



## Obscure but Powerful

Shaping U.S. Immigration Policy through  
Attorney General Referral and Review

By Sarah Pierce

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# Contents

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- Executive Summary** ..... 1
  
- 1 Introduction** ..... 2
  
- 2 History of the Attorney General’s Referral and Review Power** ..... 3
  - A. The Homeland Security Act and Its Effects ..... 6
  - B. Referral and Review as an Administrative Tool ..... 9
  
- 3 The Trump Administration’s Use of Self-Referral** ..... 12
  - A. Restricting Access to Asylum ..... 13
  - B. Eliminating Immigration Judge Discretion ..... 17
  
- 4 The Future of Self-Referral** ..... 19
  - A. Beyond the Trump Administration ..... 20
  - B. Establishing Procedural Requirements to Increase Transparency and Support High-Quality Decisions ..... 21
  
- 5 Conclusion** ..... 24
  
- About the Author** ..... 26
  
- Acknowledgments** ..... 27

## Executive Summary

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In making wide-reaching changes to the U.S. immigration system, the Trump administration employed a range of executive action tools. One of them is a little known but powerful authority of the attorney general to alter or reinterpret the application of immigration laws. Through a series of consequential decisions, the Trump administration's attorneys general elevated the reach and public profile of this obscure bureaucratic tool, raising questions about its historic roots, appropriate use, and future relevance.

Formally called the “referral and review power,” the authority allows the attorney general to review and overrule decisions made by the Board of Immigration Appeals (BIA), the immigration appellate body housed within the U.S. Department of Justice. Trump administration attorneys general referred more cases to themselves for review than under any prior administration, Democratic or Republican. These decisions stretched beyond the norms and traditional boundaries of the exercise of this power, making substantive changes to legal regimes—such as the U.S. asylum system—as well as to court procedures, including how immigration judges manage their individual dockets.

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This increase in the frequency of use and impact of the attorney general's power has exacerbated concerns that predate the Trump administration. Allowing the attorney general—the country's chief law enforcement officer—to intercede in individual immigration cases has raised questions about the true independence of the immigration adjudication system. In addition, attorneys general have issued these decisions with minimal procedural safeguards or transparency; regulations require only that the decision be issued in writing to the affected parties. Attorneys general have frequently issued decisions without input from the parties in the case or other relevant stakeholders, and many times, the affected parties have not even been aware that the attorney general has taken up their case until after the decision is issued. The lack of transparency and, at times, failure to fully brief the legal issues also have negative implications for the legal and policy soundness of attorney general decisions and their acceptance by the broader populations ultimately affected by those decisions.

Beyond questions of procedural consistency and transparency, the fact that this authority has remained within the Justice Department is itself problematic. Before the creation of the U.S. Department of Homeland Security (DHS) under the *Homeland Security Act of 2002*, most immigration functions were under the jurisdiction of the Justice Department, headed by the attorney general. The 2002 law moved the bulk of immigration policy-making and operations to DHS. Thus, attorneys general no longer hold the expertise that is derived from overseeing immigration operations nor are they tasked with immigration policy-making, yet their decisions can bind DHS, even over that agency's protests. Since 2003, attorneys general have used this power to make significant policy changes, ranging from abandoning well-established criteria for granting asylum and changing the immigration consequences of certain criminal convictions, to

dissolving the constitutional right of foreign nationals in removal proceedings to effective assistance of counsel.

The Trump administration's aggressive use of the referral and review power invited stronger scrutiny than ever before. Some of the concerns raised in this and prior administrations could be addressed by establishing more formal procedures and increasing the transparency surrounding the power's use. Such procedural safeguards would increase the quality and acceptability of decisions, but tackling the deeper issues associated with this authority's location within an agency that is no longer in the lead on immigration will require a critical rethinking of the effective use of this power along with its appropriate placement within the immigration bureaucracy. Referral and review provides a ready tool for any new administration to undo prior policy measures and nimbly and efficiently introduce different ideas for improving the performance of the U.S. immigration system, but it must be trusted to produce high-quality decisions that advance a coherent and consistent immigration policy.

## BOX 1

### About the Rethinking U.S. Immigration Policy Project

This report is part of a multiyear Migration Policy Institute (MPI) project, Rethinking U.S. Immigration Policy. At a time when U.S. immigration realities are changing rapidly, this initiative aims to generate a big-picture, evidence-driven vision of the role immigration can and should play in America's future. It will provide research, analysis, and policy ideas and proposals—both administrative and legislative—that reflect these new realities and needs for immigration to better align with U.S. national interests.

The research, analyses, and convenings conducted for MPI's Rethinking initiative address critical immigration issues, which include economic competitiveness, national security, and changing demographic trends, as well as issues of immigration enforcement and administering the nation's immigration system.

To learn more about the project and read the other studies generated by the Rethinking U.S. Immigration Policy initiative, see [bit.ly/RethinkingImmigration](https://bit.ly/RethinkingImmigration).

## 1 Introduction

Using executive authority, the administration of President Donald J. Trump made more significant changes to the U.S. immigration system than any other administration in modern memory. In the face of inaction by Congress—apart from restricting some of the president's hefty spending asks—the administration tapped into the wide range of options at its disposal to influence immigration policy, including invoking underutilized laws, issuing regulations and executive orders, and taking up other bureaucratic tools. Among these tools is an obscure but powerful legal authority—the attorney general's ability to self-refer and review immigration court decisions.

This tool, at times referred to as “certification,” is an extension of the attorney general's authority over decisions made by the immigration appeals court, the Board of Immigration Appeals (BIA), which is housed in the U.S. Department of Justice. It allows attorneys general to refer any BIA decisions to themselves for review. The U.S. Department of Homeland Security (DHS) and the BIA may also refer decisions for the attorney general to review, as could DHS's predecessor agency, the Immigration and Naturalization Service (INS).

Historically, the referral and review power allowed attorneys general to efficiently exercise policy control and knit adjudications, rulemaking, and other bureaucratic decisions into one coherent immigration policy framework, as well as to solve disagreements between the BIA and INS. At the same time, there have always been questions about whether referral and review violates the due process rights of the immediate parties in a case, as well as about the soundness and broad acceptance of the decisions, given the extraordinary power it concentrates in the hands of the nation's chief law enforcement officer. In essence, it gives the attorney general the final say on administrative decision-making in immigration law.

*As broader authority over immigration matters was shifted out of the Justice Department, attorneys general increasingly used their power to influence immigration policy.*

Referral and review significantly increased in scope and importance with the enactment of the *Homeland Security Act of 2002* (HSA), which moved the majority of immigration functions out of the Justice Department and into the newly formed DHS. As broader authority over immigration matters was shifted out of the Justice Department, attorneys general increasingly used their

power to influence immigration policy. Since the March 1, 2003, implementation of HSA, with only one exception, every case referred to the attorney general has been self-referred—28 of 29 cases as of January 2021.

Under Trump, attorneys general exercised this authority even more than in prior administrations, implementing significant changes that include paring down the authority of immigration judges to exercise discretion and manage their dockets, upending decades of established precedent to change asylum law, and making it more difficult for immigrants with criminal records to remain in the country.

This report details the evolution and impact of referral and review. It begins by summarizing the history of this legal tool, the Trump administration's use of it to accomplish specific policy objectives, and the possible future uses of the power, including the Trump administration's proposed expansion of it and how a new administration could use it to improve the immigration system. The report concludes by recommending new procedures and increased transparency to boost the integrity of review decisions as well as to improve the use of this power and its placement within the immigration bureaucracy.

## 2 History of the Attorney General's Referral and Review Power

The referral and review power is an extension of the attorney general's historic authority over the immigration system.<sup>1</sup> When the Justice Department gained jurisdiction over the INS in 1940, the attorney

<sup>1</sup> After decades of use, Congress finally recognized the review power in the *Homeland Security Act of 2002*: "The attorney general shall...review such administrative determinations in immigration proceedings." See *Homeland Security Act of 2002* (HSA), Public Law 107-296, *U.S. Statutes at Large* 116 (2002): 2135.

general, via regulations, established the immigration appellate court—the BIA—giving himself and his successors power over its decisions.<sup>2</sup>

Between 1940 and 2003, referral and review of BIA decisions was a small but powerful part of the broad legal and administrative portfolio of attorneys general in overseeing the immigration system. Today, even after the 2003 creation of DHS and the transfer of most immigration functions into this new department, the BIA remains in the Justice Department, where it continues to serve as an instrument for the exercise of the attorney general’s power over immigration. By regulation, the BIA has authority to exercise independent judgment and issue its own decisions.<sup>3</sup> But those decisions are subject to final review by the attorney general, through the referral and review power.

The procedures for how cases are referred to the attorney general and by whom have changed over the years. At first, only specific types of cases could be referred. A 1940 Justice Department regulation—the same one that formally created the BIA—specified that a case could be referred if (1) it involved a particularly difficult legal question, (2) the BIA had ordered the suspension of a foreign national’s deportation, or (3) the attorney general directed that the case be referred.<sup>4</sup>

In 1947, the regulation was amended to eliminate the substantive criteria for referral (points 1 and 2 above) and simply designated who could refer a case. The regulation allowed the BIA and attorney general to refer cases at any time but specified that the commissioner of the INS could only refer a case if the BIA agreed.<sup>5</sup> In 1952, the Justice Department removed this impediment, giving INS the full right to appeal BIA decisions to its highest administrative arbiter.<sup>6</sup>

As immigration law has evolved, so has the use of the referral and review power, both in frequency and justification. Initially, such decisions came down with great frequency. Between 1942 and 1952, attorneys general reviewed approximately 37 cases per year.<sup>7</sup> These decisions were often issued without independent legal reasoning, stating as little as: “The foregoing decision and order of the Board were certified to and approved by the Attorney General.”<sup>8</sup>

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2 When the first quasi-immigration court was created in 1921—an advisory committee known as the Board of Review—it was designed to assist the two government officials tasked at that time with immigration functions, the commissioner-general of immigration and the secretary of labor, and to provide a forum for oral argument. In 1940, the immigration functions were transferred from the Department of Labor to the Department of Justice, and the Board of Immigration Appeals (BIA) was formally created by regulation of the attorney general, and it was made responsible directly to the attorney general. See Maurice A. Roberts, “The Board of Immigration Appeals: A Critical Appraisal,” *San Diego Law Review* 15, no. 29 (1977): 33–34.

