

The Attorney General’s Disruptive Immigration Power

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I. INTRODUCTION

In *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, former United States Attorney General, Alberto Gonzales, and current Department of Justice/Office of Immigration Litigation attorney, Patrick Glen, provide a thorough account of the power and usage of the “referral and review” mechanism.¹ This mechanism comes from a regulatory provision that confers on the Attorney General the singular authority to refer immigration cases to herself and to then re-adjudicate them autonomously.² According to the authors, this mechanism was commonly used prior to 1956³ to summarily affirm or deny⁴ decisions made by agency adjudicators in the Board of Immigration Appeals (“BIA”). However, they note that it has been employed relatively rarely since then⁵—albeit with greater regularity during the George W. Bush era⁶ than during several previous administrations,⁷ and the Obama presidency since.⁸ One of the authors’ most striking contributions is their showing of the significant impact this tool has had on immigration policy, despite the fact that it has been used rather infrequently in more recent times.⁹

Overall, the authors argue for more frequent use of the mechanism by the Attorney General because it “provides for both definitive resolution of legal issues and the opportunity to promulgate binding policy

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

2. 8 C.F.R. § 1003.1(h)(1) (2016).

3. Gonzales & Glen, *supra* note 1, at 857 (“[A] report by the Attorney General had indicated the review of 444 decisions between 1942 and 1956.”).

4. *Id.* at 858 (“[A]t 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 . . .”).

5. *Id.* at 858–59.

6. *Id.* at 858 (“Attorneys General during the George W. Bush administration . . . issu[ed] 16 total decisions—9 by Attorney General John Ashcroft, 2 by Attorney General Alberto Gonzales, and 5 by Attorney General Michael Mukasey.”).

7. *Id.* (“Attorneys General during the George W. Bush administration used the authority with significantly more frequency than any administration since that of John Kennedy . . .”).

8. *Id.* (“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.”); *id.* at 858 n.103 (“Attorney General Lynch has recently referred a case to herself for decision and requested briefing on the relevant issues. A decision in that case is outstanding as of the publication of this Article.” (citation omitted)).

9. See *id.* 858–59 (discussing the variety of ways in which the Attorney General has used this mechanism to alter immigration law and policy); see also Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 640 n.89 (2012) (referring to the mechanism as a “powerful tool in that it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent”).

pronouncements”¹⁰ The authors characterize this mechanism, fundamentally, as a political tool, much like the President’s use of executive order and enforcement memorandum,¹¹ for advancement of the Executive Branch’s “immigration policy agenda”;¹² they also maintain that the recent exercise of this mechanism is founded in legal principles¹³ and has engendered greater legal uniformity.¹⁴ The authors also note that the mechanism lacks specified procedure.¹⁵ Nonetheless, they advocate for unfettered use of the mechanism by asserting that the absence of specific, consistent procedure underlying the use of this mechanism does not stymie due process and benefits the Attorney General’s decision making.¹⁶

This Response pushes back against two assumptions made by Gonzales and Glen. Part II disputes Gonzales’ and Glen’s fundamental characterization of the referral and review mechanism as a purely political tool, like other forms of executive discretion. First, it cautions that the Attorney General occupies a particular administrative space as bureaucrat and adjudicator, in addition to political appointee, that differentiates her decision-making from executive activity by the President. Furthermore, it asserts that because the referral and review mechanism is a form of adjudication of individual claims, its use creates a unique conflict between the exceptional power afforded the Executive Branch in immigration law, and core procedural requirements of agency decision-making that the authors believe should be suspended in regards to the Attorney General’s exercise of decision-making authority.

Part III challenges the authors’ supposition that the referral and review mechanism has contributed to a stronger immigration framework by aggregating information that shows how the recent usage of this tool has disrupted the consistent development of immigration law by the judiciary, Congress, and agencies themselves. This Part thus suggests that the referral and review mechanism has not, as suggested by the authors, lent consistency and uniformity to the development of immigration law. This Response

10. *Id.* at 920 (“The only wonder is that it has not been put to greater or better use in the preceding administrations.”).

11. Gonzales & Glen, *supra* note 1, at 843–47.

12. *See id.* at 920 (“Attorney General referral and review is a potent tool through which the executive branch can lawfully advance its immigration policy agenda.”).

13. *See id.* at 847 (describing the exercise of this mechanism as “firmly embodied in practice and regulations”).

14. *See id.* at 874–78 (discussing Attorney General “decisions [that] are focused on setting policy or instituting new decisional frameworks to govern the future adjudication of similar claims”).

15. *Id.* at 847 (noting 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”); *id.* at 855 (“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.”).

16. *Id.* at 902–12.

concludes, briefly, by noting how additional exploration of the referral and review mechanism could advance the investigation of immigration law's distinctive identity, including the extent to which it is both excused from and beholden to general tenets of administrative law.

II. AGENCY ADJUDICATION AS A POLITICAL TOOL

Gonzales and Glen begin their Article¹⁷ by analogizing the Attorney General's power to alter immigration law by use of ad hoc adjudication to the President's power to issue broad immigration policy.¹⁸ The two sets of tools—the referral and review mechanism and executive order—are similar, superficially, in that both are politically motivated and impermanent (that is, relatively easily vacated by a future Attorney General or president). However, because the Attorney General's role is unlike that of the President, this subsequently differentiates their respective exercises of discretion. Further, these two forms of executive discretion themselves diverge in important ways that inform and distinguish how each tool should be wielded. In particular, the referral and review mechanism is, fundamentally, a form of administrative decision-making, and thus may not be exercised without respect to the procedural norms attached to agency adjudication in any context.

A. THE ATTORNEY GENERAL AS AGENCY ADJUDICATOR

The Attorney General's unique role as bureaucrat and adjudicator, in addition to political appointee, results in the opportunity to exercise power in a manner more obscured to the public and thus less constrained by legislative and political forces. For instance, given that the Attorney General is a political appointee, but not an elected official like the President, she may be both influenced by political considerations but relatively unconstrained by the potential loss of public support. Indeed, while the authors note that congressional defunding¹⁹ and political pushback²⁰ have deteriorated the power of the executive to reform immigration, they do not consider the extent to which, in contrast, Congress and the public may remain unaware of or unresponsive to the Attorney General's actions. Also, because the Attorney General is a bureaucratic figure with both political and technocratic interests, she may be motivated by reasons of efficiency and resource conservation, or by resistance to institutional change, in addition to, or instead of, the political incentives that drive the President.

In addition, unlike the broader policy changes effected by the President,

17. Gonzales & Glen, *supra* note 1, at 843-47.

18. *Id.* at 846 (“[D]espite the current Administration’s focus on such tools, executive policy pronouncements . . . do not exhaust the executive branch’s scope of action in advancing its conception of immigration policy in the face of a recalcitrant Congress.”).

19. *Id.* at 846.

20. *Id.* at 845-46.

the Attorney General's exercise of the referral and review mechanism constitutes the use of the administrative adjudication of an individual case as a means for political ends. Arguably, the Attorney General's exercise of political preference via the referral and review mechanism also occurs without the significant legislative pushback and political constraints that foster accountability and keep the President's actions in check.²¹ The authors suggest very briefly that the referral and review mechanism has some visibility²² and thus, perhaps, advocates have an avenue to keep its exercise in check. However, testing this strength of this suggestion requires examination of which Attorney General decisions were meaningfully influenced by public input, which received pushback from the public once issued, and why.²³

B. BUREAUCRATIC GOALS VERSUS ADMINISTRATIVE NORMS

Currently, the referral and review mechanism is unconstrained by process and favors the agency's interests.²⁴ More specifically, the referral and review mechanism lacks "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."²⁵ In addition, petitioners may not know that their decisions have been certified for review by the Attorney General in the first instance.²⁶ Further, while the majority of cases have involved self-referral by the Attorney

21. *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 470 n.11 (3d Cir. 2009) (noting that, even in the relatively well-known *Silva-Trevino* case, "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"); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1779–80 (2010) ("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.").

22. Gonzales & Glen, *supra* note 1, at 901 n.358 (citing David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1345 n.265 (1990)).

23. It is worth noting that these two factors do not necessarily go hand-in-hand; in at least one instance, the opportunity for stakeholders to weigh in was curtailed in a case in which the Attorney General's decision eventually received significant backlash from the federal courts (and, ostensibly, the noncitizen advocacy community). *Infra* notes 113–20 and the accompanying text.

24. See *supra* note 15 and accompanying text.

25. Gonzales & Glen, *supra* note 1, at 913.

26. See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 335 n.109 (2011) ("[N]either 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." (quoting *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 470–71 n.11 (3d Cir. 2009))).

General, only the BIA and the Department of Homeland Security are also allowed to refer cases to the Attorney General²⁷—never an individual claimant or advocate for noncitizens.²⁸ The referral and review tool also gives the Attorney General *de novo* review,²⁹ and serves as the highest level of administrative precedent within the agency if designated as such by the Attorney General.³⁰ In this way, decisions resulting from the referral and review mechanism are both unanchored by minimal procedure and also binding on administrative decisions nationwide, a characteristic that puts them on par with the nationwide administrative application of judicial precedent.³¹

The authors suggest that the referral and review mechanism is an “efficient and effective”³² method for the furtherance of politicized immigration goals, in part due to this lack of procedure. Yet, unlike the presidential executive order and many other forms of policy making furthered by the Executive Branch, the Attorney General’s referral and review power constitutes, at its core, an adjudication of an individual’s immigration claim before the agency. Due to the lack of procedure underlying what is fundamentally a form of administrative adjudication, this exercise of this tool embodies conflict between the exceptional authority afforded the Executive Branch in immigration law and the core procedural requirements of all administrative decision-making. Per the former, the agency has the autonomy to act efficiently and in its own best interests while setting immigration policy. In regards to the latter, while agencies may seek to maximize efficacy and expertise when adjudicating cases, they are also obliged to protect individual rights,³³ or risk acting outside the bounds of their discretion.

27. Gonzales & Glen, *supra* note 1, at 859 (“[I]n 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 [Immigration and Naturalization Service] or [the Department of Homeland Security].”).

28. *Id.* at 852; Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 *FORDHAM L. REV.* 145, 156–58 (1958) (“The regulations make no provision for the alien himself to appeal to the Attorney General.”).

29. *Id.* at 856.

30. 8 C.F.R. § 1003.1(g) (2016).

31. See *infra* note 95 (discussing the nationwide application of administrative decisions).

32. Gonzales & Glen, *supra* note 1, at 912; see also *id.* at 898 (characterizing this mechanism as more efficient than rulemaking).

33. See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *B.U. L. REV.* 885, 885–86 (1981) (discussing the “dignitary theory” of due process, in which the “effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking”); Richard B. Saphire, *Specifying Due Process Values: Toward A More Responsive Approach to Procedural Protection*, 127 *U. PA. L. REV.* 111, 156 (1978) (“It is an essential characteristic of an individual right that it be respected and protected against—and because of—consensual views of convenience and expediency.”). Indeed, both sets of criteria must be upheld in order for an agency to meet the expectations underlying the original transfer of adjudication functions from the judicial to the Executive Branch. See Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 *U. KAN. L. REV.* 473, 476 (2003)

Certainly, the lack of procedural requirements serves to increase the Attorney General's discretionary immigration power.³⁴ The flexibility afforded the Attorney General via the referral and review mechanism may also allow her to prioritize certain agency interests, including: (1) values reaffirming the agency's role as immigration policymaker;³⁵ (2) the assumed primacy of executive authority in foreign affairs law;³⁶ (3) goals such as bolstering the government's defense in immigration litigation;³⁷ or (4)

(suggesting that agencies were entrusted to execute benefits programs because "administrative agencies have technical expertise in the areas they administer" and because the "administrative setting was more conducive to bureaucratic and scientific neutrality").

