://www.cnn.com/2018/01/09/politics/immigration-trump-explainer/index.html [https://perma.cc/L59S-LV2G]; *see infra* Part III.

[4] *See* Scott Clement, *The Public Rejected Trump's Child-Separation Policy, but a Majority Supports His Push to Detain Families Until Court Hearings*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/13/the-public-rejected-trumps-child-separation-policy-but-a-majority-supports-his-push-to-detain-families-until-court-hearings/?utm_term=.15828aed8576 [https://perma.cc/S6A2-YARS].

[5] *See* Bier, *supra* note 2.

[6] *See* 8 C.F.R. § 1003.1(g)–(h) (2018). *See generally* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016) (providing a foundational view of the referral authority written by former U.S. Attorney General Alberto Gonzales and Office of Immigration Litigation Attorney Patrick Glen). For clarity, the Attorney General's referral authority is also often referred to as "case certification."

[7] *See, e.g.*, Gonzales & Glen, *supra* note 6, at 847 (acknowledging "that the referral authority is not without its critics, who have . . . focused on the lack of guidelines or clearly established processes utilized by the Department of Justice when a case is referred to and decided by the Attorney General").

[8] 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, 1767 (2010).

due process and provides for inadequate neutrality and transparency in the adjudicatory context.[9] Generally, administrations rarely use the referral authority as a tool to implement policy.[10] The Trump Administration, though, has already used the referral authority twelve times.[11] The prevalence of its use is striking when compared with its use under the Obama Administration, which used the referral authority only four times throughout its eight years.[12] Also divergent is the nature of the cases referred under the Trump Administration and the issues decided.[13] Unlike many of his predecessors, after referring the case to himself, Attorney General Sessions essentially altered the issue originally on appeal to the Board of Immigration Appeals (Board).[14] Attorney General Sessions not only used the referral authority more often, but also garnered attention for the way that he used the referral authority.[15]

To be sure, as a means for effectuating policy, the referral authority is both statutorily based and arguably effective.[16] The Immigration and Nationality Act (INA) grants wide-ranging authority to the Attorney General by allowing him to direct the administration, interpretation, and enforcement of immigration policy.[17] Immigration judges (IJs) usually first adjudicate removal proceedings and the Board reviews their decisions, but the Attorney General can also

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[9] *Id.* at 1768; *see* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (affirming that noncitizens present in the United States are entitled to due process whether having a "lawful, unlawful, temporary, or permanent" presence).

[10] *See* Sanchez-Penunuri v. Longshore, 7 F. Supp. 3d 1136, 1149 (D. Colo. 2013) ("[A]lthough he rarely uses this power, the Attorney General is the final arbiter of the immigration agency's interpretation of a statute . . . ."); *see infra* Part II.

[11] *See generally* Thomas & Thompson, 27 I. & N. Dec. 674 (A.G. 2019); Castillo-Perez, 27 I. & N. Dec. 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018); Negusie, 27 I. & N. Dec. 481 (A.G. 2018); M-S-, 27 I. & N. Dec. 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469 (A.G. 2018); S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (A.G. 2018); L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018).

[12] Gonzales & Glen, *supra* note 6, at 858.

[13] *See* Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, OPINIONS/ANALYSIS IMMIGR. L. (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://perma.cc/4TEL-VD28] (stating that "Sessions' use of certification thus far is unique in his redetermination of what the case he chooses is even about").

[14] *See id.* (collecting examples of cases in which Sessions has altered the issue on appeal).

[15] *See, e.g.*, David Hausman, *How Jeff Sessions Is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges [https://perma.cc/U39A-TCNS].

[16] Gonzales & Glen, *supra* note 6, at 897 (arguing that Attorney General referral authority is an effective means of setting executive federal immigration policy).

[17] *See* 8 U.S.C. § 1103(g) (2009); Gonzales & Glen, *supra* note 6, at 850 ("It is the Attorney General who was statutorily charged, and remains charged together with the Secretary of the Department of Homeland Security, with the administration and enforcement of the immigration laws.").

adjudicate individual immigration cases.[18] The Board, the Department of Homeland Security (DHS) Secretary, or the Attorney General himself can refer a case for Attorney General review.[19] This process allows an Attorney General to become the decision maker and further federal immigration policy as envisioned by the executive branch.[20] This authority also provides an Attorney General with the opportunity to resolve wide-ranging issues and affect cases beyond the particular case certified.[21] Still, the Attorney General, a political appointee charged to enforce executive policies, can hardly be expected to play the role of a neutral adjudicator.[22] Thus, despite an Attorney General's statutory charge to enforce immigration law, there exists an inherent and severe lack of neutrality and procedural safeguards which ultimately demonstrate that the referral authority is an inappropriate method to adjudicate individual immigration cases.

This Note addresses the Attorney General's referral authority over immigration cases and its use under the Trump Administration. To illustrate and understand the referral authority, Part II of this Note considers the statutory background of the INA that grants an Attorney General the ability to adjudicate cases through the referral authority, as well as its use throughout history. Part III examines the use of the referral authority under the Trump Administration, along with the nature of the cases selected for review. Finally, Part IV suggests amending the INA by relegating immigration policymaking by an Attorney General to notice-and-comment rulemaking only, thus ensuring that the adjudications of individual immigration cases are fair.

II. BACKGROUND ON THE REFERRAL AUTHORITY AND ITS USE

In order to understand the drastic shift in the Trump Administration's use of the referral authority, it is first necessary to understand the statutory basis for the referral authority, its use by previous administrations, and its well-established criticisms. This Part provides this overview of the referral authority by beginning with its creation leading up to its use under the Obama

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[18] 8 C.F.R. § 1003.1(b), (h) (2018).

[19] *Id.* § 1003.1(h)(1)(i)–(iii).

[20] Gonzales & Glen, *supra* note 6, at 846 (considering the referral authority to be within "the executive branch's scope of action in advancing its conception of immigration policy in the face of a recalcitrant Congress").

[21] *See id.* at 860.

[22] *See* Chase, *supra* note 13 (arguing that the DOJ is "enforcement-minded" and "has never really grasped the concept of independent decision makers existing under its jurisdiction"); Ted Hesson, *Sessions Signals Immigration Crackdown: 'This Is the Trump Era,'* POLITICO (Apr. 11, 2017), https://www.politico.com/story/2017/04/jeff-sessions-immigration-crackdown-237109 [https://perma.cc/9Y58-K5NS] (noting that the policies of the Trump Administration represent an "aggressive approach [that] could help lock down the border, but it could also lead to the arrest of valid asylum seekers, depending on how the new plans are implemented").

Administration. Consideration of the referral authority's use under the Trump Administration is analyzed in the following Part.[23]

A. *The Statutory Basis for the Attorney General's Referral Authority*

The INA gives broad authority to the Attorney General to implement the statute.[24] The statute enables the Attorney General to direct the administration, interpretation, and enforcement of immigration policy through the INA.[25] Pursuant to this authority, the Board of Immigration Appeals (Board) was created by regulation in 1940.[26] The Board serves as an appellate body charged with reviewing appeals of individual immigration decisions made by IJs over "removal determinations, requests for discretionary relief, and asylum applications."[27] Through its review, the Board can issue precedential decisions over issues that bind the administration and adjudication of immigration law.[28]

Still, the Board has no statutory authority of its own, and it serves as a delegate of the Attorney General.[29] Although a delegate of the Attorney General, by regulation the Board is granted as much authority over discretionary decisions as the Attorney General.[30] Therefore, as long as the regulations remain, the Board has a degree of independence in decision making.[31] Indeed, members of the Board "shall exercise their independent judgment and discretion in considering and determining . . . cases."[32] Essentially, this regulation attempts to prevent the Attorney General from "sidestep[ping] the Board."[33]

However, aside from adjudication by the Board, the Attorney General can directly adjudicate individual immigration cases through use of the referral authority.[34] As for the cases referred to the Attorney General, the statute does not mandate any criteria for a case to be reviewed by the Attorney General; it

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[23] *See infra* Part III.

[24] *See* 8 U.S.C. § 1103(g) (2009).

[25] Gonzales & Glen, *supra* note 6, at 841, 850.

[26] Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified at 8 C.F.R. pt. 90).

[27] Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 668–69 (2008).

[28] 8 C.F.R. § 1003.1(d) (2018); *see* Eyer, *supra* note 27, at 670 (quoting 8 C.F.R. § 1003.1(g) (2007)).

[29] Eyer, *supra* note 27, at 669. Despite being created by regulation, the Board has remained a relatively "stable" body for more than seven decades. *Id.*

[30] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) ("In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's.").

[31] *See id.* at 267; 8 C.F.R. § 1003.1(d)(1)(ii) (2018).

[32] 8 C.F.R. § 1003.1(d)(1)(ii) (2018).

[33] *Shaughnessy*, 347 U.S. at 267.

[34] 8 C.F.R. § 1003.1(h)(1)(i) (2018) ("The Board shall refer to the Attorney General for review of its decisions all cases that . . . [t]he Attorney General directs the Board to refer to him.").

merely specifies who may refer a case.[35] The Board, the DHS Secretary, or the Attorney General himself can refer cases for review.[36] Attorney General review is performed de novo and review is not limited by the decisions in the underlying proceedings.[37] This process allows the Attorney General to become the decision maker and further the Administration's immigration policy.[38]

B. *Use of the Referral Authority by Prior Administrations*

Generally, since its inception, referral authority use by attorneys general has decreased in number, and the substance of its use has changed as well.[39] The following table provides data on the total number of times the referral authority has been used under each administration.

Table 1. *Referral Authority's Use by Prior Administrations*
(continuing on to the next page)

Year Range (Administration)[40]	**Total Use**
1942–1945 (Franklin D. Roosevelt)	111
1945–1953 (Harry S. Truman)	296
1953–1961 (Dwight D. Eisenhower)	10
1961–1963 (John F. Kennedy)	11
1963–1969 (Lyndon B. Johnson)	5
1969–1974 (Richard M. Nixon)[41]	3
1974–1977 (Gerald R. Ford)[42]	1

[35] *Id.*; *see also* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 484 n.35 (2007) ("The regulation does not specify any substantive criteria for referral. Rather, it delineates those who have authority to invoke this mechanism of policy control.").

[36] 8 C.F.R. § 1003.1(h)(1)(i)–(iii) (2018).

[37] INS v. Doherty, 502 U.S. 314, 327 (1992) (holding that the Attorney General is not limited by the underlying decision of the Board but can instead find an independent basis for his decision); A-H-, 23 I. & N. Dec. 774, 779 n.4 (A.G. 2005). Indeed, the referral authority grants the Attorney General very broad authority. Trice, *supra* note 8, at 1773. "[T]he Attorney General [has] discretion to review any of the 30,000 [Board] cases decided annually," and, "when he does so, he views his review power as plenary, extending to de novo review of law and facts and unconstrained by regulations that bind the [Board]." *Id.*

[38] Gonzales & Glen, *supra* note 6, at 847. *But see* Trice, *supra* note 8, at 1773–74 (arguing that "politically driven decisionmaking" leaves those individuals filing asylum or withholding claims ultimately vulnerable).