3 8 *Code of Federal Regulations* § 1003.1(d)(1)(ii). See also *Tefel v. Reno*, 972 Federal Supplement 608, 613 n.1 (U.S. District Court for the Southern District of Florida, 1997).

4 8 *Code of Federal Regulations* § 90.12 (1940).

5 Justice Department, Immigration and Naturalization Service (INS), “Appeals from Orders Issued by Commissioner of Immigration and Naturalization; Miscellaneous Amendments to Chapter,” *Federal Register* 12, no. 140 (July 14, 1947): 4781, 4782 (to be codified at 8 *Code of Federal Regulation* § 90.12).

6 INS, “Immigration and Nationality Regulations,” *Federal Register* 17, no. 247 (Dec. 19, 1952): 11,469, 11,475 (to be codified at 8 *Code of Federal Regulations* § 6.1 (h)(1)(iii)).

7 Harry N. Rosenfield, “Necessary Administrative Reforms in the Immigration and Nationality Act of 1952,” *Fordham Law Review* 27, no. 2 (1958): 145, 158.

8 Rosenfield, “Necessary Administrative Reforms,” 157. See, for example, *In Matter of B---*, 1 I&N Dec. 204 (BIA, August 5, 1942).

Rather than set binding legal precedent, the intent was solely to adjudicate the merits of the case quickly before the Justice Department. Most of the referrals during this time came from the BIA, with those from INS trailing far behind, in part because the condition requiring BIA agreement on cases INS wished to refer had not yet been removed.

As immigration jurisprudence developed further, the number of referred cases declined and the decisions became more considered and consequential. Between 1953 and 1956, the pace slowed to about eight cases per year.<sup>9</sup> And in 1955, the summary disposition of cases before the attorney general generally ended.<sup>10</sup> Decisions instead tended to be independently reasoned and articulated. For example, in 1955, in *Matter of R-R-*, the attorney general reversed a BIA decision that held that a foreign national who had committed a crime could not be denied admission to the country if the crime at issue occurred before the enactment of the law that first made it a grounds for exclusion (the *Immigration and Nationality Act of 1952*).<sup>11</sup> In reversing the BIA decision, Attorney General Herbert Brownell, Jr., looked to the Senate Judiciary Committee report to deduce that Congress intended the law to also apply to crimes committed prior to enactment, making the foreign national excludable.

For several decades after Brownell's tenure, the number of referred decisions dropped to three or four per year, or even less, and the reviews increasingly focused on cases whose resolution would have lasting importance beyond the individual case.<sup>12</sup> In 1961, for example, in *Matter of S- and B-C-* Attorney General Robert Kennedy self-referred two cases in order to resolve an open legal quandary on fraudulent immigration applications. The cases raised the question of when misrepresentations on applications for immigration benefits are "material"—that is, when they are serious enough to merit denying applicants admission to the country or deporting them from it.<sup>13</sup> Recognizing that prior related decisions on material misrepresentations made by the executive branch and the courts "have not been wholly clear or consistent," Kennedy self-referred the cases to re-examine the issue.<sup>14</sup> In the opinion, Kennedy articulated a three-step test that is still used today, as illustrated by its inclusion in the U.S. Citizenship and Immigration Services (USCIS) policy manual (see Table 1).

9 Alberto R. Gonzales and Patrick Glen, "Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority," *Iowa Law Review* 101, no. 3 (2016): 841–921, 857.

10 Gonzales and Glen, "Advancing Executive Branch Immigration Policy," 858–59. There was one post-1955 summary disposition, by Attorney General Nicholas Katzenbach in 1966.

11 *In the Matter of R—R—*, 6 I&N Dec. 55 (BIA, July 29, 1955).

12 Attorney General William Rogers issued only ten decisions between 1958 and 1961. Attorney General Robert Kennedy issued 11 decisions during his tenure between 1961 and 1964. In the latter part of the Lyndon B. Johnson administration, ending in 1969, attorneys general issued four more decisions. See Gonzales and Glen, "Advancing Executive Branch Immigration Policy," 857–58.

13 One of the foreign nationals involved had failed repeatedly to disclose his past membership in the Communist Party on his visa applications. Upon admitting his misstatements, he explained that the membership was involuntary. Because involuntary membership in the Communist Party is not grounds for exclusion, the INS decided the misrepresentation was not material and permitted the foreign national's admission. See *Matter of S- and B-C-*, 9 I&N Dec. 436 (Attorney General, October 2, 1961).

14 *Matter of S- and B-C-*, 444.



TABLE 1

**USCIS Policy Manual Guidelines for Determining Whether Misrepresentation on an Application for Immigration Benefits Is Material**

Step	If Yes, then...	If No, then...
<b>Step 1:</b> Consider whether the evidence in the record supports a finding that the applicant is (or was) inadmissible on the true facts.	Misrepresentation is material	Proceed to Step 2
<b>Step 2:</b> Consider whether misrepresentation tended to shut off a line of inquiry, which was relevant to the applicant's eligibility.	Proceed to Step 3	Misrepresentation is NOT material
<b>Step 3:</b> If a relevant line of inquiry had been cut off, ask whether that inquiry might have resulted in a determination of ineligibility. (The applicant has the burden to show that it would not have resulted in ineligibility.)	Misrepresentation is material	Misrepresentation is NOT material

Source: U.S. Citizenship and Immigration Services (USCIS), "Policy Manual, Chapter 3 – Adjudicating Inadmissibility," accessed December 29, 2020.

From the late 1960s through the 1990s, the rate of referral and review remained low. Attorneys general rarely employed this power throughout the presidencies of Richard Nixon (two cases referred to the attorney general), Gerald Ford (two), Jimmy Carter (one), Ronald Reagan (three), and George H.W. Bush (two), with an increase under Bill Clinton (eleven), as shown in Figure 1 below. Almost all of these cases were referred by the INS Commissioner appealing BIA decisions.

During this period, several attorneys general were quite active on immigration policy-making, but largely through other means.<sup>15</sup> With INS still housed in the Justice Department, referral and review was only a small part of their broad legal and administrative portfolio in overseeing the immigration system. Attorneys general had many ways to establish and participate in immigration policy-making, including setting policy and priorities for immigration enforcement, promulgating regulations on immigration benefits, or directing strategy at the U.S. border.

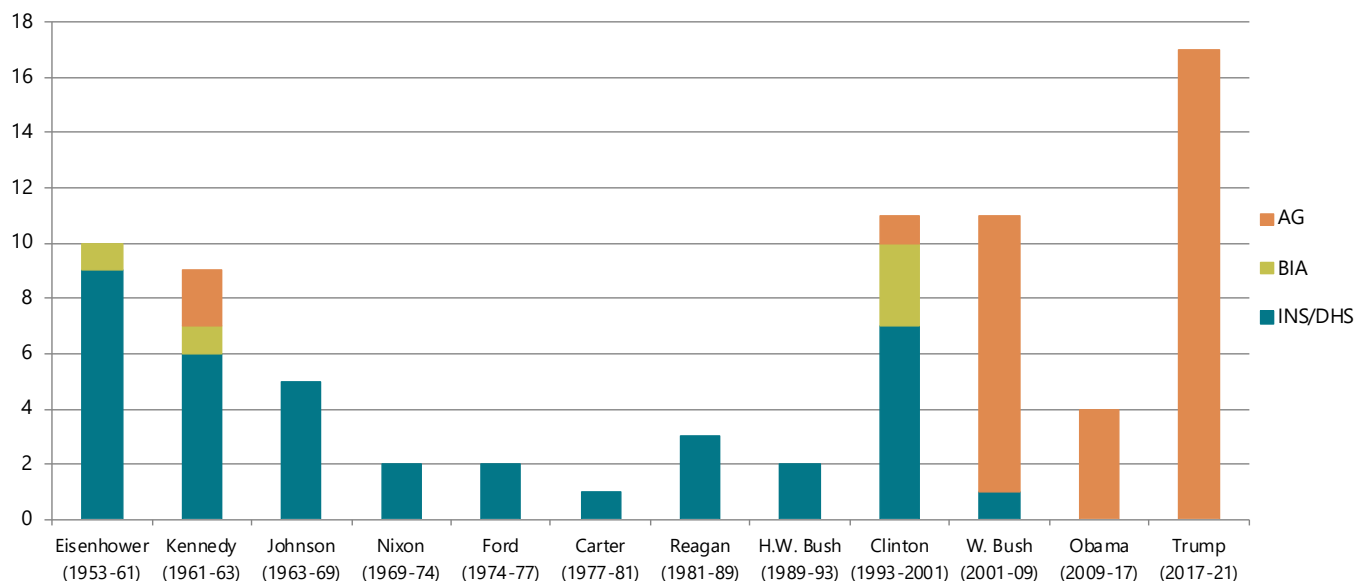
### *A. The Homeland Security Act and Its Effects*

With the passage of the HSA in 2002, Congress left the immigration court system in the Justice Department and, for the first time, recognized it in statute as the Executive Office for Immigration Review (EOIR). But all other direct powers over immigration policy and operations were reassigned to DHS. With more limited means of influencing immigration policy, this marked the start of a fundamental shift in the use of the referral and review power by attorneys general. Since then, it has significantly increased in importance. Whereas attorneys general historically used this power primarily as a tool for resolving intradepartmental disputes, since the HSA's passage they have increasingly and nearly exclusively used the power to influence immigration policy broadly.

