Referral, Remand, and Dialogue in Administrative Law

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I. INTRODUCTION

In *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, former U.S. Attorney General and now Dean Alberto Gonzales and current Office of Immigration Litigation attorney Patrick Glen provide a rich account of a longstanding, but little-used regulatory tool for immigration adjudication: the Attorney General's referral and review authority.[1] Under this referral authority, cases before the Board of Immigration Appeals ("BIA") can be referred to the Attorney General for decision in three circumstances: (1) the chair or a majority of the BIA refers the case to the Attorney General; (2) the Secretary of Homeland Security (or one of her designees) refers the case; or (3) the Attorney General self-refers by directing the BIA to transfer the case.[2] The Attorney General has discretion whether to accept the referral request. Any decision by the Attorney General

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1. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016). For ease of reference, the Response will refer to the Attorney General's referral and review authority as "referral authority."

2. 8 C.F.R. § 1003.1(h)(1) (2015).

on the merits has precedential and binding effect on all agency officials involved "in the administration of the immigration laws of the United States."[3]

To be sure, others have written at some length on the Attorney General's referral authority.[4] After all, the referral authority has been around since at least 1940 and, before that, the Secretary of Labor had plenary authority over such immigration decisions.[5] Ultimately, however, the Gonzales and Glen article deserves consideration as the foundational treatment of referral authority because the article painstakingly traces its history and use over the decades, demonstrating how it has been used by presidential administrations of both political parties to shape the direction of federal immigration law. The article's treatment of the referral authority is also enriched by the fact that one of the authors served as Attorney General—and exercised the referral authority—and the other presently works in the Justice Department's Office of Immigration Litigation.[6]

As Gonzales and Glen address at length, the Attorney General's referral authority is a novel and understudied regulatory tool that raises all sorts of

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3. *Id.* at § 1003.1(g). *Compare* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) (explaining that the BIA "is appointed by the Attorney General, serves at his pleasure, and operates under regulations" that include the referral authority), *with id.* at 269–70 (Jackson, J., dissenting) (explaining that the BIA "operates under [the Attorney General's] supervision and direction, and its every decision is subject to his unlimited review and revision").

4. *See, e.g.*, Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 640 n.89 (2012) ("This certification power, though sparingly used, is a powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent."); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 650 (1981) ("The Attorney General's ability to review Board decisions inappropriately injects a law enforcement official into a quasi-judicial appellate process, creates an unnecessary layer of review, compromises the appearance of independent Board decisionmaking, and undermines the Board's stature generally."); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1345 n.265 (1990) ("Referrals are rare, and in any event they are publicly known and visible, thus minimizing the risk of improper invasion of adjudicative neutrality."); Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 288 (2002) ("To critics, Attorney General review of BIA decisions violates the independence of the Board, and (especially when review is at the behest of the INS) breaches the separation of function between immigration enforcers at INS and the adjudicators at the Executive Office for Immigration Review."); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1767 (2010) ("Certification is almost always controversial, in part because the Attorney General has used the certification power to announce new rules and overturn longstanding precedent, but also because he often does so in 'a precipitous manner, without affording an adequate opportunity for parties and interested amici to provide full briefing of the serious issues involved.'" (citing Letter from Lee Gelernt et al., ACLU Immigrants' Right Project, to Att'y Gen. Michael Mukasey (Oct. 6, 2008), http://www.aclu.org/pdfs/immigrants/mukasey_letter.pdf)).

5. *See* Gonzales & Glen, *supra* note 1, at 848–50.

6. There is something to be said for law reviews publishing more administrative law scholarship that has been coauthored by lawyers who have worked in the bureaucratic trenches and who can shed light on the empirical realities of the modern administrative state. The *Iowa Law Review* should be commended for doing so here.

questions and concerns about agency adjudication.[7] These questions include: Is the referral power a valid exercise of executive branch policymaking? Should it be used to create national policy and in the process bypass more rigorous and public notice-and-comment rulemaking? Should it be allowed to affect the BIA's decisional independence (if any)? Does it impermissibly infringe on the procedural rights of the immigrants whose cases are referred to the Attorney General? These questions merit closer examination; Gonzales and Glen's article should spark important discussions aimed at answering them.

