

# Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority

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*ABSTRACT: Prospects for comprehensive immigration reform look dim in light of past failures to enact legislation, such as the DREAM Act, and a continued period of divided government placing a skeptical Republican Congress in opposition to a sympathetic Democratic President. With legislative fixes for the United States' immigration system unlikely in the near future, the Obama Administration will continue to press its immigration agenda via executive order and enforcement memorandum. Such initiatives do provide real short-term benefits, but they are by nature temporary and lack the ability to provide any permanent status to their beneficiaries. Importantly, however, they are not the only tools that the executive branch wields if it is intent on implementing certain reforms even in the face of a divided Congress.*

*This Article focuses on a little used mechanism, Attorney General referral and review, which could play an efficacious role in the executive branch's development and implementation of its immigration policy. This procedure permits the Attorney General to adjudicate individual immigration cases and thereby provide a definitive interpretation of law or institute new policy-based prescriptions to guide immigration officials in the future. Although used only four times by the Obama Administration, and sparingly in prior administrations, the history of its invocation establishes it as a powerful tool through which the executive branch can assert its prerogatives in the immigration field.*

*Structurally, this Article presents both a historical overview of the referral authority and a doctrinal assessment of its prior use by modern Attorneys*

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The authors thank Samantha Simpson, J.D. Candidate 2016, Belmont University College of Law, for her valuable assistance. The views and opinions expressed in this Article are the authors' own and do not represent those of the U.S. government or Department of Justice.

*General. It also refutes common, but fundamentally misplaced, criticisms of the authority, including the purported lack of due process attendant upon referral. Finally, it concludes by considering certain proposals for reform that could make the authority a more robust avenue for executive branch immigration policy.*

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## I. INTRODUCTION

On June 15, 2012, Janet Napolitano, then Secretary of the Department of Homeland Security, announced the Deferred Action for Childhood Arrivals (“DACA”) initiative with a memorandum to component directors.<sup>1</sup> Napolitano’s memo set out criteria for the exercise of the Department’s prosecutorial discretion in instituting or terminating removal proceedings, focusing on the alien’s age, period of residence in the United States, educational attainment or status, and lack of disqualifying criminal convictions.<sup>2</sup> Justifying this focus, Napolitano wrote:

Our Nation’s immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.<sup>3</sup>

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1. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter Napolitano Memorandum], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. See generally Elisabeth M.W. Trefonas, *Deferred Action for Childhood Arrivals*, WYO. LAW., June 2014, at 32.

2. See Napolitano Memorandum, *supra* note 1, at 1.

3. *Id.* at 2.

Despite this strong sentiment, however, the policy was recognized for what it was—temporary, subject to rescission, and the source of no substantive rights to the beneficiaries: “This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”<sup>4</sup>

In his remarks that afternoon, President Obama framed the promulgation of the DACA policy as an issue of executive action in response to legislative inaction, specifically the defeat of the DREAM Act, which would have provided more permanent benefits to approximately the same class of undocumented aliens eligible for relief under DACA.<sup>5</sup> The President also placed the new initiative in the context of prior administrative measures to focus its enforcement discretion, such as the so-called Morton Memo, which outlined the enforcement and prosecutorial priorities for Immigration and Customs Enforcement.<sup>6</sup> As the President noted in regard to these prior initiatives: “We focused and used discretion about whom to prosecute, focusing on criminals who endanger our communities rather than students who are earning their education. And today, deportation of criminals is up 80 percent. We’ve improved on that discretion carefully and thoughtfully. Well, today, [with DACA] we’re improving it again.”<sup>7</sup> But the President also echoed Secretary Napolitano in presenting DACA as a temporary measure, simply an exercise of prosecutorial discretion in the absence of more comprehensive congressional action.<sup>8</sup>

Many people welcomed DACA, not least the demographic of young, undocumented aliens the action was meant to benefit.<sup>9</sup> Prominent immigration scholars, with a caveat regarding the precedent for unilateral executive action being set by the administration,<sup>10</sup> defended the Obama Administration’s use of executive authority to implement DACA and to

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4. *Id.* at 3.

5. Barack Obama, President of the U.S., Remarks by the President on Immigration (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>; see also Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 L. & SOC. INQUIRY 666, 675–76 (2014).

6. See Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to all field office directors, all special agents in charge, and all chief counsel (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Obama, *supra* note 5.

7. Obama, *supra* note 5.

8. *Id.*

9. See, e.g., Nati Carrera, *Immigrants Wary of Deferred Action for Childhood Arrivals Memo*, INDEP. VOTER NETWORK (Aug. 31, 2012), <http://ivn.us/2012/08/31/immigrants-wary-of-deferred-action-for-childhood-arrivals-memo>.

10. See Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 309 (2013) (“[W]e must urge the Administration to focus on legislative solutions, and to avoid establishing a precedent for unilateralism that will be subject to abuse in future administrations.”).

otherwise focus on prosecutorial discretion initiatives in advancing its enforcement priorities.<sup>11</sup>

But the new policy was not without its critics. Kris Kobach argued that there was no prosecutorial discretion to decline to deport an alien unlawfully present in the United States.<sup>12</sup> Michael McConnell placed the DACA initiative in the context of other instances where the Obama Administration acted by executive fiat and ignored its duty to “take Care that the Laws be faithfully executed,”<sup>13</sup> a position also advanced by Professors Robert Delahunty and John Yoo in the *Texas Law Review*.<sup>14</sup> Zachary Price wrote: “However attractive it might be as a matter of policy, the DACA program appears to violate the proper respect for congressional primacy in lawmaking that should guide executive action, even when substantial exercises of prosecutorial discretion are inevitable.”<sup>15</sup> There were even congressional threats to defund the program.<sup>16</sup>

Most recently, on November 20, 2014, President Obama announced his plans for immigration reform through executive action.<sup>17</sup> Specifically, President Obama plans to provide “additional resources for our law enforcement personnel” at the borders, facilitate the process for “high-skilled immigrants . . . to stay and contribute to our economy,” and to “take steps to deal responsibly” with current undocumented aliens.<sup>18</sup> Secretary Jeh Johnson also issued a memorandum to expand “certain parameters of DACA and [provide] guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities.”<sup>19</sup> The scope of DACA will now be extended to “all otherwise eligible immigrants who entered the United States by the requisite

11. See, e.g., David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012).

12. Kris W. Kobach, Opinion, *The ‘DREAM’ Order Isn’t Legal*, N.Y. POST (June 22, 2012, 4:00 AM), <http://nypost.com/2012/06/22/the-dream-order-isnt-legal>.

13. Michael W. McConnell, Commentary, *Michael McConnell: Obama Suspends the Law*, WALL STREET J., (July 8, 2013, 7:28 PM), <http://www.wsj.com/articles/SB10001424127887323823004578591503509555268>.

14. See generally Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013).

15. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 761 (2014).

16. See, e.g., Pete Kasperowicz, *House Votes to Defund Obama’s ‘Administrative Amnesty’ for Immigrants*, HILL, (June 6, 2013, 2:45 PM), <http://thehill.com/blogs/floor-action/house/303869-house-votes-to-defund-obamas-administrative-amnesty-for-immigrants>.

17. Barack Obama, President of the U.S., Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

18. *Id.*

19. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 3 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

adjusted entry date before the age of sixteen.”<sup>20</sup> Additionally, the extension period of DACA is expanded to three-year increments from two-year increments, and “the eligibility cut-off date by which a DACA applicant must have been in the United States” is now January 1, 2010.<sup>21</sup> Secretary Johnson also directed “USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis to” certain individuals.<sup>22</sup> To be considered for deferred action under this new process, individuals must have a child “who is a U.S. citizen or lawful permanent resident”; “have continuously [lived] in the United States since before January 1, 2010”; have been “physically present in the United States on [November 20, 2014]”; and on the date the individual applies “for consideration of deferred action”; “have no lawful status [as of November 20, 2014]”; not be “an enforcement priority”; and “present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.”<sup>23</sup> The Obama Administration’s focus on discretionary initiatives, such as DACA and the policies restated in the Morton Memo, to advance its immigration policy is a reflection of the current impasse over comprehensive immigration reform.<sup>24</sup> These policies have granted a measure of relief to those that fall within the purview of the eligibility criteria, but they have not represented the best possible avenue for reform, which would be a statutory solution.<sup>25</sup> Additionally, the very nature of the flexibility embodied in prosecutorial discretion initiatives “makes it controversial and vulnerable to political challenges,” as the congressional attempts to defund DACA demonstrate.<sup>26</sup>

Importantly, however, despite the current Administration’s focus on such tools, executive policy pronouncements such as DACA do not exhaust the executive branch’s scope of action in advancing its conception of immigration policy in the face of a recalcitrant Congress. An additional tool, used only twice by the Obama Administration, is the authority of the Attorney General to adjudicate immigration cases under the Immigration and Nationality Act.<sup>27</sup> This authority can be exercised on the Attorney General’s own motion, or through the referral of cases to him by the Board of Immigration Appeals (“Board” or “BIA”) or the Secretary of the Department of Homeland

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20. *Id.*

21. *See id.* at 3–4.

22. *Id.* at 4.

23. *Id.*

24. *See generally* Zatz & Rodriguez, *supra* note 5.

25. *See, e.g.,* Trefonas, *supra* note 1, at 36 (“Although DACA was created as a sweeping program to grant discretionary relief from removal for certain young people, and though it has been a boon for many who otherwise had no immigration options, DACA has not developed into a reliable program or created a path to long-term stability for the hundreds of thousands of undocumented youth in this country.”).

26. Zatz & Rodriguez, *supra* note 5, at 684.

27. *See* 8 C.F.R. § 1003.1(h) (2015).

Security.<sup>28</sup> As has been recognized: “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.”<sup>29</sup> This authority, which gives the Attorney General the ability “to assert control over the BIA and effect profound changes in legal doctrine,”<sup>30</sup> while providing “the Department of Justice final say in adjudicated matters of immigration policy,”<sup>31</sup> represents an additional avenue for the advancement of executive branch immigration policy that is already firmly embodied in practice and regulations. It thus may be a less controversial method by which to advance immigration policy than the executive-decree style thus far utilized by the Obama Administration. But that is not to say that the referral authority is not without its critics, who have, especially in the waning days of the Bush Administration, 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.<sup>32</sup>

The focus of this Article is on how the referral authority has been and could be used to advance the executive branch’s immigration policy. Part II reviews the history and background of the Attorney General’s authority to oversee and enforce the United States’ immigration laws, with special reference to the referral authority and how that authority has changed over time. This Part also presents an overview of the mechanics of the referral authority, which seem to be little understood by the courts and private bar. Part III examines the practicalities of the referral authority—how and under what circumstances it has been used, what types of cases have predominated, and how policy has been advanced by invocation of this mechanism. Finally, Part IV addresses how the referral authority could serve the broader purpose of advancing immigration policy, especially in administrations that confront a Congress that is reluctant or unwilling to act. This Part will further present rebuttals to common, but misplaced, criticisms of the authority, while proposing some ideas for reform that could make this mechanism a more robust tool for executive branch action.

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28. See *id.* § 1003.1(h)(1)(i)–(iii).

29. Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 *FORDHAM L. REV.* 619, 640 n.89 (2012).

30. Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 *N.Y.U. L. REV.* 1766, 1771 (2010).

31. 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).

32. See, e.g., Memorandum of Law of *Amici Curiae* Am. Immigration Lawyers Assoc. et al. in Support of Reconsideration at 7–11, Silva-Trevino, 24 *I. & N. Dec.* 687 (Attorney Gen. 2008) (No. A013 014 303), <http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Silva-Trevino-Amicus.pdf>.

## II. THE ATTORNEY GENERAL'S REFERRAL AUTHORITY: BACKGROUND, HISTORY, CONTEXT, AND MECHANICS

Contemporary reviews and criticisms of the referral authority have operated in a historical vacuum, ignoring the history of the authority itself and, largely, the development of the structure of immigration authority, especially of the circumscribed authority of the Board vis-à-vis the Attorney General. This is unfortunate, as this history is important. It establishes the Board as the Attorney General's delegate, a fact founded in the pre-1940 status of the Board of Review as a clearly subsidiary and advisory decision-maker in the Department of Labor, a concept carried forward with the Board of Immigration Appeals' 1940 placement within the Department of Justice.<sup>33</sup> This history also makes clear that the referral authority has existed in some form or another since the very creation of the Board as an adjudicatory delegate of the Attorney General.<sup>34</sup> Finally, a review of Board and Attorney General practices over the 75 years of this relationship establishes a clear and unbroken line of practice regarding how the Attorney General makes decisions. Accordingly, Subpart A reviews the history of the Board of Immigration Appeals and its relation to the various Heads of Department in those agencies where it has been placed, the Departments of Labor and Justice. Subpart B then turns to the history of the referral authority itself, as it has undergone several changes since being announced as part of the 1940 departmental reorganization of immigration functions. Finally, Subpart C provides an overview of the mechanics and procedures utilized by the Attorney General in exercising the referral authority.

### A. THE HISTORY AND AUTHORITY OF THE BOARD OF IMMIGRATION APPEALS

Immigration functions were initially seated within the Department of Commerce and Labor, under the Bureau of Immigration and Naturalization.<sup>35</sup> When the Department of Labor was established as its own independent agency, the Bureau was moved there and split into two entities—the Bureau of Immigration and the Bureau of Naturalization.<sup>36</sup> From 1913 through 1921, “decisions in immigration cases were made by employees of the Bureau of Immigration in the form of memoranda presented for signature to the Commissioner-General of Immigration and the Secretary of Labor, without opportunity for oral argument.”<sup>37</sup>

Following the First World War, however, U.S. immigration law changed dramatically with the institution of the national origin system, which restricted

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33. See *infra* Part II.A.

34. See *infra* Part II.B.

35. See A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 306 (George T. Kurian et al. eds., 1998).

36. *Id.*

37. Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 33 (1977).



legal routes of immigration and led to a significant increase in illegal immigration.<sup>38</sup> The increase in illegal immigration carried over into a substantial increase of administrative appeals.<sup>39</sup> Accordingly, in 1921, the Board of Review was established to assist the Commissioner and Secretary in the discharge of their immigration-related functions, and to hold oral argument and handle certain other review matters.<sup>40</sup> The Board was not, however, authorized to make final decisions, but only to recommend outcomes to the Commissioner and Secretary.<sup>41</sup> It was also open to criticism for combining both enforcement and judicial functions, and for being, at least in part, responsible to an enforcement official, the Commissioner.<sup>42</sup>

On June 10, 1933, the two extant Bureaus concerned with immigration matters were consolidated into a single entity titled the Immigration and Naturalization Service (“INS”).<sup>43</sup> The Board of Review became the Commissioner’s Board of Review, although the final orders were still signed by the Secretary of Labor.<sup>44</sup> Additionally, “in 1939, the Board was freed from all its non-quasi-judicial functions and made responsible only to the Secretary of Labor, who still made the final decisions.”<sup>45</sup>

The government underwent another significant restructuring as war broke out in Europe in the late 1930s. As part of this reorganization, immigration functions were transferred “from the Department of Labor to the Department of Justice.”<sup>46</sup> It was at this point “that the Board of Immigration Appeals was created by regulation of the Attorney General as a separate entity in the Department of Justice, responsible directly to the Attorney General and completely independent of the [Immigration and Naturalization] Service.”<sup>47</sup>

#### B. *THE ATTORNEY GENERAL’S REFERRAL AUTHORITY: A HISTORY*

Since the Board’s creation in 1940 it has acted as the Attorney General’s delegate without enjoying any independent statutory existence. It was “not even mentioned in the 119 page [Immigration and Nationality] Act of

38. A HISTORICAL GUIDE TO THE U.S. GOVERNMENT, *supra* note 35, at 306–07.

39. *See id.* at 307 (“Rigorous enforcement of immigration law at the ports of entry also swelled appeals under [the new system].”).

40. *Id.*; Roberts, *supra* note 37, at 33.

41. *See* Roberts, *supra* note 37, at 33–34.

42. *Id.*

43. Exec. Order No. 6166, § 14 (June 10, 1933); *see also* A HISTORICAL GUIDE TO THE U.S. GOVERNMENT, *supra* note 35, at 307.

44. Roberts, *supra* note 37, at 34.

45. *Id.*

46. Reorganization Plan No. V of 1940, 5 Fed. Reg. 2223 (June 15, 1940); *see also* Patrick J. Glen, *Judulang v. Holder and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 7 (2012).

47. Roberts, *supra* note 37, at 34.

1952.”<sup>48</sup> 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.<sup>49</sup> The Board has authority to act only to the extent that the Attorney General, by regulation, so provides.<sup>50</sup> Despite acting as the Attorney General’s delegate, the Board has the ability to exercise independent judgment,<sup>51</sup> and its decisions are its own and not imputable to the Attorney General.<sup>52</sup> Moreover, the Attorney General may not attempt to influence or dictate the decisions of the Board.<sup>53</sup>

However, the referral authority permits the Attorney General to exercise his power directly rather than through his delegate.<sup>54</sup> This authority was embodied in Attorney General Order No. 3888, which created the Board.<sup>55</sup> With slight modification, this authority was promulgated in the regulations issued in 1940, which provided that

In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19(c) of the Immigration Act

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48. Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 *FORDHAM L. REV.* 145, 155 (1958).

49. See 8 U.S.C. § 1103(a), (g) (2012).

50. See 8 C.F.R. § 1003.1(d)(1) (2015) (“The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it.”); Delegation of Powers and Definition of Duties, 5 *Fed. Reg.* 2454, 2454 (July 1, 1940) (stating that “the Board of Review of the Immigration and Naturalization Service shall have authority to exercise the powers of the Attorney General” in certain delineated cases).

51. See 8 C.F.R. § 1003.1(d)(1)(ii) (“Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.”).

52. See, e.g., *Tefel v. Reno*, 972 F. Supp. 608, 613 n.1 (S.D. Fla. 1997) (“[T]he decision of the BIA is not factually, nor legally, the decision of the Attorney General.”).

53. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (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. And if the word ‘discretion’ means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.”).

54. See, e.g., *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 . . .”).

55. Delegation of Powers and Definition of Duties, 5 *Fed. Reg.* at 2455. The “Special Assistant in Charge” referred to the Special Assistant to the Attorney General in charge of overseeing the INS. *Id.* at 2454.

of 1917, as amended, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision.<sup>56</sup>

The regulations also mandated that if the Attorney General reversed the decision of the Board or ordered suspension of deportation, he "will state in writing his conclusions and the reasons for his decision."<sup>57</sup> The regulation was amended in 1947,<sup>58</sup> eliminating the substantive criteria for referral embodied in the earlier form of the regulation and focusing on the question of *who* could refer cases, but no rationale was provided for this shift.<sup>59</sup>

Subsequent amendments to the regulation focused on how the INS could request referral and who within INS was given that authority. In 1952, for instance, a new subsection (iii) was added to the regulation, which provided that the Board shall refer cases that "[t]he Assistant Commissioner, Inspections and Examinations Division requests be referred to the Attorney General for review."<sup>60</sup> This amendment was important because it eliminated the prior requirement under 8 C.F.R. § 90.12(c) that the Board had to "agree" with the request of the Commissioner before it would refer a case to the Attorney General for review.<sup>61</sup> In 1955, the authority to refer cases on behalf of INS was provided to the Commissioner and the Assistant Commissioner, Examinations Division,<sup>62</sup> whereas by 1958 that authority had been granted to the Commissioner and any "assistant commissioner."<sup>63</sup> By

56. 8 C.F.R. § 90.12 (1940); *see also* *Bridges v. Wixon*, 326 U.S. 135, 139 n.3 (1945).

57. 8 C.F.R. § 90.12. In 1945, the requirement that the Attorney General state in writing his conclusions and reasons for decision was limited to reversal of the Board, with the reference to a grant of suspension of deportation removed from the regulation. *See* Departmental Organization and Authority; Miscellaneous Amendments, 10 Fed. Reg. 8096, 8096 (June 23, 1945) (to be codified at 8 § C.F.R. 90.12 (1945)).

58. *See* Appeals from Orders Issued by Commissioner of Immigration and Naturalization; Miscellaneous Amendments to Chapter, 12 Fed. Reg. 4781, 4782 (July 14, 1947) (to be codified at 8 § C.F.R. 90.12 (1947)).

59. *See, e.g., id.* at 4785. ("The requirements of section 4 of the Administrative Procedure Act relatives to notice of proposed rulemaking and delayed effective date are inapplicable for the reason that the rule prescribed by this order pertains to organization, particularly to delegation of authority, and to procedure." (citation omitted)).

60. Immigration and Nationality Regulations, 17 Fed. Reg. 11,469, 11,475 (Dec. 17, 1952) (to be codified at 8 C.F.R. § 6.1(h)(1)(iii) (1952)).

61. *See* Rosenfield, *supra* note 48, at 173 n.201. *Compare* 8 C.F.R. § 90.12(c) (1947) ("The Commissioner requests be referred to the Attorney General by the Board and it agrees."), *with* 8 C.F.R. § 6.1(h)(iii) (1952) ("The Assistant Commissioner, Inspections and Examinations Division requests be referred to the Attorney General for review.").

62. 8 C.F.R. § 6.1(h)(1)(iii) (1957); *see* 20 Fed. Reg. 3818, 3818 (June 1, 1955); Granting referral power to Commissioner and Assistant Commissioner, Granting referral power to Commissioner or Assistant Commissioner, 19 Fed. Reg. 8053, 8055 (Dec. 8, 1954).

63. *See* Immigration and Naturalization Service, Department of Justice, 22 Fed. Reg. 9765, 9772 (Dec. 6, 1957) (to be codified at 8 C.F.R. § 6.1(h)(1)(iii) (1958)).

1964, only the Commissioner was granted authority to refer cases to the Attorney General for review.<sup>64</sup>

In 2002, the Department of Homeland Security (“DHS”) was established,<sup>65</sup> and certain immigration enforcement functions were transferred to it from the Department of Justice.<sup>66</sup> The regulation, as it currently stands, provides that:

The Board shall refer to the Attorney General for review of its decision all cases that:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.<sup>67</sup>

The regulation also provides for a decision in writing by the Attorney General, and its transmittal to the Board or Secretary for further service as provided by the regulations.<sup>68</sup>

### C. THE MECHANICS OF ATTORNEY GENERAL REFERRAL AND REVIEW

The path to a decision by the Attorney General begins with the referral of a decision for review. The current regulations do not contain any criteria or standard that cases must meet in order to be referred for review, unlike prior versions of the regulation,<sup>69</sup> but instead focus exclusively on *who* may refer cases for review.<sup>70</sup> As written, the regulations contemplate only three main actors that can institute this process—the Attorney General himself, the Board (acting through its Chairman or a majority of its members), and the

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64. See Immigration and Naturalization Service, Department of Justice; Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9117–18 (Nov. 26, 1958) (to be codified at 8 C.F.R. § 3.1(h)(1)(iii) (1964)) (regarding the redesignation in section 3).

65. Homeland Security Act of 2002, Pub. L. No. 107–296, § 101(a), 116 Stat. 2135, 2142 (codified as amended at 6 U.S.C. 111 (2012)).

66. See Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9831–32 (Feb. 28, 2003).

67. 8 C.F.R. § 1003.1(h)(1) (2015).

68. *Id.* § 1003.1(h)(2).

69. Compare 8 C.F.R. § 90.12 (1940) (noting substantive criteria to govern referral process), with 8 C.F.R. § 1003.1(h)(1) (2015) (focusing solely on which officials or bodies may refer cases).

70. 8 C.F.R. § 1003.1(h)(1) (2015); see also Taylor, *supra* note 31, at 484 n.35 (“The regulation does not specify any substantive criteria for referral. Rather, it delineates those who have authority to invoke this mechanism of policy control.”).

Secretary of DHS, although other possible DHS officials are contemplated so long as the Attorney General concurs in their designation.<sup>71</sup>

Commentators have noted that an alien cannot himself refer a case to the Attorney General for review,<sup>72</sup> but there does not seem to be any necessary bar to his requesting that the Attorney General certify a case to himself for review.<sup>73</sup> Moreover, an alien may request that the Board refer a case to the Attorney General consistent with the regulation, but such a request is not likely to be granted.<sup>74</sup> It is also possible for third parties to request Attorney General self-referral. For example, Attorney General self-referral has been requested by third parties in the wake of the Board's decision in *Matter of A-T*.<sup>75</sup>

If a case is referred to the Attorney General for review, the decision of the Board becomes non-final and the alien's removal is effectively stayed pending further proceedings.<sup>76</sup> There is no provision in the regulations that mandates notice to the alien when the Attorney General has referred or accepted a case for review,<sup>77</sup> nor do the regulations contain any provision for how the Attorney General should consider the case upon review—nothing about briefing, procedure, or argument.<sup>78</sup> Private counsel thus does not

71. 8 C.F.R. § 1003.1(h)(1)(i)–(iii); *see also* D-J-, 23 I. & N. Dec. 572, 573 (Attorney Gen. 2003) (noting referral of a case by the DHS Under Secretary for Border and Transportation Security).