34. Gonzales & Glen, *supra* note 1, at 913 (arguing both descriptively and normatively that a lack of process gives the Attorney General "maximum flexibility in determining how to review cases that are referred to him for review").

35. Gonzales and Glen cite a Supreme Court case affirming the Chinese Exclusion Act in order to suggest that Congress may diverge from administrative due process norms when legislating immigration and that the Attorney General has exceptional power to shirk process in the adjudication of immigration cases if she does so in service of policymaking. Gonzales & Glen, *supra* note 1, at 906–907 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 860–61 (1987) (noting that, despite expanding the "scope of constitutional protections for the individual in almost every other context," the Court in *United States ex rel. Knauff v. Shaughnessy* and other immigration cases, "apparently felt bound by the legacy of *Chinese Exclusion*"). Gonzales and Glen also assert that the Department of Justice has a unique policymaking function in immigration, and is not primarily a litigating body as it is in other areas of the law. Gonzales & Glen, *supra* note 1, at 896–97.

36. *Immigration & Naturalization Serv. v. Abudu*, 485 U.S. 94, 110 (1988) ("INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context." (footnote omitted)); Gonzales & Glen, *supra* note 1, at 882 (quoting *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[W]e 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.'")); see Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 196–97 (2004) (arguing that the executive is more accountable and should have more power over customary international law and human rights issues). *But see* HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 6–7 (1990) ("[W]e must reject notions of either executive or congressional supremacy in foreign affairs in favor of more formal institutional procedures for power sharing, designed clearly to define constitutional responsibility and to locate institutional accountability."); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 743–44 (2008) (suggesting that it is Congress that has the "power to establish the basic immigration-law framework regulating who can enter the country and under what conditions"); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237 (2001) ("[M]odern foreign affairs scholarship has failed to provide a satisfactory account of the source and allocation of presidential and congressional foreign affairs powers. . . . [T]here is little attempt to explain how these allocations cohere with the Constitution's text or to construct from these allocations a comprehensive theory of foreign affairs powers.").

37. For instance, the Attorney General may seek to reverse a BIA opinion that is contrary to a position the Solicitor General would like to take in a pending case before the Supreme Court.

enhancing the agency's anti-terrorism objectives.³⁸ Indeed, Gonzales and Glen suggest that while there would be no benefits to increasing the procedural requirements of the referral and review tool, a significant drawback would be the deterioration of the Attorney General's discretion.³⁹

And yet, to the extent aims furthering the agency's immigration interests are achieved and maintained at the expense procedural transparency, due process,⁴⁰ and of independent decision-making,⁴¹ exercise of the referral and review power runs counter to administrative decision-making norms and may even be unconstitutional.⁴² Given the relative control that immigration

See Chairez-Castrejon & Sama, 26 I. & N. Dec. 686 (Attorney Gen. 2015) (vacating two BIA decisions in order to issue an opinion that squares with the government's position in a recent Supreme Court decision); Gonzales & Glen, *supra* note 1, 874, 918-19 (suggesting that Department of Justice litigators play a greater role in advising the Attorney General's review of immigration cases); 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 (2002) ("The 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.").

38. In at least one instance, an Attorney General has conflated the importance of expanding criminal consequences of immigration law with expanding measures combatting terrorism. *See* Gonzales & Glen, *supra* note 1, at 868-69, 879 (discussing Luviano-Rodriguez, 21 I. & N. 235, 237-38 (B.I.A. 1996)).

39. Gonzales & Glen, *supra* note 1, at 902-12.

40. Indeed, "[t]he attorney general's enforcement responsibilities might well dictate the relative priorities assigned to those" interests that conflict with due process. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1672 (2010) ("In theory, empowering Attorneys General to review and reverse BIA decisions makes them more politically accountable for the BIA's shortcomings. In practice, that benefit is of small consolation. As the nation's chief law enforcement officer, the Attorney General has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of the decisionmaking, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and the fairness of procedures."). Gonzales and Glen suggest as well that the Attorney General's interest in due process is minimal. Gonzales & Glen, *supra* note 1, at 909 ("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. . . . [We are not] concerned with . . . what procedures might in some abstract sense improve the decision-making of the Attorney General."); *Id.* at 911-12 ("The due process and optics-based concerns of critics of Attorney General referral and review are empty . . ."). Further, Gonzalez and Glen liken due process during the exercise of the referral and review mechanism to "Kabuki theater." *Id.* at 911. Certainly, the superficial implementation of process (for instance, the collection of briefs from both parties, the opportunity for oral argument, etc.) is meaningful only if the additional information gathered as a result is genuinely considered by the Attorney General during her deliberations.

41. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (holding that the BIA must "exercise its own independent discretion" vis-à-vis the Attorney General); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 472-73 (2007) (discussing options for "protecting the independence of both immigration judges and BIA members").

42. *Bridges v. Wixon*, 326 U.S. 135, 159 (1945) (holding that the Attorney General's exercise of his referral authority "without holding a hearing or listening to argument" was a violation of due process law); Rosenfield, *supra* note 28, at 156 ("Whether this [referral and review mechanism] is constitutional is still open to question.").

enforcement officials (as opposed to adjudicators) have over which cases are referred to the Attorney General,⁴³ there may also be due process problems inherent in allowing an enforcement agency sole authority to invoke the upper-level administrative adjudication of immigration rights.⁴⁴

In response to a general argument for additional process, Gonzales and Glen suggest not only that the Attorney General is not required to adhere to procedure in adjudication, but also that a lack of procedure not only benefits the Attorney General, but also noncitizens.⁴⁵ To further the first claim, the authors note that the BIA previously did not have high-quality procedures and has since shored up its adjudication processes over time,⁴⁶ thereby placing emphasis on the hierarchical nature of the relationship between the BIA and the Attorney General⁴⁷ in order to suggest that the Attorney General should be able to diverge from the procedural framework maintained by the BIA in its adjudication.⁴⁸ However, the authors do not specify why the Attorney General should be held to different norms of administrative adjudication than her subordinates, given that the norms of due process are more concerned with the quality of administrative adjudication and less so with the identity of the agency adjudicator (as long as she is unbiased).⁴⁹

In order to argue that a lack of procedure may benefit noncitizen claimants, the authors reference an instance in which the Attorney General remanded a BIA decision to deny immigration benefits to a married,

43. *Supra* notes 27–28.

44. See Memorandum of Law of *Amici Curiae* American Immigration Lawyers Association at 7–11, *In re Silva-Trevino*, No. A013 014 303 (B.I.A. Dec. 5, 2008) (arguing that *ex parte* communication leading to certification of a case by the Attorney General was a violation of the respondent's due process rights); Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1082 n.20, 1096 (2004) (noting the importance to due process, in some cases, "of maintaining a separation of functions between decision-makers and staff who acted in a prosecutorial capacity"); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 838 (2015) (suggesting in regards to immigration, a "trial-level agency acting as neutral adjudicator [and] as prosecutor before the appellate agency later in the same adjudicative process").

45. Gonzales & Glen, *supra* note 1, at 902–12.

46. *Id.* at 848 ("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.'"). Arguably, the use of oral argument before the BIA remains rare; relatively recently, the BIA called fewer than ten oral arguments a year. I would like to thank Alina Das for this insight. To the extent that the BIA's process has improved since then, its evolution is not unusual; "as agencies' judicial functions have expanded, so have the administrative procedures through which agencies make legal decisions." Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. (forthcoming 2017) (manuscript at 50) (on file with author).

47. Gonzales & Glen, *supra* note 1, at 849–50.

48. *Id.* at 850.

49. See generally Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (suggesting that the instrumental values furthered by *Mathews v. Eldridge* "cannot be furthered without the participation of an adjudicator truly independent of the governmental body involved in the case").

binational same-sex couple after the White House and Justice Department declined to defend the Defense of Marriage Act (“DOMA”) before the federal courts.⁵⁰ However, this example is one of the minority of instances in which the Attorney General has acted in the interests of a noncitizen during her exercise of the referral and review mechanism.⁵¹ For this reason, it does not serve the authors’ claim well, given that due process considerations are less crucial where the government is working on behalf of the individual (as the authors themselves acknowledge),⁵² as opposed to situations where the government’s interests are hostile to those of the individual.⁵³

From time to time, Attorneys General have incorporated additional process into their exercise of the referral and review mechanism.⁵⁴ The authors note one instance in which briefing was requested,⁵⁵ and one in which

50. *Id.* at 913 (referencing Dorman, 25 I. & N. Dec. 485 (Attorney Gen. 2011)); *see also* Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 205 n.360 (2013) (noting that the Attorney General remanded the case back to the BIA to “[m]ake such findings as may be necessary to determine . . . whether, absent the requirements of DOMA, respondent’s same-sex partnership or civil union would qualify him to be considered a ‘spouse’ under the Immigration and Nationality Act”).

51. Of all the substantive decisions catalogued by the authors, the minority have benefitted noncitizens, and only one, *Matter of A-T*, has resulted in access to status for a noncitizen. *See* Gonzales & Glen, *supra* note 1, at 861–63 (presenting information supporting this deduction); *see also* A-T, 24 I. & N. Dec. 617 (Attorney Gen. 2008) (opening the door to asylum claims made by victims of female genital mutilation). Arguably, the Attorney General’s decision in *Matter of A-T* was influenced by unusual political pressure. *See, e.g.*, Press Release, U.S. House of Representatives, Reps. Lofgren and Conyers Call on Attorney General to Review Female Genital Mutilation Ruling (Jan. 30, 2008) <https://lofgren.house.gov/news/documentsingle.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://www.nycbar.org/pdf/report/0424_001.pdf; Letter from Members of Cong. to Michael Mukasey, U.S. Attorney Gen. (April 25, 2008), http://cgis.uchastings.edu/sites/default/files/Matter_of_AT_senate_letter_to_AG_Snowe_Levin_2008.pdf; Letter from Physicians for Human Rights to Michael B. Mukasey, U.S. Attorney Gen. (March 6, 2008), http://cgis.uchastings.edu/sites/default/files/Matter_of_AT_physicians_for_human_rights_letter_to_AG_2008.pdf; *see also* Bah v. Mukasey, 529 F.3d 99, 110 n.14 (2d Cir. 2008) (noting requests by politicians and non-governmental organizations for Attorney General referral of the Board’s decision).

52. Gonzales & Glen, *supra* note 1, at 912 (“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. 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” (footnote omitted)).

53. *See* Mashaw, *supra* note 33, at 886–87, 907 (noting that “process concerns are intimately connected to substantive rights” including the “preserv[ation] and enhance[ment of] human dignity and self-respect,” and noting the tradition of “limiting government by providing individual rights”); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1047 (1984) (arguing that the due process “inquiry should focus on the fairness of the governmental action”).

