

COMMENT

OUT OF THE HANDS OF ONE: TOWARD INDEPENDENCE IN IMMIGRATION ADJUDICATION

KAREN M. SAMS*

Introduction	86
I. Current Structure and History of Immigration Courts.....	87
A. Overview of the Structure of Immigration Courts Today	87
B. Origins and History: Independence and Efficiency within the Executive Branch.....	88
C. Increasing Control of Adjudication Post-9/11	91
II. Challenges and Criticisms.....	93
A. The Growing Case Backlog.....	93
B. The Inherent Structural Flaw.....	95
III. In The Hands of One: AG Case Certification	96
A. Origin of the Certification Process	96
B. The Evolution of Case Certification.....	97
1. Evolution: 1940 to 9/11	98
2. The Nature of Case Certification: 9/11 to 2017	100
C. Certification in the Trump Administration	102
IV. The <i>Accardi</i> Doctrine As A Cautionary Tale	105
V. Procedural Safeguards, Checks, and Balances	106
A. Administrative Law Structures	106

* J.D. candidate, 2020, American University Washington College of Law. This comment would not have been possible without the guidance, support, and mentoring of Professors Jayesh Rathod and Dave McConnell. I am grateful to Professor Jeffrey Lubbers and John Humphrey for providing valuable feedback and suggestions. Thank you to the entire staff of the *Administrative Law Review* for your hard work, support, and edits throughout this process. This piece is dedicated to my current and future clients, who inspire me daily to fight to make the system fair and just—for all.

B. Step One: Oversight and Safeguards for Certification.....	108
C. Step Two: ALJs and Transforming the Immigration Courts.	109
Conclusion	110

INTRODUCTION

The framers of the United States Constitution established a tripartite system of government with separation of powers and built-in checks and balances between the branches to prevent the abuse of power.¹ Central to this system is an independent judiciary, un beholden to the Executive or Legislative Branches.² James Madison warned of the lack of such independence in 1788: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny.”³ For decades, many have criticized the immigration court system for lacking such independence, precisely because its placement in the Executive Branch—within the Department of Justice (DOJ)—inherently makes immigration judges (IJs) accountable to the chief law enforcement officer of the United States: The Attorney General (AG).⁴

This Comment will review the historical path and regulatory foundation for the current immigration court structure; discuss its failings in the areas of case backlogs, directives, and judicial independence; and analyze the role that AG certification of cases plays in promoting Executive policy, influencing immigration law, and restricting due process.⁵ Part I will focus on the history of U.S. immigration courts and the role which the intermingling of

1. *Separation of Powers*, LEGAL INFO. INST. CORNELL UNIV. LAW SCH., https://www.law.cornell.edu/wex/separation_of_powers (last visited Oct. 19, 2019).

2. See Madison, *The Federalist Papers*, No. 47, LILLIAN GOLDMAN LAW LIBRARY, YALE LAW SCH., avalon.law.yale.edu/18th_century/fed47.asp (last visited Nov. 18, 2019) (arguing for separation of powers between the branches of government).

3. *Id.*

4. *Strengthening and Reforming America’s Immigration Court System: Before the Subcomm. on Border Security and Immigration of the S. Judiciary Comm.*, 115th Cong. (2018) [hereinafter *Hearings*] (statement of Hilarie Bass, President, American Bar Association (ABA)) (emphasizing that the court’s position within the Department of Justice (DOJ) prevents it from being independent); *Hearings* (statement of Judge A. Ashley Tabaddor, President, National Association of Immigration Judges (NAIJ)) (arguing that the immigration court’s placement within the law enforcement agency is a “fundamental flaw” of the immigration system).

5. The Board of Immigration Appeals (BIA) may certify removal cases to the Attorney General (AG) for review. The AG also has the discretion to review cases where the BIA entered a final judgment. The decisions that result from this additional review establish national precedent. 8 C.F.R. § 1003.1(h) (2019).

adjudicatory and enforcement functions has played in shaping independence in the current system. Part II will discuss the substantial challenges of the current structure. Part III will analyze AG certification as one facet of the Trump Administration's immigration policy that raises further issues of judicial integrity and potential Executive overreach. Part IV will then take a closer look at a case that illustrates the extreme results that may occur when due process is replaced by the pursuit of a policy agenda. Part V will conclude by proposing changes to both the case certification process and the structure of immigration courts as a whole.