This Response, however, will approach the subject of their article from another angle: The Attorney General's referral authority presents federal courts with a powerful, yet previously overlooked tool to engage in a richer dialogue with the agency when remanding cases to the BIA. In particular, this dialogue-enhancing tool allows the court to exercise a more profound systemic effect on agency adjudication. Part II briefly sketches out the role of courts in reviewing agency adjudications and how the ordinary remand rule can strengthen the court–agency dialogue. Part III then situates the Attorney General's referral authority within the judicial toolbox for agency dialogue that I have developed in prior work.[8] The Response concludes by encouraging courts to develop additional dialogue-enhancing tools to escalate issues within the executive branch outside of this narrower context of immigration adjudication and the Attorney General's referral authority.

II. REMAND AND DIALOGUE

When a court concludes that an agency's decision is erroneous, the ordinary rule is to remand to the agency to consider the issue anew—as opposed to the court deciding the issue itself.[9] This administrative law doctrine has been around since at least the 1940s,[10] and the Supreme Court rearticulated the rule in the immigration adjudication context in a trilogy of cases in the 2000s.[11] Those cases reinforce that the "ordinary remand rule" applies to not only questions of fact, but also mixed questions of law and fact, policy judgments, and even certain questions of law.[12] This does not mean

7. *See* Gonzales & Glen, *supra* note 1, at 896–919.

8. Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

9. For more on the evolution of the ordinary remand rule, see generally *id.* at 1561–79.

10. *See* Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 95 (1943) (remanding to the agency because the "administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

11. Negusie v. Holder, 555 U.S. 511, 517 (2009); Gonzales v. Thomas, 547 U.S. 183, 185–86 (2006) (per curiam); Immigration & Naturalization Serv. v. Ventura, 537 U.S. 12, 16–17 (2002) (per curiam).

12. *See, e.g.*, *Negusie*, 555 U.S. at 520 (remanding question of statutory interpretation to the agency instead of providing an answer itself).

that courts must remand every erroneous agency decision. It is the "ordinary" rule subject to exceptions for "rare circumstances."[13] These rare circumstances include when there are minor errors as to subsidiary issues that do not affect the agency's ultimate decision or when the agency lacks authority to decide the issue.[14]

The federal courts of appeals handle thousands of petitions for review of immigration adjudications each year,[15] and in the last decade alone they have cited the Court's *Ventura* remand rule decision in nearly 1500 immigration decisions.[16] In prior work, I examined all of the published federal court of appeals decisions (over 400) that cite the immigration trilogy since the Court's 2002 rearticulation of the remand rule in *INS v. Ventura* through the end of 2012. Those cases reveal that most circuits, most of the time, follow the ordinary remand rule. Indeed, the overall compliance rate in the cases reviewed was over 80%, though there was much variance among circuits.[17] Some circuits were less faithful to this command, with the Fifth Circuit (67%) and the Ninth Circuit (68%) among the worst offenders.[18]

When courts refuse to follow the ordinary remand rule, they often express concerns that reflect the judiciary's traditional role as authoritative interpreter of the law and protector of individual rights and due process. Courts appear to refuse to remand certain issues when the remand would allow the agency to continue to delay or deny relief when it should not, and thus result in courts abdicating their constitutional authority to say what the law is and their duty to ensure that procedures are fair and rights are protected in the administrative process.[19] In one particularly colorful decision, Judge Sidney Thomas, writing for the Ninth Circuit en banc, compared the BIA's process to Tegwar: "The Exciting Game Without Any

13. *Id.* at 523 (quoting *Gonzales*, 547 U.S. at 186).

14. *See* Walker, *supra* note 8, at 1579. Another exception contemplated under the Administrative Procedure Act is when the governing statute provides that "the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(F) (2012); *see also* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 267–68 (2014) (exploring this exception in the tax context).

15. In 2014, for instance, the federal courts of appeals decided 2172 immigration petitions. John Guendelsberger, *Circuit Court Decisions for December 2014 and Calendar Year 2014 Totals*, IMMIGR. L. ADVISOR, Jan. 2015, at 1, 5.