54. Gonzales & Glen, *supra* note 1, at 902–12.

55. *Id.* at 888.

it was, while not requested, at least accepted.⁵⁶ In addition, in a recent self-certification of an immigration matter, the Attorney General set up a briefing schedule for both of the relevant parties and requested briefs from “interested amici” as well.⁵⁷ Finally, those respondents whose cases the Attorney General remands back to the BIA may have more access to sustained due process than those whose cases result in the Attorney General herself rendering a final decision on the merits.⁵⁸ However, although each of these examples of safeguards have improved an instance in which the referral and review tool has been employed, they are nonetheless admittedly anomalous.

C. *RESOLVING THE CONFLICT BETWEEN POLICYMAKING AND DECISION-MAKING*

Having highlighted the tension between the exercise of autonomous executive policy-making power and the need for procedural safeguards in the use of the referral and review mechanism, this Part concludes by surveying potential avenues for its resolution. One targeted solution would be to prioritize rule of law values by creating uniform procedural requirements for the exercise of the referral and review tool. More specifically, these norms could be furthered by implementing standardized procedural requirements (such as notice,⁵⁹ a briefing schedule,⁶⁰ a consistent role for noncitizens’ counsel, etc.) for the Attorney General’s exercise of the referral and review mechanism, and an option for individuals and stakeholders outside of the Executive Branch to refer cases to the Attorney General. Such measures would be more effective if concretized by legislation or regulations, and thus not subject to discretionary alteration by the Attorney General. Barring a clear prioritization of due process in immigration adjudication, reducing the influence of political⁶¹ and litigation-oriented⁶² concerns on the Attorney

56. *Id.* at 904.

57. Chairez-Castrejon & Sama, 26 I. & N. Dec. 686 (Attorney Gen. 2015).

58. I would like to thank Alina Das for this insight.

59. Rosenfield, *supra* note 28, at 156 (“In fact, the alien is not advised when the Board has been deprived of authority to decide, by virtue of the fact that the Attorney General is reviewing his case.”).

60. Gonzales & Glen, *supra* note 1, at 855–56 (citing Attorney General orders); Rosenfield, *supra* note 28, at 156–58.

61. See Gonzales & Glen, *supra* note 1, 884–85 nn.275–77 (discussing how “political judgments are at the heart” of a referral and review decision (quoting *Doherty v. U.S. Dep’t of Justice*, 908 F.2d 1108, 1124 (2d Cir. 1990), *rev’d sub nom.* *Immigration & Naturalization Serv. v. Doherty*, 502 U.S. 314 (1992) (Lumbard, J., concurring in part and dissenting in part))); David H. Laufman, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495, 531–39 (1986) (noting consideration of political and foreign policy issues in immigration cases); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 782–85 (2002) (noting that agencies that have given in to political demands are unlikely to announce the true reason for their actions).

62. See Taylor, *supra* note 37, at 301–02 (“[The] DOJ’s litigation-oriented counseling can blur the sequencing of policymaking and litigation.”); cf. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 77 (1993) (“[A]n

General's decision-making could help create a better balance between the agency's immigration enforcement goals and the individual's interest in due process.

Evaluating the referral and review mechanism within a broader administrative law framework could also either help cure some of the rule of law problems associated with the use of this mechanism or, alternatively, strengthen the authors' argument that there are none. One inquiry worth pursuing (but that is beyond the scope of this Response) is whether the Attorney General's decision-making process is an extension of the BIA's formal review,⁶³ or whether it may be justified as a type of informal adjudication more similar to the U.S. Citizenship and Immigration Services asylum adjudication.⁶⁴ In the latter case (and per the authors' assumption⁶⁵) the Attorney General perhaps need not adhere to the same procedural requirements as the BIA under the Administrative Procedures Act.⁶⁶ This assessment, if validated, could support the authors' normative argument in favor of greater procedural freedom for the Attorney General.

Another way to situate the referral and review mechanism within an administrative decision-making framework would be to evaluate the authors' assertion that "judicial review itself serve[s] as the backstop to any due process concerns in the underlying administrative proceeding."⁶⁷ The authors do not

authoritarian style of legal interpretation may stultify the capacities of the politically accountable institutions to engage in interpretation."). See generally Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000) (considering the costs of the DOJ's role as "the litigator for the United States and its administrative agencies").

63. Legomsky, *supra* note 40, at 1638.

64. *Id.* at 1638 n.6.

65. Gonzales & Glen, *supra* note 1, at 903.

66. For instance, under the Administrative Procedures Act ("APA"), in a formal adjudication, a written record and adversarial procedure is expressly required by statute. 5 U.S.C. §§ 553(c), 556-57 (2012); see Levin, *supra* note 44, at 1082 n.20 ("[T]he APA responded with great care to [cases that] highlighted the quasi-judicial norms implicit in a 'full hearing.'") (citing Daniel J. Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L. REV. 237 (1978)); see also *Morgan v. United States*, 304 U.S. 1, 22 (1938) ("The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority."); *Morgan v. United States*, 298 U.S. 468, 479-82 (1936) (discussing the requirements of a full and fair hearing before an agency head); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 785 n.134, 820 (1981) ("[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing'-essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process." (quoting *Morgan II*, 304 U.S. at 14-15)). Conversely, the APA does not set out this rule for informal adjudications.

67. Gonzales & Glen, *supra* note 1, at 904; see *id.* at 907 ("Considering . . . 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

elaborate, but they might be referring to the fact that a decision in an administrative proceeding can be reviewed in federal court by means of the usual immigration appeals process specified by the Immigration and Naturalization Act, or perhaps even via suit under the Administrative Procedure Act, under certain circumstances. By studying, for example, the referral and review mechanism's treatment in federal court decisions (and how federal court decisions, in turn, are implemented by agency and Attorney General adjudication of immigration cases) and the impact of the time lag between the initial agency decision and the resolution of the federal court appeal, those seeking to substantiate the authors' hypothesis could facilitate a better understanding of the extent to which the courts are likely to save noncitizens from the results of poor administrative process. It is also worth noting that, because the Attorney General is removed from the agency's expertise in immigration, scholars might also debate the proper level of judicial deference to administrative decision-making in immigration or perhaps any area of law in which a political official exercise discretion beyond her core competencies.⁶⁸

Another possible way to draw on a broader administrative context to increase the legitimacy of an unfettered referral and review mechanism would be to establish it as the pinnacle of an intra-agency hierarchy that is qualified to disrupt the agency's decision-making system. This might be accomplished, for instance, by drawing on the authors' characterization of the referral and review mechanism as the Attorney General's power of review of the BIA,⁶⁹ and comparing it to other mid-level, vertical forms of agency control that exist elsewhere in the administrative state. Arguably, however, this work would require an uphill battle, since at least a few studies of parallel mechanisms in other agencies suggest that improved procedure and judicial oversight improve the quality intra-agency review by agency heads,⁷⁰ which likely increases its validity as well. It is also possible that interference by the Attorney General could weaken the legitimacy of the BIA, an agency already struggling

deprived of his ability to remain in the United States or pursue relief from removal.”).

68. See, e.g., SEPARATION OF POWERS RESTORATION AND SECOND AMENDMENT PROTECTION ACT, S. 2434, 114th Cong., at 3 (2016) (awarding judges *de novo* review of all agency actions is due in part to the political influence in agency decision-making).

69. Gonzales & Glen, *supra* note 1, at 901.

70. See, e.g., Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–64, 58–59 (2007) (examining the relationship between the Administrator of the Environmental Protection Agency (“EPA”) and agency bureaucrats, and suggesting that that executive leadership has politically interfered with agency expertise in the EPA and discussing the nomination of a particular Director of the Office of Information and Regulatory Affairs in the Office of Management and Budget as “a White House effort to exert more centralized political control over agency staff,” among other things); Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927, 976–82 (2014) (examining a uniquely hierarchical relationship between the Secretary of Health and Human Services and the Food and Drug Administration, and arguing that courts both probe agency officials' decision-making processes further and limit the impact of politics on agency decision-making).

with problems in light of its vast case law and the politicization of its appointments and firing process.⁷¹

Also, while the authors cite and quickly dismiss one of the Supreme Court's *Morgan* cases, seriously considering the potential influence of these⁷² and other related cases on the exercise of the referral and review mechanism would also sharpen any normative account of the impact of procedural requirements on the Attorney General's exercise of upper-level decision-making power in immigration. More specifically, there are several decisions that advise a balance between the preservation of political considerations in agency decision making and the protection of due process/implementation of political safeguards.⁷³ Thoughtful application of these in order to evaluate usage of the referral and review mechanism could lead to a more intentional calibration of emphasis on the agency's goals and the individuals' rights in administrative adjudication. Also, considering the mechanism with an eye towards the need to balance as well the technocratic expertise of agency specialists, and the democratic accountability of political appointees,⁷⁴ could

71. See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 602–603, 606–608 (2009) (discussing the problems and litigation associated with a “politicized” approach to immigration judge hiring, as well as the increased decision-making delay, caseload burden and other problems associated with “streamlining” efforts); Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 358–59 (2005) (noting issues of large caseload as well as those pertaining to accuracy and fairness as a result of less substantive BIA review of immigration judge decisions). See generally Gabriel Pacyniak, *Controversy Reemerges Over Hiring, Review of Immigration Judges*, 22 GEO. IMMIGR. L.J. 805 (2008) (discussing “politicized hiring [and] systematic abuse . . . in the screening and selection of Immigration Judges and members of the BIA”).

72. See, e.g., *United States v. Morgan*, 313 U.S. 409, 422 (1941) (quoting *Morgan II*, 304 U.S. at 18 to declare that that courts should not “probe the mental processes” of agency decision makers); *Morgan II*, 304 U.S. at 25 (“Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.”); *Morgan I*, 298 U.S. at 481 (determining that while an agency head may not cede decision-making authority to subordinates, he may rely on evidence they have gathered, and on their advice).

73. See cases cited *supra* note 72; see also *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (suggesting that converting executive policymaking “into a rarified technocratic process, unaffected by political considerations,” may unduly limit executive power); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1679 (1975) (“[M]ore rigorous enforcement of procedural requirements, such as hearings, may have influenced agencies’ exercise of their discretion and may have served as a partial substitute for political safeguards by, for example, facilitating input from affected interests.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 657–58 (1984) (characterizing the later *Morgan* and *Sierra Club* decisions as illustrating courts’ “general hesitation to put agency motivation on trial”).

74. I would like to thank Ron Levin for this insight. See generally Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763 (2012) (discussing the interplay between political accountability and agency expertise in judicial deference); Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489 (2014) (discussing the tension between the promotion of expertise and accountability in administrative law impacting foreign relations).

further a meaningful determination of which administrative competencies the Attorney General should emphasize during the continued exercise of this mechanism.

Overall, the inquiries that must be satisfied to ensure the proper exercise of the referral and review mechanism—a form of agency adjudication—diverge from those required to evaluate the proper exercise of a nonadjudicative policy-making tool, like the executive order, for pursuing political or bureaucratic goals. In general, more critical study could reveal unique characteristics of, and problems resulting from, both the Attorney General’s influence on individual noncitizens’ claims and her potential to curtail the public’s ability to shape official immigration policies in accordance with evolving norms of citizenship as a result of dynamics associated with the referral and review mechanism.

III. IMMIGRATION DISCRETION AND DISRUPTION

Gonzales and Glen assert that the referral and review mechanism allowed the Attorney General to “set[] policy or institut[e] new decisional frameworks” to make more consistent the future adjudication of similar immigration claims.⁷⁵ This claim, which suggests that the referral and review mechanism has contributed to greater uniformity in immigration, goes to the heart of whether the authors’ suggestion that this tool be used more often⁷⁶ is justified. While the authors do not specify, the benefits of improved uniformity resulting from a more consistent decisional framework could include helping agencies to more faithfully implement views backed by a majority of the courts of appeals, square the BIA’s continuing application of statute with its traditionally-established meaning, or reinforce high-quality, technocratic agency policy.