I. CURRENT STRUCTURE AND HISTORY OF IMMIGRATION COURTS

A. Overview of the Structure of Immigration Courts Today

Immigration courts, which are located throughout the country, are specialized civil courts that hear immigration removal cases.⁶ Such proceedings involve charges of inadmissibility and deportability, as well as applications for relief including asylum, withholding of removal, and protections under the international Convention Against Torture.⁷ Just as in state and federal judicial courts, respondents must meet their burden of proof through evidence and testimony.⁸ Decisions of IJs are final, but either party may appeal to the Board of Immigration Appeals (BIA), also housed within the DOJ.⁹

On appeal, the BIA has jurisdiction to review the questions of law and fact that the IJs determined in the original case.¹⁰ As a nationwide

6. *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/>.

7. *Immigration Benefits in EOIR Removal Proceedings*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws/immigration-benefits-eoir-removal-proceedings> (last visited Nov. 18, 2019) [hereinafter *Immigration Benefits*].

8. In most instances in removal hearings, respondents must establish they have experienced past persecution or have a credible fear of future, targeted persecution, or torture. 8 C.F.R. § 208.13(a), (b)(1)(ii)–(iii), (b)(3)(i) (2001).

9. Both the IJs and the BIA are within the Executive Office of Immigration Review (EOIR) in the DOJ. 8 C.F.R. §§ 1003.0(a), 1003.1(b), 1003.10; see *Immigration Benefits*, *supra* note 7; see also *Board of Immigration Appeals*, DEP'T OF JUSTICE, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Oct. 15, 2018). The AG established the BIA by regulation in 1940 as the appellate-level immigration review board. See 8 C.F.R. §§ 90.2–90.12 (1940).

10. 8 C.F.R. § 103.3; 28 C.F.R. §§ 68.53(a), 68.55 (no jurisdiction); 8 C.F.R. §§ 1003.1(b), 1292.3 (jurisdiction); see *Board of Immigration Appeals Practice Manual*, BD. OF IMMIGR. APPEALS 5–6, <https://www.justice.gov/eoir/page/file/1103051/download> (last visited Nov. 18, 2019) [hereinafter *BIA Manual*].

administrative appellate body, the role of the BIA is to provide clear and consistent interpretive guidance on immigration law to IJs, the Department of Homeland Security (DHS), and the public, through the binding decisions it elects to make precedential.¹¹ The BIA makes only a small percentage of its decisions precedential. This designation is based on several factors, which include “the resolution of an issue of first impression; modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.”¹²

Currently, a single BIA member hears and decides most cases that are appealed to the BIA, although a panel of three may decide cases with more complex legal issues.¹³ Either party can then appeal BIA decisions to the appropriate federal court of appeals.¹⁴

B. *Origins and History: Independence and Efficiency within the Executive Branch*

Throughout its history, immigration adjudication has often overlapped with enforcement and prosecutorial functions, creating potential due process issues.¹⁵ The Treasury Department first established immigration adjudication in 1893, with the enforcement-focused customs service inspectors also serving on the Boards of Special Inquiry as adjudicators and issuing case recommendations.¹⁶ These inspectors reviewed exclusion cases and issued recommendations to the agency Commissioner who made final case determinations.¹⁷ Immigration moved from the Treasury Department to

11. Only precedential cases are published. 8 C.F.R. § 1003.1(d)(1), (g); *BIA Manual*, *supra* note 10, at 8.

12. *BIA Manual*, *supra* note 10, at 8.

13. 64 Fed. Reg. 56,135, 56,135–36 (Oct. 18, 1999); *see also* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 1994 (2009).

14. Ashcroft, *supra* note 13, at 1995. There are limits on what federal courts can review. 8 C.F.R. § 1252(a)(1), (a)(5).

15. *1891: Immigration Inspection Expands*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about/history/1891-immigration-inspection-expands> (last modified Mar. 21, 2014) [hereinafter *1891*]; *Overview of INS History*, U.S. CITIZENSHIP & IMMIGR. SERVS. 4, <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf> (last visited Oct. 19, 2019) [hereinafter *INS History*].