72. *See* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 318 (1956) (noting, under former 8 C.F.R. 6.1(h), that the Board's decisions "will not be reviewed [by the Attorney General] . . . at the request of the alien."); Allan van Gestel et al., Note, *Immigration—Exclusion and Deportation, Proceedings and Review, Under the McCarran-Walter Act of 1952*, 41 B.U. L. REV. 207, 212 (1961) ("There does not seem to be any provision in the regulations for the alien himself to appeal to the Attorney General.").

73. *See, e.g.*, C-, 4 I. & N. Dec. 130, 133 (Attorney Gen. 1950) (noting, in a case of Attorney General review, that "[t]he alien, through counsel, . . . filed a petition with the Attorney General requesting the relief denied him by the [INS] and by the Board of Immigration Appeals.").

74. *See, e.g.*, Pierre, 14 I. & N. Dec. 467, 471 (B.I.A. 1973) (noting, but denying, request of alien's counsel to refer case to Attorney General); Garcia-Castillo, 10 I. & N. Dec. 516, 518 (B.I.A. 1964) (denying request); E-, 6 I. & N. Dec. 388, 391 (B.I.A. 1954) (same).

75. *See* Letter from Members of Cong. to Michael Mukasey, U.S. Attorney Gen. (Apr. 29, 2008), [http://archives.foreignaffairs.house.gov/press\\_display.asp?sub\\_id=117](http://archives.foreignaffairs.house.gov/press_display.asp?sub_id=117); Letter from Physicians for Human Rights to Michael B. Mukasey, U.S. Attorney Gen. (Mar. 6, 2008), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_AT\\_physicians\\_for\\_human\\_rights\\_letter\\_to\\_AG\\_2008.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_AT_physicians_for_human_rights_letter_to_AG_2008.pdf); Press Release, Rep. Lofgren & Rep. Conyers, Reps. Lofgren and Conyers Call on Attorney General to Review Female Genital Mutilation Ruling (Jan. 30, 2008), [https://lofgren.house.gov/news/document\\_single.aspx?DocumentID=365533](https://lofgren.house.gov/news/document_single.aspx?DocumentID=365533); Letter from Barry M. Kamins, President, N.Y.C. Bar, to Michael B. Mukasey, U.S. Attorney Gen. (Jan. 4, 2008), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_AT\\_Bar\\_Association\\_NY.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_AT_Bar_Association_NY.pdf); *see also* Bah v. Mukasey, 529 F.3d 99, 110 n.14 (2d Cir. 2008) (noting requests by politicians and nongovernmental organizations for Attorney General referral of the Board's decision).

76. *See* Ren v. Gonzales, 440 F.3d 446, 448 (7th Cir. 2006); E-L-H-, 23 I. & N. Dec. 700, 702 (Attorney Gen. 2004).

77. *See* van Gestel et al., *supra* note 72, at 212 ("[T]he alien is not advised when the Board has been deprived of authority to decide the case by virtue of the fact that the Attorney General is reviewing it.").

78. *See Matter of Silva-Trevino*, Attorney Gen. Order No. 3034-2009 (Jan. 15, 2009) ("[T]here is no entitlement to briefing when a matter is certified for Attorney General review.").

necessarily have a role to play during the review process, although participation can be determined on an ad hoc basis.<sup>79</sup>

The Attorney General himself is advised during the course of the proceedings by government attorneys. Initially, the General Counsel of the INS was given this role.<sup>80</sup> Prior practice seems more disparate, however, at least in the early decisions of the Attorney General. For instance, there is a memorandum to the Acting Attorney General from a “chief attorney” in an early report of an Attorney General decision, but no indication that this attorney was actually the INS General Counsel.<sup>81</sup> At least one Special Assistant to the Attorney General provided advice on a pending case, consistent with the provision of such advice contemplated by Attorney General Order No. 3888,<sup>82</sup> and the Office of the Solicitor General played a role in at least two cases.<sup>83</sup> Contemporary practice places the Office of Legal Counsel (“OLC”) in the role of advisor to the Attorney General on matters referred to him for review,<sup>84</sup> and it is OLC that is frequently designated as the filing place for briefs and other pleadings once a case has been referred for review.<sup>85</sup> The

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79. See, e.g., R-, 5 I. & N. Dec. 29, 46 (Attorney Gen. 1952) (“At his request respondent’s counsel was given a full opportunity to present his arguments and authorities to me in an informal conference on December 10, 1952. In addition a full hearing was held before me on December 17, 1952, in which counsel for the respondent and for the Immigration and Naturalization Service were heard in extensive oral argument.”).

80. 8 C.F.R. § 90.17(b) (1941).

81. See E-, 1 I. & N. Dec. 40, 44–46 (B.I.A. 1941) (memorandum of Bart W. Butler).

82. See C-, 1 I. & N. Dec. 631, 633 (B.I.A. 1943) (citing a memorandum by Alexander Holtzoff, Special Assistant to the Attorney General); see also Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454, 2454 (July 1, 1940) (establishing the position of Special Assistant in Charge and delineating responsibilities).

83. See S-, 1 I. & N. Dec. 476, 481–84 (Attorney Gen. 1943) (memorandum of Paul A. Freund, OSG); S-, 1 I. & N. Dec. 376, 383–84 (Attorney Gen. 1943) (memorandum of Oscar Cox). Paul Freund, who was then serving his second stint in the Solicitor General’s office during a leave from his professorship at Harvard Law School, is widely considered the most prominent mid-century constitutional law scholar and among the most prominent legal scholars of the 20th century. See, e.g., William J. Brennan, Jr. et al., *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 1, 1–18 (1992) (collecting tributes by William Brennan, Lewis Powell, and Archibald Cox, among others); see also Erwin N. Griswold, *Paul A. Freund*, 89 HARV. L. REV. 1657, 1657 (1976) (noting Freund’s war-time service in the Solicitor General’s office, during which he was on leave from Harvard Law School).

84. See 28 C.F.R. § 0.25(f) (2015) (explaining that the duties of the OLC include, “[w]hen requested, advising the Attorney General in connection with his review of decisions of the Board of Immigration Appeals and other organizational units of the Department”); see also 28 C.F.R. § 0.182 (2014) (“All orders prepared for the approval or signature of the Attorney General shall be submitted to the Office of Legal Counsel for approval as to form and legality and consistency with existing orders.”); 28 C.F.R. § 0.25(d) (same); Roberts, *supra* note 37, at 37 (“In the rare instances in which review by the Attorney General is sought while a case is still in the administrative stage, the Office of Legal Counsel participates.”).

85. See, e.g., Attorney Gen. Order No. 2380-2001 (designating OLC as the place for filing of briefs for Attorney General consideration of a referred case).

official compilation of OLC opinions has also been the place of publication for at least two decisions by the Attorney General in referred cases.<sup>86</sup>

When a case is referred for review, modern Attorneys General have taken a number of different approaches to the question of how to proceed, and there is no one normal, preferred, or required set of procedures to be observed:

1. A case is referred and accepted for review, and the Attorney General issues a briefing schedule.<sup>87</sup>
2. A case is referred and accepted for review, but no briefing schedule is issued.<sup>88</sup>
3. A case is referred and the order of acceptance for review issues simultaneously with the Attorney General's decision.<sup>89</sup>
4. A case is referred, the Board's decision is vacated, and the case is remanded for further proceedings in light of intervening developments or the need for further consideration of discrete issues.<sup>90</sup>
5. A case is referred and accepted for review, but that acceptance is later rescinded.<sup>91</sup>

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86. See *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. O.L.C. 1 (1989); *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1 (1988).

87. See, e.g., Attorney Gen. Order No. 2992-2008 (Aug. 7, 2008) (setting briefing schedule for parties and amicus and containing a list of issues to address in the course of briefing); Attorney Gen. Order No. 2991-2008 (Aug. 7, 2008) (same); Attorney Gen. Order No. 2990-2008 (Aug. 7, 2008) (same).

88. See, e.g., Attorney Gen. Order No. 2889-2007 (July 10, 2007) (referring case for review, noting stay of the Board's decision, but otherwise issuing no directive regarding further proceedings before the Attorney General).

89. See, e.g., *Compean*, 25 I. & N. Dec. 1 (Attorney Gen. 2009), *vacating* 24 I. & N. Dec. 710 (Attorney Gen. 2010); *R-A-*, 24 I. & N. Dec. 629 (Attorney Gen. 2008); *A-T-*, 24 I. & N. Dec. 617 (Attorney Gen. 2008); *Marroquin-Garcia*, 23 I. & N. Dec. 705 (Attorney Gen. 2005); *Luviano-Rodriguez*, 23 I. & N. Dec. 718 (Attorney Gen. 2005).

90. See, e.g., *Dorman*, 25 I. & N. Dec. 485 (Attorney Gen. 2011) (remanding to the Board so that it could "make such findings as may be necessary to determine whether and how the constitutionality of DOMA is presented in this case," with four specific issues for it to consider in the course of resolving the case on remand); *E-L-H-*, 23 I. & N. Dec. 700 (Attorney Gen. 2004) (granting review, vacating Board decision, and remanding for further consideration in light of an intervening decision by the Attorney General potentially affecting the outcome of the Board's decision); *N-J-B-*, 22 I. & N. Dec. 1057 (Attorney Gen. 1999) (remanding without deciding an issue based on the possibility that the alien could be eligible for relief based on an intervening statutory enactment).

91. See *Zhang v. Slattery*, 55 F.3d 732, 741 (2d Cir. 1995) (noting that the Attorney General "declined to resolve the evident conflict" that had led to referral "because it was 'apparent' to her that the resolution of the two cases presented did not 'require a determination that one or the other of these [two potentially conflicting] standards is lawful and binding.'" (quoting Attorney Gen. Order No. 1756-1993 (June 29, 1993))).

6. A case is referred to the Attorney General by the Board or DHS, but the Attorney General declines to accept the case for review.<sup>92</sup>

There are other possible permutations of the referral authority, especially if the Attorney General is engaging in self-referral. For instance, the Attorney General can refer a case to himself for purposes of designating the underlying Board decision as precedential.<sup>93</sup> But in the main, the outcome of referral is normally an Attorney General decision on the issues presented.

When the Attorney General accepts a case, his standard of review is *de novo*,<sup>94</sup> and his authority to render whatever decision seems correct and appropriate is not limited by what the agency has decided in the underlying proceedings under review.<sup>95</sup> This includes the *de novo* review of factual findings and the receipt of additional evidence not considered by the Board or the immigration judge.<sup>96</sup> Upon issuance, a decision by the Attorney General is binding on the government and parties, and precedential to the extent provided by the Attorney General.<sup>97</sup> Such decisions are also meant to overrule any prior Board precedent to the extent such precedents are inconsistent with the Attorney General's decision.<sup>98</sup> Although there is no specific provision for further proceedings before the Attorney General, a request for reconsideration will be entertained with its content likely governed by the statutory standard pertaining to the filing of such motions

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92. See, e.g., C-Y-Z-, 23 I. & N. Dec. 693 (Attorney Gen. 2004) (denying review in a case referred by the Commissioner of the INS).

93. See, e.g., Attorney Gen. Order No. 1895-1994 (June 19, 1994) (designating the Board decision in *Matter of Toboso Alfonso* as precedential); *Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

94. A-H-, 23 I. & N. Dec. 774, 779 n.4 (Attorney Gen. 2005).

95. See *Immigration & Naturalization Serv. v. Doherty*, 502 U.S. 314, 327 (1992) ("The Court of Appeals also took the view that since the BIA had granted the motion to reopen, the Attorney General was in some way limited in his authority to overturn that decision. But the BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes. He is the final administrative authority in construing the regulations, and in deciding questions under them. The mere fact that he disagrees with a conclusion of the BIA in construing or applying a regulation cannot support a conclusion that he abused his discretion." (citation omitted)); J-F-F-, 23 I. & N. Dec. 912, 913 (Attorney Gen. 2006) ("While Attorneys General have delegated their authority to the Board and Immigration Judges in the first instance, I retain the power to exercise full decisionmaking upon review."); *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 4 (1988) ("The regulations setting out [the Attorney General's] review authority do not expressly or by implication circumscribe the Attorney General's statutory decisionmaking authority."); cf. 8 U.S.C. § 1103(a)(1) (2012) ("[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.").

96. See, e.g., *Doherty*, 12 Op. O.L.C. at 4 (stating that the Attorney General has "full authority to receive additional evidence and to make *de novo* factual determinations.").

97. See 8 C.F.R. § 1003.1(g) (2015).

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



with the agency.<sup>99</sup> On petition for review before the courts of appeals, a decision by the Attorney General is entitled to deference consistent with the *Chevron* framework.<sup>100</sup>

### III. ATTORNEY GENERAL REVIEW IN PRACTICE

This Part moves away from the governing regulations and mechanics of the referral authority to examine the practical dimensions of that authority's exercise. It attempts to answer two main questions. First, how have prior Attorneys General exercised the referral authority, and second, what types of cases or classes of cases have predominated in the exercise of this authority? In concluding, this Part will also consider why the use of the authority has waned so significantly in the preceding five decades, after having been utilized with a much higher level of frequency in the 1940s and early 1950s.

#### A. HOW HAVE ATTORNEYS GENERAL UTILIZED THE REFERRAL AUTHORITY?

The use of the referral authority by various administrations has shifted significantly over time in both quantitative and qualitative terms. First, the referral authority has been used less and less over the course of successive administrations. Writing in 1958, Harry Rosenfield offered a statistical sampling of how the authority had been used between 1940 and 1956. He noted that in the first six volumes of the Official Reporter, there were notations that the Attorney General had reviewed 148 decisions, but that not all decisions were published and that a report by the Attorney General had indicated the review of 444 decisions between 1942 and 1956.<sup>101</sup> Even within this time span, however, there was a fairly disparate rate of review. Between 1942 and 1952, the Attorney General reviewed approximately 37 cases per year, whereas between 1953 and 1956, this pace dropped to approximately 8 cases per year.<sup>102</sup>

Beginning with Volume Eight of the Official Reporter, there is an even more significant drop in the frequency of Attorney General review, with that frequency heavily dependent on the administration in office. Attorney General William Rogers issued 10 decisions between 1958 and 1961, while

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99. See Attorney Gen. Order No. 3034-2009 (Jan. 15, 2009) (denying reconsideration of prior Attorney General decision in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008)); Compean, 25 I. & N. Dec. 1 (Attorney Gen. 2009), *vacating* 24 I. & N. Dec. 710 (Attorney Gen. 2009); see also 8 U.S.C. § 1229a(c)(6) (2012) (permitting the filing of one motion to reconsider, "within 30 days of the date of entry of a final administrative order of removal," that specifies "the errors of law or fact in the previous order").

100. Xian Tong Dong v. Holder, 696 F.3d 121, 124 (1st Cir. 2012); Miranda Alvarado v. Gonzales, 449 F.3d 915, 921-22 (9th Cir. 2006) ("Congress has generally delegated authority to the Attorney General to interpret immigration statutes and . . . a considered, precedential statutory interpretation adopted by the Attorney General or his delegatee, the BIA, is entitled to *Chevron* deference as an interpretation that has 'the force of law.'" (citation omitted)).

101. Rosenfield, *supra* note 48, at 158.

102. *Id.*

Attorney General Robert Kennedy issued 11 decisions between 1961 and 1964. Only 5 published decisions were issued throughout the remainder of the Johnson administration, with infrequent decisions occurring during the presidencies of Richard Nixon, Jimmy Carter, Ronald Reagan, and George H.W. Bush. During the latter half of the Clinton administration there was a slight uptick in both orders relating to immigration cases (14) and decisions issued (3). Attorneys General during the George W. Bush administration used the authority with significantly more frequency than any administration since that of John Kennedy, issuing 16 total decisions—9 by Attorney General John Ashcroft, 2 by Attorney General Alberto Gonzales, and 5 by Attorney General Michael Mukasey. During the Obama administration, the authority has only been exercised four times, twice to vacate a decision issued by Attorney General Mukasey, and once to remand a decision for further proceedings before the Board, without deciding any substantive issue. Thus, from a peak of 37 cases a year through 1952, the authority was exercised, on average, only twice per year during the Bush administration, and only 4 times during the 8 years of the Obama administration.<sup>103</sup>

Second, the 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. Rosenfield observed in 1958 that "[o]ften the Attorney General's action is a peremptory 'disapproved' or 'approved,' without any clue to the alien as to the 'why's' and 'wherefores.'"<sup>104</sup> Since the advent of the Official Report in 1940, at least 108 Attorney General decisions have been issued summarily. Of these, the Attorney General summarily approved the decision of the Board in 99 cases (91.67%), and summarily disapproved the decision in 9 cases (8.33%). The summary disposition of cases on review before the Attorney General effectively ended in 1955, however, as there is

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103. During the Bush Administration, Attorney General Ashcroft issued nine decisions. *See* A-H, 23 I. & N. Dec. 774 (Attorney Gen. 2005); Luviano-Rodriguez, 23 I. & N. Dec. 718 (Attorney Gen. 2005); Marroquin-Garcia, 23 I. & N. Dec. 705 (Attorney Gen. 2005); E-L-H-, 23 I. & N. Dec. 700 (Attorney Gen. 2004); R-A-, 23 I. & N. Dec. 694 (Attorney Gen. 2005); C-Y-Z-, 23 I. & N. Dec. 693 (Attorney Gen. 2004); D-J-, 23 I. & N. Dec. 572 (Attorney Gen. 2003); Jean, 23 I. & N. Dec. 373 (Attorney Gen. 2002); Y-L-, 23 I. & N. Dec. 270 (Attorney Gen. 2002). Attorney General Gonzales issued two decisions. *See* S-K-, 24 I. & N. Dec. 289 (Attorney Gen. 2007); J-F-F-, 23 I. & N. Dec. 912 (Attorney Gen. 2006). Attorney General Mukasey issued five decisions. *See* Compean, 24 I. & N. Dec. 710 (Attorney Gen. 2009); Silva-Trevino, 24 I. & N. Dec. 687 (Attorney Gen. 2008); R-A-, 24 I. & N. Dec. 629 (Attorney Gen. 2008); A-T-, 24 I. & N. Dec. 617 (Attorney Gen. 2008); J-S-, 24 I. & N. Dec. 520 (Attorney Gen. 2008). During the Obama Administration, Attorney General Holder issued three decisions. *See* Silva-Trevino, 26 I. & N. Dec. 550 (Attorney Gen. 2015); Dorman, 25 I. & N. Dec. 485 (Attorney Gen. 2011); Compean, 25 I. & N. Dec. 1 (Attorney Gen. 2009). Attorney General Lynch has recently referred a case to herself for decision and requested briefing on the relevant issues. *See* Chairez-Castrejon, 26 I. & N. Dec. 686 (Attorney Gen. 2015). A decision in that case is outstanding as of the publication of this Article.

104. Rosenfield, *supra* note 48, at 157 (footnotes omitted).

only one post-1955 summary disposition by the Attorney General—a summary approval by Attorney General Nicholas Katzenbach in 1966.<sup>105</sup>

Since the mid-1950s, the decisions of the Attorney General on review have not been summary, but rather have been independently reasoned decisions on the issues presented. This shift has coincided with the significant drop in the frequency of the Attorney General's exercise of his decision-making authority under the regulations, and the form of decision is also correlated, to a lesser extent, with the action taken by the Attorney General. Whereas a summary decision nearly always resulted in the approval of the Board decision under review, in only 29.63% of the cases where the Attorney General has issued a written, independently reasoned decision has the Board been affirmed, while it has been reversed or vacated in 70.37% of those cases. It is also worth noting, however, that in 64.47% of the cases where the Attorney General reversed the Board's decision, the result was contrary to the interests of the alien—the decision entailed an outright denial of relief, a finding of removability, or the institution of a new rule that would be unlikely to provide relief.<sup>106</sup>

The “who” of the referral has also shifted between 1940 and the present. Initially, the Board was the driver behind referrals to the Attorney General, while the INS was the impetus behind referral in just over a quarter of the cases through 1956.<sup>107</sup> When the INS obtained independent authority to refer cases to the Attorney General,<sup>108</sup> its pace of referrals increased slightly, but self-referrals at the direction of the Attorney General still lagged behind referrals by the Board and INS. Yet in the most recent 26 decisions reviewed by the Attorney General, only one has been referred by the Board, while 14 have been self-certified by the Attorney General and 11 have been referred by either the INS or DHS.

This drop in Board referrals tracks a general drop in the utilization of the referral authority, from its peak through the middle of the 1950s to the significantly less prominent usage of the authority in the contemporary era. There are several possible explanations for this shift in who is referring cases. The early versions of the referral regulation dictated referral when a Board

105. See *Hira*, 11 I. & N. Dec. 824 (B.I.A. 1965).

106. These statistics are based on a review of the 108 written decisions of the Attorney General, i.e., non-summary dispositions, in the *Immigration and Nationality Reporter*, through Attorney General Holder's decision in *Matter of Dorman*. In 32 of these decisions, the Attorney General upheld the decision of the Board, whereas the agency decision was reversed, remanded, or modified in the remaining 76 decisions. Out of the 76 decisions reversing Board decisions, the Attorney General's opinion effectively denied relief in 49 cases (64.47%), while effectively granted relief in only 27 cases (35.33%).

107. See *Rosenfield*, *supra* note 48, at 158 (noting 41 INS referrals out of 148 Attorney General decisions in the first six volumes of the *Reporter*).

108. See *id.* at 173 n.201 (noting amendment to the regulation that eliminated the requirement that the Board must agree with the Commissioner's request for referral before the case would be referred to the Attorney General for review).

member dissented, when a question of difficulty was posed, or in certain substantive cases, making it virtually mandatory that the Board refer cases to the Attorney General.<sup>109</sup> With these criteria superseded by a regulation that focuses only on who can refer cases, a large source of the early Board referrals has been abrogated. This is especially true with reference to the “question of difficulty” basis for referral, which predominated in referred cases through the 1950s. Immigration law has also developed significantly since 1940 and, especially, since the enactment in 1952 of the Immigration and Nationality Act, it is perhaps less important or less necessary for the Board to seek definitive guidance from the Attorney General through his review of the legal questions posed.

Whatever the reason, this brief review makes quite clear that the exercise of the referral authority has shifted quite dramatically from 1940 to 2015, along every possible metric of analysis—it is used less frequently at present than at any other time in the past, the nature of the decisions issued has increasingly tended towards non-summary and higher quality opinions, and the Board has largely been marginalized as a referring agent as the Attorney General and the enforcement agencies have been dominant in referring cases for review.

#### B. WHAT TYPES OF CASES HAVE DOMINATED THE REFERRAL PROCESS?

Attorney General review has never been cabined to certain classes of cases, and the first version of the referral regulation contemplated robust review not only of legal questions, but also of discretionary determinations, including specifically providing for review when the agency granted an alien suspension of deportation. Since the mid-1950s, however, cases have tended to focus on those 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.<sup>110</sup> Discretionary and fact-based determinations that are not susceptible to bright-line rulemaking have been disfavored vehicles for Attorney General review under prevailing practice.<sup>111</sup>

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109. See 8 C.F.R. § 90.12 (1940) (providing for referral where a dissent has been recorded and where the Board has ordered suspension of deportation, among other bases).

110. *Theodoropoulos v. Immigration & Naturalization Serv.*, 358 F.3d 162, 173–74 (2d Cir. 2004) (noting the policy-making aspect of referral and the many factors that may come into play in the Board’s determination of whether to refer a case to the Attorney General for review); see also Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 301 n.91 (“The Attorney General generally utilizes such review to resolve legal questions.”).

111. R-E-, 9 I. & N. Dec. 720, 741 (Attorney Gen. 1962) (“The only issue for decision which I find in this case is whether, on its particular record, the majority or the dissenters are correct in their assessment of the facts leading to the conclusion that the alien had satisfied the burden imposed upon him. This is not ordinarily an issue appropriate for reference to me under the pertinent regulations. The record is one upon which reasonable men can differ and have

What follows is a review of more contemporary decisions by Attorneys General that illustrates to what ends decisions have been referred, reviewed, and decided. This subsection is broken down into broad thematic groupings, dependent on the predominating aspect of how the authority was used: (1) the resolution of legal questions; (2) the setting of policy or the institution of a new decisional framework; (3) foreign-policy related decisions; and (4) remand for further consideration of specified issues or Attorney General inaction upon a request for review. These are not self-contained or mutually exclusive categories, and there is some obvious overlap in these groupings. Nonetheless, the thematic organization is illustrative of how Attorneys General have used the referral authority and thus provides a useful framework by which to conceive of the various ways in which that authority has been and could be exercised.