[39] Gonzales & Glen, *supra* note 6, at 857.

[40] *Id.* at 857–58; *The Presidents Timeline*, WHITE HOUSE HIST. ASS'N, https://www.whitehousehistory.org/the-presidents-timeline [https://perma.cc/8RLU-CC5F].

[41] *See generally* Hernandez, 14 I. & N. Dec. 608 (A.G. 1974); Janati-Ataie, 14 I. & N. Dec. 216 (A.G. 1972); Lee, 13 I. & N. Dec. 214 (A.G. 1969).

[42] *See generally* Stultz, 15 I. & N. Dec. 362 (A.G. 1975).

1977–1981 (Jimmy Carter)[43]	1
1981–1989 (Ronald Reagan)[44]	1
1989–1993 (George H.W. Bush)[45]	1
1993–2001 (William J. Clinton)[46]	3
2001–2009 (George W. Bush)	16
2009–2017 (Barack Obama)[47]	4
2017–present (Donald J. Trump)[48]	12

The shift in use is largely attributable to a difference in use by particular presidential administrations, a change in the type of substantive review over each case by the Attorney General, and who is referring the case to the Attorney General.[49] First, a change in the type of review by attorneys general may have also contributed to the overall downward trend in the number of cases reviewed.[50] Early decisions often attached little reasoning, and thus could be performed quickly.[51] However, beginning in the 1950s, the Attorneys Generals' decisions on referred cases became increasingly more "independently reasoned" and they tended to serve more significant ends than mere summary review.[52] In

[43] *See generally* Cantu, 17 I. & N. Dec. 190 (A.G. 1978).

[44] *See generally* Belenzo, 17 I. & N. Dec. 374 (A.G. 1981).

[45] *See generally* Hernandez-Casillas, 20 I. & N. Dec. 262 (A.G. 1991).

[46] Under the Clinton Administration, in addition to the three issued decisions, fourteen orders were given by the Attorney General. Gonzales & Glen, *supra* note 6, at 858.

[47] Gonzales & Glen, *supra* note 6, at 858. However, some commentators argue that, though the referral authority was not often used under the Obama Administration, it instead used other tools to advance its immigration policies, such as executive orders or executive branch memorandum. *See id.* at 846. Particularly, President Obama issued DACA as an executive branch memorandum and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) by an executive action. *See 2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/archive/2014-executive-actions-immigration [https://perma.cc/4L44-64AC] (listing a series of executive actions announced by President Obama on November 20, 2014).

[48] *See generally* Thomas & Thompson, 27 I. & N. Dec. 674 (A.G. 2019); Castillo-Perez, 27 I. & N. Dec. 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018); Negusie, 27 I. & N. Dec. 481 (A.G. 2018); M-S-, 27 I. & N. Dec. 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469 (A.G. 2018); S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (A.G. 2018); L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018).

[49] Gonzales & Glen, *supra* note 6, at 857–59.

[50] *Id.* at 858 ("[T]he quality of the Attorney General's decisions have been greater in recent years, even if those decisions have been less frequent, tending towards independently reasoned, articulated, and published opinions on the merits of the case.").

[51] Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 157 (1958) ("Often the Attorney General's action is a peremptory 'disapproved' or 'approved,' without any clue to the alien as to the 'why's' and 'wherefores.' And sometimes the Attorney General will first approve or disapprove the Board's decision and then withdraw his action or reverse himself, in *both* instances without any reason assigned.").

[52] Gonzales & Glen, *supra* note 6, at 859.

fact, these decisions resolved larger legal issues, they created policy or established new standards for future cases, they involved issues of foreign policy, and, in some instances, the rejection of a referral effectively acted as acceptance or a stay on certain issues.[53] The focus, then, has been on cases "whose resolution would have continuing importance—the decision of a legal question that would potentially affect many cases or the setting of policy that would likewise have significant effects beyond the case at issue."[54] This type of review necessarily is more time consuming, and thus limits the number of cases that can be reviewed under the referral authority by an Attorney General.

Second, in addition to the more substantive review slowing the number of referred cases, the source of referred cases has also changed.[55] Early decisions were mostly referred to the Attorney General by the Board.[56] The Immigration and Nationality Service (INS), though referring less than the Board, still referred a significant amount of cases to the Attorney General also.[57] Cases certified directly by the Attorney General lagged behind both the Board's and the INS's referrals.[58] However, recently, most cases are self-certified by the Attorney General, with DHS providing some and the Board providing very few.[59] The downward trend mirrors the overall decrease in the use of the referral authority by the Attorney General.[60] Though, this may also be partly attributable to a regulatory change that made mandatory referral in certain instances merely discretionary.[61] While a variety of sources may have contributed to a decrease in the use of referral authority—the inclinations of a particular administration, the type of review, or the source of referral—the number of cases reviewed by the Attorney General under the referral authority has generally decreased over time.

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[53] *Id.* at 861, 886.

[54] *Id.* at 860.

[55] *Id.* at 859.

[56] *Id.*

[57] *Id.*; *see Did You Know?: The INS No Longer Exists*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 13, 2011), https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists [https://perma.cc/6NAT-PQ7R] ("[S]ince March 1, 2003 . . . most INS functions were transferred from the Department of Justice to three new components within the newly formed Department of Homeland Security. USCIS is one of those three components. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) are the other two.").

[58] Gonzales & Glen, *supra* note 6, at 859.

[59] *Id.* (noting that, as of 2016, fourteen cases were self-certified by the Attorney General, eleven were referred by DHS, and only one case was referred to the Attorney General by the Board).

[60] *Id.*

[61] *Id.* at 859–60; *see* 8 C.F.R. § 90.12 (1940) (mandating referral to the Attorney General over cases with a "question of difficulty" and "in any case in which a dissent has been recorded").

C. *Common Criticisms of the Referral Authority*

Despite the decreasing use of the referral authority, this process is routinely criticized when it is used.[62] Three of the most prevalent critiques include (1) the threatened lack of neutrality by a politically appointed adjudicator; (2) the removal of a decision from what might be considered a neutral adjudicative body with subject matter expertise to instead be decided by a political appointee;[63] and (3) the absence of statutory or regulatory provisions safeguarding the due process of noncitizens under use of the referral authority.[64]

First, as stated above, the Attorney General is a political appointee.[65] The Attorney General serves under the executive branch and is thus charged with carrying out the policy directives of the administration.[66] While the obvious function of an administrative agency is to carry out the political agenda of the executive branch, the perception of political policy in adjudication raises the question of fairness in the decision-making.[67] Indeed, when the Attorney General carries out adjudications, it may "be seen as objectionable because it conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome."[68] Finally, when an Attorney General or administration is on their way out, they often issue many significant decisions as a last-ditch effort to put their policy in place.[69] Thus, this concern that the Attorney General lacks neutrality is not unfounded.

Second, when an Attorney General certifies a case, he takes the decision from the Board and leaves it with little decisional independence.[70] Many agency adjudicators are "specialists" and "selected because their background and

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[62] *See* Chase, *supra* note 13.

[63] *See id.*

[64] Trice, *supra* note 8, at 1768; *see* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (affirming that noncitizens present in the United States are entitled to due process whether having a "lawful, unlawful, temporary, or permanent" presence).

[65] Chase, *supra* note 13.

[66] *See id.*

[67] Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 19 (2016); Elise Foley, *Jeff Sessions Has Power to Shape Asylum Policy. He Could Be Gearing Up to Use it to Deny Relief to Domestic Violence Victims.*, HUFFPOST (Mar. 16, 2018), https://www.huffingtonpost.com/entry/sessions-asylum-deportations_us_5aa9729fe4b0600b82ff93b4 [https://perma.cc/MP3A-UY7Q] ("'Even apart from Jeff Sessions, I've never liked the idea that the attorney general can review a decision of the [Board] at all,' said Stephen Legomsky, a former lead counsel for U.S. Citizenship and Immigration Services under the Obama administration. 'When the attorney general substitutes his decision for that of the [Board], it would be analogous to a prosecutor in a criminal case deciding the case.'").

[68] Taylor, *supra* note 67, at 19.

[69] *Id.* at 20 (referring to this process as "midnight agency adjudications," in which "an agency head . . . refers a controversial issue to himself and renders a decision upending agency precedent on his way out the door").

[70] *See* Taylor, *supra* note 35, at 480.

expertise suits them to hear a particular type of case."[71] Indeed, in the immigration context, IJs and the Board possess "subject matter expertise."[72] Still, as employees of the DOJ, an agency tasked with carrying out executive policy, a similar concern over their neutrality arises.[73] Board members are appointed by the Attorney General but do not have a fixed tenure and serve at the pleasure of the Attorney General.[74]

Finally, both the lack of neutrality by the Attorney General and the Board's lack of independence create serious due process concerns for those individuals whose cases are being heard.[75] Under the Fifth Amendment to the United States Constitution, the Due Process Clause does not just apply to citizens, but all noncitizens in the country "whether their presence here is lawful, unlawful, temporary, or permanent," as well.[76] Currently, though, Attorney General review under referral authority is not subject to any "particular process," or even the minimal requirement of giving the parties "notice and an opportunity for meaningful participation in the review process."[77] Without even minimal process, decision-making lacks neutrality and transparency, thus endangering a noncitizen's due process rights.[78]

III. THE REFERRAL AUTHORITY'S USE UNDER THE TRUMP ADMINISTRATION

Under the Trump Administration, the Attorneys General have certified twelve cases for review by referral authority.[79] This section will consider the

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[71] *Id.* at 481.

[72] Chase, *supra* note 13. For instance, the author, Jeffrey S. Chase, himself demonstrates that many adjudicators employed by the Board have expertise in United States immigration law. *Id.* Chase is presently an immigration lawyer and was formerly an "Immigration Judge and Senior Legal Advisor at the Board of Immigration Appeals." *Id.*

[73] *See* Taylor, *supra* note 35, at 480–81 (noting that agency adjudication of cases may be carried out by "agency adjudicators" subject to oversight by "agency heads").

[74] Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 34 (1977).

[75] Trice, *supra* note 8, at 1768.

[76] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[77] Trice, *supra* note 8, at 1773.

[78] *Id.* at 1775 (stating that, in some cases, "the Attorney General has failed to provide adequate opportunities for interested parties to brief or argue the issues under consideration and at times has failed even to inform the parties to the case of the issues to be considered upon review"). Though not required by regulation, the Attorney General may still "invite" the parties or amici to submit briefs on the matter. L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018).