16. The 1891 Immigration Act established the Office of the Superintendent of Immigration, including the U.S. Customs Service. *INS History*, *supra* note 15, at 4; *1891*, *supra* note 15 (“Beginning in 1893, inspectors also served on the Boards of Special Inquiry that closely reviewed each exclusion case.”).

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

the Department of Commerce and Labor in 1903, but adjudicators retained only an advisory role and presented memos of decision to the Commissioner of Labor for final order and signature.¹⁸ Ten years later, this Department split into two divisions, with immigration remaining in the Department of Labor (DOL).¹⁹

With the outbreak of World War I, the immigration service expanded its enforcement role, which included interning “enemy aliens” from ships.²⁰ After the War, more restrictive immigration laws and enforcement created a surge in unauthorized immigration and case appeal that overwhelmed the system.²¹ In response, the Secretary of Labor established the Board of Review (BR) to hear oral arguments and make recommendations of decisions directly to the Secretary.²²

Still within the DOL, federal immigration adjudication and enforcement moved under the umbrella of the newly created Immigration and Naturalization Service (INS) in 1933.²³ With this consolidation of services, the INS shifted its focus to enforcement and directed more resources to investigation, prevention of illegal immigration, deportation, and cooperation with prosecutions by the FBI and the DOJ.²⁴

The threat of a second European war increased the enforcement and national security focus of the INS. Thus, in 1940, the INS moved out of the DOL and into the DOJ, the nation’s law enforcement agency.²⁵ In 1940, the AG transformed the BR into the BIA, as a fully functioning appellate body.²⁶ As designee of the AG, the BIA had jurisdiction to review appeals from Special Inquiry Officer (SI Officer) decisions, hear oral argument in exclusion

18. *News and Information: Evolution of the U.S. Immigration Court System: Pre-1983*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/evolution-pre-1983> (last updated Apr. 30, 2015) [hereinafter *Pre-1983*].

19. *Id.*

20. *INS History*, *supra* note 15, at 6.

21. *Id.* at 7.

22. *Pre-1983*, *supra* note 18. The absence of authority to issue final orders, combined with its placement within an enforcement agency, elicited criticisms that the BR lacked judicial integrity and independence from the enforcement agency. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 848–49 (2016); Roberts, *A Critical Appraisal*, *supra* note 17, at 33.

23. Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 155 n.64 (1958); *Pre-1983*, *supra* note 18; Gonzales, *supra* note 22, at 849.

24. *INS History*, *supra* note 15, at 7.

25. *Id.* at 8.

26. 8 C.F.R. §§ 90.2–90.12 (1940); *see also* Jeffrey S. Chase, *75 Years of the Board of Immigration Appeals*, 10 IMMIGR. L. ADVISOR 1, 3 (Feb.–Mar. 2016); *Pre-1983*, *supra* note 18.

and fine cases, and—for the first time—issue final orders.²⁷ In cases in which the issue was a “question of difficulty,” the BIA could refer the case to the AG for review of the BIA’s decision.²⁸

The Immigration and Nationality Act (INA) of 1952 integrated all previous immigration law into a complex statute that granted SI Officers the authority to review deportation cases and issue final determinations.²⁹ The INA prohibited an SI Officer from investigating and adjudicating the same case, but SI Officers could prosecute and judge the same case and ex parte communications between prosecutors and adjudicators on the same case were permitted by statute.³⁰ Such communications raised concerns about due process through questions of unequal access and imbalance of power. The INA allowance conflicted with the Administrative Procedure Act (APA) of 1946, which required separation of functions and therefore banned investigatory and prosecutorial officials from supervising adjudicators or having ex parte communications.³¹ The APA’s applicability to removal hearings was unclear for several years, but the Supreme Court ultimately ruled that the APA did not apply to deportation hearings, over strong dissent from the minority.³² Thus, the APA strictures maintaining separation of functions within an agency—designed to protect the decisional independence of adjudicators—did not offer protections for SI Officers or the respondents.

In 1973, Congress granted SI Officers the additional title of “Immigration Judge” and authorized them to wear judges’ robes.³³ Ten years later, the

27. 8 C.F.R. §§ 90.2–90.10.