### 1. Resolution of Legal Questions

Despite the creation of the DHS and the transfer of primary responsibility for many enforcement functions to the Secretary of DHS, the “determination and ruling by the Attorney General with respect to all questions of law [is] controlling.”<sup>112</sup> The definitive resolution of questions of law arising under the provisions of the Immigration and Nationality Act has been one of the focal points of the exercise of the Attorney General’s review authority under the referral regulation.

#### *i. Eligibility Determinations for Asylum and Related Protection*

In *Matter of A-T*, the issue presented was whether an alien who had previously suffered female genital mutilation (“FGM”), and thus past persecution, was entitled to rely on the presumption of a well-founded fear and clear probability of persecution, or whether that presumption was rebutted by the fact of already having undergone FGM.<sup>113</sup> In an earlier decision, the Board had concluded that a well-founded fear of FGM could constitute a basis for granting asylum and withholding of removal.<sup>114</sup> In a

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differed. Further consideration of the question has established no general principle which could guide the disposition of other cases, or revealed any clear error on the part of the Board.”).

112. 8 U.S.C. § 1103(a)(1) (2012); *see also* Geoffrey Forney, *Material Misrepresentation—Labor Certification, Actual Minimum Requirements and Employer Sanctions*, 23 GEO. IMMIGR. L.J. 463, 480 (2009) (“Although authority to enforce and administer the *Immigration and Nationality Act* . . . has been transferred to the Secretary of Homeland Security under the *Homeland Security Act of 2002*, the Attorney General retains his authority to make controlling determinations with respect to legal questions arising under these laws.”).

113. *A-T*, 24 I. & N. Dec. 617, 617–18 (Attorney Gen. 2008); *see also* 8 C.F.R. § 1208.13(b)(1) (2015) (regarding asylum and establishing a rebuttable regulatory presumption of a well-founded fear of persecution if past persecution is established); *id.* § 1208.16(b)(1) (regarding withholding of removal and establishing a rebuttable regulatory presumption of persecution if past persecution is established).

114. *Kasinga*, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

subsequent case, however, the Board “rejected a claim for withholding of removal by a woman who had *previously* been subjected to female genital mutilation, reasoning that because her genitalia already had been mutilated she had no basis to fear persecution if returned to her home country.”<sup>115</sup> Under the Board’s reasoning, “[a]ny presumption of future [female genital mutilation] persecution is . . . rebutted by the fundamental change in the respondent’s situation arising from the reprehensible, but one-time, infliction of [female genital mutilation] upon her.”<sup>116</sup> This conclusion was rejected as erroneous by the Second Circuit<sup>117</sup> and prompted numerous calls for the Attorney General to refer an FGM case to himself for review.<sup>118</sup>

On review, Attorney General Mukasey concluded that the Board’s legal conclusion was premised on a misapprehension of the nature of FGM: “that female genital mutilation is a ‘one-time’ act that cannot be repeated on the same woman.”<sup>119</sup> This factual conclusion was inconsistent with uncontroverted evidence that FGM could be and was often performed multiple times<sup>120</sup> and undermined the “Board’s legal conclusion that the past infliction of female genital mutilation by itself rebuts ‘[a]ny presumption of future [female genital mutilation] persecution.’”<sup>121</sup> The Attorney General also determined that the Board’s focus on the future threat of FGM was incorrect, as the law did not require a fear of the same *type* of persecution, simply fear on the same basis as that which prompted the past persecution.<sup>122</sup> The focus of her claim was her membership in a particular social group, it was on account of this membership that she had undergone FGM, and it must be the risk of future persecution based on this membership that the agency should assess in weighing whether the presumption of persecution was rebutted. The Attorney General then vacated the Board’s decision and remanded proceedings for further consideration of three discrete questions relating to A-T’s possible eligibility for withholding of removal.<sup>123</sup> The

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115. *A-T*, 24 I. & N. Dec. at 617–18.

116. *Id.* (second and fourth alterations in original) (quoting *A-T*, 24 I. & N. Dec. 296, 299 (B.I.A. 2007)); *see also* 8 C.F.R. § 1208.13(b)(1)(i)(A) (providing for a denial of an asylum application where past persecution is established, but “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution”); *id.* § 1208.16(b)(1)(i)(A) (same, for withholding of removal).

117. *Bah v. Mukasey*, 529 F.3d 99, 113–15 (2d Cir. 2008).

118. *See supra* note 75 (listing various congressional and nongovernment organization statements urging Attorney General referral).

119. *A-T*, 24 I. & N. Dec. at 621.

120. *Id.* at 621–22 (citing *S-A-K*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008)).

121. *Id.* at 622 (second alteration in original) (quoting *A-T*, 24 I. & N. Dec. at 299).

122. *Id.* (“More broadly, the Board was wrong to focus on whether the future harm to life or freedom that respondent feared would take the ‘identical’ form—namely, female genital mutilation—as the harm she had suffered in the past. This is not what the law requires.” (citation omitted)).

123. *Id.* at 623–24.

Attorney General's decision in this case "was lauded as an advancement and clarification of the United States' stance on international women's rights."<sup>124</sup>

Attorney General Mukasey also resolved a quandary on the proper scope of relief to provide to applicants seeking asylum based on coercive population control programs, most notably China's one-child policy. The issue presented in *Matter of J-S* was whether spouses of aliens who had been subjected to involuntary sterilization or forced abortions as part of a coercive population control program were entitled to per se refugee status based on that fact alone, regardless of whether they had suffered any physical harm themselves. In 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act, Congress had amended the "refugee" definition to specifically address the case of individuals who asserted eligibility for asylum based on coercive population control programs.<sup>125</sup> As amended, the statute provided that for purposes of assessing refugee status,

a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.<sup>126</sup>

In *Matter of C-Y-Z*, the Board determined that the spouse of a woman who had been forcibly sterilized established his status as a refugee under the INA on that basis alone.<sup>127</sup> The government requested that the Attorney General review the Board's decision, but Attorney General Ashcroft denied this request without explanation on December 1, 2004.<sup>128</sup>

124. Kevin Loughman, Developments in the Executive Branch, *Attorney General Mukasey Ruling Clears Path for Future FGM-Related Asylum Claims*, 22 GEO. IMMIGR. L.J. 801, 804 (2008).

125. See Brian Edstrom, *Assessing Asylum Claims from Children Born in Violation of China's One-Child Policy: What the United States Can Learn from Australia*, 27 WIS. INT'L L.J. 139, 155-56 (2009) (noting addition of subsection (B) to 8 U.S.C. § 1101(a)(42) (2000) and the desire to target claims of persecution arising under China's one-child policy); Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 J. TRANSNAT'L L. & POL'Y 131, 133 (2005) (same).

126. 8 U.S.C. § 1101(a)(42)(B) (2012).

127. *C-Y-Z*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) ("We find that the applicant in this case has established eligibility for asylum by virtue of his wife's forced sterilization. This position is not in dispute, for the Service conceded in its appeal brief that the spouse of a woman who has been forced to undergo an abortion or sterilization procedure can thereby establish past persecution.")

128. *C-Y-Z*, 23 I. & N. Dec. 693, 693 (Attorney Gen. 2004); see also *J-S*, 24 I. & N. Dec. 520, 532 (Attorney Gen. 2008) ("DHS has abandoned the INS's prior support [of the] per se rule on spousal eligibility.")

In July 2005, the Second Circuit remanded a subsequent case, *Lin v. United States Department of Justice*, to the Board so that it could

more precisely explain its rationale for construing IIRIRA . . . to provide that the ‘forced sterilization of one spouse on account of a ground protected under the Act is an act of persecution against the other spouse’ and that, as a result, the spouses of those directly victimized by coercive family planning policies are *per se* as eligible for asylum as those directly victimized themselves.<sup>129</sup>

On remand, the Board reaffirmed its prior interpretation of the statute, holding that the provision was ambiguous and that its interpretation gave full effect to congressional intent in enacting the provision, and noted Congress’s failure to amend the provision in light of the Board’s earlier interpretation in *C-Y-Z*.<sup>130</sup> The Second Circuit, sitting en banc, reversed this decision, holding that the statute was unambiguous and did not provide for *per se* refugee status for the spouses of those who had undergone involuntary or forced sterilizations and abortions.<sup>131</sup> The Second Circuit’s decision created a circuit conflict on the proper interpretation of 8 U.S.C. § 1101 (a) (42) (B), with most courts having previously upheld the Board’s rule.<sup>132</sup>

In *J-S*’s case, asylum was denied where the alien’s spouse had undergone involuntary insertion of an intrauterine device after the birth of the couple’s first child, on the ground that insertion of an IUD was “not tantamount to sterilization nor to abortion,” and thus could not serve as a basis for a finding of *per se* eligibility under the Act.<sup>133</sup> A petition for review of the agency’s decision was filed with the Third Circuit which, following the en banc decision of the Second Circuit in *Lin II*, ordered en banc consideration of the issue and requested supplemental briefing as to whether the Third Circuit should adopt the rationale of the Second Circuit.<sup>134</sup> It was at that point that Attorney General Gonzales ordered the case to himself for review, with Attorney General Mukasey eventually issuing a decision after briefing, overruling the Board’s precedent decisions in *Matter of C-Y-Z* and *Matter of S-L-L*.<sup>135</sup>

The Attorney General resolved the question at *Chevron* step one, concluding, like the Second Circuit, that the statute unambiguously confined

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129. *Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 192 (2d Cir. 2005).

130. *S-L-L*, 24 I. & N. Dec. 1, 4–8 (B.I.A. 2006).

131. *Lin v. U.S. Dep’t of Justice (Lin II)*, 494 F.3d 296, 300, 306–09 (2d Cir. 2007) (en banc).

132. *See Sun Wen Chen v. Attorney Gen.*, 491 F.3d 100, 108 (3d Cir. 2007) (deferring to and upholding the Board’s interpretation); *Zhang v. Gonzales*, 434 F.3d 993, 1001–02 (7th Cir. 2006) (referring to the Board’s interpretation); *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003) (same). *But see Chen*, 491 F.3d at 112–14 (McKee, J., dissenting) (arguing that the Board’s interpretation of the statute should be rejected at *Chevron* step one). For more background on the circuit conflict, see *Current Circuit Splits*, 4 SETON HALL CIR. REV. 129, 135–36 (2007).

133. *J-S*, 24 I. & N. Dec. 520, 525 (Attorney Gen. 2008).

134. *Id.* at 526.

135. *Id.* at 523.



refugee status, under the relevant provisions, to those who had undergone involuntary sterilizations and forced abortions, not their spouses.<sup>136</sup> This conclusion comported with the natural meaning and ordinary understanding of the language used in the statute,<sup>137</sup> as well as the structure and intent of the INA, which generally required an independent and individual showing of refugee status before asylum could be granted, while providing for derivative asylum status to the spouses of individuals granted asylum in the United States.<sup>138</sup> Accordingly, the Attorney General directed the agency to cease applying the per se rule of spousal eligibility and replace that approach with “a case-by-case assessment of whether a[n] . . . applicant who has not physically undergone a forced abortion or sterilization procedure can demonstrate” eligibility for asylum based on a fear of persecution if removed, under a different prong of the section 1101(a)(42)(B) standard, on a ground unrelated to any coercive population control policy, or for derivative asylum status.<sup>139</sup>

The Attorney General’s intervention and resolution of the issue in *Matter of J-S* resolved a circuit split and instituted a new decisional framework founded on the unambiguous language of the statute. The decision also provided an opportunity for the Attorney General to clarify how the refugee definition should be applied to those aliens seeking asylum based on alleged acts of persecution suffered or feared under a coercive population control program.

In *Matter of J-F-F*, the Attorney General turned to consideration of what evidence is necessary in order for an alien to establish his eligibility for protection under the regulations implementing the United States’ obligations under the Convention Against Torture (“CAT”).<sup>140</sup> An alien was found removable as an aggravated felon but was granted deferral of removal based on a determination that torture was “more likely than not” if he was removed to his native country.<sup>141</sup> The Attorney General referred the case to himself for review and disapproved of the agency’s legal conclusion that CAT eligibility had been established on the evidence presented. This decision restated an alien’s burden of proof to establish eligibility for protection under CAT—concrete evidence of a likelihood of torture if removed—and reinforced U.S.

136. *Id.* at 530–31; *see also* *Jin v. Holder*, 572 F.3d 392, 397 (7th Cir. 2009) (“Ultimately, the Attorney General adopted the Second Circuit’s view.”).

137. *J-S*, 24 I. & N. Dec. at 529.

138. *Id.* at 529–30; *see also* 8 U.S.C. § 1158(b)(3)(A) (2012) (“A spouse or child . . . of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.”).

139. *J-S*, 24 I. & N. Dec. at 537; *see also id.* at 537–38.

140. *J-F-F*, 23 I. & N. Dec. 912, 913 (Attorney Gen. 2006); *see also* 8 C.F.R. § 1208.16(c), .18 (2015).

141. *See J-F-F*, 23 I. & N. Dec. at 914–17; *see also* 8 C.F.R. § 1208.16(c)(2) (“The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”).

policy objectives by ensuring that convicted criminal aliens are not provided with a haven in the United States, absent particularly compelling circumstances.

A case with similar dynamics was decided by Attorney General Ashcroft and concerned whether an alien was entitled to asylum and related protection despite his involvement with terrorist-related organizations in his native Algeria.<sup>142</sup> A-H- sought asylum in the United States in 1993, but his application was referred to an immigration judge after INS declined to grant relief.<sup>143</sup> The immigration judge determined that A-H- was removable and ineligible for asylum or withholding of removal, but he was granted deferral of removal under CAT.<sup>144</sup> The Board reversed the denial of relief and protection by the immigration judge and granted the application for asylum.

The Attorney General reversed, denying the application for asylum and remanding the claims for withholding of removal and deferral of removal under CAT for further consideration in light of his statement of the correct legal standards.<sup>145</sup> First, the Attorney General disagreed with the Board's determination that asylum should not be denied in the exercise of discretion.<sup>146</sup> The Attorney General recounted the significant evidence regarding A-H-'s connection to terrorism and political violence in Algeria, which weighed strongly against any discretionary grant of asylum.<sup>147</sup> Moreover, "[t]he United States has significant interests in combating violent acts of persecution and terrorism wherever they may occur, including in Algeria, and it is inconsistent with these interests to provide safe haven to individuals who have connections to such acts of violence."<sup>148</sup>

Second, the Attorney General concluded that the Board had applied incorrect legal standards in assessing A-H-'s eligibility for relief and protection in light of certain bars to relief contained in the INA. It had applied an incorrect standard in assessing whether A-H- was barred from relief and protection based on his persecution of others.<sup>149</sup> It was clear to the Attorney

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142. See A-H-, 23 I. & N. Dec. 774, 778 (Attorney Gen. 2005).

143. *Id.* at 776; see also 8 C.F.R. § 1208.14(c)(1) (providing for the referral of the application to the immigration judge in cases where an asylum officer declines to grant asylum).

144. A-H-, 23 I. & N. Dec. at 777.

145. *Id.* at 775.

146. *Id.* at 780; see also 8 U.S.C. § 1158(b)(1)(A) (2012) (providing that "the Attorney General may grant asylum to an alien" that establishes refugee status); Brett C. Rowan, *You Can't Go Home Again: Analyzing an Asylum Applicant's Voluntary Return Trip to His Country of Origin*, 62 CATH. U. L. REV. 733, 738 n.19 (2013) (stating that "an immigration judge may deny asylum as a matter of discretion, even if a person is statutorily eligible for relief.").

147. A-H-, 23 I. & N. Dec. at 780-82.

148. *Id.* at 782.

149. See 8 U.S.C. § 1158(b)(2)(A)(i) (stating that an alien is not eligible for asylum if it is determined that "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"); see also 8 U.S.C. § 1231(b)(3)(B)(i) (echoing the language in 8 U.S.C. § 1158(b)(2)(A)(i)).

General that the acts in which A-H- was involved as leader-in-exile, including assassinations and other murders, constituted persecution.<sup>150</sup> Accordingly, he concluded that A-H- could be barred from relevant relief and protection on this statutory basis on account of his connection to armed groups in Algeria. He further determined that the Board had applied an incorrect evidentiary standard in holding that A-H- was not a danger to the national security of the United States.<sup>151</sup> What is required for establishing such a threat is any nontrivial danger or “risk to the Nation’s defense, foreign relations, or economic interests.”<sup>152</sup> But contrary to the Board’s holding, the evidentiary burden on the government to establish such danger “is substantially less stringent than preponderance of the evidence,” and requires only a showing that “there is information that would permit a reasonable person to believe that the alien may pose a danger to the national security.”<sup>153</sup> These issues were thus remanded for further consideration consistent with the Attorney General’s statement of the correct legal standards. The threshold issues of eligibility for both withholding of removal and protection under CAT, i.e., whether there was a clear probability of either persecution or torture in Algeria, were also remanded given the significant passage of time since the filing of the initial application so that the risk to A-H-, if any, could be assessed in light of current country conditions in Algeria.<sup>154</sup>

The decision in *Matter of A-H-* served two essential functions. First, in rendering the decision the Attorney General fulfilled his role as primary interpreter of the immigration laws. Second, the decision also has a policy-making and error-correction dynamic. A-H-’s terrorist affiliation and relation to political violence in Algeria were key components of the discretionary denial of asylum. The discretionary denial thus serves to state a general policy, that the United States will not be a haven for terrorists or members of other violent organizations and that discretionary asylum should not be extended to such individuals, while pointing out that the Board entirely missed the point of U.S. immigration policy in believing that an individual such as A-H- was entitled to discretionary relief from removal. The decision also mixes

150. *A-H-*, 23 I. & N. Dec. at 784.

151. See 8 U.S.C. § 1158(b)(2)(A)(iv) (stating that an alien is not eligible for asylum if it is determined that “there are reasonable grounds for regarding the alien as a danger to the security of the United States”); see also 8 U.S.C. § 1231(b)(3)(B)(iv) (echoing the language in 8 U.S.C. § 1158(b)(2)(A)(iv)).

152. *A-H-*, 23 I. & N. Dec. at 788.

153. *Id.* at 789; see also *Malkandi v. Holder*, 576 F.3d 906, 913–14 (9th Cir. 2009) (upholding this statement of the standard for purposes of making determinations under this provision); *Yusupov v. Attorney Gen.*, 518 F.3d 185, 200–01 (3d Cir. 2008) (same); Patrick J. Glen, *Is the United States Really Not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada’s Decision in Canadian Council for Refugees, et al. v. Her Majesty the Queen*, 22 GEO. IMMIGR. L.J. 587, 610 (2008) (noting the Attorney General’s standard in relation to the less stringent standard applied under relevant Canadian law).

154. *A-H-*, 23 I. & N. Dec. at 790–92.

policy and legal imperatives in its announcement of the standards that govern application of the statutory bars to relief and protection.<sup>155</sup> The decision thus showcases both aspects of the Attorney General's position within the immigration bureaucracy—final arbiter of legal questions and the ultimate decider as to the forms of relief and protection available to aliens under the INA.

*ii. Expungement Issues*

A central issue that has occupied Attorney General decision-making pursuant to the referral authority is under what circumstances a state law conviction can be considered a “conviction” for immigration purposes if that conviction is later expunged or set aside under state law. In 1959, Attorney General William Rogers concluded that certain narcotics convictions would survive subsequent expungement for purposes of the immigration laws, based largely on Congress's explicit concern over such convictions and the “continuing and serious Federal concern” over trafficking in narcotics.<sup>156</sup>

Attorney General Rogers returned to the issue two years later to uphold and reaffirm the Board's long-standing general rule that, so long as a narcotics conviction was not involved, a conviction that is expunged under California Penal Code section 1203.4 cannot serve as the basis for removability under the immigration laws.<sup>157</sup> In 1961, Attorney General Kennedy determined that where a court “granted *coram nobis* because of a constitutional defect in the prior conviction,” that conviction would no longer be valid for immigration purposes.<sup>158</sup> In 1967, Attorney General Ramsey Clark again reaffirmed the rule as set by Attorney General Rogers in *Matter of G*.<sup>159</sup>

Relying on these decisions, the Board subsequently held in *Matter of Luviano-Rodriguez* that a conviction for a firearms offense that is expunged under California law cannot serve as a basis for removability under the INA.<sup>160</sup> Soon after issuance of the Board's decision, however, Congress amended the INA to establish a definition of the term “conviction” for immigration purposes:

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155. Cf. William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT'L L. 94, 149 (2012) (“[I]t may be acceptable under the Refugee Convention to refuse refugee status to those who have persecuted others . . .”).

156. A-F-, 8 I. & N. Dec. 429, 445 (Attorney Gen. 1959).

157. G-, 9 I. & N. Dec. 159, 167–69 (Attorney Gen. 1961).

158. P-, 9 I. & N. Dec. 293, 294 (Attorney Gen. 1961).

159. Ibarra-Obando, 12 I. & N. Dec. 576, 589–90 (Attorney Gen. 1967).

160. Luviano-Rodriguez, 21 I. & N. Dec. 235, 237–38 (B.I.A. 1996); see also Luviano-Rodriguez, 23 I. & N. Dec. 718, 719 (Attorney Gen. 2005) (“Convictions for narcotics offenses that had been expunged pursuant to section 1203.4(a) of the California Penal Code could serve as the basis for an order of deportation . . . but convictions for other offenses that had been expunged pursuant to that provision of California law could not serve as the basis for an order of deportation.”).

The term “conviction” means with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>161</sup>

Notwithstanding this amendment, the Board initially held that the new definition of “conviction” did not affect its rule in *Matter of Luviano-Rodriguez*, as Congress expressed no intent to do so and did not reference any of the agency’s extant decisions addressing the effect of state law expungement for immigration purposes.<sup>162</sup> The Board shifted course in *Matter of Roldan*, holding that expungement for rehabilitative purposes did not undermine the conviction for purposes of immigration law.<sup>163</sup> The Board did not, however, “address the situation where a state court vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation.”<sup>164</sup>

The INS brought Attorney General Ashcroft into this milieu, requesting his review of the Board’s decision in *Matter of Luviano-Rodriguez*,<sup>165</sup> and the Board itself then entered the fray, requesting his review in *Matter of Marroquin-Garcia*.<sup>166</sup> The Attorney General began with the statutory definition of “conviction,” noting that although the definition was broad, it “is clearly not intended to encompass convictions that have been formally entered but subsequently reversed on appeal or in a collateral proceeding for reasons pertaining to the factual basis for, or procedural validity of, the underlying judgment.”<sup>167</sup> Yet by the same logic, expungement or vacatur based on reasons that do not address the validity of the underlying conviction should not disturb the validity of that conviction for immigration purposes. Referencing laws such as California’s section 1203.4, the Attorney General opined that “[t]hese state expungement laws authorize a conviction to be expunged in order to serve rehabilitative ends and without reference to the merits of the underlying adjudication of guilt. Such expunged convictions would appear, therefore, to survive as formal adjudications of guilt entered by a court.”<sup>168</sup> Notwithstanding expungement, then, a judgment of conviction “would still appear to fall squarely within the plain language of the new federal

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161. 8 U.S.C. § 1101(a)(48)(A) (2012).

162. See *Marroquin-Garcia*, 23 I. & N. Dec. 705, 710 (Attorney Gen. 2005).

163. *Roldan*, 22 I. & N. Dec. 512, 520–23 (B.I.A. 1999).

164. *Marroquin-Garcia*, 23 I. & N. Dec. at 712 (citing *Roldan*, 22 I. & N. Dec. at 523).

165. *Luviano-Rodriguez*, 23 I. & N. Dec. at 718–19.

166. *Marroquin-Garcia*, 23 I. & N. Dec. at 705.

167. *Id.* at 713.

168. *Id.* (citation omitted).

statutory definition of ‘conviction’” if expunged under a provision such as California’s.<sup>169</sup>

This statutory analysis was bolstered by Congress’s inclusion within the definition of “conviction” determinations where a formal adjudication of guilt has not been entered. Applying this rule to Marroquin-Garcia’s and Luviano-Rodriguez’s cases, their state law convictions could be considered for immigration purposes, notwithstanding the expungement of those convictions under section 1203.4 of the California Penal Code.<sup>170</sup>

The Attorney General’s decisions, although consistent with the Board’s rationale in *Matter of Luviano-Rodriguez*, served to definitively state the position of the Justice Department regarding when an expunged conviction will retain its validity for immigration purposes. Such a conviction will still be valid under the INA when expungement has been undertaken for rehabilitative purposes as opposed to some legal or constitutional infirmity in the underlying adjudication of guilt.<sup>171</sup> Those convictions expunged for rehabilitative purposes may still serve as a basis for removability and could still bar eligibility for certain forms of relief and protection under the INA.<sup>172</sup> Despite the ostensible uniform nature of the rule proposed by the Attorney General, the courts of appeals have injected uncertainty back into the system through discrete, state and fact-specific rulings regarding what constitutes a substantive or procedural defect justifying expungement for immigration purposes, and what circumstances justify continued reliance on a conviction for immigration purposes, notwithstanding a state expungement for rehabilitative or other similar purposes.<sup>173</sup>

### iii. Relief Under Former Section 212(c)

As with expungement issues, Attorney General decisions have played a central role in the development of the law regarding relief under former section 212(c) of the INA and its predecessor, the Seventh Proviso of the 1917

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169. *Id.* at 714.