[79] Eight cases were certified by Attorney General Sessions. *See* Negusie, 27 I. & N. Dec. 481 (A.G. 2018); M-S-, 27 I. & N. Dec. 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469 (A.G. 2018); S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (A.G. 2018); L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018). The two most recent cases were certified by Acting Attorney General Whitaker. *See* Castillo-Perez, 27 I. & N. Dec. 495 (A.G.

cases selected for review under the Trump Administration in thematic groupings, rather than chronological order of certification. Generally, though with some overlap, the cases certified fall into three broad categories: decisions limiting the discretion and authority of IJs and the Board, decisions intended to streamline the immigration adjudication process and promote efficiency, as well as decisions generally restricting the eligibility requirements for asylum and withholding of removal applicants.

A. *Decisions Limiting the Authority of Immigration Judges and the Board of Immigration Appeals*

The first theme of decisions under the Trump Administration involves holdings that limit the discretion and authority of IJs and the Board. Certain judges, or even courts, have gained a perception that the judgments they deliver will be based on their own political ideologies, and this is certainly the perception held by the Trump Administration.[80] In the absence of binding precedent or regulatory norms regarding a certain issue, the political ideologies of individual IJs indeed appear to have had a role in immigration law.[81] For example, whether domestic violence victims fleeing their persecutors were eligible for asylum had been relatively unclear for decades.[82] Without clear legal guidance, a particular IJ's interpretation and use of discretion controlled whether he or she granted a domestic violence victim asylum—thus, some IJs granted

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2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018). However, the authority of an Acting Attorney General to refer to himself a case has been challenged by commentators as violating the Appointments Clause of the Constitution, as well as statutorily violating a law that governs the succession between Attorneys General and the Federal Vacancies Reform Act. *Amicus Briefs:* Matter of Negusie, AM. IMMIGR. COUNCIL (Dec. 3, 2018), http://www.americanimmigrationcouncil.org/amicus_brief/matter-negusie [https://perma.cc/ME6B-J6JQ]. Finally, Attorney General Barr certified two cases in his first few months in office, which were consolidated into one decision. *See* Thomas & Thompson, 27 I. & N. Dec. 556 (A.G. 2019).

[80] *See Political Scientist Weighs In on Trump's Criticism of 9th Circuit Court of Appeals*, NPR (Nov. 22, 2018), https://www.npr.org/2018/11/22/670313813/political-scientist-weighs-in-on-trumps-criticism-of-9th-circuit-court-of-appeal [https://perma.cc/QGF4-WKXD]. Responding to a decision from the 9th Circuit, President Trump stated, "This was an Obama judge. And I'll tell you what, it's not going to happen like this anymore." *Id. But see* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1515 (2003) (concluding that, although judicial preferences may play a small role, decision-making according to the law "is the most powerful determinant").

[81] Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 2–3 (2016) (noting the acceptance by some IJs over domestic violence-based asylum claims and the rejection by others).

[82] *Recent Adjudication: Asylum Law—Membership in a Particular Social Group—Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement.*—Matter of A-R-C-G-, *26. I. & N. Dec 388 (B.I.A. 2014)*, 128 HARV. L. REV. 2090, 2090 (2015) [hereinafter *Recent Adjudication*].

domestic violence based asylum and others did not.[83] Inconsistencies exist elsewhere in immigration law, and one method to ensure consistent application is by limiting the discretionary authority of IJs and the Board.[84]

Previously, IJs and the Board had the discretion to administratively close cases, which was a useful tool to manage dockets.[85] In certifying *Matter of Castro-Tum*, though, Attorney General Sessions sought to review the authority of IJs and the Board to administratively close cases.[86] He concluded that IJs and the Board have no general authority to administratively close cases but only have authority in certain instances provided for expressly by the regulations or by a settlement.[87] Therefore, this decision necessarily limits IJ and Board authority.[88] Moreover, because the court was unsure if Castro-Tum received the

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[83] *See* Bookey, *supra* note 81, at 2–3. Judge Couch, the IJ who first heard *Matter of A-B-*, denied ten domestic violence based claims just in 2017—with some opinions later determined to be "clearly erroneous" upon review by the Board. Tal Kopan, *Judge in Case Sessions Picked for Immigrant Domestic Violence Asylum Review Issued 'Clearly Erroneous' Decisions, Says Appellate Court*, CNN (Apr. 28, 2018), https://www.cnn.com/2018/04/28/politics/jeff-sessions-immigration-courts-domestic-violence-asylum/index.html [https://perma.cc/4EH6-MG4Q]. However, other judges have taken a broader approach by applying established standards regarding gender-based violence in general to domestic violence claims. Bookey, *supra* note 81, at 2–3.

[84] *See* M-S-, 27 I. & N. Dec. 476, 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469, 469 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

[85] When an IJ or the Board administratively closes a case, "the proceedings are halted, the case is removed from the active docket, and the respondent has no future hearing dates scheduled." AM. IMMIGRATION COUNCIL & ACLU, ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM*: PRACTICE ADVISORY 2 (Oct. 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [https://perma.cc/HUF8-7WPM]. The proceedings are not re-calendared unless one party moves to continue. *Id.* Notably, "[a]dministrative closure does not terminate or dismiss the case and it 'does not provide [a noncitizen] with any immigration status'; the individual remains 'in' removal proceedings." *Id.* (alteration in original) (citations omitted). IJs or the Board previously could administratively close cases in a few different situations: for example, if a noncitizen has been granted deferred action, if a noncitizen is awaiting adjudication elsewhere, such as from the USCIS, or if a noncitizen is not considered competent. *See* W-Y-U-, 27 I. & N. Dec. 17, 18 (B.I.A. 2017) (citing Avetisyan, 25 I. & N. Dec. 688, 691–92 (B.I.A. 2012)).

[86] Castro-Tum, 27 I. & N. Dec. 271, 271–72 (A.G. 2018); Richard Gonzales, *Sessions Moves to Curb Immigration Judges' Authority*, NPR (May 17, 2018), https://www.npr.org/sections/thetwo-way/2018/05/17/612200263/sessions-moves-to-curb-immigration-judges-authority [https://perma.cc/94AK-HX83].

[87] *Castro-Tum*, 27 I. & N. Dec. at 271, 278 ("[T]hese regulations limit administrative closure authority to specific categories of cases, but do not delegate the general authority to authorize administrative closure.").

[88] *Id.* at 271. Not only will IJs and the Board no longer be able to use administrative closure as a tool to manage their dockets, but past administratively closed cases may be required to be recalendared if either party requests. *See id.* at 272 (explaining the process of recalendaring an administratively closed case).

notices to appear, it initially closed the case for due process concerns.[89] Thus, by denying IJs and the Board the discretion to administratively close cases, the decision also risks the due process rights of noncitizens during removal proceedings. Ultimately, in *Romero v. Barr*, the Fourth Circuit abrogated Attorney General Sessions's decision by finding that regulations implementing the INA "unambiguously confer upon IJs and the [Board] the general authority to administratively close cases."[90]

Attorney General Sessions also reviewed the procedure used by IJs for granting a noncitizen's motion for a continuance in *Matter of L-A-B-R-*.[91] By regulation, IJs are permitted to grant motions for continuances for good cause shown by a noncitizen awaiting the outcome of other pending "collateral matter."[92] The regulations do not provide a clear definition of "good cause," and this led the Board to create a balancing test to aid in the determination.[93] However, Attorney General Sessions used the opportunity to set forth a good cause standard limiting the discretion of IJs to grant continuances for, what he deemed, "any reason or no reason at all."[94] According to him, "the good-cause requirement is 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."[95] This decision, too, limits IJs' discretion and prevents them from controlling their dockets as they see fit. Moreover, it requires an IJ, who may have 10–15 motions for a continuance per day, "to write

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[89] Matthew Archambeault, *The Repercussions of How the Administration Has Handled* Matter of Castro-Tum, THINK IMMIGR. (Aug. 14, 2018), https://thinkimmigration.org/blog/2018/08/14/the-repercussions-of-how-the-administration-has-handled-matter-of-castro-tum/ [https://perma.cc/UHN2-3Y2A].

[90] Romero v. Barr, 937 F.3d 282, 294 (4th Cir. 2019) (citing 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii)).

[91] L-A-B-R-, 27 I. & N. Dec. 405, 405 (A.G. 2018). A motion for continuance allows an IJ to "move an upcoming hearing from one scheduled date to another or to pause an ongoing hearing and move it to a future date." AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: MOTIONS FOR A CONTINUANCE 1 (Sept. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_for_a_continuance_practice_advisory.pdf [https://perma.cc/BF6N-Y3GD]. Generally, an IJ may authorize a continuance for good cause shown. 8 C.F.R. § 1003.29 (1994). Additionally, an IJ may authorize "a reasonable adjournment either at his or her own instance" or for good cause shown. *See* 8 C.F.R. § 1240.6 (2019). However, the regulations fail to define "good cause."

[92] *See L-A-B-R-*, 27 I. & N. Dec. at 405 ("For example, an alien may move for a continuance because he is the subject of a family- or employment-based visa petition that, if approved by United States Citizenship and Immigration Services . . . would enable him to apply for adjustment of status in the immigration court and become a lawful permanent resident."); 8 C.F.R. § 1003.29 (1994) ("The Immigration Judge may grant a motion for continuance for good cause shown.").

[93] *See L-A-B-R-*, 27 I. & N. Dec. at 405.

[94] *Id.*

[95] *Id.* at 406.

lengthy, highly detailed decisions for each of these while still trying to complete three or more full hearings a day."[96]

In *Matter of S-O-G- & F-D-B-*, on the other hand, Attorney General Sessions reviewed IJ authority to terminate or dismiss removal proceedings.[97] He determined that, pursuant to *Matter of Castro-Tum*, IJs "have no inherent authority to terminate or dismiss removal proceedings."[98] Indeed, IJs can only terminate proceedings when expressly provided for by regulation or when charges of removability are not sustained.[99] Attorney General Sessions made mention that "the authority to dismiss or terminate proceedings is not a free-floating power an immigration judge may invoke whenever he or she believes that a case no longer merits space on the docket."[100] Instead, an IJ must continue with removal proceedings if the claims in the Notice to Appear can be sustained by the DHS.[101] This decision, like *Matter of Castro-Tum*, limits IJ discretion to independently terminate proceedings.[102] However, IJs can still terminate in other certain permitted contexts or when required by regulation.[103]

Finally, in *Matter of Thomas & Thompson*, Attorney General Barr considered the extent of IJ discretion when a noncitizen's criminal conviction is altered by state court orders.[104] Attorney General Barr referred the case to consider specifically "whether, and under what circumstances, judicial alteration of a criminal conviction or sentence—whether labeled 'vacatur,' 'modification,' 'clarification,' or some other term—should be taken into consideration in determining the immigration consequences of the

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[96] *Retired IJs and Former Members of the BIA Issue Statement in Response to* Matter of L-A-B-R-, AM. IMMIGR. LAW. ASS'N (Aug. 17, 2018), https://www.aila.org/infonet/retired-ijs-former-bia-statement-matter-of-l-a-b-r [https://perma.cc/K3LN-YKXA].