<sup>15</sup> For example, former Attorney General Benjamin Civiletti (1979–81) and Attorney General William Barr—during his first stint as attorney general under President George H. W. Bush (1991–93)—never reviewed an immigration case, even though they were quite active on immigration.

The clearest evidence of this shift has been a change in the source of referred cases. With only one exception, since the March 1, 2003, implementation of the HSA, every case that has been referred to the attorney general for review has been self-referred. Numbering 29 cases as of January 2021, 28 have been self-referred.

FIGURE 1

**Cases Referred to the Attorney General by Administration and Referring Entity, 1953–2021**

AG = Attorney General; BIA = Board of Immigration Appeals; INS = Immigration and Naturalization Service; DHS = Department of Homeland Security.

Notes: Cases are grouped by date of referral, not the date of decision, which in a small number of cases occurred in a separate administration. For a chart that divides the referrals by attorney general, see Jennifer S. Breen, “Labor, Law Enforcement, and ‘Normal Times’: The Origins of Immigration’s Home within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications,” *University of Hawai’i Law Review* 42, no. 1 (2019): 1–62, 36.

Source: Migration Policy Institute (MPI) analysis of data from Executive Office for Immigration Review, “Agency Decisions,” accessed January 14, 2020.

It appears that no longer having other avenues for influencing immigration policy, attorneys general are using their remaining authority—self-referral—to shape immigration policy, frequently in ways that advance political priorities.<sup>16</sup>

Some of these decisions have brought immigration adjudications in line with other areas of federal law. For example, shortly after the Obama administration determined in February 2011 that the definition of marriage under the *Defense of Marriage Act* (DOMA)—that is, as a union between one man and one woman—was unconstitutional and announced the administration would no longer defend it in court challenges, Attorney General Eric Holder self-referred and vacated a decision by the BIA to deny cancellation

<sup>16</sup> At least one expert attributes the change to use by attorneys general under President George W. Bush instead of the HSA, and indeed, Bush’s first attorney general, John David Ashcroft, did self-refer two cases to himself before HAS’s enactment. This shift towards self-referral was then embraced by Attorneys General Alberto R. Gonzales and Michael B. Mukasey. See Jennifer S. Breen, “Labor, Law Enforcement, and ‘Normal Times’: The Origins of Immigration’s Home within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudications,” *University of Hawai’i Law Review* 42, no. 1 (2019): 1–62, 42–59.

of removal to immigrants who were in a same-sex civil union with a U.S. citizen.<sup>17</sup> By directing the BIA to reconsider the case absent the requirements of DOMA, Holder’s referral paved the way for a wave of decisions in which immigration judges exercised their discretion to close or otherwise delay removal proceedings for foreign nationals in same-sex relationships with U.S. citizens.<sup>18</sup>

But other decisions have generated confusion and disparate application of the law. In 2008, in *Matter of Silva-Trevino*, Attorney General Michael Mukasey attempted to rewrite the categorical approach—a legal analysis to determine whether a criminal conviction automatically triggers an immigrant’s removal from the United States.<sup>19</sup> His policy goal was clear:

*Other decisions have generated confusion and disparate application of the law.*

increase findings of deportable crimes.<sup>20</sup> Under the attorney general’s new approach, judges were permitted to look beyond the language of the criminal statute under which the foreign national was convicted and the record of conviction to consider “any additional evidence.” The issue had not been questioned by either of the parties in the underlying case, but Mukasey defended his intervention by arguing that the federal courts were failing to apply a uniform test, necessitating a “new, standardized approach.”<sup>21</sup>

His approach was soundly rebuffed in federal courts.<sup>22</sup> Six federal courts of appeals rejected the analysis, and the Supreme Court declined to apply it.<sup>23</sup> Two courts of appeals offered “cautious acceptance” of the framework, resulting in different application of the law between the circuits.<sup>24</sup> A three-judge panel in the Fifth Circuit Court of Appeals found the approach “disregard[ed] a century of jurisprudence” and that the goal to establish uniformity was “if anything, a little ironic” because before Mukasey’s intervention there was “broad consensus among the federal courts.”<sup>25</sup> In April 2015, Attorney General Holder vacated the decision, effectively returning the categorical approach to what it was prior to Mukasey’s intervention.<sup>26</sup>

The transformation of referral and review has also taken place as the executive branch has played an increasingly active role in immigration policy-making, filling the void left by congressional inaction. As Congress has failed to enact needed reforms of immigration laws, and with only its decisions regarding appropriations to guide immigration enforcement strategies, it has fallen to executive branch officials and agencies to use the powers available to them to meet the challenges confronting the U.S. immigration system.<sup>27</sup> However, as various administrations have expanded the scope of their influence over immigration

17 Warren Richey, “US Will No Longer Defend Defense of Marriage Act in Court,” *The Christian Science Monitor*, February 23, 2011; *Matter of Paul Wilson Dorman*, 25 I&N Dec. 485 (Attorney General, April 26, 2011).

18 Joseph Landau, “Bureaucratic Administration: Experimentation and Immigration Law,” *Duke Law Journal* 65 (2016): 1173–1240, 1204.

19 *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (Attorney General, November 7, 2008).

20 Gonzales and Glen, “Advancing Executive Branch Immigration Policy,” 877.

21 *Matter of Cristoval Silva-Trevino*.

22 David A. Martin, “Improving the Exercise of the Attorney General’s Immigration Referral Power: Lessons from the Battle over the ‘Categorical Approach’ to Classifying Crimes,” *Iowa Law Review* 102 (2016): 1–98, 16.

23 Bijal Shah, “The Attorney General’s Disruptive Immigration Power,” *Iowa Law Review* 102 (2017): 130–165, 151.

24 Gonzales and Glen, “Advancing Executive Branch Immigration Policy,” 878.

25 *Silva-Trevino v. Holder*, 742 Federal Reporter, 3rd Series 197 (U.S. Court of Appeals for the Fifth Circuit, January 30, 2014).

26 *Matter of Cristoval Silva-Trevino*, 26 I&N Dec. 550 (Attorney General, April 10, 2015).

27 Adam B. Cox and Christina M. Rodriguez, *The President and Immigration Law* (Oxford, UK: Oxford University Press, 2020).

and taken up the tools with which they can exercise that influence, immigration policies have increasingly become subject to the views of successive administrations.

Thus, after decades of building immigration jurisprudence, solving disagreements between subagencies, and answering difficult legal questions, and amid the broader evolution of the executive's stronger hand in immigration, the attorney general's referral and review authority has emerged as a powerful if obscure tool administrations use to nimbly and quickly swing the pendulum of immigration policies in ways that advance their political agendas.

## B. Referral and Review as an Administrative Tool

The attorney general is not the only leader of a government agency with the ability to review decisions made within the agency. Generally called "agency head review," Congress built this tool into administrative law with the intention of giving agencies' leadership a means of maintaining control over policy and achieving consistency and coherence in agency adjudications.<sup>28</sup> Agency heads, due to their responsibilities overseeing the breadth of the operations of their respective agencies, are recognized as uniquely positioned to provide policy expertise as against adjudicators, and as political appointees, they give the system a degree of political accountability and responsiveness.<sup>29</sup>

Indeed, referral and review has allowed attorneys general to efficiently exercise policy control and weave adjudications, rulemaking, and other bureaucratic decisions into a coherent framework.<sup>30</sup> This has been especially beneficial with immigration since the high degree of politicization around the issue has made moving legislation through Congress difficult and the process of rulemaking has become increasingly cumbersome. For example, in several instances when attorneys general decided not to intervene to allow room for rulemaking or congressional action, policy changes simply never came to fruition.<sup>31</sup>

28 Stephen H. Legomsky, "Learning to Live with Unequal Justice: Asylum and the Limits on Consistency," *Stanford Law Review* 60, no. 2 (2007): 458; Administrative Conference of the United States, "Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure," *Federal Register* 57, no. 250 (Dec. 29, 1992): 61,759, 61,760 (codified at 1 *Code of Federal Regulations* pts. 305, 310); Daniel J. Gifford, "Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure," *Notre Dame Law Review* 66, no. 4 (2014): 965, 980.

29 Christopher J. Walker and Melissa F. Wasserman, "The New World of Agency Adjudication," *California Law Review* 107, no. 1 (2019): 141, 175.

30 For example, in *Matter of A-T*, Attorney General Mukasey overturned BIA analysis on withholding of removal to, in part, resolve the case in line with Justice Department regulations. See *Matter of A-T*, 24 I&N Dec. 617 (Attorney General, September 22, 2008).

31 In 2000, Attorney General Janet Reno published a proposed rule to resolve the issue raised in *Matter of R-A* and then vacated the BIA's decision pending publication of the final rule. See *In re R-A*, 23 I&N Dec. 694, 694 (Attorney General, January 19, 2005). In 2008, the final version of the rule still had not been published, thus Attorney General Mukasey remanded the original case to the BIA to resolve the issue. See *Matter of R-A*, 24 I&N Dec. 629, 629 (Attorney General, September 25, 2008). In 2009, in *Matter of Compean, Bangaly, & J-E-C*, Attorney General Eric Holder directed the Executive Office for Immigration Review (EOIR) to develop regulations establishing procedures for the filing and adjudication of motions based on a claim of ineffective assistance of counsel. See *Matter of Compean, Bangaly, & J-E-C*, 24 I&N Dec. 710 (Attorney General, January 7, 2009). Such regulations were introduced but never finalized. See Justice Department, EOIR, "Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel" (proposed rule 1125-AA68, Fall 2016). In addition, in 1997 Attorney General Reno vacated *N-J-B* with the intention of permitting Congress to resolve the issue. See Laura Trice, "Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions," *New York University Law Review* 85, no. 5 (2010): 1772; National Immigration Law Center, "INS Instructs on Handling Suspension Cases following the Vacating of N-J-B," Immigrant Rights Update, August 29, 1997. See page 3 of the latter source: "On July 10, 1997, the attorney general vacated that decision and announced that the Clinton administration would sponsor legislation to ensure that individuals who deserved to apply for suspension under pre-IIRIRA law would still be able to do so." No such legislation came to fruition.