28. 8 C.F.R. § 90.12. The BIA also certified cases to the AG 1) when a member of the BIA dissented in the decision, and 2) when the decision involved staying deportation because a respondent would be excluded statutorily under § 19(c) of the 1917 Immigration Act. *Id.*

29. Chase, *supra* note 26; *see also Pre-1983, supra* note 18; Roberts, *A Critical Appraisal, supra* note 17, at 34–35. Either party could appeal the Special Inquiry Officers’ (SI Officers’) decisions to the BIA, which was given appellate jurisdiction to review removal decisions. Roberts, *A Critical Appraisal, supra* note 17, at 35.

30. *The Special Inquiry Officer in Deportation Proceedings*, 42 VA. L. REV. 803, 803–04 (1956).

31. Administrative Procedure Act (APA), 5 U.S.C. § 554 (2018) (“The employee who presides at the reception of evidence . . . may not consult or . . . [be] subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”).

32. *Marcello v. Bonds*, 349 U.S. 302, 305, 308 (1955) (comparing the regulations and provisions under the APA against those in the Immigration and Nationality Act (INA) of 1952 and holding that Congress set up a specialized procedure for deportation hearings that deviates from the APA). *But see id.* at 315–16 (Frankfurter, J., dissenting) (arguing that due process requires a neutral and impartial adjudicator which is not established through the regulations of the INA alone).

33. 38 Fed. Reg. 8590 (Apr. 4, 1973); *Pre-1983, supra* note 18.

AG moved the IJs and BIA into the newly established Executive Office for Immigration Review (EOIR), still within the DOJ.³⁴ This new placement separated the adjudicatory functions of the immigration courts (IJs and BIA) from the prosecutorial and service functions (INS) in DOJ “both for efficiency and to foster independent judgment in adjudication.”³⁵ The new structure separated agency functions, but it did not lessen the tremendous allocation of resources involved in adjudicating BIA reviews of appeals.³⁶ Thus, in 1999, the AG instituted the first series of reforms aimed at streamlining the BIA appeals process.³⁷ Through these reforms, a single BIA member reviewed most appeals rather than a full panel of three BIA members, making more efficient use of judicial resources in response to the growing case backlog.³⁸

C. Increasing Control of Adjudication Post-9/11

Modern reforms in immigration adjudication have focused primarily on reducing crime, illegal immigration, and terrorism.³⁹ Beginning in the 1950s, enforcement activities emphasized investigating and deporting illegal residents, workers, and “criminal aliens.” This shift in focus led to strengthening border control and deportation programs targeting Mexicans, communists, and other groups who were considered a security risk.⁴⁰ Following the terrorist attacks on September 11, 2001 (9/11), the Homeland Security Act of 2002 abolished the INS and divided its former responsibilities between the DHS and the DOJ.⁴¹ This new structure consolidated the prosecutorial

34. 48 Fed. Reg. 8038, 8038–39 (Feb. 25, 1983); see *News and Information: Evolution of the U.S. Immigration Court System: Post-1983*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/evolution-post-1983> (last updated Apr. 30, 2015) [hereinafter *Post-1983*].

35. 77 Fed. Reg. 2011, 2011 (Jan. 13, 2012); see also 68 Fed. Reg. 9824 (Feb. 28, 2003) (outlining the history of agency organization prior to the Homeland Security Act of 2002); *EOIR: About the Office*, DEP’T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018).

36. 64 Fed. Reg. 56,135, 56,139 (Oct. 18, 1999) (“The current requirement that three [BIA] Members review [] cases results in a serious misallocation of resources in an agency that receives over 28,000 appeals and motions per year.”)

37. Ashcroft, *supra* note 13, at 1992 (reviewing the history and evolution of the streamlining process that began in the Clinton Administration, grew under President George W. Bush, and has continued to evolve and develop under each ensuing administration).

38. 64 Fed. Reg. at 56,135 (“The final rule responds to an enormous and unprecedented increase in the caseload of the [BIA].”).

39. *INS History*, *supra* note 15, at 9–11.