[97] S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 462 (A.G. 2018).

[98] *Id.*

[99] *Id.*; *see* 8 C.F.R. §§ 1239.2(c), (f) (2004) (permitting government counsel or an officer to move for dismissal under certain circumstances or IJ to terminate the removal proceedings if the alien has an application for naturalization pending that is likely to be granted); *see also S-O-G- & F-D-B-*, 27 I. & N. Dec. at 462 (permitting an IJ to dismiss "where the Department of Homeland Security fails to sustain the charges of removability against a respondent").

[100] *S-O-G- & F-D-B-*, 27 I. & N. Dec. at 468.

[101] *Id.* at 467–68.

[102] *See Attorney General Restricts Immigration Judges' and BIA's Power to Dismiss or Terminate Removal Proceedings*, CATH. LEGAL IMMIGR. NETWORK (Sept. 27, 2018), https://cliniclegal.org/resources/attorney-general-restricts-immigration-judges-and-bias-power-dismiss-or-terminate-removal [https://perma.cc/KZ99-3Z7H] ("*Matter of S-O-G- & F-D-B-* will make it harder for IJs to terminate proceedings unless DHS seeks dismissal under the regulations.").

[103] *See, e.g.*, 8 C.F.R. § 1216.4(a)(6) (1996) (providing for termination following the approval of conditional lawful permanent resident status); *id.* §§ 1235.3(b), 1235.6 (a)(iv) (2009) (providing for termination for noncitizens whose status has not been terminated in expedited removal proceedings).

[104] Thomas & Thompson, 27 I. & N. Dec. 556, 556 (A.G. 2019).

conviction."[105] Under the INA, certain criminal convictions also result in immigration consequences, such as inadmissibility or deportation.[106] However, in some instances a noncitizen may have a criminal conviction, through some form of post-conviction relief, vacated, modified, or clarified to avoid the conviction's immigration consequences.[107] An IJ could then take the conviction's alteration into consideration and provide discretionary relief based on immigration hardships.[108] In *Matter of Thomas & Thompson*, though, Attorney General Barr held that state court orders modifying, clarifying, or otherwise altering a conviction will only be given legal effect when the alteration is based on procedural or substantive defects in the underlying criminal proceedings.[109] Therefore, conviction alterations will no longer have legal effect on immigration proceedings if the alteration has nothing to do with the merits of the underlying conviction, and it was intended, for example, for rehabilitation or to ease immigration hardships.[110] Attorney General Barr's decision, therefore, further restricts IJ discretion by limiting their ability to consider the effect of conviction alterations.

B. *Decisions Streamlining the Immigration Adjudication Process*

The second theme of decisions under the Trump Administration aim to streamline the immigration adjudication process for efficiency purposes.[111] Without a doubt, immigration courts, like many other court systems, suffer from a heavy backlog of cases; as of 2015, there were more than 700,000 active

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[105] *Id.*

[106] 8 U.S.C. § 1227(a)(2) (2019); *see also id.* § 1101(a)(43)(F) (defining "aggravated felony" as including "crime of violence," which has a "term of imprisonment [of] at least one year"); *id.* § 1227(a)(2)(A)(iii) (indicating that noncitizens with aggravated felony convictions are automatically deportable and thus ineligible for many types of relief or protection from removal).

[107] For example, defendant's counsel in *Padilla v. Kentucky* did not inform her client that entering a guilty plea carried a risk of deportation or any immigration consequences for that matter. Padilla v. Kentucky, 559 U.S. 356, 359 (2010). After pleading guilty to charges that made the defendant deportable, the defendant brought an ineffective assistance of counsel claim. *Id.* at 359–60. The Supreme Court held that counsel could be considered ineffective under the Sixth Amendment if he or she fails to inform criminal defendants of immigration consequences. *Id.* Upon remand, the defendant's conviction was vacated, which gave him the opportunity to try his case. Padilla v. Commonwealth, 381 S.W.3d 322, 330–31 (Ky. Ct. App. 2012).

[108] *See* Thomas & Thompson, 27 I. & N. Dec. 674, 674 (A.G. 2019) (applying the tests set forth in *Matter of Cota-Vargas*, *Matter of Song*, and *Matter of Estrada* that enabled immigration courts to alter the legal effect of criminal conviction alterations); *see also* Estrada, 26 I. & N. Dec. 749, 755–56 (B.I.A. 2016); Cota-Vargas, 23 I. & N. Dec. 849, 850–52 (B.I.A. 2005); Song, 23 I. & N. Dec. 173, 174 (B.I.A. 2001).

[109] *Thomas & Thompson*, 27 I. & N. Dec. at 674.

[110] *Id.*

[111] *See* M-S-, 27 I. & N. Dec. 476, 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469, 469 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

cases.[112] Attorney General Sessions acknowledged this fact in a speech delivered before IJs on June 11, 2018.[113] In this speech he remarked, "The fact is we have a backlog of about 700,000 immigration cases, and it's still growing . . . . This is not acceptable. We cannot allow it to continue."[114] The focus of his speech urged IJs to adhere to the rule of law and to "use [their] best efforts and proper policies to enhance [their] effectiveness."[115] Attorney General Sessions seemed to take up the issue himself with the certification of *Matter of E-F-H-L*, *Matter of M-G-G-*, *Matter of M-S-*.[116]

Attorney General Sessions first began working to streamline the process in *Matter of E-F-H-L-*, which involved an applicant's entitlement to an evidentiary hearing.[117] After certifying the case, Attorney General Sessions vacated the decision four years after the case had closed.[118] During the initial removal proceedings in *Matter of E-F-H-L-*, the respondent conceded removability and sought relief from removal by applying for asylum and withholding of removal.[119] Without an evidentiary hearing, the IJ determined that the respondent "failed as a matter of law to make a prima facie case" of eligibility

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[112] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 20 (2017) ("[T]he immigration courts' overall annual caseload grew from approximately 517,000 cases in fiscal year 2006 to about 747,000 cases in fiscal year 2015 . . . .").

[113] Jeff Sessions, U.S. Attorney Gen., Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal [https://perma.cc/84QJ-QK64].

[114] *Id.*

[115] *Id.*

[116] *See* M-S-, 27 I. & N. Dec. 476, 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469, 469 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

[117] *See* E-F-H-L-, 26 I. & N. Dec. 319, 324 (B.I.A. 2014) (holding that during "removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief"); *see also* E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018) (vacating the 2014 decision of the Board and holding that an asylum applicant is not entitled to an evidentiary hearing).

[118] E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

[119] *Id.* The INA's deportability provisions are broad; if a noncitizen falls into one of these categories, he or she would be considered removable. *See* 8 U.S.C. § 1227 (2008). The most common classifications include: "inadmissible aliens," for obtaining admission through fraud or misrepresentation; aliens "present in violation of law," applying to noncitizens who enter without inspection or remain after their status has expired; aliens who have "violated nonimmigrant status or condition[s] of entry," covering noncitizens who have failed to comply with the terms of their status, such as obtaining unauthorized employment; or for certain "criminal offenses." *See id.* If found removable, a noncitizen may apply for relief from removal, such as asylum or withholding of removal. 8 U.S.C. § 1229(a) (2006). For further discussion on removal proceedings, see generally Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

and denied his application.[120] After appealing to the Board, the Board remanded the respondent's case finding that ordinarily, an applicant is entitled to an evidentiary hearing when applying for asylum and withholding of removal.[121] Upon remand, though, the defendant withdrew his application with prejudice and applied through an alternative method.[122] Despite this, Attorney General Sessions vacated the Board's decision entitling an applicant to an evidentiary hearing.[123]

The holding in *Matter of E-F-F-L-* brings forth a variety of practical consequences. First, this vacatur may mean that asylum and withholding of removal applications will be summarily dismissed if an applicant does not establish a prima facie case at the outset, rather than affording an applicant the opportunity to a full hearing.[124] It also demonstrates that no seemingly established precedent is immune from Attorney General review.[125] Still, the decision does streamline the removal process.[126] In doing so, though, it may prematurely dismiss valid applications for asylum or withholding of removal.

In another attempt to streamline immigration adjudications, Attorney General Sessions certified *Matter of M-G-G-* to himself on September 18, 2018.[127] In *Matter of M-G-G-*, he sought to address whether noncitizens detained and screened for expedited removal proceedings were entitled to a bond hearing.[128] However, on October 12, 2018, Attorney General Sessions

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[120] E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

[121] *Id.*

[122] *Id.* After the IJ administratively closed the applicant's case, he sought status through a "Petition for Alien Relative (Form I-130)." *Id.*

[123] *Id.*

[124] Paul W. Schmidt, *What Does Sessions'* E-F-H-L- *Order Mean?*, LEXISNEXIS: LEGAL NEWSROOM (Mar. 6, 2018), https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/posts/what-does-sessions-39-e-f-h-l-order-mean [https://perma.cc/4TU8-BXR7] (stating, among other theories, that by doing away with "full hearings for asylum seekers," Attorney General Sessions may want to "establish some type of 'summary dismissal without hearing' process for those who fail to establish a 'prima facie case' for asylum or withholding").

[125] Indeed, Attorney General Sessions offered no explanation for certifying this specific case four years after the case had closed. *See id.*

[126] Andrew R. Arthur, *Attorney General Moves to Streamline Immigration Adjudications*, CTR. FOR IMMIGR. STUD. (Mar. 6, 2018), https://cis.org/Arthur/Attorney-General-Moves-Streamline-Immigration-Adjudications [https://perma.cc/5NJ7-9TQM] (arguing that the decision will "streamline the adjudication of immigration applications, give immigration judges the authority to summarily dismiss deficient asylum applications, and cut down on the filing of frivolous applications to delay removal").

[127] M-G-G-, 27 I. & N. Dec. 469, 469 (A.G. 2018).