*The attorney general's referral and review power is unique compared to agency head review in other departments in that it rests in the hands of the nation's chief law enforcement officer.*

Still, the attorney general's referral and review power is unique compared to agency head review in other departments in that it rests in the hands of the nation's chief law enforcement officer. Unlike the secretary of energy's review of administrative judges' decisions on employee access to classified materials,<sup>32</sup> for example, attorneys general must weigh their law enforcement responsibilities and legitimate interest in enhancing the speed and productivity of adjudicators with the need to ensure the

"accuracy of outcomes and the fairness of procedures" in proceedings that may very well determine the life or death of the respondent in a case.<sup>33</sup>

The tension inherent in these responsibilities raises concerns of fairness and due process for the immediate parties. It can and has happened that a foreign national is granted relief from removal by both an immigration judge and the BIA, only to have it reversed by the attorney general, resulting in deportation.<sup>34</sup>

In one instance, Attorney General John David Ashcroft self-referred and reversed both the immigration judge and BIA's grants of relief from removal under the Convention Against Torture, calling the immigrant's three federal felony drug counts "insidious."<sup>35</sup> Although Ashcroft's ruling altered the agency's own longstanding application of standards to determine the immigration consequences of drug trafficking crimes, it has been held up as a reasonable interpretation of the relevant laws—indeed, for the most part it has been accepted by the circuit courts.<sup>36</sup> Substituting a law enforcement officer's judgment for one based on several layers of adjudicators' interpretation of law and facts raises concerns about impartiality that at least threaten the acceptability of these decisions, if not also the subjects' due process rights.<sup>37</sup>

There has also been concern about possible conflict in the attorney general's relationship to litigation led by the Justice Department.<sup>38</sup> Some have argued such a conflict of interest may have been present in Attorney General Janet Reno's 1997 decision in *Soriano*, which reversed the BIA's determination that amendments to the *Immigration and Nationality Act* could be given only limited retroactive effect.<sup>39</sup> The underlying BIA decision, which Reno vacated without providing for public notice or briefings, conflicted with the Justice Department's strategy in a case pending before the Supreme Court. The same day Reno issued her order, the

32 Walker and Wasserman, "The New World of Agency Adjudication," 141, 173–74.

33 Stephen H. Legomsky, "Restructuring Immigration Adjudication," *Duke Law Journal* 59 (2010): 1671–73.

34 See *In re Y-L*, *In re A-G*, *In re R-S-R*, 23 I&N Dec. 270 (Attorney General, March 5, 2002).

35 *In re Y-L*, *In re A-G*, *In re R-S-R*.

36 Shah, "The Attorney General's Disruptive Immigration Power," 129, 149.

37 In addition to attorneys general's role as a law enforcement officer, there is also tension between their role as a political appointee and adjudicator. See, for example, Legomsky, "Learning to Live with Unequal Justice," 413, 462 ("[A]gency head review poses inherent dangers to the dispensation of justice, including especially the substitution of a political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law.")

38 Legal expert Margaret Taylor has written extensively on the relationship between Justice Department litigators and policy formation. See, for example, Margaret H. Taylor, "Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation," *Georgetown Immigration Law Journal* 16 (2002): 271.

39 *In re Bartolome Jhonny Soriano*, 21 I&N Dec. 516 (Attorney General, February 21, 1997).

government filed a supplemental brief with the Supreme Court with the order appended.<sup>40</sup> Reno ultimately reversed the decision in 2001 after eight federal courts of appeals disagreed with her analysis.<sup>41</sup>

Critiques about the application of referral and review also extend to the near complete absence of procedures. The attorney general is under no obligation to follow a particular process, provide notice to the public, disclose key issues on review, or grant an opportunity for the parties or the public to participate in the review process. At times, even the immediate parties in a case have been unaware of its pending review until the decision has been issued. Attorneys general are only required to issue their decisions in writing to the affected parties.

Since the attorney general may examine all the facts and legal issues in a case anew, and thus even rule on issues not previously briefed, without knowing the reasons for referral (or even awareness that the referral has happened), parties are at times not afforded an opportunity to say anything about issues that could prove decisive in the case. Referral and review thus lacks the notice and opportunity to be heard that are fundamental to due process rights.<sup>42</sup>

The lack of procedures also has implications for the legal and policy soundness of the decisions. As discussed above, in the case in *Matter of Silva-Trevino*, Attorney General Mukasey ruled on an issue that had never been directly briefed, only to have it soundly rejected by federal courts.<sup>43</sup>

Had Mukasey made public the issues under consideration and invited briefing from those directly affected and those concerned with the decision's broader effects, his ultimate decision may have been different.<sup>44</sup>

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Finally, many of the rationales behind agency heads' power to review cases in their own agencies no longer apply to the attorney general's referral and review power since the HSA moved most of the underlying immigration functions to a new department. Agency head review is frequently defended as an opportunity for agency heads to "apply the experience gained in carrying out their myriad other responsibilities—experience that arises from action in settings far more varied and numerous than those that can resolve themselves in contested adjudications—in order to make well-informed decisions when construing ambiguous legal provisions in the course of adjudication."<sup>45</sup> With immigration operations in DHS, the attorney general no longer has this wealth of experience from which to draw.

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40 Taylor, "Behind the Scenes of St. Cyr and Zadvydas," 286.

41 Trice, "Adjudication by Fiat," 1791.

42 Trice, "Adjudication by Fiat," 1766, 1781. Some argue that the opportunity to be heard before the immigration judge and BIA and the availability of appeal to a federal court fulfill constitutional due process standards. See Gonzales and Glen, "Advancing Executive Branch Immigration Policy," 905–12.

43 *Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (Attorney General, November 7, 2008). In fact, Silva-Trevino's counsel requested information on the relevant issues on review, but 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." See *Jean-Luis v. Attorney General*, 582 Federal Reporter, 3rd Series 462, 473, and 470 n. 11 (U.S. Court of Appeals for the Third Circuit, October 6, 2009); Shah, "The Attorney General's Disruptive Immigration Power," 151.

44 "*Silva-Trevino* is perhaps the most glaring example of a substantively impaired decision that was probably weakened by the DOJ's resistance to asking for or receiving further briefs and argument before the referral decision was rendered." See Martin, "Improving the Exercise of the Attorney General's Immigration Referral Power."

45 David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements* (Washington, DC: Migration Policy Institute, 2003), 17–18.

Even before HSA restructured the immigration bureaucracy, the referral and review power existed at a precarious intersection of adjudication and policy-making, with the attorney general's law enforcement role and the lack of standardized procedures raising concerns about due process and sound decision-making. Now that the attorney general no longer oversees and has the expertise arising from responsibility for immigration operations and policy-making, referral and review has become a way for the nation's chief law enforcement officer to advance an immigration agenda expeditiously and with minimal procedural obligations.

### 3 The Trump Administration's Use of Self-Referral

From its first days in office, the Trump administration had the most activist immigration agenda in U.S. history. Its attorneys general—Jeff Sessions and William Barr, as well as Acting Attorneys General Matthew Whitaker and Jeffrey Rosen—made unprecedented use of referral and review. They self-referred 17 cases, more than under any prior administration. This compares to four during the entirety of the Obama administration and ten under George W. Bush, both administrations that lasted two terms rather than one.

The content of these referrals was also unique. Some touched on issues long wrestled with by attorneys general, including who qualifies for asylum and what the immigration law implications are of certain criminal convictions. But the reviews also had an unmatched focus on court operations, issuing decisions that significantly decrease judicial discretion and the ability of immigration judges to manage their own dockets.

*The histories of many of these cases make it clear that they were carefully selected to achieve a particular policy goal, instead of responding to legal issues that arose organically and needed resolution.*

The histories of many of these cases make it clear that they were carefully selected to achieve a particular policy goal, instead of responding to legal issues that arose organically and needed resolution. For example, after a case on bond for asylum seekers that Attorney General Sessions had self-referred was rendered moot by the respondent's deportation before Sessions could issue a decision, he quickly identified a different case for self-referral on the same issue.<sup>46</sup>

Similarly, Sessions issued a decision ruling that asylum seekers lack a right to evidentiary hearings in a case in which the respondent had withdrawn his application for asylum.<sup>47</sup> Attorney General Barr issued a decision on the question of whether nuclear families could be "particular social groups" for the purposes of qualifying for asylum, even though the respondent in the case had already been denied asylum on a different legal basis, meaning the decision did not alter the outcome.<sup>48</sup> Barr also self-referred and immediately reviewed

<sup>46</sup> *Matter of M-G-G-*, 27 I&N Dec. 475 (Attorney General, October 12, 2018); *Matter of M-S-*, 27 I&N Dec. 476 (Attorney General, October 12, 2018).

<sup>47</sup> *Matter of E-F-H-L-*, 27 I&N Dec. 226 (Attorney General, March 5, 2018); Breen, "Labor, Law Enforcement, and 'Normal Times,'" 57.