This Part suggests, in contrast, that exercise of the referral and review mechanism has in fact disrupted the development of immigration law and policy. More specifically, many recent Attorney General decisions can be understood to have unsettled of judicial doctrine; suspended the long-term application of statute; or altered the agency’s own longstanding practices, including by virtue of partisan employment of the tool. To support its claim, this Part revisits and reevaluates⁷⁷ 12 of the 19 immigration decisions made via the referral and review mechanism during the George W. Bush and Obama administrations⁷⁸ that Gonzales and Glen include in their Article, as

75. Gonzales & Glen, *supra* note 1, at 874.

76. See *supra* note 10.

77. The authors’ account of recent Attorney General immigration decisions is organized primarily by use of general labels such as “the resolution of legal questions” and “the setting of policy or the institution of a new decisional framework,” as well as by subject-matter subheadings such as “Expungement Issues.” Gonzales & Glen, *supra* note 1, at 861, 868.

78. See *supra* notes 5–8 and the accompanying text.

well as an additional, relatively new decision the authors do not examine.⁷⁹

Before proceeding, it is worth noting that the point of this exposition is neither to discuss the quality of these decisions, nor to debate whether they merited deference under *Chevron* (or even *Brand X*⁸⁰) in those instances in which courts eventually incorporated them as doctrine, although the information in this Part could support this future work. The administrative and judicial decisions discussed in this Part are also included, for ease of access and understanding, in the Appendix.

A. INTERFERING WITH THE DEVELOPMENT OF JUDICIAL PRECEDENT

The Attorney General's use of the referral and review mechanism has functioned to interrupt the organic development of immigration law by the federal courts. In one example, the Attorney General effectively altered longstanding judicial doctrine by adopting a minority court's view. Here, most courts (including the Third,⁸¹ Fifth,⁸² Sixth,⁸³ Seventh,⁸⁴ and Ninth⁸⁵ Circuits) had upheld the BIA's decision in *Matter of C-Y-Z*, which established that forced sterilization of one spouse is an act of persecution against the other spouse.⁸⁶ The Second Circuit reversed the BIA by holding that the statute in question⁸⁷ did not provide for per se refugee status for the spouses of those who had undergone involuntary or forced sterilizations and abortions.⁸⁸

After the Second Circuit issued its decision, the Attorney General overruled the BIA in a subsequent case in order to reaffirm the federal court's opinion.⁸⁹ Since then, the First,⁹⁰ Third,⁹¹ Fourth,⁹² and Eleventh⁹³ Circuits, and even the Ninth Circuit, albeit reluctantly,⁹⁴ have deferred to the Attorney

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

80. See generally *Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (ruling that the agency's interpretation of statute will be applied even in the face of circuit court precedent, unless that precedent had held the statute "unambiguous" under *Chevron* rules); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837 (1984). But see generally Bijal Shah, *Brand X Developments in the Ninth Circuit and Beyond*, 3 IMMIG. L. ADVISOR 7 (2009) (suggesting that the application of *Brand X* in the immigration context may be inconsistent).

81. *Sun Wen Chen v. Attorney Gen.*, 491 F.3d 100, 108–09 (3d Cir. 2007).

82. *Li v. Ashcroft*, 82 Fed. App'x 357, 358 (5th Cir. 2003).

83. *Huang v. Ashcroft*, 113 Fed. App'x 695, 700 (6th Cir. 2004).

84. *Zhang v. Gonzales*, 434 F.3d 993, 1001–02 (7th Cir. 2006).

85. *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003).

86. *C-Y-Z*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

87. 8 U.S.C. § 1101(a)(42)(B) (2012).

88. *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 309–13 (2d Cir. 2007) (en banc).

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

90. *Jiao Hua Huang v. Holder*, 620 F.3d 33, 35 (1st Cir. 2010).

91. *Xiang Ming Wang v. Attorney Gen.*, 378 F. App'x 216, 220 (3d Cir. 2010).

92. *Yi Ni v. Holder*, 613 F.3d 415, 425 (4th Cir. 2010).

93. *Yu v. U.S. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009) (concluding that the Attorney General's interpretation of § 1101(a)(42)(B) was "reasonable and entitled to deference").

94. See *Ming Xin He v. Holder*, 749 F.3d 792, 798 (9th Cir. 2014) (stating that "[t]he BIA

General's decision. Because the immigration decisions made by the agency, most often, the BIA, often serve as precedent nationwide,⁹⁵ the Attorney General's decision had the effect of affirming and elevating a minority circuit court's decision in a manner similar to the unique power exercised by the Supreme Court.⁹⁶

In another instance, the Attorney General sought to resolve federal courts' inquiries about the scope of the Constitution, again seemingly in deviation from the usual processes by which Article III controversies are resolved—that is, by a convergence of federal court opinions over time or a final decision by the Supreme Court. In this circumstance, there had been a longstanding framework in place establishing that ineffective assistance of counsel in immigration proceedings violates the due process rights of a noncitizen under the Fifth Amendment if it renders the proceeding fundamentally unfair.⁹⁷ Relatively recently, however, federal courts began to question—but had not yet established—whether a due process right to effective assistance of counsel in immigration proceedings could be established under the Fifth Amendment under any circumstances, on the basis of any standard at all.⁹⁸

The Attorney General responded by concluding that there is no constitutional right implicated by a lack of effective counsel.⁹⁹ The decision was ultimately vacated by a subsequent Attorney General, who brought back the previous framework.¹⁰⁰ After being vacated, the decision of the previous

was bound by the Attorney General's decision [in *J-S-*] even though it contradicted prior Ninth Circuit precedent"); see also *Nai Yuan Jiang v. Holder*, 606 F.3d 1099, 1104 (9th Cir. 2010), *opinion withdrawn and superseded*, 611 F.3d 1086 (9th Cir. 2010) ("The Attorney General's conclusion in *J-S-* is contrary to our precedent in *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) . . . [But] we conclude that the Attorney General's interpretation of INA § 101(a)(42) is entitled to *Chevron* deference.").

95. See *Jian Hui Shao v. Bd. of Immigration Appeals*, 465 F.3d 497, 502 (2d Cir. 2006) ("[O]nly a precedential decision by the BIA—or the Supreme Court of the United States—can ensure the uniformity that seems to us especially desirable in [asylum] cases such as these.").

96. *Id.*

97. In 1988, BIA established that ineffective assistance of counsel is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. *Lozada*, 19 I. & N. Dec. 637, 638 (B.I.A. 1988).

98. *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (suggesting "'some ambiguity' in the reasoning of *Matter of Lozada*"); *Afanwi v. Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008), *cert. granted, judgment vacated sub nom.* *Afanwi v. Holder*, 558 U.S. 801 (2009) (rejecting an ineffective assistance of counsel claim because "the federal government was under no obligation to provide Afanwi with legal representation"); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) ("The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering.").

99. *Compean*, 24 I. & N. Dec. 710, 733–34 (Attorney Gen. 2009) (stating that for proceedings to be reopened, "an 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").

100. *Compean*, 25 I. & N. Dec. 1, 3 (Attorney Gen. 2010) ("To ensure that there is an established framework in place pending the issuance of a final rule, the Board and Immigration

Attorney General was either not followed or recognized as overruled by some courts, including the Fourth,¹⁰¹ Ninth,¹⁰² and Tenth¹⁰³ Circuits. The result, then, was that the burgeoning trend in the federal courts of questioning noncitizens' due process right to effective counsel was stymied by the involvement of two attorneys general.

In both of these sets of cases, the Attorney General disrupted the development of judicial doctrine in order to assert an interpretation that diverged from traditional or recent consensus in the courts of appeals. In the first instance, this disruption led to deference from federal courts to a view that opposed the long standing interpretation of law by those courts themselves.¹⁰⁴ In the second instance, courts of appeals had begun to question the agency's established interpretation of the Constitution, but a series of Attorney General decisions interrupted the development of this line of doctrine and shifted courts back to the original interpretation by the agency.¹⁰⁵

B. ALTERING LEGISLATIVE STANDARDS

The referral and review mechanism has also disturbed the traditional application of legislative standards, to varying degrees. In one circumstance, the BIA twice¹⁰⁶ reversed the immigration judge denial of asylum¹⁰⁷ on the grounds that the immigration judge did not meet the standard set out in statute to prohibit status on the basis of national security.¹⁰⁸ The Attorney General then reversed the BIA's decision by creating and applying a new standard that diverged from statute in order to increase the national security barrier to asylum.¹⁰⁹ Some, but not all federal circuits, including the

Judges should apply the *pre-Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed.”).

101. *Belinga v. Holder*, 346 F. App'x 922, 923 (4th Cir. 2009).

102. *Franco v. Holder*, 414 F. App'x 968, 969 (9th Cir. 2011).

103. *Delariva v. Holder*, 312 F. App'x 130, 133 (10th Cir. 2009).

104. *See supra* notes 81–88 and the accompanying text.

105. *See supra* notes 97–102 and the accompanying text.

106. A-H-, 23 I. & N. Dec. 774, 775, 777 (Attorney Gen. 2005).

107. *Id.* at 777.

108. 8 U.S.C. § 1158(b)(2)(A)(iv) (2012) (stating an alien is not eligible for asylum if “there are reasonable grounds for regarding the alien as a danger to the security of the United States” which the government must prove by a preponderance of the evidence).

109. A-H-, 23 I. & N. Dec. at 788–89 (applying a standard where “any nontrivial danger or risk to the Nation’s defense, foreign relations, or economic interests” requiring 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”).

Second,¹¹⁰ Third¹¹¹ and Ninth¹¹² Circuits, have questioned or declined to defer to the Attorney General's new standard. In contrast, other circuits appear not to question it, and the Sixth Circuit seems to have accepted it.¹¹³

In another situation, the Attorney General sought to interpret the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")¹¹⁴ in a manner that was more restrictive to noncitizens than had been previously applied by the agency.¹¹⁵ Per the language of the statute, AEDPA repealed the availability of 212(c) waivers of inadmissibility based on the length of domicile for legal permanent residents with certain criminal convictions.¹¹⁶ The Attorney General determined that AEDPA should also render ineligible for such waivers those who were eligible for waivers at the time of their guilty pleas,¹¹⁷ including prior to the passage of the Act. This interpretation was not successful, however, as it was eschewed by most courts of appeals¹¹⁸ and the Supreme Court.¹¹⁹

110. *Tianyi Yu v. Holder*, 357 F. App'x 308, 309 (2d Cir. 2009) (questioning the Attorney General's interpretation of relevant statute).

111. *Yusupov v. Attorney Gen.*, 518 F.3d 185, 190 (3d Cir. 2008) (stating that the Attorney General's decision "ignores clear congressional intent to the extent that, instead of following the statutory language and asking whether an alien 'is a danger to the security of the United States,' it inquires whether an alien 'may pose a danger to the national security.'" (footnote omitted)).

112. *Malkandi v. Holder*, 576 F.3d 906, 913 (9th Cir. 2009) (stating that the Attorney General's "view 'accords with neither the plain wording nor the ordinary meaning of the statutory text, which does not refer to belief in a mere possibility.'" (quoting *Yusupov*, 518 F.3d at 201)).