40. *Id.*

41. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135 §§ 451, 471

functions of the former INS within DHS while maintaining the adjudicatory branches of the immigration court and BIA within DOJ.⁴² As with the creation of EOIR in 1983, this reorganization was touted “to foster independent judgment in adjudication” and increase administrative efficiency.⁴³

An outside audit of the 1999 reforms showed an increase in BIA productivity by roughly fifty percent.⁴⁴ As a result, in 2002, AG Ashcroft expanded the model of single-member appellate review to stretch judicial resources even further.⁴⁵ The AG also addressed what he saw as a major source of the case backlog: The BIA’s de novo scope of review for both questions of law and findings of fact.⁴⁶ Stressing that appellate-level de novo review of IJ factual findings is inappropriate because only IJs are in the hearings to assess credibility through testimony and demeanor, the AG narrowed the scope of review for the BIA to the “clearly erroneous” standard for findings of fact.⁴⁷

In 2006, following yet another comprehensive review of the immigration courts and BIA, the Bush Administration instituted a series of twenty-two measures designed to improve the efficiency and effectiveness of the immigration court system, instituting the first performance evaluations of IJs.⁴⁸ Further extending these evaluations, the current Administration established quotas in 2018 that the IJs must meet as part of the new performance assessments.⁴⁹ These benchmarks include specific time constraints for case completion, a minimum number of cases to conclude per year, and limits on allowable remand rates—all instituted to reduce the swelling case backlog.⁵⁰

Shortly after the EOIR Director announced the 2018 benchmarks, EOIR

(enacted Nov. 25, 2002); see *Post-1983*, *supra* note 34; see also *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*; 67 Fed. Reg. 54,880 (Aug. 26, 2002) (defining the principle goal as “[e]liminating the current backlog of cases before the [BIA]”).

42. 68 Fed. Reg. 9824 (Feb. 28, 2003).

43. *Id.*

44. Ashcroft, *supra* note 13, at 1992.

45. *Id.* Three-member review panels were reserved for more complex cases and those based on questions of law. *FACT SHEET: Board of Immigration Appeals: Final Rule 2–4*, DEP’T OF JUSTICE, https://www.justice.gov/sites/default/files/opa/legacy/2002/08/27/biafinal_rule.pdf (last visited Oct. 19, 2019).

46. Ashcroft, *supra* note 13, at 1992–93.

47. *Id.* at 1991–93; see also *BIA Manual*, *supra* note 10.

48. Press Release, Dep’t of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html.

49. *Letter from EOIR Director to All Judges*, EOIR (Mar. 30, 2018), http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf [hereinafter *EOIR Letter*].

50. *Id.*

hired and installed twenty-three new IJs, followed by a record forty-six more only a month later, again with the goals of increasing efficiency and reducing the backlog of cases.⁵¹ Yet before EOIR implemented the benchmarks in October 2018, the National Association of Immigration Judges (NAIJ) expressed its opposition to the metrics, recounting concerns that the DOJ previously voiced in 1991—that numbers-based reviews could work against the decisional independence of adjudicators.⁵²

II. CHALLENGES AND CRITICISMS

The current immigration court system has inherited structural flaws and a long history of mixed adjudication and enforcement functions that presents significant challenges to judges as well as to non-citizen respondents. The ever-growing case backlog only further strains the system.

A. *The Growing Case Backlog*

Just ten years ago, in 2009, there were 223,719 pending removal cases in immigration court; today, researchers estimate the backlog may have surpassed one million, as new cases far outpace the number of case completions each year.⁵³ One of the many reasons for this growth is that

51. Press Release, Dep't of Justice, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture>; Press Release, Dep't of Justice, Executive Office for Immigration Review Announces Largest Immigration Judge Investiture Since at Least 2010, Hiring Times Reduced by More Than 50% (Aug. 16, 2018), <https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-largest-immigration-judge-investiture-least>. Since these investitures, the Administration has sworn in sixty-five more immigration judges. See Press Release, Dep't of Justice, EOIR Swears in 16 Immigration Judges (Nov. 16, 2018), <https://www.justice.gov/eoir/page/file/1097241/download>; Press Release, Dep't of Justice, EOIR Swears in 31 Immigration Judges (Mar. 19, 2019), <https://www.justice.gov/eoir/page/file/1145691/download>; Press Release, Dep't of Justice, EOIR Swears in 18 Immigration Judges (May 13, 2019), <https://www.justice.gov/eoir/page/file/1161951/download>.

52. See *Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges*, NAIJ (Oct. 1, 2017), https://www.naij-usa.org/images/uploads/publications/NAIJ_Quotas_in_IJ_Performance_Evaluation_10-1-17.pdf (referencing a letter from Claudia Cooley, Associate Director for Personnel Systems and Oversight, OPM, to Harry H. Flickinger, Assistant AG for Administration, DOJ, dated April 6, 1991); see also *id.* (stating that IJs did not have evaluations for twenty years and that the Office of Personnel Management (OPM) only allowed performance assessments for IJs after AG Sessions assured OPM the IJs would have judicial independence).