16. This calculation is a conservative estimate based on citations to the Supreme Court's 2002 remand opinion in *Ventura*, 537 U.S. at 12. As of March 16, 2016, Westlaw KeyCite reports that *Ventura* has been cited in 1410 published and unpublished decisions by courts of appeals over the last ten years.

17. Walker, *supra* note 8, at 1582 tbl.1.

18. *Id.* With 154 published decisions in the sample of 342 cases, the Ninth Circuit's 68% compliance rate skews the overall compliance rate significantly, with eight of the twelve circuits having a compliance rate greater than 90%. *Id.*

19. For further review of these cases, see generally *id.* at 1585–90.

Rules."[20] Another Ninth Circuit decision compared the application of the remand rule in that case—where, in the court's opinion, "any remand in such circumstances would be extremely unfair to litigants, potentially triggering multiple determinations and repeated appeals"—to "a sort of Zeno's Paradox in which the arrow could never reach the target."[21]

Not all courts that express these concerns, however, refuse to remand. Instead, in the cases reviewed, some courts follow the ordinary remand rule, but also introduce certain administrative common law tools to engage in a dialogue with the agency on remand. In total, seven dialogue-enhancing tools emerged from the cases reviewed, and those tools are summarized in Table 1, below.[22]

Table 1: Judicial Toolbox for Agency Dialogue		
The Tool		**The Dialogue-Enhancing Effect**
1.	Notice of Agency Decision on Remand	Signals that court is interested in outcome and continued dialogue
2.	Panel Retention of Jurisdiction	Sends message that the panel itself is interested in continuing dialogue in the event the agency denies relief
3.	Time Limit on Remand	Communicates strong interest in continuing dialogue by speeding up that conversation
4.	Hypothetical Solutions	Not only facilitates dialogue on remand, but expressly starts the dialogue before remand
5.	Certification of an Issue for Remand	Suggests an agenda for remand, which helps frame dialogue in the event of subsequent judicial review
6.	Government Concessions at Oral Argument	Limits issues on remand and focuses court-agency dialogue
7.	Suggestion to Transfer to Different Administrative Judge	Attempts to change the primary agency speaker in the dialogue

For instance, in cases where courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuits require the agency to provide

20. Ramirez-Alejandre v. Ashcroft, 319 F.3d 365, 368 (9th Cir. 2003) (en banc) (quoting MARK HARRIS, BANG THE DRUM SLOWLY 8, 48, 60–64 (1st ed. 1956)). *But see id.* at 397 (Trott, J., dissenting) ("When we exceed our authority, separation and allocation of powers in a constitutional sense are clearly implicated.").

21. Avetova-Elisseva v. Immigration & Naturalization Serv., 213 F.3d 1192, 1198 n.9 (9th Cir. 2000); *accord* Hoxha v. Ashcroft, 319 F.3d 1179, 1185 n.7 (9th Cir. 2003) (not remanding because "constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a 'Zeno's Paradox' where final resolution would never be reached" (citing *Avetova-Elisseva*, 213 F.3d at 1198 n.9)); *see also* Christopher J. Walker, Response, *How To Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73, 83–85 (2013) (explaining how federal agencies can strategically utilize the ordinary remand rule).

22. This table reproduces part of Table 2 from Walker, *supra* note 8, at 1614 tbl.2. It excludes three tools that were not discovered in the cases reviewed but suggested by the author: (1) preliminary injunctive relief; (2) escalation of issue within the executive branch; and (3) escalation of issue to Congress. *See id.*

notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest (or order) that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Some circuits, moreover, obtain concessions from the government at argument to narrow the potential grounds for denial of relief on remand.[23]

The development of this toolbox for court–agency dialogue advances a number of important objectives for judicial review of agency adjudication (as well as agency action more generally).[24] First and foremost, unlike refusing to remand an issue—and thus substantively deciding the issue for the agency—these tools allow the court to remain part of the dialogue on remand while respecting congressional delegation and the executive branch's law-execution responsibility.[25]

Second, these tools can assist the court in addressing its concerns that an immigrant may get lost in the process on remand or that the relief may be unduly delayed or denied. As Professor Hammond observed, the tools can encourage swifter resolution of cases on remand to the agency—addressing one of the greatest concerns of the ordinary remand rule and agency decisionmaking more generally.[26] In particular, consider three of the tools uncovered in the immigration adjudication study: (1) requesting notice of the agency decision on remand so as to signal the court's interest in the outcome; (2) retaining jurisdiction over the matter on remand so that the case returns to the same judges who are already familiar with the case; and (3) placing a time limit on remand so as to expedite the process. These all signal to the agency that the reviewing court is interested in a continued dialogue and a timely (and proper) resolution of the case on remand.