113. There has been no negative treatment of this decision by any courts save those in the Second, Third, and Ninth Circuits, and a few courts appear to accept the Attorney General's decision. *See, e.g.*, *Fisenko v. Lynch*, No. 15-3418, 2016 WL 3361482, at *3 (6th Cir. Apr. 1, 2016) (citing *Matter of A-H* in a way that implies it was a valid "discretionary denial[] of asylum"); *Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009).

114. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 U.S.C.).

115. *See Taylor*, *supra* note 37, at 288 (discussing the Attorney General's controversial decision to vacate and then change the outcome of the Board's *Soriano* decision).

Former section 212(c) of the Act provides that [a noncitizen] lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in INA Section 212(a).

Immigration Judge Benchbook: Waiver of Inadmissibility Under Former INA Section 212(c), U.S. DEP'T JUST., <https://www.justice.gov/eoir/immigration-judge-benchbook-212c-standard> (last visited Sept. 22, 2016); *see* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

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

118. Executive Office for Immigration Review; Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436, 6437-38 (Jan. 22, 2001) (recounting how seven out of eight courts of appeals that decided related litigation ruled against the Attorney General's interpretation).

119. More than once, the Supreme Court denied the government's petition for certiorari.

In another foundational decision that also involved 212(c) waivers of inadmissibility, the agency created a test in which a noncitizen in deportation proceedings may pursue a 212(c) waiver so long as the charge of deportation is not “comparable” to any of the grounds of inadmissibility for which a waiver under section 212(c) was barred,¹²⁰ even though 212(c) was traditionally—and literally, per statute—applicable only to exclusions.¹²¹ This decision was further reinforced by the Attorney General¹²² and became relatively definitive law by the mid-2000s.¹²³ However, the Supreme Court eventually deemed this Attorney General’s alteration of a legislative standard by means of the referral and review mechanism to be “arbitrary and capricious” because it based “eligibility for discretionary relief on the chance correspondence between statutory categories.”¹²⁴ This ruling also signaled the Court’s view that the agency was in danger of infringing on noncitizens’ due process rights.¹²⁵

In each of these decisions, the Attorney General encouraged or facilitated the disconnection of legislation from its previous, commonly-understood interpretation. In the first example, the courts of appeals were split regarding whether the Attorney General’s new standard was a legitimate interpretation of statute.¹²⁶ In the latter two examples, the rewriting of legislative standard by the Attorney General himself, or his affirmation of a standard rewritten by the agency, faced backlash from the federal courts.¹²⁷ That the Attorney General’s use of the referral and review mechanism has destabilized previously longstanding applications of statute, even if only

See generally, e.g., *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999). The Supreme Court finally ruled against the government’s interpretation of the statute in *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 326 (2001).

120. *Hernandez-Casillas*, 20 I. & N. Dec. 262, 266 (B.I.A. 1990).

121. *See* *Judulang v. Holder*, 132 S. Ct. 476, 480 (2011) (“But by its terms, § 212(c) did not apply when an alien was being deported.”).

122. *Hernandez-Casillas*, 20 I. & N. Dec. at 282.

123. *Judulang*, 132 S. Ct. at 488–90.

124. *Id.* at 485; *see also id.* at 484 (“By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.”).

125. *See* Patrick Glen, *Judulang v. Holder and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 2 (2012) (“Commentators were quick to latch onto the ‘arbitrary and capricious’ language of the Court’s opinion and hail it as a signal that the judiciary would be especially vigilant in ensuring that the immigration system would meet the appropriate standards of due process and justice.”); *Irrationality in Deportation Law*, N.Y. TIMES: OPINION (Jan. 2, 2012), <http://www.nytimes.com/2012/01/03/opinion/irrationality-in-deportation-law.html> (quoting Justice Kagan to note that the BIA “made ‘an irrelevant comparison between statutory provisions,’ which had nothing to do with Mr. Judulang’s fitness to remain in the United States. . . . [And thus] turned a deportation decision into a ‘sport of chance,’ like ‘flipping a coin—heads an alien may apply for relief, tails he may not’”).

126. *See supra* notes 109–11 and the accompanying text.

127. *See supra* notes 117–18, 121, 123–24 and the accompanying text.

partially or temporarily, casts doubt on Gonzales' and Glen's argument that use of this tool has added consistency to the immigration law framework.

C. EXPANDING THE CONSEQUENCES OF CRIMINAL LAW

The noteworthy group of referral and review decisions in this subpart demonstrates how Attorneys General have altered the agency's own longstanding application of standards in order to expand the immigration consequences of involvement in the criminal justice system. In one example, the Attorney General issued a decision establishing that any drug trafficking presumptively constitutes a "particularly serious crime" for the purpose of excluding noncitizens under statute.¹²⁸ The decision altered the BIA's individualized, "case-by-case" application¹²⁹ of the 1996 amendments to the Immigration and Naturalization Act. The circuit courts have, for the most part, accepted the Attorney General's decision.¹³⁰

In another instance, the Attorney General determined that records expunged for rehabilitative purposes may be reviewed in order to determine immigration consequences,¹³¹ despite longstanding practice to the contrary

128. 8 U.S.C. § 1231(b)(3)(B)(ii) (2012).

129. In one specific case involving three noncitizens, the BIA decided that "the aggravated drug trafficking felonies committed by respondents did not constitute 'particularly serious crimes' for purposes of" foreclosing statutory eligibility for "*deferral* of removal" (a temporary status to protect a noncitizen from torture under the Convention Against Torture). *Y-L*, 23 I. & N. Dec. 270, 271, 276–77, 279 (B.I.A. 2002) (discussing *S-S*, 22 I. & N. Dec. 458 (B.I.A. 1999), and acknowledging "the possibility of the very rare case where an alien may be able to demonstrate extraordinary and compelling circumstances" that "justify a departure from the default interpretation that drug trafficking felonies are 'particularly serious crimes'").

130. See, e.g., *Baboolall v. Attorney Gen.*, 606 F. App'x 649, 652 (3d Cir. 2015); *Luambano v. Holder*, 565 F. App'x 410, 414 (6th Cir. 2014) (suggesting the Attorney General's *Y-L* factors also leave room for exceptions); *Padilla v. Holder*, 525 F. App'x 38, 40 (2d Cir. 2013) (considering the Attorney General's *Y-L* standard to be definitive); *Diaz v. Holder*, 501 F. App'x 734, 739 (10th Cir. 2012) (noting that exceptions to Attorney General's *Y-L* rule are very limited); *Doe v. Holder*, 651 F.3d 824, 828 (8th Cir. 2011) (finding that under *Y-L* a "drug conviction [is] presumed to be a particularly serious crime" (emphasis added)); *Gonzalez-Mendoza v. Holder*, 356 F. App'x 28, 29 (9th Cir. 2009); *Bosede v. Mukasey*, 512 F.3d 946, 951 (7th Cir. 2008) (stating the *Y-L* presumption may give way in certain cases); *Davis v. Gonzales*, 248 F. App'x 793, 794 (9th Cir. 2007); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 943 (9th Cir. 2007) (finding that *Y-L* creates a presumption, and holding that the Attorney General's decision does not apply retroactively). However, "[a] circuit split exists regarding whether the determination that a crime was particularly serious is discretionary" or fixed, even per the Attorney General's decision. *Singh v. Holder*, 516 F. App'x 387, 388 (5th Cir. 2013). For instance, at least a few courts have since applied what appears to be the BIA's previous, more flexible standard. See, e.g., *Diaz*, 501 F. App'x at 738; *Mark v. Attorney Gen.*, 330 F. App'x 390, 394 (3d Cir. 2009); *Solis v. Mukasey*, 515 F.3d 832, 834 (8th Cir. 2008); *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006).

131. "[S]tate expungement laws [that] authorize a conviction to be expunged in order to serve rehabilitative ends . . . survive as formal adjudications of guilt entered by a court." *Marroquin-Garcia*, 23 I. & N. Dec. 705, 713 (Attorney Gen. 2005).

established by previous Attorneys General.¹³² Some federal courts—including the First,¹³³ Sixth,¹³⁴ Ninth,¹³⁵ and Eleventh¹³⁶ Circuits—seem to accept the Attorney General’s decision, but none discuss its merits.

In one more instance, the Attorney General vacated a BIA decision to create a new standard allowing an immigration judge deciding if a noncitizen committed a “crime of moral turpitude”¹³⁷ to consider evidence *beyond* the noncitizen’s criminal conviction record.¹³⁸ Prior to this, longstanding precedent in place had established the “categorical” and “modified categorical” approaches for determining the nature of a criminal conviction for immigration purposes,¹³⁹ which limited the immigration judge to examination of the statute of conviction¹⁴⁰ and a portion of the record¹⁴¹ only. Decades later, the Seventh Circuit took a new position¹⁴² suggesting that “courts may consider a wider array of evidence beyond the record of

132. “For many years this Board has recognized that a criminal conviction that has been expunged . . . may not support an order of deportation” under INA 241(a)(2)(C). *Luviano-Rodriguez*, 21 I. & N. Dec. 235, 237 (B.I.A. 1996) (citing *Ibarra-Obando*, 12 I. & N. Dec. 576 (B.I.A. 1966); *G-*, 9 I. & N. Dec. 159 (B.I.A. 1960)); *see also* *P-*, 9 I. & N. Dec. 293 (Attorney Gen. 1961) (suggesting the same). The carve out to this is expunged drug convictions. *Luviano-Rodriguez*, 21 I. & N. Dec. at 237 (citing *A-F-*, 8 I. & N. Dec. 429 (B.I.A. 1959)).

133. *Rumierz v. Gonzales*, 456 F.3d 31, 40 (1st Cir. 2006) (“State laws that authorize the subsequent expungement of a conviction typically do so for reasons that are entirely unrelated to the legal propriety of the underlying judgment of conviction Such expunged convictions *would appear*, therefore, to survive as formal adjudications of guilt entered by a court.” (emphasis added) (quoting *Marroquin-Garcia*, 23 I. & N. Dec. at 713)).

134. *Jaadan v. Gonzales*, 211 F. App’x 422, 429 (6th Cir. 2006) (distinguishing between vacating a sentence and a conviction for immigration purposes).

135. *Baez-Orozco v. Lynch*, 627 F. App’x 638, 639 (9th Cir. 2015) (stating that a conviction “dismissal ‘does not reflect a judgment about the merits of the underlying adjudication of guilt’” (quoting *Marroquin-Garcia*, 23 I. & N. Dec. at 713-14)).

136. *Azim v. Attorney Gen.*, 314 F. App’x 193, 196 (11th Cir. 2008) (declining to apply *Matter of Marroquin-Garcia* retroactively).

137. Immigration and Naturalization Act §§ 212(a)(9), 241(a)(4), 8 U.S.C. §§ 1182(a)(9), 1251(a)(4) (2012); Act of Feb. 5, 1917, ch. 29, § 19, Pub. L. No. 64-301, 39 Stat. 874, 889. A crime involving moral turpitude (“CIMT”), which can cover a wide variety of acts, has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a “reprehensible act” with a *mens rea* of at least recklessness. *Silva-Trevino*, 24 I. & N. Dec. 687 (Attorney Gen. 2008).

138. *Silva-Trevino*, 24 I. & N. Dec. at 690.