<sup>48</sup> *Matter of L-E-A-*, 27 I&N Dec. 581 (Attorney General, July 29, 2019); Breen, "Labor, Law Enforcement, and 'Normal Times,'" 55.

a case that was relevant to oral arguments taking place before the Supreme Court five days later,<sup>49</sup> and he self-referred another case that had been finalized fourteen years prior.<sup>50</sup> Only three weeks after taking office, Jeffrey Rosen became the first acting attorney general to issue a decision in a referral and review case.<sup>51</sup> In an opinion that significantly restricts the legal definition of asylum, Rosen made not one mention of the underlying facts or legal issues of the referred case.

While the Trump administration made unprecedented use of a full range of bureaucratic tools to aggressively pursue its immigration agenda, referral and review served as a particularly expeditious and flexible means of making changes to administrative immigration law. Especially in asylum and court operations, the administration employed referral and review to quickly and completely reshape these systems toward their policy goals.

## A. Restricting Access to Asylum

The U.S. asylum system, particularly at the southwest border, has faced intense challenges in recent years. Although southern border apprehensions of asylum seekers and other migrants dropped sharply during Trump's first year in office, this lull did not last. Between February and March 2018, apprehensions rose by 40 percent, from 26,666 to 37,393, before rising further to more than 40,000 in May 2018.<sup>52</sup> Apprehensions involving members of families travelling together, many intending to apply for asylum, saw especially notable increases—growing by 62 percent between February and March to reach 8,882.

This increase in apprehensions occurred against the backdrop of a new trend in the region: migrant caravans. Starting in April 2018, large groups of migrants gathered in Central America and traveled through Mexico together—an option often cheaper and safer than hiring smugglers.<sup>53</sup> While the caravans represented a small share of the total number of migrants traveling through the region, they were highly visible and attracted significant media and public attention.

To discourage and stem these flows, the Trump administration initiated a rapid series of increasingly controversial policy responses.<sup>54</sup> The most contentious was family separation, which followed the Justice Department's April 2018 announcement of a "zero-tolerance" policy that resulted in the forcible separation of parents from their children after apprehension at the U.S.-Mexico border, as the parents were detained

49 Five days before the Supreme Court heard oral arguments in *Nasrallah v. Barr*, which focused on the reviewability of a denial of benefits under the Convention Against Torture, Barr self-referred and immediately reviewed a decision on the standard of review for relief under the convention. In addition to affirming the immigration appeals court's ability to decide whether the facts of a given case rise to the level of "torture" within the meaning of the regulations, a footnote in the case reaffirmed the deference federal courts should grant the administration. The attorney general thereby used his unique authority to make law that would be relevant in a case to which he himself was a party. See *Nidal Khalid Nasrallah v. William P. Barr*, No. 18-1432 (U.S. Supreme Court, brief filed by government on September 2019), 20–22; *Matter of R-A-F-*, 27 I&N Dec. 778 (Attorney General, February 26, 2020). The Supreme Court's ultimate decision in the case made no mention of Barr's decision, holding that the standard of review for factual challenges to Convention Against Torture orders is substantial evidence—as conceded by the petitioner. See *Nidal Khalid Nasrallah v. William P. Barr*, No. 18-1432 (U.S. Supreme Court, opinion, June 1, 2020), 9.

50 *Matter of A-M-R-C-*, 28 I&N Dec. 7 (Attorney General, June 17, 2020).

51 *Matter of A-B-*, 28 I&N Dec. 199 (Attorney General, January 14, 2021).

52 U.S. Customs and Border Protection (CBP), "Southwest Border Migration FY2018," updated November 9, 2018; CBP, "Southwest Border Migration FY2017," updated December 15, 2017.

53 Randy Capps et al., *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement* (Washington, DC: Migration Policy Institute, 2019).

54 Capps et al., *From Control to Crisis*.



and criminally prosecuted for illegal entry but the children, who cannot be held in criminal detention, were processed as unaccompanied migrants and, as such, were transferred to the custody of the U.S. Department of Health and Human Services. While it received less attention, the administration also quickly utilized the attorney general's referral and review power to reshape the legal landscape for asylum and to ensure that few arriving asylum applicants ultimately succeed in receiving protection.

## Decisions Narrowing Access to Asylum

In March 2018, as apprehension numbers were beginning to rise significantly, Attorney General Sessions self-referred and immediately issued the first attorney general review of the Trump administration: *Matter of E-F-H-L*.<sup>55</sup> In a one-page decision, Sessions summarily vacated a 2014 BIA decision that held that foreign nationals who apply for asylum and withholding of removal are ordinarily entitled to full evidentiary hearings on such applications. The clear intention was to give immigration judges the ability to rule on asylum applications before applicants have a chance to testify or even present evidence, but the decision had no bearing on other regulations, statutes, or case law supporting the right to a full evidentiary hearing.<sup>56</sup>

Two days after issuing his first review, Sessions self-referred another asylum case: *Matter of A-B-*, a 2016 BIA decision to grant asylum to a Salvadoran woman who was fleeing her abusive ex-husband. The referral requested briefings on whether victims of such private criminal activity constitute a "particular social group"—one of the five grounds for asylum under U.S. law.<sup>57</sup> The referral confused even DHS, which argued in a later brief that "this matter does not appear to be in the best posture for the attorney general's review" and that the question presented "has already been answered, at least in part, by the Board in its prior precedent."<sup>58</sup> Sessions denied DHS's request to suspend the scheduled briefing and clarify the question presented.

In a decision issued three months later, Sessions vacated the BIA's decision in *Matter of A-B-* and overruled *Matter of A-R-C-G-*, a 2014 precedential BIA decision that was the first binding decision granting asylum to a survivor of domestic violence.<sup>59</sup> The BIA's recognition of domestic violence as a basis for asylum in *Matter of A-R-C-G-* was the culmination of years of litigation around what it means to qualify for asylum based on membership in a particular social group.

Sessions' decision was directed at asylum seekers at the southern border. If they apply for asylum, migrants from Guatemala, Honduras, and El Salvador—the top origin countries for families arriving in the summer of 2018—overwhelmingly claim they are fleeing from pervasive and systemic violence connected to criminal armed groups and domestic partners.<sup>60</sup> In his order, Sessions explicitly stated that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors will not

<sup>55</sup> *Matter of E-F-H-L*.

<sup>56</sup> See Kate Jastram and Sayoni Maitra, "Matter of A-B- One Year Later: Winning Back Gender-Based Asylum through Litigation and Legislation," *Santa Clara Journal of International Law* 18, no. 1 (2020): 48–91.

<sup>57</sup> *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, June 11, 2018).

<sup>58</sup> *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, brief amici curiae of 16 former immigration judges and members of the BIA urging vacatur of referral order and in support of respondent, April 2018).

<sup>59</sup> *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, June 11, 2018).

<sup>60</sup> United Nations High Commissioner for Refugees (UNHCR), *Women on the Run* (Washington, DC: UNHCR, 2015).

qualify for asylum”—the latter item included despite the fact that the case the order was responding to (*Matter of A-B-*) did not involve gang-related violence.

Sessions’ successors have continued his quest to limit the access applicants at the southern border have to asylum. In December 2018, Acting Attorney General Whitaker referred to himself *Matter of L-E-A-* to examine when a foreign national’s membership in a family could serve as the basis for a claim of persecution on account of membership in a particular social group.<sup>61</sup> The foreign national in the case had applied for and received asylum based on persecution he experienced after his father refused to sell a gang’s drugs out of his store. The review was issued in July 2019 by his successor, Attorney General Barr, and severely limited the ability of asylum seekers to claim persecution based on membership in their immediate family.<sup>62</sup> Barr held that unless the immediate family had “societal import,” it was unlikely to be eligible as a group for the purposes of asylum.

In January 2021, Acting Attorney General Rosen self-referred and reviewed *Matter of A-B-* (the second attorney general review for the case).<sup>63</sup> After Sessions issued his original decision, he remanded it to an immigration judge, whose opinion was appealed to the BIA. Rosen then self-referred the BIA’s ruling. The opinion touches on issues raised in both the original *Matter of A-B-* and *Matter of L-E-A-* to further tighten the definition of asylum. In it, Rosen limits when an applicant can qualify for asylum based on persecution by nonstate actors—ruling that as long as the applicant’s home country has made efforts to prevent the relevant violence or threats, even if those efforts have failed, the situation does not meet the legal definition of asylum. Rosen also ruled that the protected ground on which an asylum claim is based (such as political opinion or membership in a particular social group) must play a central role in the persecution and that it must be shown that the perpetrator of the persecution would not pursue harm against the applicant if the protected ground did not exist.

## The Impacts of these Decisions on Asylum Cases

With just *Matter of A-B-* and *Matter of L-E-A-*, Trump administration attorneys general significantly curtailed asylum—especially asylum based on membership in a particular social group. According to a dataset of twelve months of reported BIA and immigration court decisions, compiled by the Center for Gender and Refugee Studies, the attorney general reviews have spurred uneven treatment of domestic and gang violence claims.<sup>64</sup>

Some judges have shied away from granting asylum based on membership in a particular social group altogether, preferring to grant it on the basis of a different ground to avoid a DHS appeal. Others have followed the attorney general’s dicta on domestic and gang violence and are denying all such cases. In denials citing to *Matter of A-B-*, judges are supporting an antiquated characterization of domestic violence

61 *Matter of L-E-A-*, 27 I&N Dec. 494 (Attorney General, December 3, 2018).

62 *Matter of L-E-A-*, 27 I&N Dec. 581 (Attorney General, July 29, 2019).

63 *Matter of A-B-*, 28 I&N Dec. 199 (Attorney General, January 14, 2021).

64 Jastram and Maitra, “Matter of A-B- One Year Later.” Since it tightens requirements laid out in both *Matters of A-B-* and *L-E-A-*, Acting Attorney General Rosen’s January 2021 opinion in *Matter of A-B-* has the potential to also greatly diminish asylum grants, but it is too early to see such results.

as a “personal dispute” that does not rise to the level of persecution under asylum law.<sup>65</sup> The BIA, in following this course, has been “overwhelmingly unfavorable to asylum seekers.”<sup>66</sup> Of 50 unpublished BIA decisions on domestic violence and related claims over the course of twelve months, the BIA denied 37 and remanded 13.