170. *Id.* at 717; *Luviano-Rodriguez*, 23 I. & N. Dec. at 720–21.

171. See Elizabeth L. Young, *How Arkansas Convictions Are Treated for Immigration Purposes*, 2010 ARK. L. NOTES 137, 139 (“The general rule regarding expungements is that only those that go to remedy a substantive or procedural defect will be considered for immigration purposes.” (citing *Marroquin-Garcia*, 23 I. & N. Dec. at 705)).

172. See Karen Denise Bradley, *Ten Things a Criminal Attorney Should Know When Representing the Non-Citizen in Criminal Proceedings*, 34 U. DAYTON L. REV. 35, 45 (2008) (“Although expungement of a crime in state court proceedings removes the crime from a person’s record as it relates to state matters, this does not lessen the consequences of a particular conviction for immigration purposes.”).

173. See, e.g., Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 686–701 (2008) (recounting various splits amongst the courts of appeals on issues relating to expungement and what continuing effects, if any, such expunged convictions may have under the INA).

Immigration Act.<sup>174</sup> This development had two contemporary manifestations: (1) assessing the legal rule for whether and when an alien in deportation proceedings could pursue a waiver under section 212(c), which, by its terms, was only available to waive charges of inadmissibility; and (2) determining the retroactive effect, if any, of the changes made to 212(c) relief in 1996.

Section 212(c), as initially enacted, provided a waiver of inadmissibility so long as aliens could meet certain eligibility criteria.<sup>175</sup> Despite the limitation in its text to aliens charged with inadmissibility, the provision was soon extended outside the context of exclusion proceedings. By 1990, the policy had been firmly set in the jurisprudence of the Board and courts of appeals that an alien in deportation proceedings could pursue a waiver under section 212(c), so long as the charge of deportation had a statutory counterpart in the grounds of inadmissibility.<sup>176</sup>

In 1990, the Board issued a decision in *Matter of Hernandez-Casillas*, rejecting the comparable grounds approach in favor of a broader policy that would permit an alien in deportation proceedings to pursue a 212(c) waiver so long as the charge of deportation did not correspond to any of the grounds of inadmissibility for which a waiver under section 212(c) was barred.<sup>177</sup> The Attorney General disapproved of this extension of relief.<sup>178</sup> Although the Attorney General rejected INS's argument that relief under section 212(c) should be limited to its statutory text (i.e., that it should only be applied in exclusion proceedings to waive grounds of inadmissibility), he did not sanction any further departure from the text of the provision.<sup>179</sup> The comparable grounds approach was still tenuously tied to the text of the statute, as it applied to waive grounds of deportability with a corresponding

174. 8 U.S.C. § 1182(c) (1994) (repealed 1996); Immigration Act of 1917, Pub. L. No. 301, ch. 29, § 3, 39 Stat. 874, 875 (repealed 1952).

175. See Glen, *supra* note 46, at 8–9 (providing the legislative history behind the passage of section 212(c)).

176. See *id.* at 10–13 (tracking the development of the Board's application of former section 212(c)).

177. *Hernandez-Casillas*, 20 I. & N. Dec. 262, 266 (B.I.A. 1990) (citing grounds of inadmissibility pertaining to subversives and war criminals, for which a waiver is not permitted); see also Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 GEO. IMMIGR. L.J. 65, 96 (1997) (“The BIA remained steadfast in its [comparable] approach until *Matter of Hernandez-Casillas*, when it decided to extend section 212(c) relief to all deportation grounds, except when the deportation ground was equivalent to an exclusion ground that could not be waived under section 212(c).” (footnote omitted)); William R. Robie & Ira Sandron, *Criminal Aliens in the Immigration System: Examining the Significant Role of the Criminal Alien Hearing Program*, 38 FED. B. NEWS & J. 449, 451 (1991) (“In 1990, the Board, in *Matter of Hernandez-Casillas*, for the first time expanded the application of section 212(c) relief to all deportation proceedings, irrespective of whether there exists a corresponding exclusion ground.” (footnote omitted)).

178. See *Farquharson v. U.S. Attorney Gen.*, 246 F.3d 1317, 1323 (11th Cir. 2001) (noting that the Board's “unexpected liberality was soon curtailed . . . as the Attorney General reversed the BIA”).

179. *Hernandez-Casillas*, 20 I. & N. Dec. at 286–87.

ground of inadmissibility, while the Board's new approach would entirely untether 212(c)'s application in deportation proceedings from the text, forbidding waiver only when the ground charged had a corresponding ground of inadmissibility that was specifically foreclosed from consideration for a waiver.<sup>180</sup> With the Attorney General's rejection of any expansion of 212(c) eligibility in deportation proceedings, the law reverted to the Board's long-standing approach.<sup>181</sup>

The Attorney General's involvement in the development of this law both expanded application of the Seventh Proviso and its successor, 212(c), by sanctioning its availability in deportation proceedings, and eventually limited the scope of that expansion, by refusing to permit blanket availability of the waiver in deportation proceedings. Ultimately, however, this entire line of development was abrogated by the Supreme Court, which held that the comparable grounds approach was arbitrary and capricious.<sup>182</sup> Rather than providing direction as to the approach the agency should favor, however, or returning the availability of the waiver to the province of its text, the Supreme Court left it largely to the Board on remand to divine a new approach to govern the availability of 212(c) waivers in deportation proceedings.<sup>183</sup>

Running somewhat parallel with this path of development was the substantial litigation that ensued following two landmark reforms passed in 1996—the Antiterrorism and Effective Death Penalty Act (“AEDPA”)<sup>184</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>185</sup> AEDPA amended 212(c) by changing a final sentence to the eligibility provision: This section shall not apply to an alien who “is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).”<sup>186</sup>

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180. *See id.*

181. Jimenez-Santillano, 21 I. & N. Dec. 567, 574 (B.I.A. 1996).

182. *See* Judulang v. Holder, 132 S. Ct. 476, 483–90 (2011); *see also* Glen, *supra* note 46, at 16–24 (recounting and critiquing the Supreme Court's opinion).

183. *See* Glen, *supra* note 46, at 24 (“The Court elected to render a decision on one single issue under the 212(c) heading, the permissibility of the comparable grounds analysis, without delving into the related issues regarding whether relief can be extended to deportable aliens and, if so, what the executive's authority for that extension would be. In declining to render decisions on these points . . . it also necessarily failed to offer any clear-cut guidance to the agency on the appropriate path forward. Such a decision may have been appropriate in the context of an existing statute where the intricacies and nuances of application could be teased out through subsequent litigation. Where the relevant statutory provision has been repealed for nearly two decades, however, this approach is singularly misguided.”).

184. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 42 U.S.C.).

185. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.).

186. Antiterrorism and Effective Death Penalty Act § 440(d), 110 Stat. at 1277.



In *Matter of Soriano*, the alien was removable under section 241(a)(2)(A)(iii).<sup>187</sup> His application for 212(c) relief was denied by an immigration judge in the exercise of discretion, and he appealed that determination to the Board, during which time AEDPA was enacted.<sup>188</sup> The questions before the Board were whether amended 212(c) applied to: (1) all pending proceedings; and (2) to all pending applications in which there had not yet been a final decision at the time of section 440(d)'s enactment.<sup>189</sup> The Board determined that the lack of an effective date regarding section 440(d) indicated that it applied without limitation to all proceedings, not just those instituted after its effective date, because other provisions of AEDPA clearly indicated their effective dates if meant to be different than the enactment date.<sup>190</sup> But the opposite inference was due in the context of what applications 440(d) was meant to apply to, as other provisions clearly stated that limitations or changes to discretionary relief applied "to applications filed before, on, or after" the effective date of the AEDPA.<sup>191</sup> Congress did not include such language in 440(d), and thus the Board held that the alien was statutorily eligible to apply for a waiver of inadmissibility.<sup>192</sup> Nonetheless, it upheld the denial of the waiver in the exercise of discretion.<sup>193</sup>

The Attorney General reversed the Board's decision and concluded "that the amendment to INA § 212(c) made by AEDPA § 440(d) applies to proceedings . . . in which an application for relief under section 212(c) was pending when AEDPA was signed into law."<sup>194</sup> This conclusion was based on the Attorney General's determination that the application of 440(d) to all pending applications did not entail any retroactive effect, as 212(c) was a prospective form of relief and the effect of the amendment was to eliminate the Attorney General's authority, or jurisdiction, to grant discretionary relief in certain circumstances.<sup>195</sup> Given these considerations, application of 440(d) to Soriano's waiver application "would not be retroactive."<sup>196</sup> Nonetheless, the Attorney General directed the EOIR "to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability."<sup>197</sup>

187. *Soriano*, 21 I. & N. Dec. 516, 517–18 (B.I.A. 1996).

188. *Id.*

189. *Id.* at 518.

190. *Id.* at 519.

191. *Id.* at 519–20 (quoting Antiterrorism and Effective Death Penalty Act of 1996 § 413(g), 110 Stat. at 1269–70).

192. *Id.* at 520 ("[W]e interpret Congress' omission of the 'before, on, or after' language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily barred from section 212(c) relief by operation of the AEDPA.").

193. *Id.* at 521–22.

194. *Soriano*, 21 I. & N. Dec. 516, 534 (Attorney Gen. 1997).

195. *Id.* at 537.

196. *Id.* at 540.

197. *Id.*

*Soriano*, although clearly a decision on a point of law, also has a strong undercurrent of policy-prescription. Professor Margaret Taylor has argued, for instance, that “[t]he fact that the Board’s *Soriano* opinion conflicted with the government’s strategy in Supreme Court litigation was seen as a compelling reason for prompt referral to the Attorney General,” as was the fact that the Board’s decision differed from INS’s preferred interpretation of the applicability of 440(d).<sup>198</sup>

## 2. Setting Policy and Establishing New Decisional Frameworks

Many decisions, although resolving legal questions, also have a strong policy-based *raison d’être*. In the cases reviewed in the preceding Subpart, the legal aspects of the decision predominated over any policy-setting impetus. In contrast, in this Subpart the decisions are focused on setting policy or instituting new decisional frameworks to govern the future adjudication of similar claims. Attorneys General have used the referral authority to pursue these types of objectives in a wide range of cases. Although the referral authority can be an effective way to announce a policy that will govern immigration adjudicators, it also unsurprisingly has the potential to generate significant controversy, as several of the following cases demonstrate.

In *Matter of Compean*, the issue presented was one of ineffective assistance of counsel and under what circumstances aliens have a remedy when such ineffectiveness is suffered in removal proceedings. At both the agency and federal appellate court level, there was a generally accepted, if incompletely theorized, belief that the Fifth Amendment encompassed a due process right to the effective assistance of counsel in removal proceedings, and the Board had created an administrative framework for the advancement of such claims in the context of motions to reopen.<sup>199</sup> But a circuit conflict began developing in the late 2000s, with the Fourth and Eighth Circuits rejecting the assertion that the Fifth Amendment established a due process right to effective assistance of counsel in immigration proceedings, thus joining decisions from the Seventh Circuit that had questioned the existence of such a right.<sup>200</sup> This

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198. See Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 285–86 (2002).

199. Assaad, 23 I. & N. Dec. 553, 554 (B.I.A. 2003) (reaffirming the applicability of *Matter of Lozada*); Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988) (establishing certain substantive and procedural requirements for advancing ineffective assistance of counsel claims before the agency); see also Patrick J. Glen, *The Nonconstitutional Character of Ineffective Assistance of Counsel Claims in Immigration Proceedings: A Brief Comment on Afanwi v. Mukasey*, 82 S. CAL. L. REV. POSTSCRIPT 1, 4–7 (2008) (recounting the development of the Fifth Amendment jurisprudence on this issue).

200. See Rafiye v. Mukasey, 536 F.3d 853, 859–61 (8th Cir. 2008); Afanwi v. Mukasey, 526 F.3d 788, 798 (4th Cir. 2008), *vacated on other grounds sub nom.* Afanwi v. Holder, 558 U.S. 801 (2009); see also Magala v. Gonzales, 434 F.3d 523, 525–26 (7th Cir. 2005); Stroe v. Immigration & Naturalization Serv., 256 F.3d 498, 499–501 (7th Cir. 2001).

developing conflict prompted the intervention of Attorney General Mukasey and, later, Attorney General Eric Holder.<sup>201</sup>

On review, Attorney General Mukasey considered whether there is a due process right to effective assistance of counsel in immigration proceedings and if not, whether there should be an administrative framework in place to permit assertion of such claims and, when warranted, reopening of removal proceedings. Regarding the first issue, the Attorney General determined that there was no due process right to effective assistance of counsel, as the Fifth Amendment applies only against the government and any ineffective assistance would be by private counsel with an insufficient nexus to state action.<sup>202</sup> Nonetheless, he did conclude that the Board possesses the discretion to reopen proceedings based on a claim of ineffective assistance of counsel.<sup>203</sup> To govern such claims, the Attorney General established a substantive and procedural framework, superseding the prior standards announced by the Board in *Matter of Lozada*.<sup>204</sup> Substantively, the ineffective assistance must be egregious, the alien must be prejudiced,<sup>205</sup> and the alien must exercise due diligence in presenting his claim.<sup>206</sup> Procedurally, the alien must proffer certain documents to the Board along with his motion to reopen, the most important of which is his own affidavit detailing the facts and allegations of his claim.<sup>207</sup> All the stated requirements must be met, and no “substantial compliance” shortcut was to be entertained by the Board or courts of appeals.<sup>208</sup>

201. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1775–76 (2010) (“[Q]uestions about a right to effective counsel in removal proceedings came to a head in the case of *Matter of Compean*, which prompted the rare intervention of two attorneys general of the United States, one of whom reversed his predecessor.” (footnote omitted)).

202. *Compean*, 24 I. & N. Dec. 710, 716–20 (Attorney Gen. 2009) (citing, inter alia, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)), *vacated by* 25 I. & N. Dec. 1 (Attorney Gen. 2009); see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

203. *Compean*, 24 I. & N. Dec. at 727–28.

204. See Daniel Changshik Moon, *Developments in the Judicial Branch, Former Attorney General Mukasey Eliminates Right to Effective Assistance of Counsel in Immigration Proceedings*, 23 GEO. IMMIGR. L.J. 245, 248–50 (2008).

205. *Compean*, 24 I. & N. Dec. at 733–34 (“[A]n alien must show that but for the deficient performance, it is more likely than not that the alien would have been entitled to the ultimate relief he was seeking.”).

206. *Id.* at 732–35.

207. *Id.* at 735–36. In addition to the affidavit, the alien must submit: (1) a copy of the agreement between himself and his lawyer; (2) a copy of a letter to former counsel informing of the allegations, and any response received from counsel; (3) a completed and signed complaint addressed to the appropriate disciplinary authorities, but which does not necessarily have to be filed with such authority; (4) a copy of what the attorney failed to submit, if the allegation is that he did not file a necessary document; and (5) a certification from current counsel that he believes, in essence, that the claim against former counsel is colorable. See *id.* at 736–39.

208. *Id.* at 739 (citing *Reyes v. Ashcroft*, 358 F.3d 592, 597–99 (9th Cir. 2004)).

Yet Attorney General Mukasey's decision did not last, as his successor, Attorney General Holder, vacated the decision soon after the presidential transition.<sup>209</sup> In place of the framework established by Mukasey, Holder directed the institution of rule making, and directed that in the interim the pre-*Compean* standards for establishing ineffective assistance of counsel claims would continue to apply.<sup>210</sup> Attorney General Holder also held that his decision did not change the litigating position of the Department of Justice, which was and would continue to be that there is *no* due process right to effective assistance of counsel in immigration proceedings.<sup>211</sup> Importantly, the Attorney General also decided that the Board has the discretion to consider ineffective assistance of counsel claims that occur after entry of the final order of removal, e.g., in the failure to timely file a petition for review with the court of appeals.<sup>212</sup>

More controversial than his decision in *Matter of Compean* was Mukasey's decision in *Matter of Silva-Trevino*, issued in November 2008, which instituted a new framework for considering when offenses qualify as "crimes involving moral turpitude" for purposes of the immigration laws.<sup>213</sup> Silva-Trevino conceded removability for having been convicted of an aggravated felony but sought relief from removal in the form of an adjustment of status.<sup>214</sup> An immigration judge concluded that he was removable as an aggravated felon and ineligible for adjustment of status, as his conviction constituted a crime involving moral turpitude that rendered him inadmissible.<sup>215</sup> The Board ultimately concluded that the conviction did not constitute a crime involving moral turpitude and remanded for a decision on the application of adjustment of status, noting that Silva-Trevino bore the burden of establishing eligibility for relief in the exercise of discretion and that, in weighing whether to exercise that discretion, the immigration judge could consider facts outside the record of conviction.<sup>216</sup>

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209. *Compean*, 25 I. & N. Dec. 1 (Attorney Gen. 2009).

210. *Id.* at 2–3.

211. *Id.* at 3; *see, e.g.*, Brief for the Respondent in Opposition at 16–17, *Merchant v. Holder*, 134 S. Ct. 1276 (2014) (No. 13-400), 2013 WL 6913345; Brief for the Respondent at 10–12, *Afanwi v. Holder*, 558 U.S. 801 (2009) (No. 08-906), 2009 WL 2625869.

212. *Compean*, 25 I. & N. Dec. at 3; Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings Matter of Compean and the Fundamental Fairness Doctrine*, 22 FLA. J. INT'L. L. 65, 92 (2010) ("Holder temporarily decided an issue not decided prior to *Compean*. The BIA had not yet resolved whether its discretion to reopen removal proceedings includes the power to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after BIA entered a final order of removal. Holder resolved this issue by granting the Board this discretion.").

213. *Silva-Trevino*, 24 I. & N. Dec. 687, 688 (Attorney Gen. 2008).

214. *Id.* at 691.

215. *Id.*; *see also* 8 U.S.C. § 1255(a) (2012) (requiring an alien to be admissible to the United States in order to obtain adjustment of status).

216. *Silva-Trevino*, 24 I. & N. Dec. at 691–92.

The Attorney General referred the case to himself for review, vacated the Board's decision, and remanded so that the agency could apply the new decisional framework announced in the opinion.<sup>217</sup> The Attorney General first concluded that he was not compelled by the INA to apply the categorical and modified categorical approaches employed in criminal cases.<sup>218</sup> Instead, he sought to establish a "uniform framework for ensuring that the [INA's] moral turpitude provisions are fairly and accurately applied."<sup>219</sup> Under the Attorney General's framework, an immigration judge must first make a "categorical inquiry" of the criminal statute to see if there is a "realistic probability" that the statute is applied only to conduct that is reprehensible and evinces some level of scienter.<sup>220</sup> If not, the immigration judge then proceeds to the "modified categorical inquiry" and examines "the alien's record of conviction."<sup>221</sup> The third step permitted immigration judges to "consider evidence beyond . . . [the record of conviction] if doing so is necessary and appropriate to ensure proper application of the [INA's] moral turpitude provisions."<sup>222</sup> Ultimately, Silva-Trevino's offense was deemed to constitute a crime involving moral turpitude, as Silva-Trevino admitted that he knew his victim was younger than 17 years of age when he committed the crime.<sup>223</sup>

The policy import of the Attorney General's decision was clear: To permit a fuller examination of the circumstances of an alien's criminal conviction would have the likely effect of permitting findings of crimes involving moral turpitude in cases where strict application of the categorical and modified categorical approaches would have proven inconclusive.<sup>224</sup> The decision's third-step granted immigration judges broad discretion when considering whether to look to evidence outside the record of conviction, what evidence to consider, and to determine what evidence might be sufficient to support a finding that an offense constituted a crime involving moral turpitude.<sup>225</sup>

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217. *Id.* at 709.

218. *Id.* at 700–02.

219. *Id.* at 688–89; *see also id.* at 695–96.

220. *Id.* at 696–97.

221. *Id.* at 690.

222. *Id.* at 699.

223. *See Silva-Trevino v. Holder*, 742 F.3d 197, 199 (5th Cir. 2014).

224. *See Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1714–16 (2011) (noting *Silva-Trevino*'s third-step analysis and its dramatic shift from the prevailing strictures of the categorical approach); *see also* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 93–94 (2012).

225. *See, e.g.,* Dana Leigh Marks & Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the Immigration Court Perspective*, 39 FORDHAM URB. L.J. 91, 105 (2011) ("Step three of the *Silva-Trevino* analysis is extremely broad and places a tremendous amount of discretion in the hands of immigration judges to determine when it is necessary and appropriate to consider evidence beyond the record of conviction, and if so, what evidence would be proper.

Nonetheless, the decision was controversial both because of the manner in which the Attorney General referred and decided the case and because of its departure from prior law. Process-based concerns about the referral authority, with special reference to *Silva-Trevino*, are discussed further *infra*. Only two courts of appeals have offered cautious acceptance of the *Silva-Trevino* substantive framework,<sup>226</sup> with the majority of courts rejecting the approach under a *Chevron* step one analysis.<sup>227</sup> As a policy decision, then, it did not meet its goal of establishing a uniform framework for determining which offenses constitute crimes involving moral turpitude.<sup>228</sup>

Attorney General Mukasey's *Silva-Trevino* decision ultimately suffered the same fate as his decision in *Compean*, with Attorney General Holder vacating the decision on April 10, 2015.<sup>229</sup> This decision was based on

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.<sup>230</sup>

Attorney General Holder directed the Board to consider, as appropriate, several issues raised by the vacatur of *Silva-Trevino*, including the proper analysis for determining whether an alien has been convicted of a crime involving moral turpitude, when adjudicators may resort to the modified categorical approach in making this assessment, and whether an alien must make a heightened evidentiary showing of hardship if he has engaged in acts constituting the sexual abuse of a minor.<sup>231</sup>

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Indeed, many immigration judges now hold *Silva-Trevino* hearings to determine inadmissibility or removability.”).

226. See *Mata-Guerrero v. Holder*, 627 F.3d 256, 260–61 (7th Cir. 2010); see also *Bobadilla v. Holder*, 679 F.3d 1052, 1056–57 (8th Cir. 2012).

227. See *Silva-Trevino*, 742 F.3d at 199–203; *Olivas-Motta v. Holder*, 746 F.3d 907, 909–16 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472, 480–82 (4th Cir. 2012); *Fajardo v. U.S. Attorney Gen.*, 659 F.3d 1303, 1307–10 (11th Cir. 2011); *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 473 (3d Cir. 2009).

228. Cf. *Silva-Trevino*, 742 F.3d at 205 (“The Attorney General further contends that we should defer to his interpretation of [the INA] because he is charged with ensuring uniform application of the law. This argument is, if anything, a little ironic. Until he intervened in *Silva-Trevino*, there was broad consensus among the federal courts that the ‘convicted of’ language precludes consideration of evidence beyond the conviction record. So at least with respect to the admissibility of evidence, there *was* uniform application of the law. Yet now the circuits have split, with some Courts of Appeals using the new method, and others abiding by longstanding precedent. So it seems that his interpretation has been counterproductive toward his own stated objective, in that the prior jurisprudential accord has been replaced by competing interpretations.” (citation omitted)).

229. *Silva-Trevino*, 26 I. & N. Dec. 550 (Attorney Gen. 2015).

230. *Id.* at 553.

231. *Id.* at 553–54.

In *Matter of D-J*, Attorney General Ashcroft discussed the considerations that should govern bond determinations. The case began with the interdiction of a boat from Haiti laden with illegal immigrants.<sup>232</sup> One of them, D-J, sought release on bond after being taken into custody. Despite the objection of the INS, both an immigration judge and the Board granted bond.<sup>233</sup> The Attorney General then certified the case to himself and, through his decision, “provide[d] the BIA and Immigration Judges with the [requisite] ‘contrary direction.’”<sup>234</sup>

The Attorney General began by noting that there is no right to release on bond, and that such release is provided in the discretion of the Attorney General. He also noted the many concerns presented by DHS and the Department of State “that the release of aliens such as respondent . . . would tend to encourage further surges of mass migration from Haiti by sea, with attendant strains on national and homeland security resources. Such mass migrations would also place the lives of the aliens at risk.”<sup>235</sup> Concerns were also voiced regarding the screening process and illegal immigrant flows: “[I]n light of the terrorist attacks of September 11, 2001, there is increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process.”<sup>236</sup> For these reasons, the Attorney General set out broad considerations that could be weighed in making bond determinations, some of them general and not necessarily tied to the individual characteristics of the specific case under consideration, and stated that “[s]uch national security considerations clearly constitute a ‘reasonable foundation’ for the exercise of my discretion to deny release on bond.”<sup>237</sup> The decision was clearly meant as a statement of policy and a signal of deterrence, a point that Ashcroft subsequently made in congressional testimony.<sup>238</sup>

Focused more narrowly on immigration-specific issues, the decision served to establish a framework for the agency’s exercise of the Attorney General’s delegated discretionary authority to grant release on bond, embodying criteria that had been previously rejected by the Board *in the absence of* any clear contrary direction by the Attorney General.<sup>239</sup> His opinion, as Ashcroft explicitly noted, provided that direction and put into place a

232. D-J, 23 I. & N. Dec. 572, 572–73 (Attorney Gen. 2003).

233. *Id.* at 573.