Third, and perhaps more importantly, an enriched dialogue in a particular case can have systemic effects on agency decisionmaking. Consider another set of three tools uncovered in the study: (1) providing hypothetical

23. These dialogue-enhancing tools are explored in greater detail in Walker, *supra* note 8, at 1590–1600, as are the statutory and constitutional limits on dialogue-enhancing tools. *See id.* at 1601–07.

24. A colleague and I explore these implications in much greater detail elsewhere, in the context of the Tax Court's review of actions by the Internal Revenue Service ("IRS"). *See* Hoffer & Walker, *supra* note 14, at 268–95 (explaining how judicial adherence to the ordinary remand rule while utilizing dialogue-enhancing tools preserves proper separation of powers while promoting expertise, consistency, efficiency, and equity on the systemic level).

25. Emily Hammond similarly explored this court–agency dialogue in the rulemaking context. Emily Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1743–71 (2011) [hereinafter Hammond, *Deference and Dialogue*] (examining the dialogue on remand in a variety of agency rulemaking contexts). Professor Hammond also noted that this judicial toolbox for agency dialogue "extends beyond the immediate context . . . to other types of adjudications as well as rulemakings." Emily Hammond, Response, *Court-Agency Dialogue: Article III's Dual Nature and the Boundaries of Reviewability*, 82 GEO. WASH. L. REV. ARGUENDO 171, 177 (2014).

26. Hammond, *Deference and Dialogue*, *supra* note 25, at 1775.

solutions in the court's decision to remand; (2) certifying an issue or issues for remand; and (3) obtaining government concessions at oral argument (or in the briefing) to limit the open issues on remand. These tools not only help focus the dialogue on remand, but they also communicate to the agency specific—and oftentimes even systemic—problems identified by the reviewing court. Importantly, the tools allow the court to suggest potential solutions for the agency to implement beyond the particular case under review. The issuance of written, public judicial opinions allows this dialogue to extend beyond the immigration judge and BIA member(s) dealing with the particular case, communicating, for instance, to similarly situated immigrants and other immigration judges handling similar claims. Indeed, such a public dialogue can even reach the agency's principals in Congress and in the executive branch.[27]

In sum, by remanding yet utilizing these dialogue-enhancing tools, courts can contribute to a more properly functioning regulatory state where all three branches of government interact and influence agency action—not just in agency adjudication under judicial review, but in the agency's adjudication system as a whole. As Professor Hammond has remarked, "asking agencies to be equal partners in a dialogue enhances participation, deliberation, and legitimacy because . . . interested parties, Congress, and the courts can more easily understand and respond to their reasoning."[28]

III. REFERRAL AS A PART OF THE JUDICIAL TOOLBOX FOR AGENCY DIALOGUE

In prior work, I encouraged courts and scholars to build on this judicial toolbox for agency dialogue and suggested three additional tools: (1) ordering preliminary injunctive relief; (2) escalating the issue to Congress; and (3) escalating the issue within the executive branch.[29] The last tool is most relevant to the Attorney General's referral authority and is the focus of this Part.

With respect to escalating the issue within the executive branch, I suggested that courts should consider asking the government at oral argument to confirm in writing the agency's position on a particular issue as well as consider ordering supplemental briefing on a particular issue.[30] Both of these approaches force the government attorney to return to the agency to get clarification, which likely elevates the issue to higher levels within the agency. I also suggested that a court can escalate the issue within the executive

27. *See* Walker, *supra* note 8, at 1610–14 (providing examples).

28. Hammond, *Deference and Dialogue*, *supra* note 25, at 1780; *see* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 492 (2010) ("[R]equiring that agencies explain and justify their actions also arguably reinforces political controls by helping to ensure that Congress and the President are aware of what agencies are doing.").