139. *See generally* *Taylor v. United States*, 495 U.S. 575, 600-02 (1990); *see also* *Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1675-78 (2011) (explaining the categorical and modified categorical approaches). For a comprehensive list of federal court and BIA decisions applying the categorical approach, *see id.* at 1749-60.

140. According to the categorical approach, the immigration judge may examine the statute of conviction underlying the noncitizen’s criminal charge to determine whether it is a “crime of moral turpitude.” *Taylor*, 495 U.S. at 600-02.

141. An immigration judge may also consider portions of the record of conviction while adjudicating the immigration consequences of a criminal conviction when it is unclear which of the provisions of the criminal statute was the basis of conviction. *Id.*

142. *Ali v. Mukasey*, 521 F.3d 737, 741-42 (7th Cir. 2008).

conviction to determine whether to classify a conviction as a crime involving moral turpitude, because ‘moral turpitude’ was not typically an element of a criminal offense.”¹⁴³

The Attorney General took up the Seventh Circuit’s torch by declaring that if the statute and record of conviction are “inconclusive, [immigration judges and the BIA should] consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.”¹⁴⁴ A number of circuits, including the Third,¹⁴⁵ Fourth,¹⁴⁶ Fifth,¹⁴⁷ Eighth,¹⁴⁸ Ninth¹⁴⁹ and Eleventh,¹⁵⁰ have since rejected this framework, and the Supreme Court declined to apply it.¹⁵¹ Recently, a subsequent Attorney General rescinded the previous Attorney General’s decision,¹⁵² partially in response to the Supreme Court opinion. In particular, scholars have noted that in the final Attorney General decision, an Attorney General commented on the Supreme Court’s use of the “categorical approach to interpreting grounds of removal ‘cast doubt’ on the looser approach in that seven-year-old [Attorney General] decision.”¹⁵³

The Attorney General decisions in these cases have unsettled norms for the determination of the immigration consequences of involvement in the criminal justice system by upsetting the agency’s own application of immigration standards. In two of the preceding examples, the Attorney General’s modification of longstanding immigration policy was subsequently accepted by the federal courts. Even in the third instance, in which the Attorney General essentially empowered immigration judges to re-adjudicate criminal convictions for immigrations purposes, significant pushback from

143. Das, *supra* note 139, at 1678.

144. *Silva-Trevino*, 24 I. & N. Dec. at 687.

145. *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 473 & 470 n.11 (3d Cir. 2009) (taking issue with the fact that “[d]espite requests by Silva-Trevino’s counsel, the Attorney General refused to identify the issues to be considered, to define the scope of review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure”).

146. *Prudencio v. Holder*, 669 F.3d 472, 480–82 (4th Cir. 2012).

147. *Silva-Trevino v. Holder*, 742 F.3d 197, 199–203 (5th Cir. 2014). In this decision, the Attorney General’s actions were “counterproductive towards his own stated objective” of “ensuring uniform application of the law.” *Id.* at 205; *see also* Gonzales & Glen, *supra* note 1, at 878 (“As a policy decision, [*Silva-Trevino*] did not meet its goal of establishing a uniform framework for determining which offenses constitute crimes involving moral turpitude.”).

148. *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (“We are bound by our circuit’s precedent, and to the extent *Silva-Trevino* is inconsistent, we adhere to circuit law.”).

149. *Olivas-Motta v. Holder*, 746 F.3d 907, 909–16 (9th Cir. 2013).

150. *Fajardo v. Attorney Gen.*, 659 F.3d 1303, 1307–10 (11th Cir. 2011).

151. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013) (citing Das, *supra* note 139).

152. *See* *Silva-Trevino* 26 I. & N. Dec. 550 (Attorney Gen. 2015). Alina Das has suggested that the Attorney General’s reversal of the government’s position was the result of immense pressure from immigration advocates.

153. Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 150 (2015).

advocates led to only partial rejection of the new policy by the courts of appeals until a subsequent Attorney General rescinded the decision.

D. *PARTISAN DECISION-MAKING*

Finally, the referral and review mechanism has also been used to further partisan dynamics. In one instance discussed earlier,¹⁵⁴ Republican Attorney General Michael Mukasey issued new, more stringent standards that heightened the bar to establishing whether a noncitizen received ineffective assistance of counsel.¹⁵⁵ Soon after, it was a Democratic Attorney General, Eric Holder, who vacated Mukasey's decision and instructed agencies to both issue a rule and, in the interim, apply the previous standards.¹⁵⁶ In another example explored at the end of the previous subpart, Holder¹⁵⁷ again rescinded one of Mukasey's decisions—in this case, a policy creating a lower bar for determining whether a noncitizen had committed a crime of moral turpitude.¹⁵⁸

In another set of circumstances, Democratic Attorney General Janet Reno overturned a BIA decision reversing an immigration judge; in this case, the BIA had determined that suffering from domestic abuse did not qualify a woman for asylum on the basis of membership in a particular social group. Reno then proposed new regulations for gender-related asylum claims (affirming that gender can be a sufficiently unifying characteristic)¹⁵⁹ and ordered the BIA to reconsider the case after these regulations were finalized.¹⁶⁰

While the regulations were still being finalized, the Department of Homeland Security “conceded” in briefing to Republican Attorney General John Ashcroft that the applicant was eligible for asylum; Ashcroft nonetheless directed the BIA to continue waiting for the issuance of a final rule.¹⁶¹ Finally, a third Attorney General, Mukasey, remanded the case to the BIA and lifted the stay in light of “the fact that the proposed rule cited by Attorney General Reno never has been made final,”¹⁶² thus allowing the BIA to issue a decision

154. See *supra* notes 97–102 and the accompanying text.

155. Compean, 24 I. & N. Dec. 710, 731 (Attorney Gen. 2009) (deciding that ineffective assistance must be “egregious,” among other criteria).

156. Compean, 25 I. & N. Dec. 1, 2–3 (Attorney Gen. 2009) (reverting the standard back to the more general integrity and competence standard from *In re Lozada*).

157. Silva-Trevino, 26 I. & N. Dec. 550, 553 (Attorney Gen. 2015).

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

159. The proposed regulation built on the recent issuance of an interim rule opening the door to asylum claims made by victims of domestic violence. R-A-, 22 I. & N. Dec. 906, 906 (B.I.A. 1999).

160. *Id.*

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

162. R-A-, 24 I. & N. Dec. 629, 630–31 (Attorney Gen. 2008).

in the case.¹⁶³ While federal courts (including the Third,¹⁶⁴ Sixth,¹⁶⁵ and Ninth¹⁶⁶ Circuits) have applied this final Attorney General decision in order to affirm asylum on the basis of domestic violence, variance in their application of the administrative decision¹⁶⁷ suggests there is still no specified approach to evaluating the asylum applications of victims of domestic violence.

The three examples in this subpart showcase the ease with which Attorneys General may vacate the decisions of their predecessors. Perhaps, this ability to easily reverse a previous policy serves as a check on the potentially problematic politicized decision-making discussed in Part II. It may also allow Attorneys General to be responsive to updates in the court. Nonetheless, the impermanence of these types of decisions likely deteriorates the internal consistency of immigration policymaking.

IV. CONCLUSION

This Response argues that the exercise of the referral and review mechanism triggers a unique tension between the Executive Branch's exceptional influence on immigration policy and broader administrative law norms. Part II argues that the legitimacy of this mechanism depends on the extent to which it adheres to administrative law values associated with agency adjudication. Thus, one way to better ensure that Attorney General acts of discretion are reasonable per fundamental administrative decision-making norms would be to implement significant improvements in the protection of noncitizen claimants through procedural and other modifications. Part III illustrates, however, that by using the referral and review mechanism, the Attorney General has interrupted the development of immigration law by the judiciary, altered legislative standards, and restructured the agency's own application of immigration policy, often with partisan interest in mind. None of these potentially problematic uses of the mechanism would necessarily be ameliorated by improved procedural safeguards. Therefore, Attorney General usage of the administrative adjudication of immigration claims in order to further a particular administration's political agenda is not a fully justifiable exercise of the Executive Branch's discretionary power unless it is amply checked, adheres to fundamental requirements of administrative

163. See Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 397 (2014).

164. *Ramirez-Alvarado v. Attorney Gen.*, 414 F. App'x 410, 413 (3d Cir. 2011) (suggesting that final Attorney General *R-A*-decision stands for the proposition that there is no per se rule granting asylum to victims of domestic violence, but that it is possible to do on a case-by-case basis).

165. *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (referencing final Attorney General *R-A*-decision in order to affirm a petitioner's claim on the basis of domestic violence).

166. *Rodas v. Holder*, 472 F. App'x 636, 637 (9th Cir. 2012) (referencing final Attorney General *R-A*-decision in order to affirm a petitioner's claim on the basis of domestic violence).

167. See *supra* notes 164–66.

adjudication, *and* is rooted in a coherent and consistent mode of legal interpretation and policy development.

Regardless of whether improvements are made to the referral and review mechanism, its recent exercise provides a useful body of information for both immigration and administrative law scholars. More specifically, additional analysis of the Attorney General's exercise of immigration authority in these cases could be used to investigate inquiries at the intersection of immigration and administrative law, as well as administrative law problems for which immigration serves as a suitable model. For example, examination of the potential overreach of the Attorney General in these instances could contribute to the investigation of the proper separation of powers among the executive and other branches of government¹⁶⁸ and add to the nascent study of how Executive Branch leadership besides the President¹⁶⁹ wields power in the immigration context. If the Attorney General has, as a result of the referral and review mechanism, autonomously reduced the reach of both the judicial and legislative branches in immigration, these instances serve as fruitful examples of actions by an executive official below the level of the President that might alter the balance of the federal government as a whole.

Finally, a better understanding of the referral and review tool might also illuminate the impact of agencies' decision-making discretion (as opposed to that of the President alone) on the exercise of executive power in immigration and, perhaps, other substantive administrative law settings. For instance, it is worth evaluating the extent to which these non-presidential but nonetheless executive exercises of discretion have the potential to stymie the political and other accountability processes by which Executive Branch power as a whole is evolved.¹⁷⁰ Because of its potential to help shed light on these matters, Gonzales' and Glen's Article is both a worthwhile contribution to the study of immigration and also of use to future administrative law scholarship.

168. See, e.g., Press Release, Orrin Hatch, U.S. Senate, House Leaders Introduce Bill To Restore Regulatory Accountability Through Judicial Review (March 17, 2016), <http://www.hatch.senate.gov/public/index.cfm/2016/3/release-senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review> (discussing how "the core problem of executive agencies inventing new law [comes] not from politically accountable officials in Congress, but from unelected bureaucrats in federal agencies").

169. See, e.g., Brief for the State Respondents at 1, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674); *The Bounds of Executive Discretion in the Regulatory State*, REG BLOG (Jan. 25, 2016), <http://www.regblog.org/2016/01/25/bounds-of-executive-discretion> (discussing many prominent scholars' views on presidential discretion).

170. See Gonzales & Glen, *supra* note 1, at 892-94 (suggesting that there may even be instances in which the Attorney General and the agency might purposefully interfere with the exercise of executive power).