234. *Id.* at 581. In its decision granting bond, the Board had rejected the bases for denying bond offered by INS, holding that such broad concerns were insufficient to support denial “[a]bsent contrary direction from the Attorney General.” *Id.* at 573 (alteration in original).

235. *Id.* at 577.

236. *Id.*

237. *Id.* at 579.

238. *DOJ Oversight: Terrorism and Other Topics: Hearing Before the Comm. on the Judiciary U.S.S., 108th Cong. 40–41* (2004) (statement of John Ashcroft, Attorney Gen. of the United States).

239. *See D-J*, 23 I. & N. Dec. at 573.

framework where adjudicators are permitted to rely on categorical assessment, at least in part, when judging the propriety of a particular alien's release on bond.<sup>240</sup> And, although focused on sea-bound arrivals from Haiti, the Attorney General's directive has allegedly provided cover for the use of "categorical decrees" and considerations in other contexts.<sup>241</sup>

The Attorney General set a heightened standard for criminal aliens in *Matter of Y-L-*, although that decision had arisen in a different context.<sup>242</sup> The main issue in that case was whether drug trafficking crimes constituted "particularly serious crimes" that would statutorily bar eligibility for withholding of removal.<sup>243</sup> The three aliens in the consolidated case were found removable based on their convictions for felony drug trafficking offenses, but the Board granted all three withholding of removal, holding in each case "that the aggravated drug trafficking felonies committed by respondents did not constitute 'particularly serious crimes' for purposes of" foreclosing statutory eligibility for withholding of removal.<sup>244</sup>

On review, the Attorney General disagreed, focusing on the statute, legislative intent, and the prior precedent of the Board and courts of appeals. First, the statute dictated that any aggravated felony for which an aggregate sentence of five years or more is imposed would constitute a "particularly serious crime."<sup>245</sup> But the statute also made clear that the Attorney General had broad discretion to find that *other* aggravated felonies constituted disqualifying, particularly serious crimes.<sup>246</sup> Operating without a prior Attorney General decision, "the BIA ha[d] seen fit to employ a case-by-case approach, applying an individualized, and often haphazard, assessment as to the 'seriousness' of an alien defendant's crime," which often led to

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240. See Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 167 (2004) ("[T]he Attorney General essentially declared that these individualized risk assessments are not required—and indeed are prohibited—once he concludes that detention of any group of noncitizens would further sound immigration policy or national security.").

241. *Id.* at 168 (noticing the growth of the rationale as well as providing anecdotal cases of the use of categorical decrees in bond denials); cf. Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 265 n.208 (2012) ("Taken to its logical extreme (a short step from its actual position), the Attorney General's decision in *Matter of D-J-* permits executive detention of any noncitizen regardless of the bond provisions currently mandated by statute.").

242. See *Y-L-*, 23 I. & N. Dec. 270 (Attorney Gen. 2002).

243. See 8 U.S.C. § 1231(b)(3)(B) (2012) (stating that an alien will not be eligible for withholding of removal "if the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States").

244. *Y-L-*, 23 I. & N. Dec. at 272.

245. See 8 U.S.C. § 1231(b)(3)(B) ("For purposes of [determining the seriousness of a crime], an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime.").

246. *Id.*



inconsistent and illogical results.<sup>247</sup> Second, the Attorney General rejected the Board's contention that amendments to the INA reflected Congress's intent that the length of the sentence was the most relevant factor for determining the seriousness of a crime.<sup>248</sup> In the Attorney General's "considered judgment," and contrary to the conclusion of the Board, all "aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes,' and "[o]nly under the most extenuating circumstances that are both extraordinary and compelling would departure from this interpretation be warranted or permissible."<sup>249</sup>

The Attorney General supported his "virtual per se rule"<sup>250</sup> with various considerations, including past precedent of the Board and courts of appeals, which had "long recognized that drug trafficking felonies equate to 'particularly serious crimes,'" and the "long-standing *congressional* recognition that drug trafficking felonies justify the harshest of legal consequences."<sup>251</sup> However, the Attorney General did not establish a per se rule, simply a strong presumption.<sup>252</sup> Returning to the cases under review, he concluded that none of the aliens' cases "present[ed] the kind of extraordinary and compelling circumstances that might warrant treating the respondents' aggravated drug trafficking felonies as anything other than 'particularly serious crimes.'"<sup>253</sup>

*Matter of Y-L-* is a clear statement of policy that the gravity of a criminal conviction will largely dictate whether it constitutes a "particularly serious crime," with the length of sentence playing a subsidiary role in that determination. It also erected a legal framework based on this consideration of policy: Drug trafficking convictions will presumptively constitute "particularly serious crimes," absent a strong and extraordinary showing by the alien that the circumstances of his particular conviction should not bar

247. *Y-L-*, 23 I. & N. Dec. at 273.

248. *Id.* (quoting the Board's conclusion that the 1996 amendments, which eliminated a provision declaring all aggravated felonies to be "'particularly serious crimes' reflect[ing] Congress' desire to replace classifications based on the 'category or type of crime that resulted in the conviction' with classifications 'based on length of sentence imposed'" (footnote omitted)).

249. *Id.* at 274.

250. Lauren Gilbert, *The 26th Mile: Empathy and the Immigration Decisions of Justice Sotomayor*, 13 HARV. LATINO L. REV. 1, 23–24 (2010).

251. *Y-L-*, 23 I. & N. Dec. at 275.

252. *Id.* at 276 ("I do not consider it necessary . . . to exclude entirely the possibility of the very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances that justify treating a particular drug trafficking crime as falling short of that standard."). The Attorney General also emphasized that "such commonplace circumstances as cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence do not justify such a deviation." *Id.* at 277.

253. *Id.* The Attorney General also concluded that none of the aliens establish eligibility for deferral of removal under CAT. *Id.* at 281–85.

relief,<sup>254</sup> and the decision is a strong signal of how the Attorney General would deal with other aggravated felonies.<sup>255</sup>

### 3. Foreign Policy-Related Decisions

Foreign policy objectives and considerations play a central role in immigration law, a fact frequently noted by the Supreme Court. As the Court held in *INS v. Aguirre-Aguirre*, “we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”<sup>256</sup> Therefore it is unsurprising that foreign policy considerations have occasionally featured in the Attorney General’s decision-making process under the referral authority.

The legal proceedings of Joseph Patrick Thomas Doherty, which have a long and complicated history, are a case of note regarding foreign policy considerations.<sup>257</sup> Doherty was convicted of murder, attempted murder, and various other crimes in the United Kingdom, based on his role in a Provisional Irish Republican Army attack on British soldiers.<sup>258</sup> He escaped prison and fled to the United States, where he was arrested and where the United Kingdom was unable to obtain his extradition, based on the courts’ conclusions that his crime in the United Kingdom fell within the political-

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254. See Maryellen Meymarian, *Providing Immigration Advice During Criminal Proceedings: Preempting Ineffective Assistance of Counsel Claims When Non-Citizen Aliens Seek to Withdraw Guilty Pleas to Avoid Adverse Immigration Consequences*, 39 AM. J. CRIM. L. 53, 87 (2011) (noting that “an aggravated felony conviction involving unlawful trafficking will presumptively constitute a ‘particularly serious crime’ and therefore bar the alien from almost all possible relief options”).

255. See, e.g., Ian Atkinson, Note, *Assumption of Risk in United States Refugee Law*, 49 VA. J. INT’L L. 273, 296–97 (2008) (referencing *Matter of Y-L-* as an exercise of the Attorney General’s discretion under 8 U.S.C. § 1231(b)(3) (2012) to designate certain crimes “particularly serious”); Valerie Neal, Note, *Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons,”* 36 VAND. J. TRANSNAT’L L. 1619, 1640–41 (2003) (noting that although the Attorney General’s decision is limited to consideration of drug trafficking convictions, the decision also establishes general considerations that may dictate most aggravated felony convictions constitute “particularly serious crimes”).

256. *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 110 (1988)); see also *id.* at 425 (“A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.”); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–91 (1999) (“What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques.”).

257. See generally James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 318 (1992) (“[T]he Doherty Case took a number of surprising twists and turns, and raised a host of nettlesome diplomatic, legal, and policy questions.”).

258. *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 1 (1988).

offense exception to the U.S.–U.K. extradition treaty.<sup>259</sup> He was placed into deportation proceedings where he conceded removability, sought no relief from removal, and designated Ireland as the country of removal.<sup>260</sup>

The INS objected to Doherty’s designation of Ireland as “prejudicial to the interests of the United States,” and sought deportation to the United Kingdom instead, but this contention was rejected by the immigration judge for lack of evidence.<sup>261</sup> The Board upheld this determination, despite the introduction of an affidavit by the Associate Attorney General asserting prejudice to U.S. interests.<sup>262</sup>

Attorney General Meese disapproved of Doherty’s designation. He noted: “It is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment.”<sup>263</sup> Doherty would not receive his punishment if he was deported to Ireland, where the U.K. could not likely obtain his extradition. Even assuming that Doherty *could* be extradited to the U.K. if deported to Ireland, that deportation would still be prejudicial to the United States because “[d]eporting respondent to Ireland would require the United Kingdom to invoke Irish law to secure respondent’s return to the United Kingdom.”<sup>264</sup> A second, and corollary point, was that the failure to extradite Doherty had already been a disappointment, therefore, the deportation of Doherty to Ireland might jeopardize confidence in the United States as a counter-terrorism partner of the U.K. while prejudicing other aspects of the important bilateral relationship.<sup>265</sup> Accordingly, Meese disapproved of the designation of Ireland as the country of removal and remanded proceedings to the Board for consideration of a motion to reopen that had been filed by Doherty.<sup>266</sup>

In his motion to reopen, Doherty sought reopening to apply for asylum and withholding of removal, and to change his designation of a country of removal.<sup>267</sup> This motion was allegedly prompted by a change in Irish law, the Extradition Act, which would allow Doherty’s extradition to the U.K., a fact

259. *Id.* at 1–2; *see also* United States v. Doherty, 615 F. Supp. 755, 761 (S.D.N.Y. 1985), *aff’d*, 786 F.2d 491 (2d Cir. 1986) (denying U.S. request for declaratory judgment seeking collateral review of the extradition order); *In re* Doherty, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) (denying extradition request under political offense exception); Steve Lampo, *A Proposal to Change the Political Offense Exception to Extradition*, 37 NAVAL L. REV. 239, 245–49 (1988); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT’L L. 338, 341 (1986).

260. *Doherty*, 12 Op. O.L.C. at 2.

261. *Id.*; *see also* 8 U.S.C. § 1231(b)(2)(C) (“The Attorney General may disregard [the alien’s] designation of a country of removal] if . . . the Attorney General decides that removing the alien to the country is prejudicial to the United States.”).

262. *Doherty*, 12 Op. O.L.C. at 2–3.

263. *Id.* at 6.

264. *Id.*

265. *See id.* at 6–7.

266. *Id.* at 7–8.

267. Deportation Proceedings for Joseph Patrick Thomas Doherty, 13 Op. O.L.C. 1, 5 (1989).

that had not been previously contemplated, according to Doherty.<sup>268</sup> The Board granted the motion, holding that the prior failure to apply for asylum was excusable, as there was not then a risk that he would be deported to the U.K. given his designation of Ireland and the unlikelihood of his extradition from Ireland to the U.K.; the Attorney General's holding on the designation of a country of removal constituted a cognizable changed circumstance; and a *prima facie* case of a well-founded fear of persecution had been established.<sup>269</sup>

The case was again referred to the Attorney General for review, and Attorney General Thornburgh denied the motion. First, Thornburgh concluded that reopening was not warranted as no new facts or law had intervened since the underlying proceedings. The possible rejection of the designation was foreseeable, the Irish government had stated its intent to sign the extradition treaty as early as 1985, and the other evidence sought to be proffered was either old or immaterial.<sup>270</sup> Second, any claim of asylum was deemed waived as a tactical decision to obtain deportation to Ireland as soon as possible, and thus could not be pursued now,<sup>271</sup> and any claims of asylum or withholding of removal would be independently barred on account of Doherty's probable commission of serious nonpolitical crimes in the United Kingdom.<sup>272</sup>

Doherty's proceedings did not end with the Attorney General's decisions. The Second Circuit subsequently upheld Attorney General Meese's rejection of Ireland as the designated country of removal but reversed Attorney General Thornburgh's denial of the motion to reopen.<sup>273</sup> The Supreme Court granted certiorari and reversed, holding that the denial of the motion to reopen was not an abuse of discretion.<sup>274</sup>

The whole course of Doherty's deportation proceedings was dictated by foreign policy considerations, quite explicitly in the rejection of Doherty's designation of a country of removal and more implicitly in Thornburgh's subsequent denial of the motion to reopen, which reiterated some of the main concerns that Meese had earlier noted.<sup>275</sup> Such considerations have been

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268. *See id.* at 5–6.

269. *Id.* at 6–7.

270. *Id.* at 10–20.

271. *Id.* at 20–22; *see also* 8 C.F.R. § 1003.2(c)(1) (2015) (“[N]or shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien’s right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing . . .”).

272. *Doherty*, 13 Op. O.L.C. at 22–27; *see also* 8 U.S.C. § 1158(b)(2)(A)(iii) (asylum); *id.* § 1231(b)(3)(B)(iii) (withholding of removal).

273. *See Doherty v. U.S. Dep’t of Justice*, 908 F.2d 1108, 1121 (2d Cir. 1990), *rev’d sub nom.* *Immigration & Naturalization Serv. v. Doherty*, 502 U.S. 314 (1992).

274. *See Doherty*, 502 U.S. at 321–22.

275. *See Doherty*, 908 F.2d at 1124 (Lumbard, J., concurring in part and dissenting in part) (“There can be no doubt that political judgments are at the heart of the decision not to reopen

criticized as playing an inappropriate role in the disposition of the case,<sup>276</sup> as has the government's aggressive pursuit of the case itself through the administrative process of Attorney General review.<sup>277</sup> The decision was also criticized for obtaining through deportation proceedings what the United States and United Kingdom failed to obtain through extradition proceedings—the removal of Doherty to the United Kingdom.<sup>278</sup> None of these criticisms are compelling, and the referral process worked in a manner that allowed the government to pursue its interests within the bounds permitted by law. The statute explicitly contemplates consideration of prejudice to U.S. interests in permitting the Attorney General to reject a designation, and there is no colorable argument that foreign policy considerations cannot play into the calculation of what constitutes prejudice to those interests. The statute grants broad discretion to the attorney general to assess eligibility for relief, including the ability to deny asylum on discretionary grounds even if eligibility has otherwise been established.<sup>279</sup> The fact that deportation was obtained but not extradition is similarly inapposite to consideration of the fairness or legitimacy of the proceedings, as these are distinct legal frameworks meant to assess quite different questions that might not always lead to the same conclusion in cases such as Doherty's. Finally, the

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this case. As we stated in *Doherty v. Meese*, the Doherty matter 'affects not only the relations of the United States with the United Kingdom and the Republic of Ireland, but also the complicated multilateral negotiations concerning efforts to halt international terrorism.'" (quoting *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986)); *Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 6–8 (1988).

276. See, e.g., *Doherty*, 908 F.2d at 1119–21 (majority opinion) (rejecting the permissibility of weighing foreign policy considerations in deciding asylum eligibility); Jennifer M. Corey, Note, *Immigration and Naturalization Service v. Doherty: The Politics of Extradition, Deportation, and Asylum*, 16 MD. J. INT'L L. & TRADE 83, 119–21 (1992); Note, *Prisoners of Foreign Policy: An Argument for Ideological Neutrality in Asylum*, 104 HARV. L. REV. 1878, 1896–97 (1991); cf. David H. Laufman, Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495, 531–39 (1986) (noting apparent consideration of political and foreign policy issues in decisions granting and denying asylum, as well as other immigration decision-making).

277. See, e.g., *Doherty*, 908 F.2d at 1122 ("We find the government's professed concern for the 'integrity of the administrative process' unconvincing in light of its own actions in this case. The government's use of administrative and judicial processes has been exhaustive, to say the least. . . . [T]he government itself moved to reopen the case at an earlier stage of the administrative proceedings . . . [and] the certification procedure itself, a rarely used procedural device that is removed from normal administrative channels, has twice been invoked by the attorney general with respect to Doherty.").

278. See Michael J. Bove, Note, *Deportation as De Facto Extradition: The Matter of Joseph Doherty*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 263, 295–96 (1990).

279. See *Doherty*, 908 F.2d at 1126 (Lumbard, J., concurring in part and dissenting in part) ("If Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so. That the statute places no restrictions on his discretion tells us that Congress intended that there be none.").

ultimate determinations made by the Attorney General in the referral process are ones that Congress has given him the authority to make.<sup>280</sup>

#### 4. Remand and Attorney General Inaction

The preceding three sections have dealt with decisions in which the Attorney General took some form of substantive action on review. Often, however, Attorneys General will take little or no substantive action on review of a decision, or will reject review of a case that has been referred. This often acts as a stand-in for certain policy decisions. The rejection of review, for instance, may signal acceptance of the status quo regarding the Board's interpretation of the issue. Or a case may be referred, vacated, and held, pending other administration initiatives. In this sense, the Attorney General review mechanism may act as a "stay" on certain issues of significant importance to the administration.

##### *i. Remands for Further Consideration*

If *Matter of Silva-Trevino*, *Matter of Compean*, and *Matter of Doherty* are the rare cases where two Attorneys General issued decisions in a single case, then *Matter of R-A* is unique for having "a dizzying procedural history spanning nearly fifteen years" in which three Attorneys General referred the Board's decision for further review.<sup>281</sup> A Guatemalan woman, the victim of severe domestic abuse, sought asylum and related protection in the United States.<sup>282</sup> As the Board recounted: "From the beginning of the marriage, her husband engaged in acts of physical and sexual abuse against [her]."<sup>283</sup> His motivation, however, was not clear. R-A supposed that her husband abused her "because he had been mistreated when he was in the army, and as he had told her, he treated her the way he had been treated."<sup>284</sup> An immigration judge granted asylum, finding that she "was persecuted because of her membership in [a] particular social group."<sup>285</sup> Additionally, "the Immigration Judge further found that through [R-A's] resistance to his acts of violence, her husband

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280. *Cf. id.* at 1124-25 ("The denial of Doherty's motion to reopen was made not by an inferior INS official but by the Attorney General himself in a thorough and reasoned signed opinion. The Attorney General, as a member of the Cabinet who reports to the President and is conversant with the views of the administration, expresses the views of the Government. When the Attorney General makes a judgment on an essentially political question, we usurp the executive's authority when we review that decision for infirmities less grave than the most serious violations of law.").

281. Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 396 (2014); *see also* R-A, 22 I. & N. Dec. 906 (B.I.A. 1999).

282. R-A, 22 I. & N. Dec. at 908.

283. *Id.*

284. *Id.* at 909.

285. *Id.* at 911 (describing that social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" (quoting the findings of the Immigration Judge)).

imputed to [her] the political opinion that women should not be dominated by men, and he was motivated to commit the abuse because of the political opinion he believed her to hold.”<sup>286</sup>

A majority of the Board, sitting en banc, reversed this decision on both grounds.<sup>287</sup> First, the Board agreed with the immigration judge that the harm alleged rose to the requisite level of severity to constitute persecution under the INA.<sup>288</sup> The main question, however, was whether this harm was suffered on account of a statutorily protected ground, either political opinion or the alien’s membership in a particular social group.<sup>289</sup> Regarding the first ground, there was no indication in the record that R-A- held a particular political opinion or that her husband’s violence against her was on account of any opinion so held.<sup>290</sup> Nor did the Board believe that she had adequately established her membership in a particular social group.<sup>291</sup> Her proposed group was not shown to be “a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala” because neither the victims nor the male oppressors see the victims as a part of a group.<sup>292</sup> It was also not shown that members of the group were at general risk of persecution because of their membership.<sup>293</sup> The majority noted that INS could take action to halt R-A-’s deportation in the exercise of its discretion, but rejected her claim to asylum.<sup>294</sup>

On December 7, 2000, the Department of Justice promulgated proposed rules to amend certain regulations pertaining to asylum eligibility, motivated in large part to reverse certain aspects of the Board’s decision in *Matter of R-A-*.<sup>295</sup> First, the rule clarified that there is no legal requirement that an alien demonstrate that her persecutor would persecute *all* women in the proposed particular social group in order to establish the requisite nexus between the harm alleged or feared and the social group<sup>296</sup> and proposed a provision that

286. *Id.*

287. *Id.* at 914.

288. *Id.*

289. *Id.*

290. *Id.* at 914–17.

291. *Id.* at 917–18.

292. *Id.* at 918.

293. *Id.* at 920–21.

294. *Id.* at 928.

295. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

296. *Id.* at 76,592–93 (“[I]t often would be reasonable to expect that a person who is motivated to harm a victim because of a characteristic the victim shares with others would be prone to harm or threaten others who share the targeted characteristic. Such a showing should not necessarily be required as a matter of law . . . [I]t may be possible in some cases for a victim of domestic violence to satisfy the ‘on account of’ requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a domestic relationship with the abuser.”).

included: “Evidence that the persecutor seeks to act against other individuals who share the applicant’s protected characteristic is relevant and may be considered but shall not be required.”<sup>297</sup> Second, the rule established illustrative criteria to meet in order to establish a cognizable particular social group, drawing in part from the Board’s decision in *Matter of R-A*.<sup>298</sup> This approach, clarifying the governing law at a higher level of generality, was preferred over the announcement of a categorical rule that domestic violence does or can qualify an applicant for refugee status under the INA.<sup>299</sup>

On January 19, 2001, Attorney General Reno vacated the Board’s decision in *Matter of R-A*, after referral by the Acting Commissioner of the INS and remanded proceedings to the Board for reconsideration.<sup>300</sup> She also directed that the Board stay its reconsideration of the case until the proposed rule was “published in final form,” and then reconsider R-A’s case under the new rule.<sup>301</sup> However, no final rule was published. Attorney General Ashcroft subsequently certified the case to himself in 2003 and requested briefing from the parties. DHS, in its brief before the Attorney General, “conceded that [R-A-] was eligible for asylum.”<sup>302</sup> On January 19, 2005, however, Ashcroft again “remanded . . . for reconsideration following final publication of the proposed rule published at 65 Fed. Reg. 76,588 (Dec. 7, 2000)” and instructed that “[t]he BIA should reconsider the decision in light of the final rule.”<sup>303</sup>

Nearly four years later, the final rule remained unpublished, and on September 25, 2008, Attorney General Mukasey directed that the case be referred to himself and again remanded for immediate reconsideration of R-A’s claim.<sup>304</sup> Mukasey noted that the Board had stayed its consideration not only of *Matter of R-A*, but also of all similarly situated claims of asylum eligibility based on allegations of domestic violence.<sup>305</sup> In light of those stays and the fact that the proposed regulation had never materialized, Mukasey lifted the stay and directed the Board to revisit the domestic-violence issue in both *Matter of R-A* and other pending cases involving that same issue.<sup>306</sup> Although this reconsideration would not be pursuant to the final rule, Mukasey did note the substantial developments in the area of asylum law, both before the Board and the courts of appeals, in the time between the initial

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297. *Id.* at 76,598.

298. *See id.* at 76,594, 76,598.

299. *Id.* at 76,595.

300. R-A-, 22 I. & N. Dec. 906, 906 (Attorney Gen. 2001).

301. *Id.*

302. Gupta, *supra* note 281, at 397.

303. R-A-, 23 I. & N. Dec. 694, 694 (Attorney Gen. 2005).

304. R-A-, 24 I. & N. Dec. 629, 629 (Attorney Gen. 2008).

305. *Id.* at 630.

306. *Id.* at 630–31.



denial of asylum and his remand order, which could “have relevance to the issues presented with respect to asylum claims based on domestic violence.”<sup>307</sup>

R-A- was subsequently granted asylum in December 2009, upon the stipulation of the government.<sup>308</sup> Yet there is still no final rule nor any precedential decision on the issue of asylum eligibility for victims of domestic violence, despite the Obama Administration refocusing on implementing the final rule.<sup>309</sup> Although the Attorney General decisions had meant to create the space to implement asylum policies through the rulemaking process, that process has failed and the void has not been filled by either an Attorney General decision or other controlling precedent, undermining the initial impetus behind the rulemaking initiative.