29. Walker, *supra* note 8, at 1614 tbl.2.

30. *Id.* at 1610–11.

branch by the public message it sends in written opinions. I offered the following example on how this tool has been effective in the past:

> [I]n the early 2000s, a number of circuits in a number of different opinions expressed serious concerns about the quality, competence, and caseloads of immigration judges across the country. In August 2006, the Attorney General responded to these concerns and took a number of formal measures to address the problem, including implementation of annual performance reviews of immigration judges. In announcing these changes, the Attorney General expressly indicated that these changes were in response to "serious complaints coming from the Courts of Appeals, the press, and a host of other observers."[31]

The Attorney General's referral authority, however, is a more effective tool to escalate the issue on remand than merely complaining about the agency adjudication in judicial opinions. To be sure, as noted in the Introduction, the referral regulations only expressly provide for certain actors—the chair or a majority of the BIA, the Secretary of Homeland Security (or her designee), or the Attorney General herself—to refer a case for Attorney General review.[32] As Gonzales and Glen note, the regulations do not expressly provide for an immigrant to refer her case to the Attorney General,[33] and the same is certainly true of a reviewing court. But as Gonzales and Glen further argue, "there does not seem to be any necessary bar to [the immigrant] requesting that the Attorney General certify a case to himself for review."[34] Indeed, in at least one instance (in 1950) the Attorney General considered a referral made by an immigrant though his counsel.[35] And, as Gonzales and Glen document, third parties have also requested that the Attorney General self-refer matters.[36]

In other words, there is nothing in the regulatory framework that would prohibit a court from suggesting in its opinion that the Attorney General self-refer and review the case on remand rather than the BIA or immigration judge. In that sense, this judicial referral request is similar to Supreme Court Rule 19 that

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31. *Id.* at 1611 (footnotes omitted) (citing, inter alia, Nina Bernstein, *Immigration Judges Facing Performance Reviews*, N.Y. TIMES, (Aug. 10, 2006), http://www.nytimes.com/2006/08/10/washington/10immig.html (quoting then-Attorney General Alberto R. Gonzales)). It is perhaps no coincidence that the Attorney General who engaged in this dialogue with the circuit courts is one of the authors of this article.

32. 8 C.F.R. § 1003.1(h) (2015).

33. *See* Gonzales & Glen, *supra* note 1, at 853 n.72 (citing commentators who have made similar observations).

34. *Id.* at 853.

35. *Id.* at 853 n.73.

36. *Id.* at 853.

allows circuit courts to certify questions for the Supreme Court review[37]—a "certification process" that Justice Stevens has bemoaned "has all but disappeared in recent decades."[38] It also seems analogous to the longstanding practice of federal courts certifying state-law statutory interpretation questions to state supreme courts when they are questions of first impression.[39] Indeed, Kathryn Watts has already made this smart comparison between remanding questions of statutory interpretation to state courts and to agencies.[40] In both circumstances, the higher court has absolute discretion whether to accept the certification request.

Accordingly, when remanding a case to the agency, courts should consider including in their written opinion a request that the Attorney General self-refer the case as opposed to sending the case back to the BIA (or immigration judge). This dialogue-enhancing tool is quite similar to those that courts already use in recommending assignment of the case to a different immigration judge on remand[41] or in certifying certain issues for the agency to consider on remand.[42] To be sure, the court cannot order the Attorney General to accept the referral, as the referral regulations leave that ultimate decision to the Attorney General and in all events such order would exceed the reviewing court's authority under the Administrative Procedure Act and

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37. SUP. CT. R. 19 ("A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case.").

38. United States v. Seale, 558 U.S. 985, 985 (2009) (Stevens, J., respecting dismissal of the certified question); *see also* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000) (calling this little-used certification process "a dead letter").

39. *See, e.g.*, Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 385–86 (2000) ("Today, forty-five states, the District of Columbia and Puerto Rico allow their high courts to answer questions about their law posed by a court in another jurisdiction.").

40. *See* Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1025–47 (2007).