V. APPENDIX: DISRUPTION OF LEGAL DEVELOPMENT BY THE REFERRAL AND REVIEW MECHANISM

A. JUDICIAL DOCTRINE

Case	Subject Matter	Prior Law	Attorney General Intervention	Judicial Response
<i>Matter of J-S</i> ¹⁷¹	Adjudication of refugee/asylum application	Forced sterilization of one spouse is <i>per se</i> an act of persecution against the other spouse; this interpretation of statute was put forth by the B.I.A. ¹⁷² and upheld by Third, ¹⁷³ Fifth, ¹⁷⁴ Sixth, ¹⁷⁵ Seventh, ¹⁷⁶ and Ninth ¹⁷⁷ Circuits.	Forced sterilization of one spouse is <u>not</u> <i>per se</i> an act of persecution against the other spouse, based on Second Circuit decision only. ¹⁷⁸	The First, ¹⁷⁹ Third, ¹⁸⁰ Fourth, ¹⁸¹ Eleventh ¹⁸² Circuits and even the Ninth Circuit, reluctantly, ¹⁸³ have since deferred to the Attorney General's decision.

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

172. *C-Y-Z*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997).

173. *Sun Wen Chen v. Attorney Gen.*, 491 F.3d 100, 108–09 (3d Cir. 2007).

174. *Li v. Ashcroft*, 82 F. App'x. 357, 358 (5th Cir. 2003).

175. *Huang v. Ashcroft*, 113 F. App'x. 695, 700 (6th Cir. 2004).

176. *Zhang v. Gonzales* 434 F.3d 993, 1001 (7th Cir. 2006).

177. *He v. Ashcroft*, 328 F.3d 593, 604 (9th Cir. 2003).

178. *See Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

179. *See Jiao Hua Huang v. Holder*, 620 F.3d 33, 35 (1st Cir. 2010).

180. *Xiang Ming Wang v. Attorney Gen.*, 378 F. App'x 216, 220 (3d Cir. 2010).

181. *Yi Ni v. Holder*, 613 F.3d 415, 425 (4th Cir. 2010).

182. *Yu v. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009) (concluding that the Attorney General's interpretation of § 1101(a)(42)(B) was "reasonable and entitled to deference").

183. *See Ming Xin He v. Holder*, 749 F.3d 792, 798 (9th Cir. 2014) (stating that the "BIA was bound by the Attorney General's decision [in *J-S*] even though it contradicted prior Ninth Circuit precedent"); *see also Nai Yuan Jiang v. Holder*, 606 F.3d 1099, 1104–05 (9th Cir. 2010), *opinion withdrawn and superseded*, 611 F.3d 1086 (9th Cir. 2010) ("The Attorney General's conclusion in *J-S* is contrary to our precedent in *He v. Ashcroft*, 328 F.3d 593 (9th Cir. 2003) . . . [but] we conclude that the Attorney General's interpretation of INA § 101(a)(42) is entitled to *Chevron* deference.").

<p><i>Matter of Compean, Bangaly and J-E-C-</i> (Compean I)¹⁸⁴</p>	<p>Ineffective assistance of counsel</p>	<p>In 1988, BIA established that ineffective assistance of counsel is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.¹⁸⁵ In the 2000s, courts of appeals, including the Fourth,¹⁸⁶ Seventh,¹⁸⁷ and Eighth Circuits,¹⁸⁸ began to question the principle that there could be a due process right to effective assistance of counsel.</p>	<p>There is no constitutional right to effective assistance of counsel in removal proceedings; for proceedings to be reopened, “an 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.”¹⁸⁹</p>	<p>Since this decision was vacated (for more information, see the next <i>Matter of Compean</i> entry), some courts, including the Fourth,¹⁹⁰ Ninth,¹⁹¹ and Tenth¹⁹² Circuits, have either declined to follow it or recognized that it was overruled.</p>
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184. *Compean*, 24 I. & N. Dec. 710, 714 (B.I.A. 2009).

185. *Lozada*, 19 I. & N. Dec. 637, 638 (B.I.A. 1988).

186. *Afanwi v. Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008), *cert. granted, judgment vacated sub nom.* *Afanwi v. Holder*, 558 U.S. 801 (2009) (rejecting an ineffective assistance of counsel claim because “[t]he federal government was under no obligation to provide Afanwi with legal representation”).

187. *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (“The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering.”).

188. *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (suggesting there is “‘some ambiguity’ in the reasoning of *Matter of Lozada*”).

189. *Compean*, 24 I. & N. Dec. at 733–34.

190. *Belinga v. Holder*, 346 F. App’x 922, 923 (4th Cir. 2009).

191. *Franco v. Holder*, 414 F. App’x 968, 969 (9th Cir. 2011).

192. *Delariva v. Holder*, 312 F. App’x 130, 133 (10th Cir. 2009).

<p><i>Matter of Compean, Bangaly and J-E-C- (Compean II)</i>¹⁹³</p>	<p>Ineffective assistance of counsel</p>	<p>In 2009, Attorney General decided there is no constitutional right to effective assistance of counsel in removal proceedings; for proceedings to be reopened, “an 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.”¹⁹⁴</p>	<p>Also in 2009, a subsequent Attorney General vacated the previous attorney general’s decision and “[t]o ensure that there is an established framework in place pending the issuance of a final rule, [directed] the Board and Immigration Judges [to] apply the pre-Compean standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed.”¹⁹⁵</p>	<p>There has been no negative federal court treatment of Compean II.</p>
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193. Compean, 25 I. & N. Dec. 1 (Attorney Gen. 2009).

194. Compean, 24 I. & N. Dec. at 733-34.

195. Compean, 25 I. & N. Dec. at 3.

B. LEGISLATIVE INTERPRETATION

Case	Subject Matter	Prior Law	Attorney General's Alteration	Judicial Response
<i>Matter of A-H</i> ¹⁹⁶	Standard for denying asylum to potential terrorist threat	The BIA decided that the immigration judge did not meet the standard set out in the statute to deny asylum ¹⁹⁷ : under a preponderance of the evidence, an alien is not eligible if "there are reasonable grounds for regarding the alien as a danger to the security of the United States[.]" ¹⁹⁸	Lowered bar for denying asylum by changing standard: asylum may be denied on the basis of "any nontrivial degree of risk" to "the Nation's defense, foreign relations, or economic interests[.]" requiring 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." ¹⁹⁹	Some federal courts, including the Second, ²⁰⁰ Third, ²⁰¹ and Ninth ²⁰² Circuits, have questioned or declined to defer to the Attorney General's interpretation of statute.

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

197. *Id.* at 775, 777.

198. 8 U.S.C. § 1158(b)(2)(A)(iv) (2012).

199. A-H, 23 I. & N. Dec. at 788–89.

200. *Tianyi Yu v. Holder*, 357 F. App'x 308, 309 (2d Cir. 2009) (questioning the Attorney General's interpretation of relevant statute).

201. *Yusupov v. Attorney Gen.*, 518 F.3d 185, 190 (3d Cir. 2008), as amended (Mar. 27, 2008) (stating the Attorney General's opinion "ignores clear congressional intent to the extent that, instead of following the statutory language and asking whether an alien 'is a danger to the security of the United States,' it inquires whether an alien 'may pose a danger to the national security'" (emphasis in original) (footnote omitted) (quoting A-H, 23 I. & N. Dec. at 788–89)).

202. *Malkandi v. Holder*, 576 F.3d 906, 913 (9th Cir. 2008) (stating the Attorney General's "view 'accords with neither the plain wording nor the ordinary meaning of the statutory text, which does not refer to belief in a mere possibility.'" (quoting *Yusupov*, 518 F.3d at 201)).

<p><i>Matter of Soriano</i>²⁰³</p>	<p>212 (c) waivers of inadmissibility to the U.S.²⁰⁴</p>	<p>The Anti-Terrorism and Effective Death Penalty Act of 1996, (“AEDPA”)²⁰⁵—which repealed the availability of 212 (c) waivers based on length of domicile for legal permanent residents with certain criminal convictions—would not apply to those who were eligible for waiver at the time of guilty plea.²⁰⁶</p>	<p>The repeal of the statute retroactively applies to everyone.²⁰⁷</p>	<p>Seven out of eight courts of appeals, (including the First²⁰⁸ and Second²⁰⁹ Circuits) that heard related litigation ruled against the Attorney General’s interpretation.²¹⁰ After refusing to grant certiorari a few times,²¹¹ the Supreme Court also ruled against it.²¹²</p>
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203. Soriano, 21 I. & N. Dec. 516 (B.I.A. 1996).

204. “Former section 212(c) of the Act provides that [a noncitizen] lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in INA Section 212(a).” Immigration Judge Benchbook: Waiver of Inadmissibility Under Former INA Section 212(c), *supra* note 116; *see* Immigration and Naturalization Act § 212(c), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1182(c) (1994).

205. Antiterrorism & Effective Death Penalty Act of 1996, § 440(d), Pub. L. No. 104-132, 110 Stat. 1214, 1277 (1996) (codified as amended at 18 U.S.C. § 1182(c)).

206. Soriano, 21 I. & N. at 517–18.

207. *See supra* notes 114–18. *See generally* Hernandez–Casillas, 20 I. & N. Dec. 262 (Attorney Gen. 1991).

208. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied sub nom. Reno v. Pereira Goncalves*, 526 U.S. 1004 (1999).

209. *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 128–31 (2d Cir. 1998), *cert. denied sub nom. Navas v. Reno*, 526 U.S. 1004 (1999) (rejecting the Attorney General’s interpretation by holding that AEDPA Section 440(d) does not apply to aliens whose deportation proceedings were pending on the AEDPA’s enactment date).

210. Executive Office for Immigration Review; Section 212(c) Relief for Certain Aliens in Deportation Proceedings before April 24, 1996, 66 Fed. Reg. 6436, 6437–38 (Jan. 22, 2001) (codified at 8 C.F.R. pts. 3, 212, 240 (2012)).

211. *See generally, e.g., Goncalves*, 526 U.S. 1004; *Henderson*, 157 F.3d 106.

212. *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 326 (2001).

<p><i>Matter of Hernandez–Casillas</i>²¹³</p>	<p>212(c) waivers of inadmissibility to the U.S.²¹⁴</p>	<p>Agency created a test in which a noncitizen in deportation proceedings may pursue a 212(c) waiver (traditionally applied to exclusions only) so long as the charge of deportation is not “comparable” to any of the grounds of inadmissibility for which a waiver under section 212(c) was barred.²¹⁵</p>	<p>Reiterated BIA policy regarding access to 212(c) waivers.²¹⁶</p>	<p>The Supreme Court eventually determined the BIA’s interpretation of the statute to be “arbitrary and capricious.”²¹⁷</p>
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213. See generally *Hernandez–Casillas*, 20 I. & N. Dec. 262 (Attorney Gen. 1991).

214. See *supra* note 204.

215. *Hernandez–Casillas*, 20 I. & N. at 266.

216. See generally *St. Cyr*, 533 U.S. 289.

217. See generally *Judulang v. Holder*, 132 S. Ct. 476 (2011) (holding that the BIA’s comparable-grounds test to determine a noncitizen’s eligibility for discretionary relief arbitrary and capricious).