[128] *Id.* The "expedited removal" proceeding allows an immigration officer to summarily order the removal of noncitizens "who are present in the U.S. without having been admitted or paroled by an immigration officer at a designated port-of-entry, who are encountered by an immigration officer within 100 air miles of the U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter." Designating Aliens for Expedited Removal, 69 Fed. Reg.

announced that he would no longer review the Board's decision, because the respondent had been removed to his home country, Guatemala, since being certified.[129] On the very same day, though, Attorney General Sessions certified *Matter of M-S-* to himself, to answer the exact question posed in *Matter of M-G-G-*.[130]

Upon taking office, Attorney General Barr issued a decision in *Matter of M-S-* eliminating bond hearings for individuals detained for expedited removal proceedings, despite having established a credible fear of persecution.[131] This decision overturned *Matter of X-K-*, in which the Board held that once a noncitizen is screened from expedited removal, for example by establishing a credible fear of persecution, and can proceed with an application for asylum or withholding of removal, he or she is entitled to a bond hearing.[132] The decision has yet to fully take effect, though, because a class of asylum applicants challenged the decision in *Padilla*.[133] The government has since appealed the *Padilla* decision to the Ninth Circuit.[134] Though the Ninth Circuit has yet to rule on the case, under Attorney General Barr's holding, *Matter of M-S-* threatened to mandatorily detain a noncitizen in asylum proceedings, which can last months or even years.[135] While that decision, too, arguably attempted to streamline the adjudication process by eliminating individual bond hearings in this instance, it did so at the risk of a noncitizen's indefinite detention.[136]

48,877, 48,877 (Aug. 11, 2004). If, however, an asylum officer "determines that an alien in expedited removal proceedings has a credible fear of persecution or torture" or an "alien requests a review of that determination by an immigration judge," a noncitizen can avoid expedited removal and proceed with an application for asylum or withholding of removal. 8 C.F.R. § 235.6 (2009).

[129] M-G-G-, 27 I. & N. Dec. 475, 475 (A.G. 2018).

[130] M-S-, 27 I. & N. Dec. 476, 476 (A.G. 2018).

[131] M-S-, 27 I. & N. Dec. 509, 509 (A.G. 2019).

[132] *See* X-K-, 23 I. & N. Dec. 731, 731 (B.I.A. 2005).

[133] *See* Padilla v. U.S. Immigration & Customs Enf't, 379 F. Supp. 3d 1170, 1224 (W.D. Wash. 2019), *modified sub nom*. Padilla v. U.S. Immigration & Customs Enf't, 387 F. Supp. 3d 1219 (W.D. Wash. 2019) (order modifying a preliminary injunction but affirming that the government must provide eligible individuals with bond hearings with certain procedural protections within seven days or release these individuals from detention).

[134] *See* Padilla v. U.S. Immigration & Customs Enf't, No. 19-35565 (9th Cir. July 22, 2019) (order upholding preliminary injunction in part and denying in part).

[135] *See Fact Sheet: U.S. Asylum Process*, NAT'L IMMIGR. F. (Jan. 10, 2019), https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/ [https://perma.cc/M36A-QV8H] (noting that the "length of the asylum process varies, but it typically takes between 6 months and several years," and in July 2018, "the average wait time for an immigration hearing was 721 days").

[136] *But see* Brief for Former INS & DHS General Counsels as Amici Curiae Supporting Respondents at 2, Nielsen v. Preap, 139 S. Ct. 954 (2019) (No. 16-1363) (seeking an answer from the Court over whether a criminal alien is subject to mandatory detention under 8 U.S.C. § 1226(c), if he was not taken into custody by DHS immediately). Bond proceedings do not take long, maybe less than ten minutes, and impose no great administrative burden on IJs. *Id.* at 11.

C. *Decisions Restricting Eligibility Requirements for Applicants*

Finally, the third theme of decisions under the Trump Administration entail restricting the eligibility of applicants for asylum and withholding of removal.[137] This theme seems to naturally correspond to the first two: in order to streamline the immigration adjudication process and indirectly limit the authority of IJs and the Board, the number of applicants must decrease. By constraining the eligibility criteria for asylum and withholding of removal, the number of applicants will likely decrease. While an Attorney General cannot restrict the statutory criteria, he can remind the IJs and the Board of their "responsibility . . . to ensure that our immigration system operates in a manner that is consistent with the laws enacted by Congress."[138]

First, in *Matter of A-B-* Attorney General Sessions reviewed the Board's decision granting asylum to a domestic violence victim under a "particular social group" (PSG) based claim.[139] The Board's decision was supported by *Matter of A-R-C-G-*,[140] which was the first case to hold that domestic violence victims can constitute a cognizable "particular social group" following decades-long uncertainty over the status of domestic violence victims for asylum purposes.[141] However, in *Matter of A-B-*, the decision was overruled.[142] Attorney General Sessions determined that "being a victim of private criminal activity [does not] constitute[] a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[143] Under this ruling, immigration courts can only recognize domestic violence-based asylum

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[137] *See generally* Castillo-Perez, 27 I. & N. Dec. 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018); Negusie, 27 I. & N. Dec. 481 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

[138] Sessions, *supra* note 113.

[139] *A-B-*, 27 I. & N. Dec. at 316. An applicant for asylum must demonstrate that she has either suffered past persecution or that she has a well-founded fear of future persecution on account of protected ground—that is, race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42) (2014). The fifth ground, "membership in a particular social group," is notoriously indefinite. *See, e.g.*, Fatin v. INS, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Read in its broadest literal sense, the phrase is almost completely open-ended."). As a means to limit the scope of the refugee definition, the Board "interpret[ed] the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic" and this "characteristic might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience such as military leadership or land ownership." Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, I. & N. Dec. 439, 439 (B.I.A. 1987). Whether victims of domestic violence qualify for asylum had been an ongoing and, at times, contentious question within asylum law. *Recent Adjudication*, *supra* note 82, at 2090.

[140] A-R-C-G-, 26 I. & N. Dec. 388, 388 (B.I.A. 2014).

[141] *Recent Adjudication*, *supra* note 82, at 2093.

[142] *A-B-*, 27 I. & N. Dec. at 316.

[143] *Id.* at 317.

claims in the most narrow circumstances.[144] Moreover, by labeling domestic violence broadly as "private criminal conduct," the decision calls into question other well established PSGs also comprised of victims of private criminal conduct.[145]

Indeed, then-Acting Attorney General Matthew Whitaker questioned the validity of another PSG-based asylum claim when he certified *Matter of L-E-A-*.[146] The Acting Attorney General certified the case to address whether a noncitizen can establish asylum eligibility based on membership in a "particular social group" on account of "membership in a family unit."[147] The Board first recognized the family unit as a cognizable PSG in 2017.[148] On July 29, 2019, Attorney General Barr ultimately issued a decision in *Matter of L-E-A-*, holding that a family unit will now only be considered a PSG if "it has been shown to be socially distinct in the eyes of its society."[149] This added restriction comes at a time when many commentators already view the eligibility requirements for asylum as a family unit as too restrictive.[150]

In certifying *Matter of Negusie*, Attorney General Sessions sought to answer "[w]hether coercion and duress are relevant to the application of the [INA's] persecutor bar" for a noncitizen applying for asylum or withholding of removal.[151] The Supreme Court addressed the issue in *Negusie v. Holder*, but ultimately remanded for the Board to determine whether the bar to asylum for applicants that have themselves persecuted others could claim an exception for duress.[152] The Board issued its opinion on remand in 2018, five months prior to Attorney General Sessions' certification, in which it held that an asylum applicant, who was otherwise barred from eligibility, could claim duress as a defense, albeit in a limited nature.[153] The Attorney General has not yet issued a

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[144] *See id.* at 316 (requiring domestic violence-based asylum claims to be accompanied by a showing that the applicants home country is unwilling or unable to control the private criminal conduct).

[145] *See id.* These groups include, among others, those comprised of family membership, members of the LGBTQ community, or former child soldiers—each subject to persecution at the hands of private actors. L-E-A-, 27 I. & N. Dec. 40, 40 (B.I.A. 2017); Lukwago v. Ashcroft, 329 F.3d 157, 157 (3d Cir. 2003); Toboso-Alfonso, 20 I. & N. Dec. 819, 819 (B.I.A. 1990).

[146] L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018).

[147] *Id.*

[148] *L-E-A-*, 27 I. & N. Dec. at 42, 47 (concluding that "an immediate family may constitute a particular social group," but ultimately finding that the applicant failed to establish that his membership in his family unit was at least one central reason for his fear of future persecution).

[149] L-E-A, 27 I. & N. Dec. 581, 582 (A.G. 2019).

[150] *See, e.g.*, Jeffery S. Chase, Matter of L-E-A-*: The BIA's Missed Opportunity*, OPINIONS/ANALYSIS IMMIGR. L. (June 22, 2017), https://www.jeffreyschase.com/blog/2017/6/11/matter-of-l-e-a-the-bias-missed-opportunity?rq=LEA [https://perma.cc/TJ3V-3SBX].

[151] Negusie, 27 I. & N. Dec. 481, 481 (A.G. 2018).

[152] Negusie v. Holder, 555 U.S. 511, 514 (2009).

[153] Negusie, 27 I. & N. Dec. 347, 347 (B.I.A. 2018).

decision, but it is likely that any decision will follow the trend of restricting eligibility. Therefore, the Attorney General may decide to eliminate, or at least narrow, the exception.

Finally, Acting Attorney General Whitaker referred to himself *Matter of Castillo-Perez*, seeking to determine the correct "legal standard for determining when an individual lacks 'good moral character'" regarding an application for cancellation of removal.[154] Particularly, he sought to consider the effect of "multiple convictions for driving while intoxicated or driving under the influence" on good moral character.[155] Attorney General Barr ultimately decided the case, holding that "evidence of two or more convictions for driving under the influence during the relevant period establishes a rebuttable presumption that the [noncitizen] lacked good moral character during that time."[156] Moreover, because noncitizens must possess good moral character for ten years before being eligible for cancellation of removal, two or more convictions for driving under the influence also establishes that the noncitizen is not eligible for cancellation of removal.[157] The decision nevertheless further restricts a noncitizen's immigration eligibility.

D. *Criticisms of the Trump Administration's Use of the Referral Authority*

Many of the criticisms leveled at prior uses of the referral authority by Attorneys General of past administrations mirror the criticisms of the use of the referral authority under the Trump Administration.[158] However, because the Trump Administration has used the referral authority substantially more than other administrations, this criticism is amplified.[159] The criticism generally

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[154] Castillo-Perez, 27 I. & N. Dec. 495, 495 (A.G. 2018). "Cancellation of removal" is a form of relief from removal that, depending on the class of noncitizen, generally requires the noncitizen to have been continuously present in the U.S. for ten years, be a person of good moral character, have no convictions that would make the noncitizen inadmissible, and establish "that removal would result in exceptional and extremely unusual hardship." 8 U.S.C. § 1229(b) (2008).

[155] *Castillo-Perez*, 27 I. & N. Dec. at 495.

[156] Castillo-Perez, 27 I. & N. Dec. 664, 664 (A.G. 2019).

[157] *Id.*

[158] *See generally* Trice, *supra* note 8 (calling to attention the controversial nature of the Attorney General's referral authority, specifically regarding the lack of procedural safeguards to ensure due process, transparency, and legitimacy, in 2010, under the Obama Administration's tenure).