41. *See, e.g.*, Abulashvili v. Att'y Gen., 663 F.3d 197, 209 (3d Cir. 2011) ("[W]e strongly recommend that the agency refer the matter to a different IJ . . . ."); Tekle v. Mukasey, 533 F.3d 1044, 1056 (9th Cir. 2008) ("[W]e suggest that the BIA remand to a different IJ."); Morgan v. Mukasey, 529 F.3d 1202, 1211 (9th Cir. 2008) ("Given the [passionate and biased] involvement of the immigration judge in the case, it would be appropriate to assign it to a different immigration judge."); Mapouya v. Gonzales, 487 F.3d 396, 416 (6th Cir. 2007) ("We urge that, on remand, a different immigration judge be assigned to any further proceedings."); Shu Ling Ni v. Bd. of Immigration Appeals, 439 F.3d 177, 181 (2d Cir. 2006) ("[T[he ends of justice would be better served if, on remand, this case were assigned to a different IJ . . . ."); Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004) ("[W]e urge the service to refer the cases to different immigration judges."); Bace v. Ashcroft, 352 F.3d 1133, 1141 (7th Cir. 2003) ("[W]e urge the BIA to assign a different judge to the [petitioner's] case on remand.").

42. For examples of courts certifying issues for remand, see *Ayele v. Holder*, 564 F.3d 862, 872 (7th Cir. 2009); *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 172 (2d Cir. 2006) (per curiam); *Zhang v. Gonzales*, 408 F.3d 1239, 1249 (9th Cir. 2005); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 648 (8th Cir. 2004); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 663 (9th Cir. 2003).

Vermont Yankee.[43] Notwithstanding, because the Attorney General is a repeat player in federal court in a variety of legal contexts, the Attorney General—and the Justice Department more generally—will no doubt give serious attention to any self-referral request made by a federal court.

Judicial requests for Attorney General referral and review on remand further the objectives of the judicial toolbox for agency dialogue discussed in Part II. These requests maintain the proper separation of powers between the judicial and executive branches while helping the court protect the interest of the individual on remand, as well as allowing the court to have a more systemic effect on agency decisionmaking. In other words, the Attorney General maintains his statutory authority to decide the issue (or not). And if she decides the issue, the Attorney General resolves not just the particular case remanded but establishes binding policy on all agency officials involved "in the administration of the immigration laws of the United States."[44]

This last judicial objective—the ability to have a systemic effect on agency decisionmaking—is well served by judicial requests for Attorney General referral and review. And having a systemic effect is particularly important for immigration adjudication and in other agency adjudication contexts where less-sophisticated individuals navigate the agency process, oftentimes without legal representation. In those circumstances, it is much more likely that individuals will not seek judicial review of erroneous agency decisions—either because they lack the sophistication to navigate the judicial process or have otherwise procedurally defaulted meritorious claims in the administrative process. Only by remanding and forcing the agency to correct systemic errors can the court help these individuals who fail to seek judicial review.

Stephanie Hoffer and I have made a similar point in the context of judicial review of IRS adjudications:

> If inconsistent application of the law by the IRS is confined primarily to litigated cases and if the Tax Court itself is consistent in its application of the law, deviation from the APA default standard and scope of review may further the tax policy goal of consistency. Conversely, and more likely, if uneven success in litigation is indicative of a larger intra-agency problem with consistent application of the law (which might arise from sources such as a lack of adequate or clear written procedure in a particular area, high employee turnover, or uneven employee training), the Tax Court's

43. *See* Walker, *supra* note 8, at 1601–07 (discussing the limitations on dialogue-enhancing tools imposed by *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519 (1978), and the Administrative Procedure Act ("APA")); *see also* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'" (quoting *Vermont Yankee*, 435 U.S. at 549) (alteration in original)).

44. 8 C.F.R. § 1003.1(g) (2015).

> exceptionalist stance is of limited use in the furtherance of consistency. Only a fraction of innocent spouse claimants file appeals with the Tax Court. As a consequence, if a problem within the agency gives rise to disparate treatment of similarly situated taxpayers, it is probable that the court will address only a small fraction of this disparate treatment. The latter assumptions of more systemic inconsistencies at the IRS seem much more likely.[45]

In the immigration adjudication context, we have much more evidence to support the need for dialogue-enhancing tools to address systemic problems in agency adjudication. For instance, one recent study found that fewer than two in five immigrants in removal proceedings had legal representation,[46] and less than half of those represented actually had legal representation at all of their agency hearings.[47] That study also confirmed the common intuition that immigrants represented by counsel are more likely to prevail. Indeed, "detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts."[48] Perhaps even more important, the study found that, "[a]mong similarly situated respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief and five-and-a-half times greater that they obtained relief from removal."[49] Although these findings concern seeking relief before the agency, the numbers are likely similar regarding immigrants seeking judicial review of the agency's decision.