53. This estimate includes the cases administratively closed and continued. See Press Release, Dep't of Justice Office of Pub. Affairs, Executive Office for Immigration Review

Congress historically increases funding for immigration enforcement—through DHS and ICE—at a much higher rate than they increase funding and support for immigration adjudication.⁵⁴ Community involvement in enforcement actions also plays a role in this growth: Through the growing number of “287(g)” agreements between the AG and communities, local law enforcement officers are functioning as *immigration* enforcement officers to investigate, apprehend, and detain non-citizens on behalf of the AG and the Administration.⁵⁵ Even without such formal agreements, the revived Secure Communities (SCOMM) program authorizes state and local jails to submit arrestees’ fingerprints to both immigration and criminal databases for identification.⁵⁶

Through Executive Order 13,768 and USCIS Guidance, President Trump has greatly expanded the array of non-citizens targeted for removal, eliminating classifications of non-citizens previously exempted from enforcement.⁵⁷ Thus, the number of apprehended and detained non-citizens

Releases Court Statistics, Announces Transparency Initiative (May 9, 2018), <https://www.justice.gov/opa/pr/executive-office-immigration-review-releases-court-statistics-announces-transparency> (referencing the linked chart of statistics, including administratively closed cases); *Immigration Court Backlog Surpasses One Million Cases*, TRAC IMMIGR. (Nov. 6, 2018), <https://trac.syr.edu/immigration/reports/536/>.

54. See Katie Shepherd, *Disarray in Baltimore Immigration Court is Emblematic of Systemic Issues*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (Oct. 12, 2018) (reporting that Congressional funding for the immigration court system is out of proportion to funding for prosecution, resulting in hundreds of thousands of cases added to dockets every year).

55. Section 287(g) of the INA additionally expands federal financial resources used for immigration enforcement because the enforcement actions may be carried out at the expense of the local government, under the direction of the U.S. AG. 8 U.S.C. § 1357(g) (2018).

56. Exec. Order No. 13,768 § 10(a), 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017) (repealing the Priority Enforcement Program (PEP) that was developed to address Fourth Amendment concerns regarding the Secure Communities (SCOMM) program that courts previously raised).

57. *Id.* at 8799 (removing categories of non-citizens from previous exemption status and directing the executive branch to “employ all lawful means to enforce the immigration laws of the United States”); see also U.S.C.I.S., PM-602-0050.1, POLICY MEMORANDUM: UPDATED GUIDANCE FOR REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS (2018) (delineating the categories of prioritization, including a special focus on fraud and misrepresentation); *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL (Mar. 7, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [hereinafter *End of Immigration Enforcement Priorities*] (reporting that in the first eight months, this change in policy resulted in a forty-two percent increase in arrests, increasing the backlog of cases while no longer focusing law enforcement resources on removing the most dangerous criminals).

awaiting hearings far outpaces the number of detainees that immigration courts can process, further extending the wait time for case completions.⁵⁸

B. *The Inherent Structural Flaw*

As great as the backlog's impediment to judicial efficiency is, the impact of the underlying structural problem is more profound. IJs are DOJ attorneys and are supervised by the AG, the chief law enforcement officer of the United States;⁵⁹ yet as adjudicators, they are tasked with being independent and neutral arbiters.⁶⁰ Thus, the IJ's placement within the DOJ creates dualing allegiances of enforcement and neutrality.

Even with regard to efficiency, the goals of the IJ's placement within the DOJ are at odds. The quotas imposed on IJs for case closures and annual clearance rates are intended to lessen the case backlog. They also significantly constrain IJs' time to thoroughly and individually adjudicate the cases that come before them, raising due process concerns.⁶¹

Also, because IJs are administrative judges (AJs), they receive none of the protections for adjudicatory independence that Administrative Law Judges (ALJs) receive under the APA.⁶² Structurally, the BIA—established by AG regulation and not Congressionally mandated—remains under the control, direction, and mission of the AG as his “designee.”⁶³ Thus, BIA members

58. *End of Immigration Enforcement Priorities*, *supra* note 57. The case backlog has grown by more than 200,000 cases in the Trump Administration thus far. Nick Miroff & Maria Sacchetti, *Burgeoning Court Backlog of More than 850,000 Cases Undercuts Trump Immigration Agenda*, WASH. POST (May 1, 2019), https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5_story.html?utm_term=.2998479f10fa.