[159] For example, "[i]n his first year, Sessions referred eight cases to himself." Sarah Pierce, *Sessions: The Trump Administration's Once-Indispensable Man on Immigration*, MIGRATION POL'Y INST. (Nov. 8, 2018), https://www.migrationpolicy.org/article/sessions-trump-administrations-once-indispensable-man-immigration [https://perma.cc/95G8-EYEW]. Acting Attorney General Whitaker has referred two cases to himself, bringing the total number under the Trump Administration to ten. *See* Castillo-Perez, 27 I. & N. Dec. 495, 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018). Again, the Obama Administration only used the referral authority four times in eight years, and the

involves the lack of transparency under Attorney General decision-making and the lack of due process throughout the process.[160]

First, as a tenet of our legal system, there is a strong expectation for claims to be adjudicated by an impartial and neutral adjudicator.[161] Thus, when a politically appointed Attorney General serves as an adjudicator, questions of impartiality arise.[162] This concern is heightened when an Attorney General has, for example, been known for his "hard-line immigration stance" while serving as a member of Congress.[163] In fact, issues of impartiality arose in a recent decision by Attorney General Sessions, which prompted him to include a disclaimer of his impartiality in the opinion.[164] The disclaimer was in response to many commentators alleging that Attorney General Sessions had "prejudge[d]" the case and generally "lack[ed] impartiality."[165] He claimed, however, that despite his previous comments regarding immigration policy, he had no "personal interest in the outcome of the proceedings" and never expressed any comments regarding the specific case before him.[166] Still, his consistent, restrictive stance towards immigration[167] and the curb on immigration that many of his decisions have set forth make his simple disclaimer asserting impartiality inadequate.

Second, the Supreme Court has held that the Due Process Clause of the Fifth Amendment applies to all individuals present in the United States, "whether their presence here is lawful, unlawful, temporary, or permanent."[168] However, Attorney General Sessions disregarded this guarantee of due process through the certification process and by using that process to set precedent that threatens

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Bush Administration used the referral authority nine times in eight years. Pierce, *supra* note 159.

[160] Hausman, *supra* note 15 ("And although the immigration courts have long been plagued by due process problems—including the lack of any right to an appointed lawyer, even for kids—those courts have at least held out the promise of neutrality: a neutral immigration judge hears the case, and the losing party may appeal to the Board of Immigration Appeals. But Jeff Sessions is aggressively working to make these courts instruments of the Trump administration's immigration agenda.").

[161] Taylor, *supra* note 67, at 19 (describing the expectation for "impartial" adjudication in the American legal system).

[162] *See id.*

[163] Seung Min Kim & Josh Gerstein, *What Jeff Sessions Thinks About Immigration, Police and Terrorism*, POLITICO (Jan. 10, 2017), https://www.politico.com/story/2017/01/jeff-sessions-views-attorney-general-233383 [https://perma.cc/JRE6-GGZC] (noting that "Sessions has also long advocated for curbs to future legal immigration").

[164] A-B-, 27 I. & N. Dec. 316, 324–25 (A.G. 2018).

[165] *Id.*

[166] *Id.* at 325 (citing Stivers v. Pierce, 71 F.3d 732, 741 (9th Cir. 1995)).

[167] For example, Attorney General Sessions was one of the "fiercest opponents" of a bipartisan push for comprehensive immigration reform in 2013. Kim & Gerstein, *supra* note 163.

[168] Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (finding that a noncitizen held for longer than ninety days following a final order of removal violated the due process rights of the noncitizen, guaranteed to citizens and noncitizens alike).

the future due process rights of noncitizens.[169] In *Matter of S-O-G- & F-D-B-*, for example, Attorney General Sessions did not provide advance notice to the parties that he was reviewing the case or allow for briefing by the parties.[170] The Supreme Court has recognized meaningful notice and opportunity to be heard as an "elementary and fundamental requirement" of due process,[171] which applies in the immigration context as well.[172] Additionally, while many of Attorney General Sessions' decisions sought to improve the efficiency of the immigration process, it was often at the expense of noncitizens' due process rights. For example, in *Matter of E-F-H-L-*, Attorney General Sessions eliminated required hearings for applicants that provided them an opportunity to testify and present evidence of their eligibility before an IJ.[173] Due process, though, guarantees noncitizens the opportunity to both present evidence and testify on their own behalf before an IJ.[174] Therefore, while the immigration courts may move faster under Attorney General Sessions' decisions, they most definitely are not more fair.

Thus, though critics have long condemned the referral authority for its lack of procedural safeguards and transparency,[175] its use under the Trump Administration amplifies critics' concerns.[176] The Trump Administration's use of the referral authority differs from prior administrations, which used it to resolve questions regarding larger legal issues, to establish new standards for

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[169] *See* L-E-A-, 27 I. & N. Dec. 494, 494 (A.G. 2018); Negusie, 27 I. & N. Dec. 481, 481 (A.G. 2018); M-S-, 27 I. & N. Dec. 476, 476 (A.G. 2018); A-B-, 27 I. & N. Dec. 316, 317 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271, 281 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226, 226 (A.G. 2018).

[170] S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 462 (2018) ("I granted review of these two cases to provide guidance on the appropriate standard by which immigration judges and the Board should evaluate such motions. Because the relevant regulation is clear, I concluded that additional briefing was unnecessary."). Generally, "there is no entitlement to briefing when a matter is certified for Attorney General review." Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1253 (2011) (citation omitted).

[171] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950).

[172] Chike v. INS, 948 F.2d 961, 962 (5th Cir. 1991) (holding that a noncitizen's due process rights were violated when the Board failed to provide the noncitizen the briefing schedule with sufficient time to prepare a brief). *But see* 8 C.F.R. §§ 1003.1(d)(2), (e)(4) (2008) (permitting the Board authority, in certain instances, for summary dismissal of any appeal or portion of appeal or affirmance without providing an opinion).

[173] *See E-F-H-L-*, 27 I. & N. Dec. at 226.

[174] Oshodi v. Holder, 729 F.3d 883, 889–93 (9th Cir. 2013) (en banc) (finding that an IJ who denied a noncitizen relief based only on an adverse credibility finding and denying the noncitizen a chance to testify violated the noncitizen's Fifth Amendment due process right to a full and fair hearing).

[175] *See generally* Trice, *supra* note 8 (describing the lack of due process and transparency inherent in the use of the referral authority and calling for the creation of procedural safeguards by regulation).

[176] *See* Hausman, *supra* note 15 (describing some issues with the use of the referral authority under Attorney General Sessions).

future cases, or directly handle delicate issues of foreign policy.[177] Instead, in the span of about three years, Attorneys General have used the referral authority to upset years of well-established precedent in a multitude of ways, and with little transparency or regard for the due process rights of noncitizens.[178] As such, this area of immigration law needs reform.

IV. STATUTORY AMENDMENT LIMITING ATTORNEY GENERAL ADJUDICATORY POWER

Thus far this Note has provided a background and overview of the referral authority, considered its use throughout previous administrations, and surveyed its use under the Trump Administration. A comparison between the referral authority's use in previous administrations and its use under the Trump Administration demonstrates many of the concerns long recognized by commentators. Below, I suggest curing the due process and transparency concerns by statutorily amending the INA. I also explain why this is the most practical option among the foregoing suggestions for reforming Attorney General use of the referral authority.

A. *Eliminating the Referral Authority by a Statutory Amendment to the INA*

The INA, by its terms, does not allow for the due process and transparency necessary in an adjudicatory context, whether for citizens or noncitizens. Therefore, this section suggests statutorily amending the INA to mandate Attorney General rulemaking exclusively through informal notice-and-comment rulemaking. This suggestion is in contrast to the current method, which allows an Attorney General to either review under the referral authority or exercise notice-and-comment rulemaking.[179] Either form, rulemaking by

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[177] *See* Gonzales & Glen, *supra* note 6, at 861 (describing the practices of past attorneys general in regard to foreign policy).

[178] *See generally* Castillo-Perez, 27 I. & N. Dec. 495 (A.G. 2018); L-E-A-, 27 I. & N. Dec. 494 (A.G. 2018); Negusie, 27 I. & N. Dec. 481 (A.G. 2018); M-S-, 27 I. & N. Dec. 476 (A.G. 2018); M-G-G-, 27 I. & N. Dec. 469 (A.G. 2018); S-O-G- & F-D-B-, 27 I. & N. Dec. 462 (A.G. 2018); L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); A-B-, 27 I. & N. Dec. 316 (A.G. 2018); Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018).

[179] *See* 8 U.S.C. § 1103(g) (2009) (describing Attorney General review authority and regulatory reform powers, including notice and comment); Trice, *supra* note 8, at 1795 ("Of course, it is well settled that agencies have broad discretion to choose between rulemaking and adjudication as a means of establishing agency policy and articulating binding legal rules."). On the other hand, some agencies do not have broad discretion to choose the type of rulemaking for a particular issue, but rather are limited by a statutory mandate directing the agency to use a particular type of rulemaking. *See* Michigan v. EPA, 268 F.3d 1075, 1088–89 (D.C. Cir. 2001) (holding that the EPA was statutorily mandated to determine

adjudication (by use of the referral authority) or informal rulemaking through notice-and-comment procedure, allows an Attorney General to set policy or address ambiguities within the INA.[180] When Attorneys General have used notice-and-comment rulemaking in immigration law, they have typically used it for issues that, in their opinion, warrant cautious consideration and deserve the participation of all parties interested.[181] These issues often relate to decisions that would significantly impact well-established precedent or involve a particularly sensitive topic.[182]

Generally, under notice-and-comment rulemaking, a Notice of Proposed Rulemaking must be published by the agency in the Federal Register, which allows the public the opportunity to be a part of the process and provide comments.[183] Following the comment period, the agency is required to consider the public's comments and then publish the final version of the rule within thirty days before the rule takes effect.[184] As a practical benefit, the process builds a record and allows an Attorney General to make a more informed decision, which is beneficial for judicial review.[185] Moreover, many consider the notice-and-comment process to be more transparent than agency adjudication.[186] Adjudications necessarily involve less communication with the public and "share less information overall."[187] Indeed, "any process that is seen as a means

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certain jurisdictional issues under the Clean Air Act through notice-and-comment rulemaking, rather than adjudicating on a case-by-case basis).

[180] *See* Administrative Procedure Act, 5 U.S.C. §§ 553–54 (2012) (providing the procedure for rulemaking). Aside from rulemaking and adjudication, there are a variety of other informal means available—for example, guidance, letters, advisory opinions, negotiations, or statements. *See generally* Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179 (2005) (surveying the means by which an agency can create substantive regulations).

[181] *See* Gonzales & Glen, *supra* note 6, at 911 (noting that notice-and-comment rulemaking is usually thoroughly conducted in order to create a record for judicial review).