One federal court has rejected the administration’s interpretation for at least preliminary asylum interviews. In *Grace v. Whitaker*, a federal district court judge ordered a permanent injunction on applying *Matter of A-B-* to credible-fear interviews—the first step for many migrants seeking asylum.<sup>67</sup> The district court judge held that the review created a “general rule” against domestic and gang violence claims, and that such a rule was “not a permissible interpretation of the statute.”<sup>68</sup> However, applicants are still subject to *Matter of A-B-* for the ultimate adjudication of their asylum cases. Thus, there is not only disparate application of asylum standards among judges and courts, but also across the different steps in the asylum application process.

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### Further Restrictions

In addition to those described above, Sessions self-referred three other asylum-related cases. *Matter of M-G-G-* was rendered moot by the respondent’s removal from the United States before Sessions could issue a decision, and *Matter of M-S-* centered around whether immigration judges could hold bond hearings for asylum seekers who were apprehended crossing into the country illegally.<sup>69</sup> The decision in the latter case, ultimately issued by Barr, held that no arriving asylum seeker—whether at a port of entry or caught crossing the border illegally—is eligible for bond, thereby consigning such asylum seekers to detention at the discretion of U.S. Immigration and Customs Enforcement (ICE).

Barr delayed the effective date of the decision to July 15, 2019, but two weeks before the decision was set to take effect, it was enjoined by a federal district court judge.<sup>70</sup> The litigation around Barr’s decision remains active, but in January 2021, the Supreme Court vacated the injunction, meaning that as the case moves forward immigration courts may no longer provide bond hearings to certain asylum seekers.<sup>71</sup>

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65 See Jastram and Maitra, “*Matter of A-B- One Year Later*,” 58. “[T]he attorney general’s statements reflect an antiquated and misguided perception of domestic abuse as a mere ‘personal’ matter, independent of societal norms regarding the role of women or lack of political will to address harms against women, both of which encourage perpetrators to act with impunity.”

66 Jastram and Maitra, “*Matter of A-B- One Year Later*,” 71.

67 *Grace v. Matthew G. Whitaker*, No. 18-cv-01853 (U.S. District Court for the District of Columbia, December 19, 2018).

68 *Grace v. Matthew G. Whitaker*, 56.

69 *Matter of M-G-G-*, 27 I&N Dec. 475 (Attorney General, October 12, 2018); *Matter of M-S-*, 27 I&N Dec. 509 (Attorney General, April 16, 2019).

70 *Yolany Padilla, et al., v. U.S. Immigration and Customs Enforcement, et al.*, No. 2:18-cv-00928-MJP (U.S. District Court for the Western District of Washington at Seattle, July 2, 2019). On July 22, 2019, the Ninth Circuit declined to stay the order requiring bond hearings. See *Yolany Padilla, et al., v. U.S. Immigration and Customs Enforcement, et al.*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, July 22, 2019).

71 *Immigration and Customs, et al., v. Yolany Padilla, et al.*, No. 20-234 (U.S. Supreme Court, January 11, 2021).

In a September 2020 decision on another self-referred case, *Matter of A-C-A-A-*, Barr established a much more aggressive posture for BIA reviews of immigration judge asylum decisions.<sup>72</sup> Barr asserted that BIA members must adjudicate each element of the asylum claim, even if there are elements that DHS never raised on appeal or to which DHS had even previously stipulated. This could result in significantly more asylum cases being overturned on appeal before the BIA.

Finally, in November 2020 Barr eliminated an exception that allowed individuals who had engaged in persecution to still apply for asylum if they had been under duress or coercion when committing persecution.<sup>73</sup> Barr also self-referred a case in which he intended to weigh the effects of time of referral; certain criminal bars to asylum; and due process issues on asylum cases that are conducted *in absentia*.<sup>74</sup> A decision in this case has yet to be issued.

## B. *Eliminating Immigration Judge Discretion*

After promising a sharp increase in deportations of unauthorized immigrants, the Trump administration faced a number of hurdles, including a cumbersome and backlogged immigration court system. Most deportable immigrants in the interior of the United States are entitled to have their cases heard before an immigration judge. But immigrants wait months or, in many cases, years for their hearings, significantly slowing the resolution of cases, whether they end in deportation or otherwise.

In an unprecedented use of referral and review, the Trump administration tried to push through the massive caseload by setting a new approach to court operations and procedures. It limited the discretion judges have to manage their own dockets and pressured them to move cases quickly, even if that means noncitizens do not get an opportunity to seek remedies for which they legally qualify.

### Ending Administrative Closure

First, Attorney General Sessions ended administrative closure.<sup>75</sup> Administrative closure suspends removal proceedings by taking a case off the court's docket. It was generally used if immigrants had a case pending adjudication with USCIS, if they were granted deferred action, or if ICE considered them a low priority for enforcement action. Once closed, either party can "reactivate" the case by filing a motion to re-calendar it. A foreign national whose case has been closed does not gain legal status or work authorization but no longer has an active deportation case pending.

Judges made only moderate use of administrative closure until 2012, when BIA ruled that judges could administratively close a case, even over a party's objection.<sup>76</sup> In 2014, judges began to employ administrative closure more broadly after the Obama administration narrowed enforcement priorities,

<sup>72</sup> *Matter of A-C-A-A-*, 28 I&N Dec. 84 (Attorney General, September 24, 2020).

<sup>73</sup> *Matter of Daniel Girmai Negusie*, 28 I&N Dec. 120 (Attorney General, November 5, 2020).

<sup>74</sup> *Matter of A-M-R-C-*.

<sup>75</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (Attorney General, May 17, 2018). This decision ended the ability of foreign nationals in removal proceedings to apply for the provisional unlawful presence waiver, which requires any pending removal proceedings be administratively closed prior to filing. See 8 *Code of Federal Regulations* § 212.7(e)(4)(iii). As a result, foreign nationals in removal proceedings who are trying to gain legal status as the spouse or child of a U.S. citizen or legal permanent resident must apply from within their countries of origin.

<sup>76</sup> *Matter of Bavakan Avetisyan*, 25 I&N Dec. 688 (BIA, January 31, 2012).

incentivizing judges to move nonpriority cases off their active dockets. Between 2008 and the Sessions ruling in 2018, more than 330,000 cases were administratively closed.<sup>77</sup>

Although both immigration judges and the BIA had been using the tool for years, Sessions concluded there was no legal basis for the authority—Congress had never authorized administrative closures in statute and Justice Department regulations only permit them in specific categories of cases.<sup>78</sup> Sessions also ordered that all administratively closed cases at the time of his opinion be re-calendared if either party filed a motion to do so.

By March 2019, the administration had filed more than 18,000 motions to re-calendar in an effort to restart administratively closed deportation cases.<sup>79</sup> This was a significant increase from the final two fiscal years of the Obama administration, in which slightly less than 8,400 motions were filed. By the end of fiscal year (FY) 2019, the number of administratively closed cases had only decreased by a little more than 10,000 cases, falling to 320,173.<sup>80</sup>

### Further Procedural Actions

Two more decisions, issued in quick succession, also constricted commonly used docket-management tools. In August 2018, Sessions issued *Matter of L-A-B-R-*, narrowing judges' ability to continue cases (i.e., to postpone case adjudications or hearings).<sup>81</sup> He clarified that judges may only grant motions for continuances "for good cause shown," and that the standard limits judges from granting continuances for "any reason or no reason at all." When foreign nationals request continuances to allow them to pursue collateral relief, such as applying for legal status before USCIS, Sessions ruled that judges must consider a series of factors, including the likelihood the relief will be granted, the applicant's diligence in seeking the relief, concerns of administrative efficiency, and the length of the continuance requested.

In September 2018, in *Matter of S-O-G- & F-D-B-* Sessions ruled that immigration judges have no discretionary authority to terminate or dismiss removal proceedings.<sup>82</sup> Unlike administrative closure, which only removes the case from the court's active docket, termination permanently dismisses the case. Explaining that judges have no general authority to terminate, even when cases have "sympathetic circumstances," Sessions limited judges' ability to dismiss or terminate cases to the few situations specified by law, such as when the notice to appear was improperly issued.

Supplementing these limitations on the use of administrative closure, termination, and continuances, EOIR issued directives implementing court performance measures, case completion standards, and master calendar scheduling requirements. The result has been a significant increase in removal orders. Between FY 2018 and FY 2019, the total number of cases adjudicated rose by 42 percent, from 195,088 to 276,523, and

77 EOIR, "Administratively Closed Cases," updated October 13, 2020.

78 In December 2020, two and a half years after Attorney General Jeff Sessions' decision in *Matter of Castro-Tum*, the Justice Department finalized regulations to clarify that judges have no freestanding authority to administratively close cases. See EOIR, "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," *Federal Register* 85, no. 242 (December 16, 2020): 81588–656.

79 Hamed Aleaziz, "The Trump Administration Asked to Restart Nearly 20,000 Suspended Immigration Cases—As It Faces An Existing Backlog," BuzzFeed News, March 28, 2019.

80 EOIR, "Administratively Closed Cases."

81 *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (Attorney General, August 16, 2018).

82 *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (Attorney General, September 18, 2018).

the total number of deportation orders (including both removal orders and voluntary departures) rose by 49 percent, from 144,171 to 215,421.<sup>83</sup>

While the immigration court system has been in dire need of reform and performance improvements, the Trump administration's resolute emphasis on speed and efficiency has left little room for due process. With referral and review playing a prominent role, they disproportionately favored completing cases over giving foreign nationals a meaningful opportunity to seek relief when they are legally entitled to do so.