59. *Hearings* (statement of Judge Tabaddor), *supra* note 4, at 2–3.

60. *Id.*; 8 C.F.R. § 1003.10(b) (2019) (“[I]mmigration judges shall exercise their independent judgment and discretion and . . . shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.”).

61. *Hearings* (statement of Judge Tabaddor), *supra* note 4, at 3.

62. See 8 C.F.R. § 1003.10; *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, AM. BAR ASS'N COMMISSION ON IMMIGR., at 2–7 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf [hereinafter *2010 ABA Proposal*] (defining immigration judges as attorneys appointed by the AG to adjudicate specific classes of immigration hearings as administrative judges (AJs)); see also *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, ADMIN. CONFERENCE OF THE U.S., Final Report: May 11, 2018, at 8–9 (May 11, 2018) [hereinafter *Non-ALJ Adjudicators*] (explaining that non-ALJ adjudicators do not have the statutory protections for decisional independence that ALJs have through the APA); see also *supra* Part IB, note 33 and accompanying text.

63. 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

(also AJs and not ALJs) work within a structure that can be altered significantly—or removed altogether—at the will of the AG.⁶⁴

III. IN THE HANDS OF ONE: AG CASE CERTIFICATION

Complicating immigration adjudication is the process of case certification, through which the AG unilaterally reviews select BIA cases and affirms or overturns the decisions.⁶⁵ This referral process has evolved since it began in 1940, from a largely prescribed process (through which certain cases—such as those with dissenting opinions—were certified to the AG for review) to its current state where virtually any case can be chosen by, and self-certified to, the AG.⁶⁶

While only precedent cases can be certified, a newly published regulation permits the AG to choose any of the non-precedent cases to make precedential—which he can then certify to himself.⁶⁷ There is no time limit for how far back an AG or the BIA can reach to select a case for review, or to overturn settled law.⁶⁸ This lack of finality of BIA decisions is at odds with the mission of the BIA to “provid[e] clear and uniform guidance across the country in applying and interpreting immigration law.”⁶⁹

A. Origin of the Certification Process

Before immigration moved into the DOJ, neither the SI Officers nor BR members were authorized to grant final orders of decisions.⁷⁰ Most of the time, the Secretary of Labor upheld the BR’s case recommendations, but those cases that met the “question of difficulty” standard were passed on to the Secretary to grapple with the legal, statutory, or regulatory issues necessary to decide the case.⁷¹ Thus, when the reconstituted Board (as the new BIA) moved into the DOJ, it was already the practice of the members to pass

64. *Id.*; 84 Fed. Reg. 31,463, 31,465 (July 2, 2019) (“Because the BIA is established under the Attorney General’s regulations, he ‘is free to tailor the scope and procedures of administrative review of immigration matters as a matter of discretion.’”).

65. 8 C.F.R. § 1003.1(h); Dara Lind, *Jeff Sessions is Exerting Unprecedented Control Over Immigration Courts—By Ruling on Cases Himself*, VOX (May 21, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>.

66. Compare 8 C.F.R. § 90.12 (1940), with 8 C.F.R. § 1003.1(h) (2012).

67. 84 Fed. Reg. at 31,470 (“Selected decisions . . . of the Attorney General . . . will be published and serve as precedents in all proceedings involving the same issue or issues.”)

68. There is no constraint on what cases the AG may make precedential. *See id.*

69. *Id.* at 31,468.