[182] *Id.* ("Most importantly, the government has a strong interest in maintaining its current procedures for referral and review."). For example, when deciding the asylum eligibility of domestic violence victims, the decision in *Matter of R-A-* was vacated by Attorney General Janet Reno. R-A-, 22 I. & N. Dec. 906, 906 (B.I.A. 1999), *vacated* (A.G. 2001). Instead, she deemed the complex and sensitive issue of gender-based claims appropriate for notice-and-comment rulemaking. *See* Immigration and Naturalization Service: Asylum and Withholding Definitions, 65 Fed. Reg. 76,588–98 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

[183] 5 U.S.C. § 553(b)–(c) (2012).

[184] 5 U.S.C. § 553(d); Trice, *supra* note 8, at 1795 (noting that notice-and-comment rulemaking allows for, and is enriched by, "experts, advocates, and affected individuals [making] their views and arguments known").

[185] Gonzales & Glen, *supra* note 6, at 911.

[186] *See* Jill E. Family, *Administrative Law through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 579 (2012) (stating the risk of reliance on "case-by-case adjudication[]" as a form of rulemaking because "[a]gency decisionmaking might become less transparent").

[187] *Id.*

of evading more transparent and participatory methods clearly presents concerns about the legitimacy and acceptability of [his decisions]."[188]

This is not to say that formal notice-and-comment rulemaking is without its own shortcomings. Admittedly, rulemaking by adjudication is more efficient.[189] The notice-and-comment process requires far more time and resources than a single, independent adjudication by an Attorney General, which allows an Attorney General to decide upon more issues more quickly.[190] As described above, the process outlined by the Administrative Procedure Act (APA) involves soliciting public comments, reviewing those comments, and setting aside a certain amount of time to consider those comments, which leaves many agencies reluctant to turn to "full-scale notice-and-comment rulemaking."[191] Furthermore, notice-and-comment rulemaking does not guarantee neutrality.[192] In fact, there is no requirement that an Attorney General genuinely consider comments—the APA only requires an Attorney General to adhere to the process.[193] However, even the minimal requirement of process under notice-and-comment rulemaking offers more of a safeguard for due process and transparency than adjudication by an Attorney General using the referral authority, which requires no process.[194]

In the context of immigration law, even marginal improvements to due process and transparency are warranted given the adjudicatory nature of asylum and withholding proceedings. As a nation, the expectation that adjudications

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[188] Trice, *supra* note 8, at 1796.

[189] *See* Gonzales & Glen, *supra* note 6, at 898 (describing the flexibility of the administrative process); Trice, *supra* note 8, at 1770 ("With retroactive effect and without cumbersome notice-and-comment process required for rulemaking, Attorney General review can be a particularly efficient means of reversing course and implementing a new administration's policies."). *But cf. id.* at 1770 ("However, it is this very efficiency—the Attorney General's ability to swiftly and unilaterally reverse precedent and impose new legal standards—that makes the certification power a potentially dangerous tool and counsels in favor of strong procedural safeguards.").

[190] *See* Trice, *supra* note 8, at 1770 (arguing that Attorney General review under use of the referral authority is more flexible and efficient than the process of notice-and-comment rulemaking).

[191] Gonzales & Glen, *supra* note 6, at 911 (citing E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992)).

[192] *See* 5 U.S.C. § 553 (2012) (requiring only that procedure be followed and the standards of review for the procedure, not that a substantive decision be reached); Gonzales & Glen, *supra* note 6, at 911–12 (arguing that the "due process and optics-based concerns" regarding an Attorney General's use of referral authority would not meaningfully be cured by instead using notice-and-comment rulemaking).

[193] *See* Gonzales & Glen, *supra* note 6, at 911 (describing how the notice-and-comment process is typically used only when "the proposed rule has 'jelled' into something fairly close to its final form").

[194] *See* Trice, *supra* note 8, at 1797 (noting the lack of procedural guidelines for the use of the referral authority and suggesting that the Attorney General "promulgate binding regulations that lay out in detail the procedures that must be followed when a case is certified for review").

will be fair and impartial is deep-seated and constitutionally guaranteed.[195] Therefore, statutorily amending the INA to no longer allow an Attorney General to adjudicate individual immigration cases through use of the referral authority is necessary to ensure that due process and transparency is a part of the rulemaking process.

1. *Possible Approaches for Amending the INA*

Statutorily amending the INA is no small feat, but it has been done before. For example, in 1996, Congress amended the INA under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and, among other changes, broadened the definition of "refugee" to include individuals who must endure an abortion and sterilization after violating their country's one-child policy.[196] This pro-immigrant area of the amendment offered Chinese nationals fleeing coercive family planning measures in China access to asylum.[197] Still, Congress approved the amendment as part of an omnibus appropriations bill following bipartisan negotiations and alongside other more restrictive immigration measures, such as increased border patrol and increased penalties for illegal immigration.[198] This history demonstrates that amending the INA in the way this Note suggests will not be simple, and, to an extent, will require the cooperation of both parties as well as cooperation across political branches.

Though not simple, an amendment to the INA could be successful even under the Trump Administration. There are at least two methods through which an amendment to the INA could be enacted into law. First, if President Trump wins a second term in 2020, and if there is at least a two-thirds majority of

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[195] *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (holding that the Due Process Clause of the Fifth Amendment requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner); Jeffrey S. Chase, *The Need for an Independent Immigration Court*, OPINIONS/ANALYSIS IMMIGR. L. (Aug. 17, 2017), https://www.jeffreyschase.com/blog/2017/8/17/the-need-for-an-independent-immigration-court [https://perma.cc/FV7W-8FZT] ("It is a cornerstone of our justice system that judges not only be impartial, but that they also avoid the appearance of impartiality.").

[196] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009–689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)). In addition to expanding the definition of "refugee," the Act also amended other aspects of the INA such as expanding certain definitions relating to criminal terms, altering procedural aspects, and allowing for increased security along the border with Mexico. *Id.* § 601–05.

[197] *See id.* § 601.

[198] *Id.* § 601–05. Notably, the bill passed through the House of Representatives and Senate shortly after a Republican majority took control following the 1994 midterm elections and President Bill Clinton signed into law the "Illegal Immigrant Reform and Immigrant Responsibility Act of 1996" on September 30, 1996. *See* Adam Clymer, *The 1994 Elections: Congress the Overview; G.O.P. Celebrates Its Sweep to Power; Clinton Vows to Find Common Ground*, N.Y. TIMES (Nov. 10, 1994), https://www.nytimes.com/1994/11/10/us/1994-elections-congress-overview-gop-celebrates-its-sweep-power-clinton-vows.html [https://perma.cc/HP9Z-HPMU].

Congress that would approve of the amendment, it could still pass.[199] If a bill including the amendment passed in both houses, a two-thirds vote from members in both the House and Senate would also override a presidential veto.[200] On the other hand, an amendment might follow the method Congress used in 1996 to pass the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA): bipartisanship and compromise.[201] Both sides of the political spectrum recognize the need for immigration law reform.[202] Indeed, President Trump spoke of the need for bipartisan efforts in this area of the law in his State of the Union address on February 5, 2019.[203] As with the IIRIRA in 1996, bipartisan efforts would be necessary to pass any type of immigration reform in the current divided Congress.[204] For most bipartisan efforts, including IIRIRA, there would likely need to be other compromises in order to secure a statutory amendment terminating the use of Attorney General referral authority.[205] Though specific compromises will depend on what is important to each side and what is actually put on the negotiating table.

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[199] At the time of this writing, the House is controlled by a Democratic majority following the 2018 midterm elections. Jonathan Martin & Alexander Burns, *Democrats Capture Control of House; G.O.P. Holds Senate*, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/midterm-elections-results.html [https://perma.cc/K8G4-43LN].

[200] *See* ELIZABETH RYBICKI, CONG. RESEARCH SERV., RS22654, VETO OVERRIDE PROCEDURE IN THE HOUSE AND SENATE 1 (2015) ("A vetoed bill can become law if two-thirds of the Members voting in each chamber agree, by recorded vote, a quorum being present, to repass the bill and thereby override the veto of the President.").

[201] *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009–689 (codified as amended at 8 U.S.C. § 1101(a)(42) (2006)).

[202] *See* Felicia Sonmez et al., *Trump Uses State of the Union to Defiantly Defend His Immigration Agenda, Announce Date of Next Summit with North Korea's Kim*, WASH. POST (Feb. 5, 2019), https://www.washingtonpost.com/powerpost/trumps-2019-state-of-the-union-address/2019/02/05/d2dd57f4-28a4-11e9-b2fc-721718903bfc_story.html?noredirect=on&utm_term=.5835c414fa73 [https://perma.cc/9PJP-94AB].

[203] Admittedly, President Trump's focus on immigration reform is largely his perceived need for funding to build a border wall. *Id.* ("President Trump called for more bipartisan cooperation in his State of the Union address Tuesday night as he stood before a Congress bitterly divided over his demand for border-wall funding that resulted in a 35-day partial government shutdown.").

[204] Robert Bach, *The Progress of Immigration Reform*, 21 DEF. ALIEN 7, 16 (1998) ("The implications for many communities in the United States, and especially for their countries of origin, led to a legislative correction last fall that drew widespread bipartisan support.").

[205] Alongside the provisions that opened asylum to Chinese nationals were provisions "cracking down" on illegal immigration. *See* Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. MIGRATION & HUM. SECURITY 192, 192 (2018) (noting that President Clinton referred to IIRIRA as "cracking down" on illegal immigration).

2. *The Implications of Amending the INA*

Though there will be a variety of benefits from the proposed statutory amendment—specifically, preserved due process rights and increased transparency—there will also inevitability be certain drawbacks. First, by doing away with Attorney General referral authority, this will not just limit an Attorney General's potential abuse of the authority, but also a future Attorney General's ability to swiftly correct any past abuses.[206] For instance, Attorney General Mukasey, two weeks before leaving office, restricted a noncitizen's ability to allege ineffective assistance of counsel during removal proceedings.[207] However, shortly after taking office the same year, Attorney General Holder used the referral authority to vacate Attorney General Mukasey's decision.[208] Though the referral authority is a quick means to reverse decisions not in line with an incoming administration, its overall efficiency is not that clear from this example; if Attorney General Mukasey had been required to set policy through notice-and-comment rulemaking, he would not have been able to issue an arguably cursory decision just two weeks prior to leaving office.[209] It follows, then, that Attorney General Holder would not have needed to use the referral authority to vacate Attorney General Mukasey's decision. Instead, Attorney General Mukasey could have used notice-and-comment rulemaking from the start, soliciting and considering public opinion, and Attorney General Holder could have followed the same approach after taking office.