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## 4 The Future of Self-Referral

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The Trump administration sought to broaden the reach of the referral and review power. The attorney general is only permitted to review cases decided by the BIA, but the Justice Department is working on a regulation that would also permit the self-referral of cases that are pending before the BIA as well as those decided by immigration judges but not yet appealed.<sup>84</sup> This would increase the number of cases on which the attorney general could rule by more than 700 percent—from an average of 33,000 cases per year to 247,000.<sup>85</sup> The regulation would not include a similar expansion of referral power for DHS or the BIA.

The expansion would give attorneys general more cases from which to select, potentially broadening the legal issues on which they could rule. But considering they already select cases from a pool of tens of thousands of decisions, it seems far more likely that the intent is to exert further pressure on immigration judges by signaling that their decisions could be reviewed directly by a powerful political appointee on a public stage.

The change would further threaten the quality of these reviews. Once cases are decided before the BIA, they have been briefed and adjudicated twice, refining the relevant issues. An attorney general review of a case that has only gone through one level of administrative adjudication would be at increased risk of error and more likely to be subject to review from federal courts of appeal.

Even though the regulation that would allow for this expanded authority is still in the works, the Trump administration had already begun to move in this direction through other means. In April 2019, one of Barr's decisions covered three lower court decisions, including two before immigration judges. In a footnote in the opinion, Barr argued that under the HSA, the attorney general has the authority to rule on decisions by

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83 Migration Policy Institute (MPI) analysis of data from EOIR, "New Cases and Total Completions," updated January 23, 2020; Transactional Records Access Clearinghouse (TRAC) Immigration, "Outcomes of Deportation Proceedings in Immigration Court," accessed March 5, 2020. Both case completions and removal orders dipped again in 2020, likely due to the COVID-19 pandemic, but neither fell lower than 2018 levels.

84 According to the most recent update from the administration, the proposed regulation is due to come out in February 2021. See Justice Department, "Referral of Decisions in Immigration Matters to the Attorney General" (proposed rule 1125-AA86, Fall 2020).

85 MPI analysis of data from EOIR, *Statistical Yearbook, Fiscal Year 2018* (Washington, DC: Justice Department, 2019).

either the BIA or immigration judges.<sup>86</sup> Thus, in addition to using referral and review to make deep changes to asylum law and court operations, the Trump administration also expanded the power with established precedent and explicit statements, ahead of anticipated regulatory changes.

## A. *Beyond the Trump Administration*

The Trump administration's broad and rapid transformation of the U.S. immigration system almost entirely by executive fiat led to a widespread call for the new administration of President Joe Biden to reverse many of the changes. Doing so quickly will likely be a near impossible task, as it would require significantly more personnel and bureaucratic investment than the administration will be willing and able to muster—particularly as their first orders of business will revolve around the ongoing COVID-19 pandemic and its impacts on the U.S. economy. The attorney general's referral and review authority, given its speed and flexibility, could be a powerful tool in this pursuit.

The Biden administration could employ referral and review to quickly reverse decisions made by Trump-era attorneys general. Indeed, there is precedent for this: for example, two of the four attorney general reviews under President Obama vacated decisions made under President Bush.<sup>87</sup> Such a strategy could be used to restore administrative closure, reset how the "particular social group" category is defined for the purposes of asylum, and enable judges to grant continuances to allow applicants to pursue immigration benefits before USCIS, among other things.

It may also be possible to use referral and review to reverse problematic developments that past attorneys general have left unaddressed. For example, if it were relevant to the outcome of a case, a future attorney general could deem unlawful a practice that began under the Trump administration of replacing interpreters at certain immigration court hearings with videos, a move that would ensure immigrants can more fully understand and participate in legal proceedings.<sup>88</sup> To a similar end, the attorney general could mandate continuances to allow noncitizens sufficient time to find counsel, reversing a Trump-administration change that clarified such continuances were not mandatory.<sup>89</sup> Going beyond changes that occurred under Trump, a future attorney general could also, for example, issue an opinion recognizing that the right to counsel is necessary for due process and efficiency, at least for some groups (such as unaccompanied children).

86 The HSA indeed paints the power broadly as reviewing "administrative determinations in immigration proceedings." See *Matter of M-S-*, 27 I&N Dec. 509, 515 (Attorney General, April 16, 2019), 515.

87 *Matter of Compean, Bangaly, & J-E-C*, 25 I&N Dec. 1 (Attorney General, June 3, 2009); *Matter of Cristoval Silva-Trevino*, 26 I&N Dec. 550 (Attorney General, April 10, 2015).

88 In June 2019, the Justice Department started to replace in-court interpreters at initial immigration court hearings with videos informing foreign nationals of their rights. See Tal Kopan, "Trump Administration Ending In-Person Interpreters at Immigrants' First Hearings," *San Francisco Chronicle*, July 3, 2019.

89 In January 2020, EOIR's acting deputy director issued a memo stating that there is no court policy mandating or requiring judges to grant continuances. See Memorandum from Sirce E. Owen, Acting Deputy Director, EOIR, Justice Department, to all of EOIR, *Case Management and Docketing Practices*, January 31, 2020. This gave judges room to deny continuances despite past EOIR policy stating that foreign nationals should be granted at least one continuance in order to have time to retain counsel.

## B. *Establishing Procedural Requirements to Increase Transparency and Support High-Quality Decisions*

Even though referral and review can be useful to expeditiously change immigration case law interpretations and court operations, the underlying problems with the power remain. Referral and review places a powerful adjudicatory tool in the hands of the nation's chief law enforcement officer—an administrator who no longer has jurisdiction over the policy-making and operations of the immigration system, and who is no longer tasked with ensuring policy coherence on immigration—enabling the official to issue consequential decisions with a near absence of procedures.

The concerns these circumstances have raised for years have only been further exacerbated by the Trump administration's aggressive use of the power. Three of the decisions made by Trump's attorneys general have been held up in whole or in part by federal courts.<sup>90</sup> But even the decisions that were within the range of accepted legal interpretations did not necessarily exhibit sound policy choices. In at least one case, DHS—the agency charged with the bulk of immigration policy-making—insisted that the issue under review did not need to be addressed.<sup>91</sup> And many of the decisions have drawn significant outcry from immigrant communities, advocates, and even immigration judges, indicating the lack of widespread acceptance of the decisions.<sup>92</sup>

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Perhaps the ultimate test of the acceptability of and trust in the Trump administration's overall management of the immigration court system can be gleaned from the number and levels of appeals taken from its decisions. Appeals of immigration court decisions to the BIA and, to a more limited extent, of BIA decisions to the federal circuit courts of appeals have been trending upwards since the end of the Obama administration. The number of cases appealed to the BIA annually has nearly tripled since the end of the Obama administration, from 17,547 in FY 2016 to 51,250 in FY 2020.<sup>93</sup>

<sup>90</sup> *Matter of A-B-* has been partially enjoined. See *Grace v. Matthew G. Whitaker*, No. 18-cv-01853 (U.S. District Court for the District of Columbia, December 19, 2018); *Grace v. William P. Barr*, No. 19-5013 (U.S. Court of Appeals for the District of Columbia, July 17, 2020). *Matter of M-S-* was enjoined before it took effect. See *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 2:18-cv-00928-MJP (U.S. District Court for the Western District of Washington at Seattle, July 2, 2019). On July 22, 2019, the Ninth Circuit declined to stay the order requiring bond hearings, and on March 27, 2020, the same court denied the government's appeal. See *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, July 22, 2019); *Yolany Padilla v. U.S. Immigration and Customs Enforcement*, No. 19-35565 (U.S. Court of Appeals for the Ninth Circuit, March 27, 2020). Though in January 2021, the U.S. Supreme Court vacated the injunction. See *Immigration and Customs, et al., v. Yolany Padilla, et al.*, No. 20-234 (U.S. Supreme Court, January 11, 2021). And the Fourth Circuit Court of Appeals found *Matter of Castro-Tum* an improper interpretation of federal regulations, meaning it does not apply in cases arising in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. See *Jesus Humberto Zuniga Romero v. William Barr*, No. 18-1850 (U.S. Court of Appeals for the Fourth Circuit, August 29, 2019).