Despite the length of the course of proceedings in *Matter of R-A-*, Attorney General remands more frequently result in fairly quick decisions resolving the issue flagged for further review or reconsideration. An example is *Matter of E-L-H-*, where the Board granted asylum based on its prior precedent decision in *Matter of C-Y-Z-*, and the INS filed a motion to reconsider, arguing that because *Matter of C-Y-Z-* had been referred to the Attorney General for review, the Board could not rely on it as precedent.<sup>310</sup> The Board denied the motion, holding that the decision retained its precedential effect “[e]xcept as [it] may be modified or overruled by the Board or the Attorney General.”<sup>311</sup> In 2004, Attorney General Ashcroft granted INS’s request for review, vacated the Board’s decision, and remanded proceedings for further consideration of an unpublished decision by Attorney General Reno addressing the finality of Board decisions that have been certified for review.<sup>312</sup> In her decision, Attorney General Reno had held that the regulations “render[] a Board decision that has been referred to the Attorney General non-final and without effect.”<sup>313</sup> On remand, however, the Board retained its original interpretation, distinguishing Reno’s order as presenting a different question relating to the effect in the particular case of the Attorney General’s referral, not any issue regarding the *precedential* effect to be given to Board decisions.<sup>314</sup> The Board determined that “under the plain language of the regulatory provision addressing the controlling effect of Board precedent decisions . . . a Board precedent decision applies to all proceedings involving the same issue unless

307. *Id.* at 630.

308. See Barbara R. Barreno, Note, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 248 (2011); see also Karen Musalo et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L.J. 161, 163 (2010).

309. See *Asylum and Withholding Definitions*, 74 Fed. Reg. 64,220, 64,220–21 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

310. E-L-H-, 22 I. & N. Dec. 21, 21 (B.I.A. 1998).

311. *Id.* (alteration in original) (quoting 8 C.F.R. § 3.1(g) (1997)).

312. E-L-H-, 23 I. & N. Dec. 700, 701–04 (Attorney Gen. 2004).

313. *Id.* at 702.

314. E-L-H-, 23 I. & N. Dec. 814, 815 (B.I.A. 2005).

and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court.”<sup>315</sup>

Proceedings can also be resolved quickly on remand when the impetus for the Attorney General’s vacatur and order is an intervening change in law, such as in *Matter of Farias*, where the Attorney General remanded a case for further consideration of an alien’s eligibility for a waiver of removability based on such a change in law.<sup>316</sup> Sometimes an intervening change in law permits the Attorney General to remand a case while declining to resolve the more difficult issue on which review had been granted. In *Matter of N-J-B-*, the majority of the Board determined that a provision of IIRIRA could be applied to abandon an application for suspension of deportation, despite the fact that proceedings against the alien had been instituted before the enactment or effective date of that Act.<sup>317</sup> The Attorney General vacated the decision of the Board on July 10, 1997, but took no adjudicatory action.<sup>318</sup> The precipitation for referral seemed to be the Clinton administration’s disagreement with the decision of the Board and its intent to ultimately resolve the matter through the introduction of legislation.<sup>319</sup> President Clinton subsequently signed the Nicaraguan Adjustment and Central American Relief Act (“NACARA”),<sup>320</sup> which revised certain parts of IIRIRA’s transitional rules, including the rule on which the Board had based its decision in *Matter of N-J-B-*.<sup>321</sup> Yet the relevant revision had the effect of codifying, for the most part, the Board’s vacated majority decision in *Matter of N-J-B-*, and the Board effectively reissued that holding in *Matter of Nolasco*, concluding that the amended rule applied to all charging documents whenever issued.<sup>322</sup>

NACARA also provided distinct relief provisions that could benefit certain aliens from qualifying countries, including Nicaraguans such as the

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315. *Id.*

316. *Farias*, 21 I. & N. Dec. 269, 279–81 (Attorney Gen. 1997).

317. *N-J-B-*, 22 I. & N. Dec. 1057, 1063–68 (B.I.A. 1997); *see also* Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 435–36 (2000) (“The Board of Immigration Appeals held . . . that the new stop-time rule applies to noncitizens whose applications for suspension of deportation were pending when the 1996 Act took effect.”).

318. *N-J-B-*, 22 I. & N. Dec. 1057, 1088 (Attorney Gen. 1997).

319. *See* Nat’l Immigration Law Ctr., *Immigration Issues*, IMMIGRANTS’ RIGHTS UPDATE, July 23, 1997, at 1, 1 (“Reno announced in a press statement that the Clinton administration will introduce legislation to ensure that individuals who applied for suspension of deportation prior to the IIRIRA’s Apr. 1, 1997, effective date . . . continue to be eligible for suspension of deportation.”).

320. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105–100, tit. 11, 111 Stat. 2193, 2193 (1997), *amended by* Pub. L. No. 105–139, 111 Stat. 2644 (1997) (codified as amended in scattered sections of 8 U.S.C.)

321. *See Nolasco*, 22 I. & N. Dec. 632, 634 (B.I.A. 1999).

322. *See Angel-Ramos v. Reno*, 227 F.3d 942, 946–47 (7th Cir. 2000); Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 588–89 (2001).

alien in *Matter of N-J-B*.<sup>323</sup> On August 20, 1999, Attorney General Reno remanded proceedings to the Board for it to consider an intervening motion to reopen filed by the alien regarding relief under the newly enacted statutory provisions of NACARA pertaining to adjustment of status.<sup>324</sup> The referral and vacatur of the Board's decision had been meant to buy the administration time to institute a statutory fix for a decision that it viewed as erroneous and was exponentially increasing deportations for those with relief applications pending at the time of IIRIRA's enactment.<sup>325</sup> But the ultimate legislative "fix" merely made explicit in the statute what the Board had reasonably inferred in the pre-amendment language, foreclosing the relief of suspension of deportation to N-J-B- and other similarly situated aliens. Having vacated the decision, however, Attorney General Reno could still control the future path to other forms of relief, to a limited extent, and she did so by remanding for consideration of N-J-B-'s eligibility for adjustment of status under the new provisions of NACARA.

*ii. Attorney General Inaction*

Attorneys General usually provide legal and policy guidance on immigration issues through action, whether a decision on substantive issues or remands where the Board is directed to consider specific issues or intervening changes in law. In rare cases, however, policy can be dictated by calculated inaction. The most significant area in which inaction has played a role is in the consideration of asylum claims based on coercive family planning policies.

The saga begins with the Board's 1989 decision in *Matter of Chang*, where it held that application of China's one-child policy would not normally give rise to a finding of past persecution or a well-founded fear of persecution, absent evidence that the policy was selectively applied to the alien for reasons attributable to one of the statutorily protected grounds, such as religion or political opinion.<sup>326</sup> The Board also held that an alien would have to show the unavailability of redress by higher levels of the Chinese government, if the challenge was based on the application of policy at the local level, and that

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323. See Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 927 (2006) (noting effective amnesty and relief provisions of NACARA); Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 129-30 (1999) (explaining BIA actions after *Matter of N-J-B*).

324. N-J-B-, 22 I. & N. Dec. 1057, 1057-58 (Attorney Gen. 1999).

325. See, e.g., Carol Rosenberg, *A Break for Central Americans: Reno Moves to Freeze Massive Deportations*, MIAMI HERALD, July 11, 1997, at 1A.

326. Chang, 20 I. & N. Dec. 38, 43-45 (B.I.A. 1989).

the policy was applied more harshly or consistently to those who had voiced opposition to it.<sup>327</sup>

A flurry of activity in both the legislative and executive branches followed the issuance of *Matter of Chang*. Congress attempted to overturn the Board's interpretation in the Emergency Chinese Immigration Relief Act of 1989, but the Act was vetoed by President Bush on grounds unrelated to the provisions pertaining to refugee determinations, and the Senate could not marshal the requisite number of votes to override the veto.<sup>328</sup> In January 1990, the Department of Justice promulgated draft regulations that would have amended the asylum regulations to provide:

(1) Aliens who have a well-founded fear that they will be required . . . to be sterilized because of their country's family planning policies may be granted asylum on the ground of persecution on account of political opinion.

(2) An applicant who establishes that the applicant (or applicant's spouse) has refused . . . to be sterilized in violation of a country's family planning policy, and who has a well-founded fear that he or she will be required . . . to be sterilized or otherwise persecuted if the applicant were returned to such country may be granted asylum.<sup>329</sup>

Following the promulgation of the draft regulation, President Bush issued Executive Order No. 12711, dealing explicitly with immigration policies aimed at assisting Chinese nationals with remaining in the United States.<sup>330</sup> Section 4 of that order directed the Attorney General "to provide for enhanced consideration under the immigration laws for individuals from any country who express a fear of persecution upon return to their country related to that country's policy of forced abortion or coerced sterilization."<sup>331</sup>

When the final rule of the proposed regulations was published in July 1990, however, the rule pertaining to coercive population control programs was not included. The "Interim Rule had quite simply and remarkably vanished without a trace or explanation,"<sup>332</sup> although its omission was apparently the result of bureaucratic "inadvertence."<sup>333</sup> In January 1993, the out-going Attorney General again signed a final rule, in substance identical to the 1990 Interim Rule, but this rule, along with numerous others, was pulled

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327. *Id.* at 45-46.

328. *See* Guo Chun Di v. Carroll, 842 F. Supp. 858, 863 (E.D. Va. 1994), *rev'd sub nom.* Guo Chun Di v. Mocato, No. 94-146, 1995 WL 543525 (4th Cir. Sept. 14, 1995) (*per curiam*).

329. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803, 2805 (Jan. 29, 1990) (to be codified at 8 C.F.R. pts 208 & 242).

330. Exec. Order No. 12711, 55 Fed. Reg. 13,897, 13,897 (Apr. 11, 1990).

331. *Id.*

332. *Guo Chun Di*, 842 F. Supp. at 864.

333. *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1337 n.4 (4th Cir. 1995).

back from publication by the incoming Clinton administration in a review of then-pending regulatory changes.<sup>334</sup> Thus, despite these various maneuverings, by the beginning of the Clinton administration *Matter of Chang* remained the precedent governing asylum claims made under coercive family planning programs.

In June 1993, the Board referred to the Attorney General two cases dealing with coercive population control programs, *Matter of Chun* and *Matter of Tsun*, and requested that the Attorney General resolve any conflict between *Matter of Chang* and President Bush's Executive Order, which had contemplated the promulgation of a final rule favorable to such asylum applicants.<sup>335</sup> On review, however, Attorney General Reno declined to resolve any conflict and rescinded the order granting review because the agency had concluded that the aliens were not credible, and thus the merits of the claims were not clearly presented for review.<sup>336</sup>

It is at this point that the story of inaction begins to merge with the path that finally ended with Mukasey's decision. In 1996, following the rescission of the referral order, Congress legislatively abrogated *Matter of Chang* with an amendment to the definition of "refugee" which explicitly contemplated persecution under coercive population control programs as persecution on account of political opinion.<sup>337</sup> With this amendment, the Board expanded its limiting interpretation in *Matter of Chang* to an interpretation of "refugee" that extended relief not only to those who had been directly subjected to forced abortions and sterilizations, but also to their spouses. Although the Commissioner of the INS referred *Matter of C-Y-Z* to the Attorney General for review, Ashcroft declined to review the decision, leaving coercive family

334. See *Guo Chun Di*, 842 F. Supp. at 864; Stanford M. Lin, Recent Development, *China's One-Couple, One-Child Family Planning Policy as Grounds for Granting Asylum—Xin-Chang Zhang v. Slattery*, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231, 239 (1995) ("When President Clinton took office on January 22, 1993, one of his first acts was to block the publication of any further Bush Administration rules in the Federal Register, pending a general review by the Office of Management and Budget of all regulations signed but not published on or before January 22, 1993. As a result, the January 1993 Rule never reached publication, and when regulations governing asylum were again published in the CFR in February 1993, the resulting regulations did not incorporate the January 1993 Rule nor did they refer in any way to it." (footnotes omitted)).

335. See *Guo Chun Di*, 842 F. Supp. at 864–65.

336. See *Gao v. Waters*, 869 F. Supp. 1474, 1478 n.6 (N.D. Cal. 1994) (providing text from Attorney Gen. Order No. 1756-1993 (June 29, 1993)).

337. 8 U.S.C. § 1101(a)(42) (2012); see also *Mei Fun Wong v. Holder*, 633 F.3d 64, 69 (2d Cir. 2011) ("In response to reports that China was enforcing its population control policy through forced abortions and sterilizations, however, Congress legislatively recalibrated the balance to ensure that persons subjected to such treatment qualified as refugees."); Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 885 (2000) ("The passage of Section 601 effectively overrules a Board of Immigration Appeals (BIA) decision, *Matter of Chang*. . . [in which] the BIA held that implementation of a coercive population control policy is not, on its face, a basis for asylum eligibility." (footnote omitted)).

planning issues to be resolved by the courts of appeals and Attorney General Mukasey's decision in *Matter of J-S*.<sup>338</sup>

Despite all the action within the executive branch to institute regulatory reform overruling *Matter of Chang*, Attorney General review of the issue was fairly inactive, since Attorney General Reno took no action to overrule the Board's decision in *Matter of Chang*. Although the two cases referred to Reno might not have presented a clear conflict of authority, given the credibility concerns, it is equally clear that other cases would have presented circumstances where the executive could have more forcefully presented its views on when and under what circumstances claims based on coercive family planning policies might justify asylum and withholding of removal.<sup>339</sup> The Administration's failure to take any action was thus an endorsement of the *Matter of Chang* status quo.

Attorney General Ashcroft's decision declining to review the Board's expansive decision in *Matter of C-Y-Z* can equally stand for the proposition that the executive branch was satisfied with the status quo that the decision represented.<sup>340</sup> Only the subsequent course of these cases through the courts of appeals ultimately prompted action, as the en banc Second Circuit had reversed the Board's reaffirmation of its *C-Y-Z* holding and the en banc Third Circuit was contemplating similar action. At that stage, Attorney General review allowed the executive branch to retake the initiative. Regardless, these cases demonstrate that the inaction of the Attorney General, especially when shown publicly through rescission of review or a published declination of further review, can be as illustrative of executive branch policy as substantive action taken to resolve an issue.

### C. WHY IS THE ATTORNEY GENERAL REVIEW AUTHORITY NOT UTILIZED MORE FREQUENTLY?

Clearly, the referral authority has provided an important avenue for executive branch immigration law and policy making on a wide variety of issues. Despite its efficacy, however, it is quite accurate to note that Attorneys General have used the authority only "sparingly."<sup>341</sup> This is especially true of contemporary practice, since the Obama administration has only issued four

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338. See *C-Y-Z*, 23 I. & N. Dec. 693, 693 (Attorney Gen. 2004).

339. See, e.g., Julie Tang, *The United States' Immigration Laws: Prospects for Relief for Foreign Nationals Seeking Refuge from Coercive Sterilization or Abortion Practices in Their Homelands*, 15 ST. LOUIS U. PUB. L. REV. 371, 384-85 (1996) ("Attorney General Reno's December 1993 justification for avoiding the issue raised by *Matter of Chang* and its progeny rings hollow in light of the plethora of cases that have arisen involving Chinese nationals seeking asylum based upon credible claims of past persecution or a well-founded fear of persecution arising from opposition to the PRC's population control practices." (footnote omitted)).

340. See *C-Y-Z*, 23 I. & N. Dec. at 693 (declining the Commissioner's request for review).

341. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 417 (2007) ("The Attorney General may review BIA decisions but in practice does so only sparingly." (footnote omitted)).

referrals. Even in the relatively “active” Bush administration, the Attorneys General only issued 16 decisions, for an average of two per year. This is significantly lower than the average of eight per year issued between 1953 and 1956, which itself was substantially lower than the average of 37 decisions issued in the period between 1940 and 1952.<sup>342</sup>

Why this drop in decisions? Some of the likely explanations for the overall drop in the rate of review coincide with the shift in who is referring—from the dominance of the Board in the early years of the referral authority, to the later predominance of the INS/DHS and Attorney General. For example, the change in the regulation that eliminated certain mandatory bases of referral meant both that the Board was referring fewer cases and that fewer gross cases were being referred. The development of the law may have entailed a higher proportion of cases where the Board could simply apply extant law or make a reasonable extension of that law, rather than refer disputed cases to the Attorney General.

Changes in the rate of referral could also stem from broader institutional changes. One possible explanation for the mid-1950s decline in referrals from the Board is the Supreme Court’s admonition in *Accardi* that it must independently exercise its judgment in cases it decides. This direction might have disinclined the Board to refer cases to the Attorney General in situations where it was confident in the judgment it rendered, but it also might have engendered a similar disinclination in Attorneys General eager to show that, for the vast majority of cases, the Board’s independent decision would stand despite the authority Attorneys General possess to review those decisions. Another possible explanation is that a busier Attorney General, whose broad oversight functions look significantly different and more expansive in 2015 than they did in 1940, simply has less time to exercise review authority in immigration cases notwithstanding any desire to do so.

Regardless of why the gross number of referrals has dropped so significantly, an explanation for this drop does not explain the disparate use of the authority across different administrations, from the robust exercise of that authority in the George W. Bush Administration to the near-absence of usage in the Obama Administration. There are always a number of issues percolating in the administrative process that would be amenable to Attorney General review, but that review is still not exercised with regularity across administrations consistent with the number of outstanding issues. Attorney General Holder did not make a decision on any substantive issues, whereas the issues decided in the Bush administration were generally of significant importance from a legal or policy perspective.

Ultimately, the usage of the referral authority would seem to be tied to very specific factors regarding how the exercise of Attorney General review could fit with the administration’s immigration-related priorities, how

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342. See Rosenfield, *supra* note 48, at 158.

amenable those issues that are important to the administration would be to resolution through adjudication, and how devoted the particular Attorney General is to vigorously exercising the authority granted to him by the INA and its implementing regulations. Comparing the Obama and Bush Administrations again, the prosecutorial discretion initiatives that have dominated Obama Administration immigration policy do not appear to be mechanisms that could have been easily developed through adjudication, as they by necessity must stem from policy changes to the enforcement of immigration law which are the purview of the Secretary of DHS, not the Attorney General. To the extent the review authority has been engaged, it has been utilized to further broader administration policy in the area of same-sex marriage, and to score a symbolic victory for immigrant advocates in the vacatur of Mukasey's decision in *Matter of Compean*. In contrast, it appears the Bush Administration was more focused on revising and clarifying legal and policy standards regarding the adjudication of immigration cases and the exercise of the Attorney General's discretion—issues that are perfectly amenable to Attorney General review.

In short, the referral authority can be a robust tool for the advancement of executive branch immigration policy, but officials must understand how it can be used and how its use can fit within the broader legal and policy objectives of any given administration.

#### IV. THE REFERRAL AUTHORITY AND THE ADVANCEMENT OF EXECUTIVE BRANCH IMMIGRATION POLICY

Thus far this Article has placed the referral authority in its historical and institutional context, provided an overview of how that authority has been used, and undertaken a lengthy doctrinal analysis of Attorney General decisions over the past 25 years. But there are also important normative and practical questions to ask if one is to advance the referral authority as an important arrow in the executive branch's policy quiver. First, and perhaps most importantly, *is* the referral authority a valid avenue through which the executive branch could advance its immigration policy? Second, if the authority could otherwise implement the administration's immigration-related goals, are there nevertheless compelling criticisms of that authority generally, or its use or potential for abuse in specific cases, that would undermine resort to Attorney General adjudication? Finally, are there any reforms to the regulatory authority that would quash these criticisms or render the authority more efficacious in its policy-making dimensions?

##### A. *IS REFERRAL A VALID AVENUE FOR EXECUTIVE BRANCH POLICY-MAKING?*

The Department of Justice is not usually a significant player in making administrative policy since it functions as “the agency's litigator” and typically



does not make policy decisions for an agency.<sup>343</sup> The situation is far more complicated in the immigration context, where the Department exercises not only its traditional litigation role, but also an important policy-making role, even with the transfer of significant enforcement functions to DHS. The question of whether the referral authority represents an effective avenue for executive branch policy-making is really three discrete questions. First, is Attorney General review itself a practical way to advance the legal and policy goals of an administration? Second, can Attorney General review effectively advance policy without the adjudicatory context adversely affecting either the process or outcome of review? Finally, is Attorney General review an adequate substitute for the more traditional avenue of rulemaking?

The referral authority has obviously proven itself to be an effective conduit for executive branch immigration policy. Through referral and review, the Attorney General has created frameworks to govern how his discretion should be exercised in certain circumstances. In many cases, the Attorney General was able, through referral and review, to provide a clear, cogent, and definitive legal or policy prescription for immigration officials on the issue resolved. At least in these cases, the review authority has met its promise as an important tool in the executive branch's quiver of options for advancing its immigration-related goals.

The limitations of the referral authority relate only to the type of policy the executive branch wants to promulgate. Not every policy initiative is susceptible to resolution through adjudication. Regardless, the referral authority is unquestionably an appropriate and efficacious mechanism for advancing a wide variety of legal interpretations and policy initiatives, even if an administration would utilize additional mechanisms in order to fully implement its vision on immigration. Moreover, at any given time there will be numerous issues percolating through the immigration system that would be valid referral candidates, providing opportunities for executive branch action that might not otherwise be contemplated in the abstract.<sup>344</sup> The referral authority provides an important path through which executive branch immigration policy has been and should continue to be advanced.

The adjudicatory context of Attorney General review does not undermine its ability to serve the executive branch's needs. In the distinct, but related, context of litigation in the federal courts, it has been argued that

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343. Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345, 1374 (2000).

344. See, e.g., Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 177 (2010) (discussing Attorney General referral in the context of policy options to revisit the post-departure bar to reopening); Elizabeth A. Rossi, *A "Special Track" for Former Child Soldiers: Enacting a "Child Soldier Visa" as an Alternative to Asylum Protection*, 31 BERKELEY J. INT'L L. 392, 436 (2013) (discussing Attorney General review in the context of eliminating the "social visibility" prong for establishing the existence of a particular social group for purposes of asylum and withholding of removal).

“active litigation can heighten the adversary nature of a policy dispute and cement the parties’ positions,” while “imbu[ing] a court-centered focus on policy deliberations. This can stultify the policymaking process.”<sup>345</sup> Because the agency adjudicatory context is inherently adversarial, the adversarial nature of Attorney General review does not render it unfit to serve a policy-making function. Moreover, in theory the Attorney General should act in a neutral manner to advance the legal interpretation or policy prescription he deems appropriate, given all relevant factors. It is the Board, rather than the Attorney General, that might represent the stultification of agency policy-making, since it largely takes its cues from the courts of appeals. The Attorney General is best placed to engage in the imaginative interpretations deemed so necessary to the advancement of executive branch policy.

Finally, “[g]iven the broad impact of the rules articulated through certification, it is legitimate to ask why the Attorney General chooses to use adjudication to issue rules that might otherwise be promulgated through notice-and-comment rulemaking.”<sup>346</sup> Attorney General review is more efficient and certain than regulatory reform, while providing nearly identical benefits in the form of clear guidance on policy issues. For example, in 2009, Attorney General Holder vacated the administrative framework for establishing ineffective assistance of counsel that Attorney General Mukasey had created in *Matter of Compean* in favor of the institution of rulemaking; as of 2016, that rulemaking remains ongoing with no conclusion in sight.<sup>347</sup>

Attorney General referral and review provides for the prompt and definitive resolution of an issue without the strictures of the Administrative Procedure Act that characterize the rulemaking process. Rulemaking is an important aspect of agency policy-making, and it may be able to provide benefits in certain circumstances that Attorney General review cannot match. But although rulemaking is a valuable avenue for administrative policy-making, this fact does not undercut the role that Attorney General review could play as a complement to more traditional forms of regulatory reform, especially given how significantly the uncertainty and time-constraints of rulemaking render that process of limited use for the sometimes rapid need to provide policy direction to agency adjudicators, particularly where the policy touches upon terrorism and national security.

#### B. CRITICISMS OF ATTORNEY GENERAL REFERRAL AND REVIEW

Despite its efficacy, Attorney General review is not without its critics. This Part considers, and rejects, the most prominent criticisms of such review. First,

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345. Taylor, *supra* note 198, at 311.

346. Trice, *supra* note 30, at 1794–95.

347. Thomas K. Ragland, *The Right to Effective Assistance of Counsel in Immigration Proceedings*, A.B.A., [http://apps.americanbar.org/litigation/committees/immigration/articles/o609\\_ragland.html](http://apps.americanbar.org/litigation/committees/immigration/articles/o609_ragland.html) (last visited Jan. 14, 2016).

Attorney General review is criticized for improperly intruding upon the independence of the Board, and second, critics allege that the lack of clear and mandated procedures to govern review offends due process.