As what might be considered another drawback, an Attorney General no longer would be able to use the referral authority to issue expedient policy over issues of national security. However, it is important to consider at what point in the process an Attorney General uses the referral authority—that is, when decisions are before the Board after a noncitizen or the government appeals an IJ decision.[210] It is also important to consider that an Attorney General rarely uses the referral authority as a means to issue national security policy.[211] Instead, national security issues are often addressed before the appellate stage

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[206] *See* Compean, 25 I. & N. Dec. 1, 2 (A.G. 2009). Not only did Attorney General Holder vacate the decision of previous Attorney General Mukasey, but he reconsidered the case through notice-and-comment rulemaking after determining that the legal framework at issue would benefit from public consideration. *Id.*

[207] *See* Compean et al., 24 I. & N. Dec. 710, 710 (A.G. 2009).

[208] *See id.* at 712.

[209] At least one scholar has referred to this type of hasty decision as "Midnight Agency Adjudication," a practice of an Attorney General "who refers a controversial issue to himself and renders a decision upending agency precedent on his way out the door." Taylor, *supra* note 67, at 20.

[210] *See* 8 C.F.R. § 1003.1(h)(1) (2018) (delineating who may refer cases before the Board to the Attorney General).

[211] As former Attorney General Gonzales noted, most cases were referred to or by an Attorney General to resolve questions regarding larger legal issues, to establish new standards for future cases, or directly handle delicate issues of foreign policy. Gonzales & Glen, *supra* note 6, at 861.

and alongside other agencies and sometimes with direct input from the executive branch.[212] For example, President Trump, the DHS, and the DOJ all recently collaborated to set national policy security.[213] President Trump set forth specific policies, including prioritizing noncitizens for removal, but specifically those who "pose a risk to public safety or national security."[214] The U.S. Citizenship and Immigration Services (USCIS), an agency within DHS that is the first to encounter noncitizens crossing the border, then sent a Policy Memorandum to implement the President's directive.[215] This example demonstrates that the setting of national security policy is generally more collaborative and occurs before a noncitizen reaches the point in removal proceedings that an Attorney General could intervene through the use of referral authority. Moreover, aside from the referral authority, the Attorney General can still set policy through informal means of rulemaking—including, guidance, policy memorandums, or statements.[216]

Therefore, even though there are certain drawbacks to eliminating the referral authority, the drawbacks are minimal and not outweighed by the risks of allowing an Attorney General to continue setting policy in this manner. Under Attorney General referral authority, serious due process concerns arise, which threatens transparency within the adjudication process. Because there are alternative means available for an Attorney General to set immigration policy—specifically, notice-and-comment rulemaking—an Attorney General should be limited to this form of rulemaking to ensure fairness throughout the immigration adjudication process.

B. *Issues with Other Foregoing Suggestions for Reforming the Referral Authority*

Above, I provided an argument for prohibiting an Attorney General from using the referral authority. Indeed, Congress should statutorily amend the INA to limit the Attorney General to notice-and-comment rulemaking. This approach, of course, is not the only possible option. Below, I consider other suggested approaches to reforming the Attorneys General use of the referral

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[212] *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0050.1, UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCES OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2018) (detailing executive agency involvement).

[213] *See id.*; Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (focusing on "[e]nsur[ing] the public safety of the American people in communities across the United States as well as to ensure that [the] Nation's immigration laws are faithfully executed").

[214] *Id.* § 5.

[215] U.S. CITIZENSHIP & IMMIGR. SERVS., *supra note* 212.

[216] While these methods may also carry the potential for hasty decisions that do not involve public opinion, they benefit by affecting an entire class rather than individuals on a case-by-case basis that presents the due process and transparency concerns discussed. *See* Morriss et al., *supra* note 180, at 185–210 (detailing the different means of rulemaking by agency).

authority and explain why relegating an Attorney General to notice-and-comment rulemaking is the preferred solution.

First, the Supreme Court serves as an important check on immigration law and thus, a check on any Attorney General referral authority decisions. If, for example, an adverse decision from an immigration judge is appealed to the Board,[217] a Board decision deemed a final agency action can be appealed to a court of appeals, and following a grant for a petition of certiorari, Supreme Court review is possible.[218] The Supreme Court can review any Board or Attorney General decision; all noncitizens have a right to judicial review in some form following an order of removal, based on the weight of the interests at stake.[219] While the Court has not taken up the issue of Attorney General referral authority itself, it has considered decisions promulgated under the referral authority and Attorney General discretion under other provisions.[220] Courts, however, have "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[221] With this strong deference to the executive branch, the actual check the Court would place on the Attorney General seems limited.

Even if a case does not get reviewed by the Court or the Court shows strong deference, the federal circuit courts of appeals also place an imperfect check on the decisions of the Board and Attorneys General.[222] Decisions by Attorneys General appealed to the circuit courts have in fact been rejected as failing the *Chevron* test.[223] For example, in *Matter of Silva-Trevino* Attorney General Mukasey instituted a new test for moral turpitude upending a century old immigration law precedent.[224] However, courts never uniformly accepted the

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[217] 8 C.F.R. § 1003.3 (2002).

[218] 8 U.S.C. §§ 1252(a)(1), (b) (2005); Amy L. Moore, *Stringent Yet Flexible: Circuit Courts' Use of the Substantial Evidence Test in Asylum Cases*, 18 TEX. TECH ADMIN. L.J. 225, 231–33 (2017) (detailing the adjudicatory process for appeals).

[219] 8 U.S.C. § 1252(a) (2005); *see* Bridges v. Wixon, 326 U.S. 135, 147 (1945) (highlighting that "deportation may result in the loss 'of all that makes life worth living'" (citation omitted)).

[220] *See* Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) (finding that an Attorney General has authority under 8 U.S.C. § 1231(a)(6) to detain a noncitizen "for as long as they are determined to be either a flight risk or a danger to the Nation").

[221] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889)). The holding in *Trump v. Hawaii* provides a more recent example, where the Court showed great deference to the executive branch under Section 1182(f) of the INA. Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).

[222] *See* 8 C.F.R. § 1252(a) (detailing the procedure for appeal to circuit courts).

[223] Gonzales & Glen, *supra* note 6, at 878; Holper, *supra* note 170, at 1243 (suggesting that courts should not apply *Chevron* deference to immigration adjudication decisions, but instead "apply *Skidmore* deference, a multifactor approach giving deference to the agency's interpretation based on the thoroughness, consistency, and validity of its position").

[224] Silva-Trevino, 24 I. & N. Dec. 687, 688 (A.G. 2008). The term "moral turpitude" is term of art in immigration law. Pursuant to 8 U.S.C. § 1227(a)(2)(A)(i), a crime of moral turpitude is one that a noncitizen was convicted of within five years and for which he could

new framework and in large part because of the role the circuit courts played.[225] Two circuit courts cautiously accepted the framework set forth in *Matter of Silva-Trevino*, but the majority found it to fail the *Chevron* test and ultimately rejected the framework.[226] However, the lack of uniformity also points to the shortcomings of this option for reform: while some courts may reject an Attorney General's decision, others may accept.

Another option for reform comes by administration change and the possible regulations that a new administration could implement or decisions it could reopen. Pursuant to the INA, the Attorney General is "statutorily charged" with the "administration and enforcement of the immigration laws" and therefore can create regulations to reform the adjudication process.[227] Furthermore, as evidenced by the Trump Administration, case certification serves as an opportunity to implement the administration's immigration policy which may involve undoing the policy of administrations prior.[228] This was also the case in *Matter of Silva-Trevino*, a decision by Attorney General Mukasey under the Bush Administration, which Attorney General Holder ultimately vacated under the Obama Administration.[229] Still, this option requires an interested executive administration which leaves this option fairly unpredictable.

Additionally, IJs and the Board remain formidable options for reform as an adjudicative body—even despite attempts to limit their authority. First, although their authority has indeed been limited as discussed above, they still retain much discretion in their decision-making.[230] Second, the often-suggested option is to separate IJs and the Board from the Attorney General's review to create a more independent adjudicatory process.[231] For instance, the National Association of Immigration judges, a union of IJs, has advocated "for the creation of an independent Article I immigration court."[232] This approach "would make the

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have been sentenced to confinement one year or longer. The statute does not define a crime of moral turpitude precisely, but generally the crime "must offend the most fundamental moral values of society, or as some would say, shock the public conscience." Hernandez-Gonzalez v. Holder, 778 F.3d 793, 801 (9th Cir. 2015).

[225] Gonzales & Glen, *supra* note 6, at 878.

[226] *Id.* Attorney General Holder later vacated the decision stating "the decisions of five courts of appeals rejecting the framework set out in Attorney General Mukasey's opinion—which have created disagreement among the circuits and disuniformity in the Board's application of immigration law—as well as intervening Supreme Court decisions that cast doubt on the continued validity of the opinion" required vacatur. *Id.*

[227] Gonzales & Glen, *supra* note 6, at 850; 8 U.S.C. § 1103(g) (2009).

[228] 8 C.F.R. § 1003.1(c) (2018).

[229] Silva-Trevino, 26 I. & N. Dec. 550, 550 (A.G. 2015).

[230] *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 3 n.8 (2018).

[231] *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 817 (2013) ("Due process demands impartiality and fairness. Independence can further these values, but the amount of independence necessary will depend upon the interest at issue and the extent of the decisionmaker's authority.").

[232] Chase, *supra* note 195.

immigration courts independent of the Department of Justice and immune from possible political pressure from the Attorney General."[233] Thus, this approach might better achieve impartiality from decision makers, or at least the appearance of impartiality.[234] However, this requires Congress to separate immigration adjudication from the DOJ and transfer it to an Article I Legislative Court.[235] As commentators have acknowledged, there seems to be little political initiative from Congress or the Attorney General to take this approach.[236]

Thus, reform through the courts or a change in presidential administration is uncertain, and despite any indirect checks on the referral authority, the Trump Administration demonstrates the potential for abuse that remains. As a result, the most effective way to prevent Attorney General abuse is through a statutory amendment to the INA.

V. CONCLUSION

While the referral authority offers an Attorney General a flexible means of rulemaking to implement executive policy, it has the potential for serious abuse. As used by an Attorney General, a political appointee, adjudication under the referral authority lacks neutrality, and thus threatens the due process rights of noncitizens. Its use under the Trump Administration has established this abuse. The uptick in the referral authority's use has been used to limit IJ and the Board's discretion and authority, while it has also further restricted the eligibility criteria for asylum and withholding of removal applicants. Many others have offered suggestions for reform, but only a statutory amendment relegating an Attorney General to notice-and-comment rulemaking, as opposed to adjudication, seems feasible. Therefore, in order to protect the interests of noncitizens and foster transparency in immigration law, the Attorney General should no longer be permitted to preside over individual immigration adjudications.

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[233] Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 21 (2013).

[234] *Id.* Judge Dana Leigh Marks, a former president of the National Association of Immigration Judges, said, "Not only is independence in decision making the hallmark of meaningful and effective review, it is also critical to the reality and perception of fair and impartial review." *Id.*

[235] *See id.*

[236] *Id.* at 48.