C. REFORMULATION OF LONGSTANDING AGENCY POLICY / EXPANSION OF IMMIGRATION CONSEQUENCES OF INVOLVEMENT IN CRIMINAL JUSTICE SYSTEM

Case	Subject Matter	Prior Law	Attorney General's Alteration	Judicial Response
<i>In re Y-L, A-G & R-S-R</i> ²¹⁸	The determination of "particularly serious crimes" for exclusion of non-citizens ²¹⁹	In one specific case involving three noncitizens, "the aggravated drug trafficking felonies committed by respondents did not constitute 'particularly serious crimes' for purposes of" foreclosing statutory eligibility for withholding of removal (a temporary status to protect noncitizen from torture). ²²⁰	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." ²²¹	Federal courts, including the Second, ²²² Third, ²²³ Sixth, ²²⁴ Seventh, ²²⁵ Eighth, ²²⁶ Ninth, ²²⁷ and Tenth ²²⁸ Circuits, have affirmed the Attorney General's decision, but "[a] circuit split exists regarding whether the determination that a crime was particularly serious is discretionary" or fixed. ²²⁹

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

219. 8 U.S.C. § 1231(b)(3)(B)(ii) (2000).

220. *Y-L*, 23 I. & N. at 271, 279; *see also id.* at 276 (acknowledging the possibility of an "unusual circumstance[]") that "might justify a departure from the default interpretation that drug trafficking felonies are 'particularly serious crimes'").

221. *Id.* at 274.

222. *Padilla v. Holder*, 525 F. App'x 38, 40 (2d Cir. 2013) (considering the Attorney General's *Y-L*-standard to be definitive).

223. *Baboolall v. Attorney Gen.*, 606 F. App'x 649, 652 (3d Cir. 2015) (affirming the IJ's finding that *Baboolall's* heroin conviction was a "particularly serious crime").

224. *Luambano v. Holder*, 565 F. App'x 410, 414 (6th Cir. 2014) (suggesting the Attorney General's *Y-L*-factors also leaves room for exceptions).

225. *Bosede v. Mukasey*, 512 F.3d 946, 951 (7th Cir. 2008) (noting the BIA's recognition that the *Y-L*-presumption may give way in certain circumstances).

226. *Doe v. Holder*, 651 F.3d 824, 828 (8th Cir. 2011) (citing the IJ's finding that under *Y-L*, a "drug conviction [is] presumed to be a particularly serious crime" (emphasis added)).

227. *See, e.g., Miguel-Miguel v. Gonzales*, 500 F.3d 941, 943 (9th Cir. 2007) (holding that while *Y-L* creates a presumption, the Attorney General's decision does not apply retroactively); *Gonzalez-Mendoza v. Holder*, 356 F. App'x 28, 29 (9th Cir. 2009); *Davis v. Gonzales*, 248 F. App'x 793, 794 (9th Cir. 2007).

228. *Diaz v. Holder*, 501 F. App'x 734, 739 (10th Cir. 2012) (noting that exceptions to Attorney General's *Y-L* are very limited).

229. *Singh v. Holder*, 516 F. App'x 387, 388 (5th Cir. 2013). For instance, at least a few courts have since applied what appears to be the BIA's previous, more flexible standard. *See, e.g.,*

<i>Matter of Marroquin-Garcia</i> ²³⁰	Expunged criminal convictions	The BIA had long “recognized that a criminal conviction that has been expunged . . . may not support an order of deportation under INA 241 (a) (2) (C),” with an exception for expunged drug convictions. ²³¹	“State expungement laws [that] authorize a conviction to be expunged in order to serve rehabilitative ends . . . survive as formal adjudications of guilt entered by a court.” ²³²	Federal courts such as the First, ²³³ Sixth, ²³⁴ Ninth ²³⁵ and Eleventh ²³⁶ Circuits, seem to accept the Attorney General’s decision, but do not engage in direct discussion of its merits.
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Mark v. Attorney Gen., 330 F. App’x 390, 394 (3d Cir. 2009) (leaving discretion to the Attorney General to determine whether the crime was particularly serious); *Diaz*, 501 F. App’x at 738 (noting that the Attorney General may determine whether an alien’s conviction constitutes a particularly serious crime); *Solis v. Mukasey*, 515 F.3d 832, 834 (8th Cir. 2008) (noting that a drug trafficking felony conviction is presumptively a particularly serious crime); *Tunis v. Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (stating that if the prison sentence is under five years, the Attorney General maintains discretion to determine whether the crime is particularly serious).

230. *Marroquin–Garcia*, 23 I. & N. Dec. 705 (Attorney Gen. 2005).

231. *Luviano –Rodriguez*, 21 I. & N. Dec. 235, 237 (B.I.A. 1996).

232. *Marroquin–Garcia*, 23 I. & N. at 713 (citation omitted).

233. *Rumierz v. Gonzales*, 456 F.3d 31, 40 (1st Cir. 2006).

234. *Jaadan v. Gonzales*, 211 F. App’x 422, 429 (6th Cir. 2006).

235. *Baez–Orozco v. Lynch*, 627 F. App’x 638, 639 (9th Cir. 2015).

236. *Azim v. Attorney Gen.*, 314 F. App’x 193, 196 (11th Cir. 2008) (declining to apply *Marroquin–Garcia* retroactively).

<p><i>Matter of Silva-Trevino</i>²³⁷</p>	<p>Evaluating “crime involving moral turpitude”²³⁸</p>	<p>Longstanding precedent in place established the categorical/modified categorical approach for determining the nature of a criminal conviction for immigration purposes.²³⁹ The Seventh Circuit took a new position²⁴⁰ suggesting that “courts may consider a wider array of evidence beyond the record of conviction to determine whether to classify a conviction as a crime involving moral turpitude, because ‘moral turpitude’ was not typically an element of a criminal offense.”²⁴¹</p>	<p>Deciding that if the statute and record of conviction are “inconclusive, [immigration judges and the BIA should] consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.”²⁴²</p>	<p>Federal courts, including the Third,²⁴³ Fourth,²⁴⁴ Fifth,²⁴⁵ Ninth²⁴⁶ and Eleventh²⁴⁷ Circuits have since rejected this framework. A subsequent attorney general rescinded the decision²⁴⁸ in response to a relevant Supreme Court ruling.²⁴⁹</p>
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237. *Silva-Trevino*, 24 I. & N. Dec. 687 (Attorney Gen. 2008).

238. Act of Feb. 5, 1917, ch. 29, § 19, Pub. L. No. 64-301, 39 Stat. 874, 889.

239. See generally *Taylor v. United States*, 495 U.S. 575 (1990). For a comprehensive list of federal court and BIA decisions applying the categorical approach, see Das, *supra* note 139, at 1749–60.

240. *Ali v. Mukasey*, 521 F.3d 737, 741–42 (7th Cir. 2008).

241. Das, *supra* note 139, at 1678.

242. *Silva-Trevino*, 24 I. & N. Dec. 687.

243. *Jean-Louis v. Attorney Gen.*, 582 F.3d 462, 473, 470 n.11 (3d Cir. 2009) (also taking issue with the fact that “[d]espite requests by Silva-Trevino’s counsel, the Attorney General refused to identify the issues to be considered, to define the scope of review, to provide a briefing schedule, or to apprise counsel of the applicable briefing schedule”).

244. *Prudencio v. Holder*, 669 F.3d 472, 480–82 (4th Cir. 2012).

245. *Silva-Trevino v. Holder*, 742 F.3d 197, 199–203 (5th Cir. 2014).

246. *Olivas-Motta v. Holder*, 746 F.3d 907, 909–16 (9th Cir. 2013).

247. *Fajardo v. U.S. Attorney Gen.*, 659 F.3d 1303, 1307–310 (11th Cir. 2011).

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

249. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

D. PARTISAN TUG-OF-WAR

<u>Case</u>	Subject Matter	First Attorney General Decision (by referral and review)	Second Attorney General's Alteration (by referral and review)	Third Attorney General's Alteration (by referral and review)
<i>Matter of Compean, Bangaly and J-E-C</i> ²⁵⁰	Ineffective assistance of counsel	In 2009, Attorney General Michael Mukasey decided there is no constitutional right to effective assistance of counsel in removal proceedings; for proceedings to be reopened, "an 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." ²⁵¹	Also in 2009, subsequent Attorney General Eric Holder vacated the previous decision and, "pending the outcome of a rulemaking process," directed the "[BIA] and the Immigration Judges to continue to apply the previously established standards for reviewing motions to reopen based on claims of ineffective assistance of counsel." ²⁵²	N/A (In addition, there has been no negative treatment of this decision-making arc in the federal courts.).
<i>Matter of Silva-Trevino</i> ²⁵³	Evaluating "crime involving moral turpitude" ²⁵⁴	Mukasey decided that if the statute and record of conviction are "inconclusive, [immigration judges and the BIA should] consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question." ²⁵⁵	Holder rescinded the decision ²⁵⁶ in response to a relevant Supreme Court ruling. ²⁵⁷	N/A

250. *Compean*, 25 I. & N. Dec. 1 (Attorney Gen. 2010); *Compean*, 24 I. & N. Dec. 710, 714 (Attorney Gen. 2009).

251. *Compean*, 24 I. & N. Dec. at 733-34.

252. *Compean*, 25 I. & N. Dec. at 1, 3 (seeking "[t]o ensure that there is an established framework in place pending the issuance of a final rule and to apply new framework retroactively").

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

254. Act of Feb. 5, 1917, ch. 29, § 19, Pub. L. No. 64-301, 39 Stat. 874, 889.

255. *Silva-Trevino*, 24 I. & N. Dec. at 687.

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

257. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

<p><i>Matter of R-A</i>²⁵⁸</p>	<p>Evaluating asylum status of victims of domestic violence</p>	<p>Initially, the BIA held, reversing an immigration judge, that a Guatemalan woman facing domestic abuse was not facing persecution on account of membership in a particular social group; Attorney General Janet Reno overturned the decision, proposed new regulations for gender-related asylum claims (affirming that gender can be a sufficiently unifying characteristic), and ordered the BIA to reconsider the case after these regulations were finalized.²⁵⁹</p>	<p>While the Department of Homeland Security “conceded” in briefing to Attorney General John Ashcroft that the applicant R-A- was eligible for asylum, he nonetheless directed the BIA to wait for the issuance of a final rule.²⁶⁰</p>	<p>Mukasey remanded to the BIA and lifted the stay in light of “the fact that the proposed rule cited by Reno never has been made final,” thus allowing the BIA to issue a decision in the case.²⁶¹ The treatment of the final R-A- decision by federal courts (including the Third,²⁶² Sixth,²⁶³ and Ninth²⁶⁴ Circuits) indicates there is no specified approach to evaluating the asylum applications of victims of domestic violence.</p>
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258. *R-A*, 24 I. & N. Dec. 629 (Attorney Gen. 2008); *R-A*, 23 I. & N. Dec. 694 (Attorney Gen. 2005); *R-A*, 22 I. & N. Dec. 906 (Attorney Gen. 2001).

259. *R-A*, 22 I. & N. Dec. 906.

260. Gupta, *supra* note 163, at 397; *see also R-A*, 23 I. & N. Dec. 694; *Id.*

261. *R-A*, 24 I. & N. Dec. at 630–31.

262. *Ramirez-Alvarado v. Attorney Gen.*, 414 F. App'x 410, 413 (3d Cir. 2011) (suggesting that the final decision by the Attorney General in *R-A* stands for the proposition that there is no per se rule granting asylum to victims of domestic violence, but that it is possible to do on a case-by-case basis).

263. *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (referencing the final Attorney General decision in the *R-A* decision to affirm a petitioner's claim on the basis of domestic violence).

264. *Rodas v. Holder*, 472 F. App'x 636, 637 (9th Cir. 2012) (referencing the final Attorney General decision in *R-A* to affirm a petitioner's claim based on domestic violence).