1. Should the Attorney General Referral Mechanism Exist in any Form?

One line of critique goes directly to the heart of the existence of the Attorney General's review authority and questions whether a political appointee should retain an effective veto over an administrative tribunal. Framing this critique is the perceived problem of the Board's lack of independence: "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."<sup>348</sup> This is not a new criticism, as Rosenfield discussed it as early as 1958, in the context of the Board's failure to obtain statutory status, stating that "[t]he result [of this failure] is that a quasi-judicial Board is at the sufferance of a political officer's whim."<sup>349</sup> Critics believe that the Board adjudicates with the knowledge that the Attorney General may reverse its decisions,<sup>350</sup> therefore decreasing the Board's effective independence even if its decisional autonomy is safeguarded by regulation and tradition.<sup>351</sup>

These criticisms have a veneer of legitimacy, as their target is less the authority of the Attorney General than the very structure of the immigration bureaucracy. The Attorney General is not usurping the authority of the Board when he reviews its decisions, but is exercising an authority that has been given to him by Congress. As the Attorney General noted in *Matter of Hernandez-Casillas*: "[T]he Board acts on the Attorney General's behalf rather

348. Taylor, *supra* note 198, at 288.

349. Rosenfield, *supra* note 48, at 159.

350. See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 544 (2011) ("Board members adjudicate with the knowledge that their boss, a politically appointed prosecutor, may take a case away from them."); cf. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1649 n.64 (2010) ("In practice, the government has no need to ask a court to reverse a BIA decision because the attorney general can simply do so unilaterally.").

351. See Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 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. . . . Although authorized to act independently in its decisionmaking role, the Board hardly can avoid taking into account its perception of the Attorney General's likely view."); Justin Chasco, Comment, *Judge Alberto Gonzales? The Attorney General's Power to Overturn Board of Immigration Appeals' Decisions*, 31 S. ILL. U. L.J. 363, 381 (2007) ("The power to overturn a Board decision decreases the independence of the Board by giving the chief policy maker direct oversight of decisions of the Board."); see also *Xian Tong Dong v. Holder*, 696 F.3d 121, 124 (1st Cir. 2012) (referring to the referral authority as an "unfettered grant of authority to usurp the BIA").

than as an independent body. The relationship between the Board and the Attorney General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court.”<sup>352</sup> Even in *Accardi*, there was no fundamental disagreement between the majority and the dissenters regarding the role the Board played vis-à-vis the Attorney General. The majority characterized the Board as “composed of subordinates,”<sup>353</sup> whereas the dissent properly characterized the Board as

neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision.<sup>354</sup>

The point of *Accardi* is only that the Attorney General may not direct the decisions of the Board, even if he does retain the authority to reverse that decision through his own motion and review.<sup>355</sup> The Board retains its ability to act independently, a right safeguarded by Supreme Court precedent and the regulations; if it fails to do so the fault lies with its own members, not the extraordinarily unlikely prospect that its decision may be reviewed by the Attorney General.

These critiques misunderstand the structure of the executive branch’s immigration functions and also falter against the well-established and well-accepted practice of head-of-department review. As commentators have written, “the authority of an agency head to review the decisions of an intermediate appeals tribunal is well grounded in administrative law. The power of secretarial review does come with certain risks. At the same time, it serves the important function of ‘facilitat[ing] the coherent formulation of agency policy.’”<sup>356</sup> Attorney General review fits comfortably within the broader tradition of head-of-department review, and preserves both the legal and policy-making functions granted directly to him by the INA, while balancing the relative adjudicatory independence of the Board: “Although we expect the BIA itself to function as a neutral adjudicatory body, the

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352. Hernandez-Casillas, 20 I. & N. Dec. 262, 289 n.9 (Attorney Gen. 1991); see also Guentchev v. Immigration & Naturalization Serv., 77 F.3d 1036, 1037 (7th Cir. 1996) (“The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review . . .”).

353. United States *ex rel.* *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

354. *Id.* at 269–70 (Jackson, J., dissenting).

355. Compare *id.* at 267 (majority opinion) (“We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding.”), with *id.* at 270 (Jackson, J., dissenting) (“We do not think [the validity of the decision] can be impeached by showing that [the Attorney General] overinfluenced members of his own staff whose opinion in any event would be only advisory.”).

356. Taylor, *supra* note 198, at 290 (alteration in original) (footnotes omitted).

Department of Justice should be able to respond to changes in the executive administration; agency head review is one means of facilitating responsive policy changes.”<sup>357</sup> The history and the nature of Attorney General review should also assuage fears of improper intrusion on the decisional independence of the Board; such review has been exceedingly rare in the past half-century, and when it is undertaken referrals “are publicly known and visible, thus minimizing the risk of improper invasion of adjudicative neutrality.”<sup>358</sup>

Even if the existence of Attorney General review is accepted, some criticize the standard of review of Board decisions or the overt centralization of authority in one adjudicator. This is a bizarre criticism in light of the Board’s own authority to review most immigration judge determinations *de novo* and the statute’s explicit provision that Attorney General determinations on matters of law shall be controlling.<sup>359</sup> It is difficult to understand why the Attorney General should be held to a more deferential standard of review than the Board itself is held to in reviewing immigration judge decisions. This is especially true where the Attorney General is not in effect reviewing the Board’s *decision* when referred but is reviewing the *case* under his congressionally delegated statutory authority, as if there has been no further delegation to the agency adjudicators.

Nor are there valid grounds for critique of the Attorney General’s exercise of solo review. One academic has criticized the review authority on this basis, writing that “the subordination of the Board’s collective judgment to a single individual’s opinion reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body.”<sup>360</sup> But this critique also misconstrues the relationship between the Board and the Attorney General, which is not that of an inferior adjudicator and an appellate body.<sup>361</sup> It also seems increasingly misplaced in an administrative context where numerous Board decisions are now issued by one Board member acting alone, and where the possibility of judicial review of the Attorney General’s decision by a three-judge panel of the appropriate federal court of appeals exists to provide a back-stop to any legally erroneous decision the Attorney General may issue.

357. Trice, *supra* note 30, at 1770.

358. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1345 n.265 (1990).

359. Compare 8 C.F.R. § 1003.1(d)(3)(i) (2015) (setting a clearly erroneous standard for Board’s review of factual finding), with *id.* § 1003.1(d)(3)(ii) (“The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.”), and *id.* § 1003.1(d)(3)(iii) (“The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*.”).

360. Levinson, *supra* note 351, at 650.

361. See Hernandez-Casillas, 20 I. & N. Dec. 262, 289 n.9 (Attorney Gen. 1991).

2. Do the Procedures That Govern Attorney General Referral and Review Comport with Due Process?

A second line of critique assumes the legitimacy of the referral authority itself, but takes issue with the lack of procedural safeguards surrounding the process of referral and Attorney General review.<sup>362</sup> At present, there are no set regulatory provisions for informing the alien of referral, submitting briefs on review, oral argument, or other procedures related to the Attorney General decision-making process. These issues are handled “in an ad hoc, case-by-case manner.”<sup>363</sup> As early as 1958, it was questioned whether such a purportedly opaque process was constitutional, with one commentator describing it as “indefensible in principle.”<sup>364</sup> There is no question that aliens present in the United States are entitled to due process of law, “whether their presence [in the United States] is lawful, unlawful, temporary, or permanent.”<sup>365</sup> But the more pressing question is ultimately what process, given the particular circumstances in which the claim is being pressed, is actually due?<sup>366</sup>

There are few judicial decisions on the issue of whether the procedures utilized by the Attorney General in exercising his review authority run afoul of appropriate constitutional limits, and most tend to be of rather ancient vintage. As an example, in 1955, the U.S. District Court for the District of Columbia concluded that there could be a violation of due process in the failure to notify the alien of referral or provide him with an opportunity to present arguments to the Attorney General on review.<sup>367</sup> To avoid the constitutional problem, the judge construed the referral regulation “as implying that there should be a notice of the reference to the Attorney General and an opportunity to file written argument or written material.”<sup>368</sup> According to the judge, “any other construction would raise a serious question as to the validity of the regulation.”<sup>369</sup> But this was a decidedly minority view. Earlier, in 1943, a U.S. District Court in California found no due process

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362. See, e.g., Trice, *supra* note 30, at 1768 (“I do not argue that Attorney General review itself is unnecessary or unlawful . . . I argue, rather, that when Attorney General review is used, it must adhere to basic tenets of fairness and due process and must be constrained by procedural safeguards spelled out in binding regulations.”).

363. *Id.* at 1775.

364. Rosenfield, *supra* note 48, at 156; see also *id.* (“Whether this practice is constitutional is still open to question.”).

365. *Zadydas v. Davis*, 533 U.S. 678, 693 (2001).

366. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see also Patrick Glen, *Health Care and the Illegal Immigrant*, 23 HEALTH MATRIX 197, 201 (2013) (“What process is due depends on specific facts and circumstances and varies from case to case . . .” (footnote omitted)).

367. *Bannout v. Brownell*, 129 F. Supp. 488, 489–90 (D.D.C. 1955).

368. *Id.* at 490.

369. *Id.* (citing *Morgan v. United States*, 298 U.S. 468 (1936)).

concerns with the process of Attorney General referral.<sup>370</sup> In addition to procedural refutations of the alien's due process arguments, the judge also noted that the proceedings before the Board and Attorney General were administrative, not judicial, and provided the alien with a fair hearing.<sup>371</sup> The Supreme Court ultimately reversed the decision on substantive grounds and also opined that the procedures of the Attorney General offended due process: "[T]he Attorney General, without holding a hearing or listening to argument, reversed the Board and ordered the deportation of Bridges. It is not surprising that the background and intensity of this effort to deport one individual should result in a singular lack of due process of law."<sup>372</sup> However, this case was a procedural anomaly,<sup>373</sup> and any statements regarding the manner of referral and the processes afforded by the Attorney General were not necessary to the Supreme Court's holding.

Even in the D.C. District Court, the law moved away from the interpretation and holding of *Bannout*. In *Nani v. Brownell*, the judge disagreed that the regulation "implied" some sort of procedure and noted that "nowhere is it provided specifically for notification of [the fact of referral] to the individual concerned nor is it implied."<sup>374</sup> Nor did the D.C. District Court find the prior reference to the Supreme Court's decision in *Morgan v. United States* compelling, as there the statute provided specifically for a "full hearing," whereas the regulations governing referral were silent regarding the nature or form of any process before the Attorney General.<sup>375</sup> The D.C. Circuit affirmed this decision, finding no due process or other legal infirmity in the procedures before, or decision of, the Attorney General, as the alien raised the same legal question regarding deportability before the District Court that was the basis for Attorney General review, and in rejecting the alien's challenge, the District Court properly resolved that issue.<sup>376</sup> The panel majority did, however, limit its decision to the circumstance presented.<sup>377</sup>

The panel majority's view in *Nani* was subsequently adopted in *Klapholz v. Esperdy*, where the alien made the argument that "the availability of review

370. *Ex parte Bridges*, 49 F. Supp. 292, 304 (N.D. Cal. 1943), *rev'd on other grounds sub nom. Bridges v. Wixon*, 326 U.S. 135 (1945).

371. *Id.* ("A deportation proceeding is administrative, not judicial, in nature. The rules applicable to judicial proceedings do not govern. Due process in deportation hearings does not require any particular form of procedure, only that the form adopted afford the alien a fair hearing and that any order of deportation made against him be based on substantial evidence.").

372. *Bridges*, 326 U.S. at 159 (Murphy, J., concurring).

373. *See generally* Comment, *In re Harry Bridges*, 52 YALE L.J. 108 (1942).

374. *Nani v. Brownell*, 153 F. Supp. 679, 680 (D.D.C. 1957).

375. *Id.*

376. *Nani v. Brownell*, 247 F.2d 103, 104 (D.C. Cir. 1957) ("[H]e raised the precise question of law [before the District Court] which had been considered by the Attorney General, and which in actuality appears to have been the only subject of consideration by the latter, namely, the question of law [regarding the charge of deportability].").

377. *Id.* (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

by the Attorney General is so one-sided as to be fundamentally unfair to an alien.”<sup>378</sup> Rejecting this contention, the district judge held that even “[a]ccepting the premise of plaintiff’s . . . argument that he had no opportunity to present a brief before the Attorney General, it would appear that his present court review satisfies any question of due process, assuming due process is required.”<sup>379</sup> The decision in *Klapholz* subtly moves beyond the limited holding of *Nani*. In *Nani*, the question was ultimately one of futility—the Attorney General and district court had properly resolved the legal question, and thus, there was no reason to remand proceedings simply to provide an opportunity for briefing and argument of an issue that could not be permissibly resolved in any different manner. In this sense, the court of appeals’ decision was of a kind with futility exceptions to the remand rule of *Securities and Exchange Commission v. Chenery*.<sup>380</sup> In contrast, the district court’s decision in *Klapholz* assumed that judicial review itself served as the backstop to any due process concerns in the underlying administrative proceeding.

The issue of procedural concerns surfaced again in the closing months of the Bush Administration, when Attorney General Mukasey issued two significant decisions in November 2008 and January 2009. Attorney General Holder questioned the processes used in *Matter of Compean* when he vacated that decision upon reconsideration,<sup>381</sup> but the actual foundation of his concerns is hard to comprehend. In *Matter of Compean*, Attorney General Mukasey did accept briefing from interested parties and immigrant-rights organizations, so the case did not involve a lack of briefing before the Attorney General. Moreover, the concerns voiced by Holder seem less about due process and more about a strong preference for rulemaking over adjudication for advancing the ineffective assistance of counsel issue. It is also odd that Attorney General Holder would choose *Matter of Compean* for making this point, when he initially declined to reconsider *Matter of Silva-Trevino*, Mukasey’s second controversial decision, despite aliens making due process arguments against the procedures used in that case. As recounted by the Third Circuit:

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378. *Klapholz v. Esperdy*, 201 F. Supp. 294, 300 (S.D.N.Y. 1961).

379. *Id.* (citing *Nani*, 247 F.2d 103).

380. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also* Patrick J. Glen, “To Remand, or Not to Remand”: Ventura’s Ordinary Remand Rule and the Evolving Jurisprudence of Futility, 10 RICH. J. GLOBAL L. & BUS. 1, 8–11 (2010) (discussing Supreme Court precedent noting exceptions to the remand rule as announced in *Chenery*).

381. *Compean*, 25 I. & N. Dec. 1, 2 (Attorney Gen. 2002) (“I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration. The preferable administrative process for reforming the *Lozada* framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.”).



The unusual circumstances of *Silva-Trevino's* referral to, and adjudication by, the Attorney General bear mention. . . . Despite requests by Silva-Trevino's counsel, the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. In fact, neither the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views. As a result, the first opportunity of *amici curiae* to file comment was *after* entry of the Attorney General's opinion.

The *amici curiae* brief in support of reconsideration echoes many of the concerns we express herein and, although no challenge to these procedures is before us, the lack of transparency, coupled with the absence of input by interested stakeholders, only serves to dissuade us further from deferring to the Attorney General's novel approach.<sup>382</sup>

Ultimately, however, despite due process challenges to *Matter of Silva-Trevino* percolating throughout the review process, no court of appeals reached any objection to the manner of referral or processes used on review by the Attorney General in reaching his decision. And even when Attorney General Holder did finally vacate that decision, over six years after assuming office, he did not explicitly reach any process-based arguments against Mukasey's decision.<sup>383</sup>

Yet the Third Circuit's criticism of the referral process in *Matter of Silva-Trevino* is arguably misguided and premised on multiple errors of fact and law. The first error is that there was nothing whatsoever unusual about the manner in which *Matter of Silva-Trevino* was referred or decided. The procedures used in *Matter of Silva-Trevino*, as well as those *not* used, including the lack of provision for additional briefing before the Attorney General, fit comfortably within the nearly 80-year history of the referral authority. Along with a lack of historical understanding regarding the referral authority, the court also ignored the regulation as well as Attorney General Mukasey's order denying

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382. *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009) (citations omitted); *see also* Trice, *supra* note 30, at 1779–80 (“The Attorney General articulated this new standard—binding on all future litigants and likely to result in increased removal of lawful permanent residents—without the benefit of briefing and without providing even minimal notice and opportunity to be heard. In effect, he issued a rule by fiat, with no input from those directly affected or from those concerned with the broader effects on the thousands of immigrants likely to be bound by the decision.”).

383. *See, e.g.*, *Silva-Trevino*, 26 I. & N. Dec. 550 (Attorney Gen. 2015). *But see id.* at 554 (“The Board should solicit and consider briefs from the parties and interested amici as it deems appropriate to ensure that its conclusions on these issues are reached after full and fair consideration of all relevant arguments.”).

reconsideration, which indicates that there is no legal or regulatory right to briefing or argument on referral. This point was previously made in judicial decisions, including *Bridges* and *Nani*, but the Third Circuit did not address any of this precedent. The Third Circuit's reference to an apparent non-party right to participate in proceedings is also puzzling, as amici have no such right before the Attorney General, just as they have no such right before the courts of appeals or Supreme Court.<sup>384</sup>

The correct question to focus on is not whether the procedures of the Attorney General referral mechanism are “unusual,” but whether due process demands certain procedures, including, presumably, notification of referral and an opportunity to present briefing and argument. It is far from clear that the test of *Mathews* is relevant to this determination. At least for aliens who have never been admitted in lawful immigrant status, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>385</sup> In such circumstances, it is “far more plausible to conclude that the rights of aliens . . . are defined entirely by the applicable statutes and regulations.”<sup>386</sup> Even for aliens lawfully admitted to the United States, any due process requirement is satisfied by the existing administrative procedures. As the Supreme Court has observed, due process in these circumstances only requires that

no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.<sup>387</sup>

Hearings before the immigration judge, appellate review by the Board, and further consideration by the Attorney General on the record, as developed below, clearly meet this minimal threshold of due process.

Even assuming the applicability of *Mathews*, however, due process cannot be shown to demand any more than what is provided by the regulation. In

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384. See, e.g., *United States v. Michigan*, 940 F.2d 143, 165–66 (6th Cir. 1991) (listing numerous limitations on the ability of amici to participate in litigation and noting that “[c]lassical participation as an amicus to brief and argue as a friend of the court was, and continues to be, a privilege within ‘the sound discretion of the courts’” (citing *N. Sec. Co. v. United States*, 191 U.S. 555 (1903))); see also *FED. R. APP. P.* 29(a) (“[Amicus who is not the United States or a state, or an officer or agency thereof] may file a brief only by leave of court or if the brief states that all parties have consented to its filing.”).

385. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

386. *Angov v. Holder*, 736 F.3d 1263, 1273 (9th Cir. 2013), *amended and superseded on denial of reh'g sub nom. Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015).

387. *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

*Mathews*, the Supreme Court focused on three factors that must be considered in weighing the consistency of any given set of procedures with the dictates of “due process”:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>388</sup>

Regarding the first factor, there is no question that the private interests implicated by Attorney General review are “weighty,” as the issue will be whether an alien may remain in the United States or whether he should be deported.<sup>389</sup> But there are no compelling arguments that the final two *Mathews* factors would militate in favor of procedures beyond what is currently employed by the Attorney General.

There seems little or no risk of an erroneous deprivation, if erroneous deprivation is understood as a legally or factually incorrect decision concluding that the alien is removable or ineligible for relief or protection from removal, and little probable value in additional procedural safeguards. The decision by the Attorney General is made on the totality of the administrative record and with the benefit of prior decisions by the Board and immigration judge, which protects against an erroneous deprivation. Moreover, even where the Attorney General makes some substantive determinations regarding the law, proceedings are in the overwhelming number of cases remanded for the Board to apply the law in the first instance, providing another proceeding in which the alien can raise relevant arguments against deportability or in support of relief. And beyond the administrative process itself lies review in the courts of appeals, which means that the alien can challenge not only the law as applied to his specific case, but any interpretation of that law which the Attorney General has provided through his review. Considering the voluminous record on which Attorney General review will be based, and the likelihood of proceedings before the Board and court of appeals after the conclusion of the Attorney General’s participation in the case, there seems little to no likelihood that an alien will be erroneously deprived of his ability to remain in the United States or pursue relief from removal.

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388. *Mathews v. Eldridge*, 424 U.S. 319, 35 (1976); *see also* *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 483–84 (1972) (discussing the private and public interests that are involved when determining parole revocation).

389. *See* *Trice*, *supra* note 30, at 1785.

Given the strength of protections against any *erroneous* deprivation, critics focus on the probable value of additional procedural safeguards. However, if there is little risk of erroneous deprivation in the first place, an assessment of *additional* safeguards puts the cart before the proverbial horse. Regardless, these arguments fail to adduce any procedures that would be of significant value to the Attorney General's review process and are premised mostly on superficial gains in the optics of referral. The "additional procedures" inevitably contemplated are greater participatory rights for parties and amicus. The argument goes, "the parties to certified cases can add significant value to the review process and contribute to the resolution of important legal and policy issues,"<sup>390</sup> and "participation by the parties has the probable value of reducing the risk of error arising from the complex nature of the legal issues considered upon certification."<sup>391</sup> By the time the Attorney General reviews a case, however, the parties have already fully presented their cases before at least an immigration judge and the Board, if not also before DHS, making the cumulative production of argument and evidence before the Attorney General largely unnecessary. More importantly, it is the decision on the record coupled with the availability of judicial review, not further party or amicus participation, that will ultimately protect against any erroneous deprivation.

Two points bear emphasizing in this context. First, judicial review *is* an adequate protection against the erroneous deprivation of any cognizable right an alien may have. It has been argued that judicial review may take too long and is an inferior solution to the institution of better procedures surrounding Attorney General decision-making itself.<sup>392</sup> Any additional procedures before the Attorney General will likely lengthen that process, however, making time-savings largely illusory. As noted in the foregoing, there seems little likelihood that more intensive participation before the Attorney General will affect the ultimate disposition of cases. In the vast majority of cases, if not in all cases, it will still be necessary for the alien to resort to judicial review. It has also been contended that the deference due to Attorney General decisions may also weaken judicial review as an effective protection, but *Silva-Trevino* again exposes the shortcomings in this criticism. Courts may take into account what has occurred during the referral process in assessing what level of deference to accord a decision by the Attorney General.<sup>393</sup> Moreover, if what is to be protected is the risk of an *erroneous* deprivation, deference does not undercut judicial review as that protection. A litigant has no right to a

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390. *Id.* at 1788.

391. *Id.* at 1790.

392. *See id.* at 1792–93.

393. *See* *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 470 n.11 (3rd Cir. 2009); *cf.* Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1273–86, 1295–97 (arguing that *Chevron* should not apply to *Silva-Trevino* given procedural shortcomings in the decision-making process, informality, and the lack of transparency).

favorable decision, or to an interpretation of the law that would provide relief.<sup>394</sup> It must only be ensured that the Attorney General was authorized to make the decision that he did and that the decision so made is not arbitrary, irrational, or capricious. Even deferential judicial review serves this function.

Second, the instant inquiry is concerned with what procedures may be *constitutionally required*, not what procedures might in some abstract sense improve the decision-making of the Attorney General. Within the *Mathews* calculus, there seems little probable value in mandating briefing before the Attorney General, since there is little risk of an erroneous deprivation and the entirety of the administrative record is already available for consideration. But that is not to say additional briefing would not have some real value. Obviously, as Attorneys General have requested such briefing in a not insubstantial minority of contemporary cases, additional briefing can benefit a decision. In the context of referral, however, there is no compelling argument that due process requires such procedures, even if many Attorneys General have viewed them as good practice in discrete cases.

The third factor also tilts sharply away from requiring additional procedures. The government has weighty interests in the procedures used, and the likelihood is that any additional procedures would entail administrative burdens disproportionate to any “due process” gains realized. Currently, the Attorney General has flexibility to dispose of referred cases in a number of ways, including through vacatur and remand, decision on the administrative record, or decision after briefing. How or why an Attorney General may settle on a particular procedure in a specific case may depend on a number of factors both intrinsically and extrinsically related to the case, including how important the issue is, whether he wants to render a decision on an issue not fully raised or aired below, whether he may simply want reconsideration or a stay of proceedings pending further developments, or what level of involvement and time his current commitments permit to be devoted to matters of immigration review. Because the determination of procedures is ad hoc, the Attorney General retains the maximum amount of flexibility to determine in specific cases how and to what extent he will be involved in the review. Assertions that these interests are not weighty miss the point. For instance, it has been asserted that “there is no reason to believe that merely providing an opportunity to present arguments that the Attorney General is free to reject interferes with executive control of immigration policy.”<sup>395</sup> The question does not relate to an “interference” with executive branch immigration policy, however, but to whether the government has a weighty interest in maintaining that procedure that it has calculated is best

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394. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2212 (2014) (“Finally, the respondents contend that even if [the INA] points at once in two directions—toward a broader scope in its first half and a narrower one in its second—the BIA acted unreasonably in choosing the more restrictive reading. . . . We cannot agree.”).