Likewise, another recent study found stark inconsistencies in outcomes among immigration judges and the failure of the BIA (and the federal courts) to correct those individual errors and systemic disparities.[50] Among other things, that study documents how some immigration judges are far more generous in allowing time for an immigrant to obtain legal counsel than others, and how unrepresented immigrants are less likely both to win before the agency and ultimately to seek further review. This study reinforces prior empirical work that has documented significant disparities in immigration

45. Hoffer & Walker, *supra* note 14, at 279–80 (footnote omitted).

46. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 7 (2015) ("By looking at individual removal cases decided on the merits, we find that only 37% of immigrants had counsel during our study period from 2007 to 2012.").

47. *Id.* at 8.

48. *Id.* at 9.

49. *Id.*

50. David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. (forthcoming 2016), http://ssrn.com/abstract=2568960.

adjudication—analogizing the broken immigration adjudication system to "refugee roulette."[51]

In other words, in the immigration adjudication context it is well documented that similarly situated immigrants are not necessarily treated similarly and that there are great disparities in outcomes that further agency and judicial review do not presently correct. And perhaps because many immigrants do not have legal representation, their otherwise meritorious claims of agency error are never appealed within the agency, much less in court. As Professor Hoffer and I have more fully explained elsewhere, remand and court–agency dialogue can help address these systemic problems by leading to improved consistency and quality of determinations not just in cases that eventually reach the courts but, more importantly, in the vast majority of cases that are never appealed.[52]

IV. CONCLUSION

Among the potential judicial tools for agency dialogue on remand, referral of cases to the Attorney General may be one of the most effective to address systemic errors in agency adjudication. After all, as Gonzales and Glen conclude, "Attorney General referral and review is a potent tool through which the executive branch can lawfully advance its immigration policy agenda. It provides both definitive resolution of legal issues and the opportunity to promulgate binding policy pronouncements on all executive branch immigration officials."[53] When a reviewing court refers a case to the Attorney General on remand, the court also escalates the issue within the executive branch such that the chief immigration administrator—the Attorney General—must decide whether to intervene and establish statutory interpretations, policies, or procedures that will bind the entire administration of federal immigration law.

The Attorney General's referral authority is thus a powerful tool in the judicial toolbox for agency dialogue, and one with which courts should begin to experiment to enhance their dialogue with the agency on remand. Moreover, Congress, agencies, and courts should look for ways to develop similar tools in other agency adjudication contexts in order to allow courts to have a more systemic effect on agency decisionmaking and a richer dialogue with agencies on remand. The scope and breadth of agency adjudication may

51. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007). To be sure, disparities in immigration adjudication have also been documented at the circuit-court level. *See, e.g.*, Christopher J. Walker, *Does the Legal Standard Matter? Empirical Answers to Justice Kennedy's Questions in* Nken v. Holder, 75 OHIO ST. L.J. FURTHERMORE 29 (2014) (reviewing Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014)).

52. Hoffer & Walker, *supra* note 14, at 268–95.

53. Gonzales & Glen, *supra* note 1, at 920.

be the biggest threat to liberty in the modern administrative state,[54] and courts play a vital role in protecting individuals subject to such agency processes. Gonzales and Glen identify an important tool—the Attorney General's referral and review authority—that courts should add to their toolbox for agency dialogue.

54. *See* Christopher J. Walker, *(Incrementally) Toward a More Libertarian Bureaucracy*, LIBR. L. & LIBERTY (Feb. 8, 2016), http://www.libertylawsite.org/liberty-forum/incrementally-toward-a-more-libertarian-bureaucracy (responding to Ilan Wurman, *A Modest Proposal for Reforming the Administrative State*, LIBR. L. & LIBERTY (Feb. 2, 2016), http://www.libertylawsite.org/liberty-forum/a-modest-proposal-for-reforming-the-administrative-state).