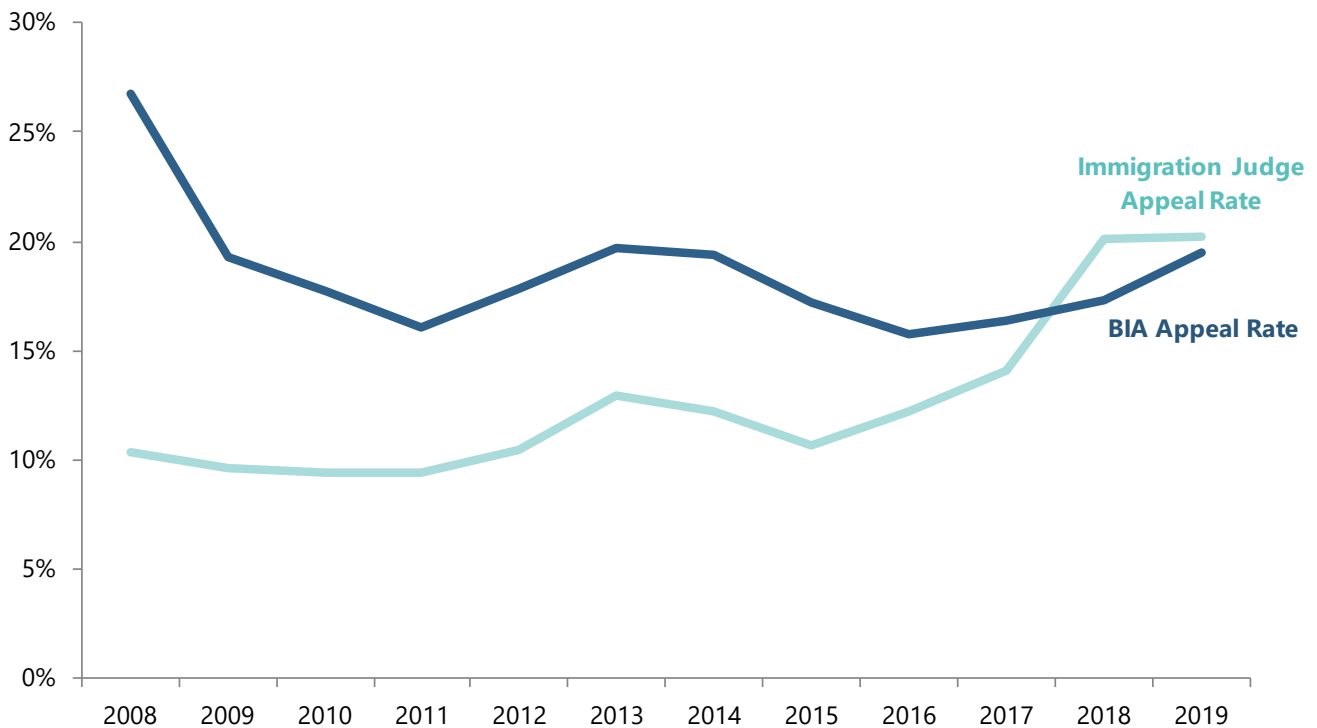
<sup>91</sup> *Matter of A-B-*, 27 I&N Dec. 316 (Attorney General, brief amici curiae of 16 former immigration judges and members of the BIA urging vacatur of referral order and in support of respondent, April 2018).

<sup>92</sup> See, for example, Kim Bellware, "On Immigration, Attorney General Barr Is His Own Supreme Court. Judges and Lawyers Say That's a Problem," *The Washington Post*, March 5, 2020. ("Half a dozen immigration experts who spoke to *The Post* said Barr's use of his certification power in [*Matter of A-B-*] erodes the neutrality and due process that should exist in immigration court.")

<sup>93</sup> EOIR, "Case Appeals Filed, Completed, and Pending," updated October 13, 2020.



FIGURE 2

**Appeal Rates for Immigration Judge and Board of Immigration Appeals Decisions, Fiscal Year 2008–19**

Notes: Appeal rates have been calculated as the number of Board of Immigration Appeals (BIA) receipts out of all immigration court case adjudications for the same fiscal year (Immigration Judge appeal rate) and the number of federal courts of appeals receipts of BIA appeals out of all BIA case adjudications (BIA appeal rate). This is helpful for understanding broad trends over time, but it is not a perfect measure for individual years, as the appeal of a case does not always occur in the same year as its adjudication by the lower body.

Sources: EOIR, “New Cases and Total Completions,” updated October 13, 2020; EOIR, “Case Appeals Filed, Completed, and Pending,” updated October 13, 2020; United States Courts, “Caseload Statistics Data Tables – B-3, U.S. Courts of Appeals – Cases Filed by Source (multiple years),” accessed January 12, 2021.

Factors that could affect this trend, include, for example, mistakes made by newer judges, since the Trump administration hired more new immigration judges than any prior administration. But it has also happened before that a lack of confidence in EOIR efforts to speed cases has led to increased appeals.<sup>94</sup> After EOIR made a number of changes to streamline adjudications in 2002, appeals immediately increased, rising to a peak in 2005–08, when more than one-quarter of BIA decisions were appealed.<sup>95</sup>

Such problems with the soundness and reception of referral and review decisions could be addressed by improving procedural safeguards. Currently, attorneys general determine procedures *ad hoc*; some referrals encourage public participation while in other cases the public, and even at times the parties to a case, are

94 Lenni B. Benson, “Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in Federal Court,” *New York Law School Law Review* 51, (2006): 37–73; John R.B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin, “Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review,” *Cornell Law Faculty Publications* (2005): 1–100.

95 Stacy Caplow, “After the Flood: The Legacy of the ‘Surge’ of Federal Immigration Appeals,” *Northwestern Journal of Law and Social Policy* 7, no. 1 (2012): 1–41; EOIR, “Case Appeals Filed, Completed, and Pending”; United States Courts, “Caseload Statistics Data Tables – B-3, U.S. Courts of Appeals – Cases Filed by Source (multiple years),” accessed January 12, 2021.

only informed of the decision to refer a case the same day as the final judgment. This latitude has made the process appear secretive and arbitrary, even as it delivers legal changes that may affect the lives of thousands.

*To address these concerns, the Justice Department should issue formal guidelines or promulgate regulations detailing procedures that must be followed for each referral and review.*

To address these concerns, the Justice Department should issue formal guidelines or promulgate regulations detailing procedures that must be followed for each referral and review. Providing the attorney general with a full briefing on the issues in a case, especially from the standpoint of the affected parties and a wider audience of stakeholders, would

reduce the risk of legal error and reliance on judicial review, while increasing the quality of the decisions and public confidence in the outcome.

In addition to creating predictability, guidelines or regulations should focus on establishing transparency through regular and robust public notification and participation.<sup>96</sup> Reviews should begin with adequate notice to the public and the parties in a case, including information on the issues to be considered, the briefing schedule, and a copy of the referred BIA decision, if it is not publicly available. There could also be an opportunity for parties and interested stakeholders to object to the referral. A robust public participation process would also reduce the risk that, as has occurred with many decisions, the outcome of a case appears to be predetermined.

Among the measures that would create a more transparent, high-quality, and trusted process, inviting a full briefing of the relevant issues in all referred cases is of utmost importance. The immediately implicated parties may not be well-positioned to brief the attorney general on the broader implications of the case, the decision in which may bind thousands of similarly situated individuals. Thus, the briefing needs to be open to all interested stakeholders. As a prominent legal scholar has noted, a more thorough briefing would “equip the attorney general with a more robust exploration of the real stakes and the full ramifications of choosing one eligible interpretation over another.”<sup>97</sup> If, after referral, the attorney general identifies additional issues that may prove decisive in the case, an opportunity should be provided for a supplemental briefing.

Additional procedures may not be necessary but would augment a thorough investigation of the issues. For example, the attorney general could provide the parties with an opportunity to respond after the initial briefing. The attorney general could also adopt relevant BIA procedures, which include the right to request an oral argument.<sup>98</sup>

Establishing procedural requirements would reduce the speed and flexibility of referral and review, especially by requiring briefings, but it would offer significant gains in terms of transparency and predictability, support quality decision-making, and potentially boost trust in the outcomes of the process. And even with such requirements in place, the attorney general would still enjoy the flexibility

<sup>96</sup> For a more detailed and technical discussion of the options, see Trice, “Adjudication by Fiat,” 1797–99.

<sup>97</sup> Martin, “Improving the Exercise of the Attorney General’s Immigration Referral Power.”

<sup>98</sup> Trice, “Adjudication by Fiat,” 1797.

and independence of an adjudicator compared to the many layers of review and procedures required in promulgating regulations.<sup>99</sup>

## 5 Conclusion

As a new administration takes office with a promise to “forcefully pursue”<sup>100</sup> a significantly different approach to immigration, this is an important moment to assess how the attorney general’s referral and review power has evolved over time, and to rethink its current and future use. The structure of the U.S. immigration bureaucracy has changed significantly since the power was established, and under the Trump administration it was used more extensively than ever before. Procedural reforms that increase the transparency and public input in referral and review would help to restore public trust in the use of the power and contribute to more consistent and coherent legal and policy decision-making for the immigration system going forward.

However, while procedural protections would increase both the quality and acceptability of reviews, they would not fully ameliorate problematic uses of referral and review. Even with strengthened public participation and transparency, referral and review places a critical immigration policy-making tool in the hands of an administrator who no longer manages the bulk of immigration policy and operations. With the power to bind DHS—the lead agency on immigration—even over that agency’s objections, the attorney general’s power extends well beyond the Justice Department’s areas responsibility, which the *Homeland Security Act* limited to EOIR and its immigration courts. Even as the lead agency of an immigration system dispersed across numerous agencies, including the Departments of Homeland Security, Justice, State, Health and Human Services, and Labor, DHS does not have the authority to singlehandedly bind other agencies to its policy decisions.

*While procedural protections would increase both the quality and acceptability of reviews, they would not fully ameliorate problematic uses of referral and review.*

The heightened politicization that has surrounded implementation of the nation’s immigration laws in recent years has brought structural issues such as this to the fore. For example, there has been a decades-long call for a more independent immigration court system, and it has received new life after the Trump administration’s aggressive interventions.

The issue of referral and review authority is similarly ripe for re-examination. It started as a pragmatic mediating measure and policy tool for the executive branch head of the immigration system to direct its work. Through a gradual transformation that was largely unintended or foreseen, it has become a powerful political tool that has proven to have sweeping implications for the nation’s immigration system.

<sup>99</sup> Agencies are subject to an imposing set of procedures and requirements when issuing regulations. See Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* (Washington, DC: Congressional Research Service, 2019), 1–6.

<sup>100</sup> Biden Campaign, “The Biden Plan for Security Our Values as a Nation of Immigrants,” accessed January 15, 2021.

In establishing a more humane and effective immigration system, the Biden administration should determine the most suitable organizational placement of EOIR and, by extension, the exercise of the referral and review power. Relocating a critical function of the immigration system, such as EOIR, would require legislation. However, should the opportunity for immigration legislation arise, the administration should be prepared to propose and support a plan for consolidating decision-making authority on immigration that restores the connection between ruling on significant questions of immigration law and policy with the operational responsibilities for administering the system.

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## About the Author

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