395. Trice, *supra* note 30, at 1786.

able to meet its relevant goals. It surely does, as the Supreme Court has consistently made clear,<sup>396</sup> and the discretion to set procedure permits the Attorney General to decline cumulative briefing in those cases where he deems it unnecessary.<sup>397</sup> Misunderstandings about the efficiency effects of any additional procedures also cloud critiques under the third prong of *Mathews*. Such concerns have been described as “carry[ing] even less weight in the certification context, where the Attorney General decides only a handful of cases each year and is not tasked with dispatching thousands of routine cases in a timely manner.”<sup>398</sup> It is correct to note that the Attorney General only decides a few *immigration* cases each year, not the thousands the Board is charged with reviewing. Unlike the Board, however, whose total focus is immigration, the Attorney General’s immigration duties are only a small part of a cabinet portfolio that encompasses every major legal issue in the United States. To opine that more time can be spent on a few immigration cases each year simply because they will be the only immigration cases the Attorney General decides misses the point and fails to place Attorney General review within the context of the myriad tasks and responsibilities that come with the position.<sup>399</sup>

Accordingly, there is a weighty government interest in confining Attorney General review to the written administrative record, while permitting the determination of additional procedures on an ad hoc basis. Mandating additional procedures to govern every case would have the effect of impinging on the Attorney General’s ability to discharge his multitudinous functions in an efficient manner. Requiring the opportunity to submit briefs, even when clearly cumulative and duplicative of arguments already contained in the administrative record on which the Attorney General’s decision will be based, does nothing to enhance due process protections, while necessarily requiring that the proceedings before the Attorney General are more drawn out and that he must expend additional time and effort in the review of the case materials.<sup>400</sup>

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396. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543 (1978) (“[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the ‘administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” (quoting *Fed. Commc’ns Comm’n v. Schreiber*, 381 U.S. 279, 290 (1965))).

397. See, e.g., *Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (noting administrative agencies’ broad discretion to establish the procedures that will best suit its work).

398. Trice, *supra* note 30, at 1786.

399. Cf. Comment, *supra* note 373, at 124 (“[T]he provisions of the deportation process pertaining to the Board of Immigration Appeals and the Attorney General’s review of its decisions are for the purpose of saving the time of the latter official, who obviously would find it impossible to give all immigration and alien cases his close scrutiny. If, however, he does decide to go thoroughly into a particular case, there seems little to prevent him.”).

400. Cf. *Morgan v. United States*, 23 F. Supp. 380, 382 (W.D. Mo. 1937), *rev’d on other grounds*, 304 U.S. 1 (1938) (“The Supreme Court has not said that it was the duty of the Secretary of

Applying *Mathews* to the referral regulation reveals that due process is adequately served with the current structure of Attorney General review. Despite the interest an alien may have in further presence in the United States, this interest is not at risk of erroneous deprivation through the procedures used, nor would the introduction of additional procedures contribute to more fully reasoned or legally correct decisions. Most importantly, the government has a strong interest in maintaining its current procedures for referral and review. To conclude “otherwise is merely to indulge in prejudice against a flexible administrative process.”<sup>401</sup>

Even if there are no colorable due process concerns with the exercise of the Attorney General’s review authority, there might still be atmospheric concerns. “When the Attorney General foregoes the transparent rulemaking process and refuses to mandate a robust adversarial process in its place, advocates and affected immigrants may question the neutrality and fairness of the resulting decisions.”<sup>402</sup> Concerns such as these are what likely prompted Attorney General Holder to vacate *Matter of Compean* and institute rulemaking on the questions therein resolved<sup>403</sup> and have been noted by other Attorneys General in declining to adjudicate certain issues.<sup>404</sup> Yet this criticism is as thin as the due process critique. Leaving aside the concerns over “neutrality” and “fairness,” which as the *Mathews* analysis has shown, are illusory, the appeal to rulemaking out of respect for transparency suffers from naivety. As one academic has written: “No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties.”<sup>405</sup> The most compelling function of the contemporary notice-and-comment process is the compilation of a record for judicial review, with public input usually coming “relatively close to the end of the agency’s process, when the proposed rule has ‘jelled’ into something fairly close to its final form.”<sup>406</sup> For this reason, the public-input aspect of the process has been likened to “Japanese Kabuki theater.”<sup>407</sup> The due process and optics-based concerns of critics of Attorney General referral and review are empty and illustrate a preference, akin to the reality of the

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Agriculture to hear or read all the evidence and, in addition thereto, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act cannot be administered.” (citation omitted)).

401. Comment, *supra* note 373, at 124.

402. Trice, *supra* note 30, at 1796.

403. See *Compean*, 25 I. & N. Dec. 1, 2 (Attorney Gen. 2009) (directing the institution of rulemaking to address claims of ineffective assistance of counsel).

404. See, e.g., *Toscano-Rivas*, 14 I. & N. Dec. 523, 557 (Attorney Gen. 1974) (“[B]y following the process of proposed rule making, the Service could obtain the views of interested parties. This would help to assure proper consideration of the various points of view.”).

405. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

406. *Id.* at 1494.

407. *Id.* at 1492.

notice-and-comment public input process, for procedures that would have no meaningful effect on the fairness or correctness of decisions.

It is also revealing that these arguments are raised solely by academics and organizations whose business is representing the claims of the alien. Their objections are ultimately less to the lack of procedures than they are to the nature of the decision reached in certain cases. No criticisms were raised when the Attorney General decided *Matter of A-T*, despite not providing for additional briefing on the issues raised, or, for that matter, *Matter of Dorman*, where the Attorney General vacated the Board's decision and posited several issues for consideration on remand.<sup>408</sup> The common theme here is that these decisions were favorable to the aliens. On the other hand, the main subject of commentator ire has been *Silva-Trevino*, a case whose administrative framework was deemed adverse to criminal aliens' interests because it would permit a more nuanced examination of whether they had been convicted of relevant criminal offenses. Attorney General Mukasey's decision in *Matter of Compean* also falls within this category, despite the fact that supplemental briefing before the Attorney General was accepted in that case. The fault line here is not a perceived lack of procedures. Instead, it is whether certain ideological inclinations are being well served by the ultimate decision rendered. If so, it is largely irrelevant that no briefing or additional argument was permitted by the Attorney General. If not, the fact that the case was fully presented on Attorney General review will not make any difference.

### C. POSSIBILITIES FOR REFORM

The Attorney General review authority is currently efficient and effective. As the doctrinal assessment demonstrated, it has been put to good use by prior Attorneys General and has advanced important legal interpretations and policy-oriented goals. Although criticisms of the review authority are not compelling, that does not mean that reform of the referral mechanism would be unwarranted. In fact, there are several reforms that could increase the efficacy of the referral authority as a policy-making instrument for the executive branch. In this section, several reform proposals will be considered, including reforming the regulation to provide for definite procedures on review before the Attorney General, introducing substantive criteria to gauge the determination of whether a case should be referred, and providing for the involvement of different actors as advisors to the Attorney General once a case has been referred.

1. Revise the Regulation to Establish Set Procedures Governing Referral and Review

Although not required as a constitutional matter, one possibility for reform would be to establish definite procedures that would govern referral

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<sup>408</sup>. See *supra* note 90 and accompanying text.



to and review by the Attorney General. In the conception of one commentator, these procedures would include notice to the parties and publication of intent to refer a case, notice upon actual referral for review, and the identification of issues to be resolved by the Attorney General and an opportunity to submit briefing.<sup>409</sup> The justifications for this reform track the rationale behind the due process critique of Attorney General referral.<sup>410</sup> However, due process critiques of the referral procedures were not compelling in the constitutional context and are equally weak when weighing whether the regulation should be reformed for practical, non-constitutional reasons.

Currently, the Attorney General enjoys maximum flexibility in determining how to review cases that are referred to him for review. This flexibility has enormous benefits and provides a range of possible actions. The Attorney General can vacate and remand the case for reconsideration by the Board, directing that it consider specific issues; he can review the Board decision and issue his own opinion, either with or without the benefit of additional briefing; the case can be referred and simply held pending further developments, such as legislative or regulatory action or the issuance of an intervening decision by the Supreme Court. This broad range of action is open to the Attorney General because of a lack of institutional strictures on the exercise of the referral authority. Without a regulatory requirement that briefing *must* be accepted, or that oral argument *must* be held, or that any particular procedure *must* govern every case that is referred and accepted for review, the Attorney General can examine the contextual circumstances of each case, how it fits into the existing obligations of the Office, and what level of decision or involvement is necessary in order for the administration to advance its policy through his review, and thereby decide how to handle the specific case.

This freedom is of obvious benefit to modern Attorneys General, who must juggle a huge variety of duties in a wide range of legal contexts. But this flexibility also benefits aliens, whose cases might be referred and reviewed by an Attorney General who knows that only a minimum amount of commitment to the case might be needed for the administration to take the gains it wants from referral. For instance, *Matter of Dorman* was a straightforward and simple referral, where Attorney General Holder vacated the Board's decision and remanded for reconsideration based on four specific questions, while the Obama White House and Justice Department signaled their intent to decline to defend DOMA before the federal courts. The case had carry-on benefits, as the direction the Attorney General provided on the questions raised for reconsideration guided the Board and immigration judges in other relief contexts, including adjustment of status. It is not clear, however, that action

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409. Trice, *supra* note 30, at 1798–99.

410. *Id.* at 1800.

would have been contemplated had a laborious procedure awaited review. The Attorney General was able to refer the case to himself, vacate the Board decision, and issue his order in one fell-swoop, without issuing any notice of an intent to refer, of actual referral, or a call for briefing or notice of the issues he would be considering. Had the latter procedure been mandated, *Matter of Dorman* might never have been issued.

Jettisoning this freedom of action might be warranted if it produced benefits. But no benefits are readily apparent. There is no reason to think that briefing would have been beneficial to the Attorney General decisions mentioned in the preceding paragraph, as the provision for briefing would have simply mangled an otherwise stream-lined process. In perhaps the majority of contemporary decisions, briefing has been permitted, often with a specific direction of what issues to brief. The provision of briefing in many, but not all, cases indicates that the Attorney General is aware of when briefing might prove beneficial to his review. There is no reason to eliminate the discretion the Attorney General enjoys on this point and mandate briefing even in those cases where there is no colorable argument that it will be beneficial to the disposition of his review. The better rule is to permit the Attorney General discretion to consider how to approach each referred case, knowing that the federal courts will be the final arbiters of the permissibility of the decision issued. This process has worked admirably for 75 years, and there are no compelling reasons for complicating it now.

2. Revise the Regulation to Provide for a Greater Flow of Cases to the  
Attorney General for Review

The most common current running through commentary on the Attorney General's referral authority is the infrequency and rarity of its invocation. That is an accurate description of its current use but has not always been the case. This shift in caseload is more than a statistical aside. A case could be made that more Attorney General involvement in the adjudication of cases would be beneficial to the operation of the vast immigration bureaucracy. A higher flow of cases to the Attorney General would provide the opportunity to definitively resolve a wider range of legal issues, while potentially placing the Attorney General in the center of ongoing debates over policy-making in the immigration context. This kind of heightened role in adjudication would be consistent with Congress's own delegation of authority to the Attorney General. It would also provide the Attorney General the opportunity to render decisions on those important issues where interpretive authority has been delegated to the agency but has not yet been exercised by the Board, or where a court of appeals has exercised such

authority in the first instance, raising the possibility of a *Brand X* resolution on remand.<sup>411</sup>

The most straightforward manner in which to increase the flow of cases for Attorney General review would be to introduce substantive criteria for referral rather than focus only on *who* can refer cases. As previously shown, this is how Attorney General referral was structured at the time of the transfer of immigration functions to the Department of Justice, and it was how the regulation was initially drafted and operated through the middle 1940s, when it was amended and given a form substantially identical to its present formulation.<sup>412</sup> This version of the regulation also coincided with the highest rate of Attorney General referral and review, which can be linked causally to the substantive criteria utilized for referral decisions.<sup>413</sup>

The question then becomes the following: What substantive or objective criteria could be contained in a regulation that would serve the purposes of both creating a higher volume of cases for Attorney General review and ensuring that review encompasses those cases where a decision on an important legal or policy matter is warranted? One example of a decision that should be referred is a precedential Board decision with a registered dissent. Such an occurrence signals a question of some difficulty, as adjudicators would have reached different conclusions on the issue presented, and the potential need for the Attorney General to step in, review the issue, and provide a definitive resolution for immigration officials. Questions of exceptional importance or difficulty should also be referred. Rather than one simple, broad category that would guide referral, however, an amended regulation should provide illustrative circumstances when such a question is presented. For instance, if the case implicates significant constitutional interests or necessitates rendering an interpretation of a provision of the INA that has engendered division in the courts of appeals, such a question could be deemed “difficult.” Questions of exceptional importance might be those where the resolution of the issue would have significant practical ramifications in the enforcement of the immigration laws, the granting of discretionary relief from removal, or the manner in which aliens could be apprehended, detained, and removed. In some sense, these criteria would track the spirit of the rehearing criteria of the Federal Rules of Appellate Procedure, which contemplate *en banc* proceedings in rare circumstances.<sup>414</sup> Application of such criteria would still ensure that Attorney General review would be

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411. See Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607, 625 (2014) (“In *Brand X*, the Supreme Court held that agency statutory interpretations of ambiguous statutes sometimes could, and indeed *should*, displace judicial precedents on what those statutes mean—perhaps even U.S. Supreme Court precedents.”).

412. See *supra* Part II.B.

413. See *supra* Part III.A.

414. See FED. R. APP. P. 35(a)–(b) (noting the general criteria to guide determination of whether a case should be reheard *en banc*).

relatively rare compared to the tens of thousands of cases decided each year by the Board, while still increasing substantially the referral rate from the once-every-few-years frequency of the preceding seven years.<sup>415</sup>

If the regulation were so amended, Attorney General review would also have to change to meet the needs of a higher number of cases being referred. This change would also be a reversion, of sorts, to the practice that existed in the 1940s of summary affirmance or approval of referred Board decisions. The Attorney General should be able to be selective in deciding when he will devote substantial time to reviewing a case and rendering an independent opinion on the legal, constitutional, or policy issues raised. If the disposition and reasoning of the case by the Board would coincide with the inclination of the Attorney General, there is no reason why his decision on review could not be a simple “I affirm” or “I approve” the decision of the Board. There are strong institutional reasons to promote this flexibility, which charts the rationale for maintaining strict criteria for when rehearing en banc is warranted, such as heavy caseloads or the burden of disrupting a court’s calendar to hear a case en banc.<sup>416</sup> There are also no significant downsides to this stream-lined conception of Attorney General review. By reviewing the case and issuing a statement of approval, the Attorney General still fulfills his role at the apex of the adjudicatory hierarchy by providing his imprimatur on the resolution of whatever issue is raised.

Reversal of the Board decision is a different matter, and the practice of peremptory and summary disapproval of Board decisions should not be countenanced. Although no set procedure should be instituted regarding what an Attorney General does when he disapproves of or reverses a Board decision, consistent with the overriding interests of flexibility and efficiency discussed at various points in this article, an opinion should issue in such cases absent extraordinary countervailing considerations. If the Attorney General did not issue an opinion in such circumstances, then he would not be as effective in his role as the final and definitive interpreter of the INA and its regulations. If the Board is in error, the Attorney General must explain why that is so, even if he ultimately leaves it to the Board to correct that error on remand. Some level of direction will almost always be necessary, however, so even though summary affirmance should be revived as an aspect of Attorney General review, summary disapproval or reversal should be left in the past.

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415. Cf. Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 817 tbl.3 (2010) (finding that from 1998 through 2009 the percentage of cases reheard en banc ranged from 0.18% in the Federal Circuit to 0.38% in the Ninth Circuit); Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 214 n.5 (1999) (citing numerous empirical studies noting that an “extremely low relative number” of all cases are resolved via en banc rehearing).

416. *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denials of rehearing en banc).

### 3. Delegate Greater Responsibility for Advising the Attorney General on Referred Cases to a Special Assistant or the Civil Division

The Office of Legal Counsel (“OLC”) is charged with primary responsibility in advising the Attorney General on cases referred for review.<sup>417</sup> This delegation makes sense as OLC is specifically charged with many similar functions, such as providing legal advice to the White House and the Attorney General, preparing the formal opinions of the Attorney General, and reviewing orders and decisions for legality and consistency. At the same time, the attorneys that staff OLC are charged with providing advice on a dizzying array of issues, and have no pretensions to expertise on immigration law or the specific legal and policy issues that most frequently arise in the context of immigration litigation.<sup>418</sup> Considering the complexity of immigration law, the Attorney General would be better served by relying on an advisor specifically versed in that area of law and with ongoing knowledge of how issues are being resolved by the agency and the federal courts. The conception of this “advisor” could vary, but past practice provides evidence of some options beyond OLC.

This advisor could be a permanent or temporary appointment to the Office of the Attorney General, such as a Special Assistant for Immigration. In the initial transfer-of-functions order establishing the Board as a subordinate to the Attorney General, such a position was contemplated and would have advised the Attorney General on all immigration-related duties, including review of Board decisions.<sup>419</sup> An analogue of this position was carried over into the first iteration of the referral regulation, which charged the General Counsel of the INS with the responsibility “to advise the Attorney General on cases certified by the Board of Immigration Appeals to him for decision.”<sup>420</sup> A specific position devoted to immigration-related functions would give the putative Special Assistant a department-wide view of immigration, including administrative and judicial litigation, put him in close coordination with officials at the Departments of Labor and Homeland Security, and provide a comprehensive exposure to the considerations that should guide Attorney General decision-making in this area of law. By seating this position in the Office of the Attorney General, it would also have the effect of placing the Special Assistant above the fray of specific legal and policy disputes occurring at the component levels of the various departments involved with immigration enforcement and litigation, since his advice to the

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417. See 28 C.F.R. § 0.25(f) (2015).

418. See, e.g., Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1310 (2006) (“OLC is staffed with legal generalists, not individual-rights experts, and they typically lack particular familiarity with the institutional conditions that foster or, alternatively, help to prevent rights violations.”).

419. See Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454, 2454 (July 1, 1940) (referring to the Special Assistant in Charge); see also C-, 1 I. & N. Dec. 631, 633 n.2 (B.I.A. 1943) (noting a memorandum from a “Special Assistant to the Attorney General”).

420. See 8 C.F.R. § 90.17(b) (1941).

Attorney General would be driven less by case-specific litigation or policy-oriented concerns than by the need to provide the requisite legal and policy guidance for future cases.

Existing Department of Justice offices and officials already charged with overseeing immigration litigation and policy promulgation could also fill this role. For example, both the Civil Division and Solicitor General's Office ("OSG") have substantial immigration litigation and policy experience. Utilizing this experience would be consistent with past practices of Attorney General review, while also maintaining the current conception of the functions of both the Civil Division and OSG. In the past, attorneys in OSG did provide written advice to the Attorney General regarding legal points raised in referred cases,<sup>421</sup> and it similarly seems that senior attorneys within the Civil Division also provided such advice.<sup>422</sup> The regulatory delegation of authority to both components would also involve a substantial role in advising the Attorney General in his review of Board decisions. OSG is charged with "[a]ssisting the Attorney General . . . in the development of broad Department program policy," which comfortably includes the immigration-related policy that is often the rationale behind referral.<sup>423</sup> The Civil Division is delegated responsibility for handling

[a]ll civil litigation arising under the passport, visa and immigration and nationality laws and related investigations and other appropriate inquiries pursuant to all the power and authority of the Attorney General to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens.<sup>424</sup>

Advice given in the context of referral would fall within "other appropriate inquiries." Considering their current roles in immigration litigation and policy-development, both OSG and the Civil Division would be as effective as a Special Assistant to the Attorney General, while being able to tap into existing institutional and historical knowledge regarding not only immigration law, but also the problems of the review mechanism itself.

An explicit delegation of such responsibility would undoubtedly engender criticism. As argued in the motion to reconsider filed in *Matter of Silva-Trevino*:

Because the Office of Immigration Litigation and the Office of the Solicitor General are part of the Department of Justice, and are charged with defending the agency in court, the Attorney General bears a special responsibility to maintain both the appearance and

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421. See S-, 1 I. & N. Dec. 476, 481-84 (B.I.A. 1943) (memorandum from Paul A. Freund, OSG); S-, 1 I. & N. Dec. 376, 383-84 (Attorney Gen. 1943) (memorandum from Oscar Cox, Assistant Solicitor General).

422. See E-, 1 I. & N. Dec. 40, 44-46 (B.I.A. 1941) (memorandum from a "Chief Attorney").

423. 28 C.F.R. 0.20(d) (2015).

424. *Id.* 0.45(k).

actuality of impartiality in the adjudication of removal charges and to protect the certification process from efforts to make it a backdoor mechanism for one-sided *ex parte* communication by the office's litigators.<sup>425</sup>

Yet these components are not just litigators, they both have explicit policy-related functions and are invariably involved in the development, drafting, and promulgation of regulations and other forward guidance. Moreover, and contrary to the caricature offered in the motion for reconsideration, both components are concerned with reaching an objectively correct result in cases and do not evidence any doctrinaire antipathy towards the legal positions offered by aliens.<sup>426</sup> Although Attorney General review could have beneficial effects on litigation, in the form of a final agency decision that would be entitled to *Chevron* deference before the courts, the machinery of referral and review is not aimed at such ends. The purpose of Attorney General review is to provide guidance to the adjudicatory components of the immigration system, the Board and immigration judges. The decision of the Attorney General then becomes just like any other decision before the courts of appeals—it must be defended and justified on its merits, making it a poor route through which to “bolster” the litigating position of the Department. As with most other misplaced critiques of the referral authority, *Matter of Silva-Trevino* proves this latter point, not the point that its critics would make: the case's main effects were administrative, not judicial, in permitting immigration judges to review a wider range of documents at the modified categorical stage of the inquiry, and rather than bolstering the Department's litigating position it resulted in an increase of litigation, the vast majority of which resulted in losses to the government.

Regardless, an Attorney General eager to utilize the referral authority to the extent contemplated by this article would be well served to have a pre-existing expert or experts dedicated solely to immigration issues. This arrangement would contemplate either a dedicated official within her own office, or the existence of a small coterie of advisors within the relevant components that could provide the necessary advice on review. OLC has without a doubt done great service in this regard thus far, but increasing complexity and a desire to effectively advance policy through Attorney General review would militate for a focus and depth of knowledge that a generalist is not well positioned to offer.

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425. Memorandum of Law of *Amici Curiae* Am. Immigration Lawyers Assoc. et al. in Support of Reconsideration, *supra* note 32, at 10.

426. See, e.g., *Kucana v. Holder*, 558 U.S. 233, 241–42 (2010) (noting the government's agreement with the position advanced by the alien); *Abdisalan v. Holder*, 728 F.3d 1122 (9th Cir. 2013), *reh'g granted*, 750 F.3d 1098 (9th Cir. 2014); *Avila-Santoyo v. U.S. Attorney Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (concurring in the contention that the 90-day filing deadline for motions to reopen is subject to equitable tolling).

## V. CONCLUSION

While prospects for comprehensive immigration reform may continue to look dim, congressional legislation remains the best solution to our nation's immigration challenges. In this period of stalemate in Washington D.C., however, Attorney General referral and review is a potent tool through which the executive branch can lawfully advance its immigration policy agenda. It provides for both definitive resolution of legal issues and the opportunity to promulgate binding policy pronouncements on all executive branch immigration officials. The only wonder is that it has not been put to greater or better use in the preceding administrations. To be sure, some seem to have recognized its potential more than others, with the Bush Administration issuing 16 decision over its two terms, many with ongoing and significant effect on the adjudication of a variety of claims, from weighing the exercise of discretion in relief and bond determinations, to establishing whether a criminal offense renders an alien removable or ineligible for a benefit. On the whole, however, utilization of the authority has tracked sharply downward since its creation in 1940, with its lowest ebb occurring in the Obama Administration.

Future Attorneys General would benefit by utilizing the authority and the vast potential it holds for advancing legal and policy-based interpretations of the immigration laws. This potential is all the more important during periods of divided government, where the legislative and executive branches are in the hands of different parties. The Obama Administration has turned to non-statutory initiatives to advance its immigration policy, but has largely ignored the referral authority. It would do well to reconsider its total reliance on executive orders and memorandum and instead test the abilities of the referral authority to advance the goals it deems worthwhile. And just as surely, a future Republican administration could invoke the authority to advance its agenda, perhaps contra its own Republican congressional caucus for whom immigration reform is anathema. The Attorneys General during the Bush administration did invoke the authority with some frequency and success; if the President had been more aware of its possibilities and the cold reception his plans for immigration reform would meet with on Capitol Hill, perhaps it would have been used even more frequently and in a broader range of cases.

Whatever the root causes of its desuetude, the authority can be a vital aspect of immigration adjudication. It represents the Attorney General's exercise of the authority delegated to him by Congress, and a fulfillment of the legal and policy roles that he is meant to serve as head of the Justice Department. The authority can and should be revitalized in the coming years. This Article has justified that revitalization and offered several arguments as to why the authority has been and will continue to be an important mechanism, while offering a blueprint for a handful of reforms that could mold referral and review into an even more efficacious procedure for the



advancement of executive branch immigration policy. All that is to be seen is whether its promise is fulfilled in the coming years.