70. Roberts, *A Critical Appraisal*, *supra* note 17, at 34–35.

71. Gonzales, *supra* note 22, at 848; Chase, *supra* note 26, at 2.

cases that involved a difficult legal question to the head of the Department.⁷² However, under the 1940 regulations, the BIA could refer the case to the AG only after reaching a final decision—although the Commissioner and AG could certify precedential BIA cases, as well.⁷³

B. *The Evolution of Case Certification*

Until 2017, AGs primarily reviewed cases upon BIA request; under the Trump Administration, the AGs' focus is on self-certifying cases. Generally, AGs have used the certification process sparingly, though there are three distinct periods of markedly different usage: before and after the terrorist attacks of 9/11, and the period since President Trump's inauguration.⁷⁴ For the first sixty-one years, virtually all cases were referred to the AG by the BIA or the Commissioner or were prescribed for certification by regulation.⁷⁵ Since 9/11, AGs have self-certified a higher percentage of cases. Three of these self-referred cases were certified and decided by more than one AG, with later decisions overruling the holdings of prior AGs.⁷⁶ A dramatic shift

72. Gonzales, *supra* note 22, at 848. The first case the BIA certified to the AG was such a “case of difficulty.” In the Matter of L-, 1 I. & N. Dec. 1, 3 (A.G. 1940) (deciding the case August 29, 1940, less than a week before the Regulations Governing Departmental Organization and Authority were published in the Federal Register on September 4, 1940).

73. 5 Fed. Reg. 3502, 3504 § 90.12 (Sept. 4, 1940) (“In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved . . . or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board’s decision.”).

74. The power to refer cases to the AG was published in 1940. *Id.* See also Justin Chasco, *Judge Alberto Gonzales—The Attorney General’s Power to Overturn Board of Immigration Appeals’ Decisions*, 31 S. ILL. U. L.J. 363, 372 (2007) (outlining the history of the BIA and the AG’s discretionary power over it); Gonzales, *supra* note 22, at 841.

75. Of the cases identified, only the following were self-certified between 1940 and 2001: Matter of S- & B-C-, 9 I. & N. Dec. 436, 444 (A.G. 1961); Matter of P-, 9 I. & N. Dec. 293, 293 (A.G. 1961); Matter of L-R-, 7 I. & N. Dec. 318, 322 (A.G. 1957); In the Matter of B-, 6 I. & N. Dec. 713, 722 (A.G. 1955). The 1940 regulation that established AG case certification permitted four paths through which a case would be certified: any case where 1) a BIA member dissents in the disposition; 2) the BIA finds a “question of difficulty” to be at issue; 3) the BIA orders the suspension of deportation under the enumerated list of exclusions in section 19(c) of the 1917 Act; or 4) the AG directs the BIA to refer the case to the AG. 8 C.F.R. § 90.12, 1041, 1066 (1940 Supp.).

76. Matter of Compean, 24 I. & N. Dec. 710 (A.G. 2009); Matter of Silva-Treviño, 24 I. & N. Dec. 687 (A.G. 2008); Matter of R-A-, 24 I. & N. Dec. 629 (A.G. 2008). Two of these cases were also certified and decided in the last weeks of the George W. Bush Administration, effectively reversing precedent on the way out the door. See Matter of Compean, 24 I. & N. Dec. 710

occurred with the Trump Administration: Every case that has been reviewed thus far was self-certified by the AG (or Acting AG), and the rate of referral and decision is outpacing that of all other administrations.⁷⁷

1. *Evolution: 1940 to 9/11*

For the first sixty years, AGs primarily used case certification power to review and determine cases of first impression or difficult legal questions that the BIA or Commissioner wanted the AG to clarify.⁷⁸ For example, in *Matter of K-W-S*,⁷⁹ the BIA referred the case to the AG to consider the question of whether the child of a concubine could qualify for fourth preference immigration status as the brother of a U.S. citizen. In another, the AG was asked to interpret section 241 of the Act where a state conviction of the non-citizen had been erased.⁸⁰ At times, what the BIA asks the AG to review may be quite narrow such as “whether public school teaching is a type of ‘employment under the government of a foreign state’”⁸¹

In one instance, the BIA referred an adoption case to the AG, requesting that he also look at a precedent case it cited, which the District Court and BIA interpreted differently in their case law.⁸² In his analysis, the AG reviewed similar cases, three of which relied on the precedent case, to

(deciding the case January 7, 2009, less than two weeks before the inauguration); *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (publishing the decision in the last two-and-a-half months of the George W. Bush Administration); *see also* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 20 (2016) (considering the recurring pattern of “an agency head [referring] a controversial issue to himself and render[ing] a decision upending agency precedent on his way out the door.”)

77. There were fifteen decisions issued by three AGs in the eight years of the George W. Bush Administration. In contrast, the AGs have already published eleven decisions in the first three years of the Trump Administration. *Matter of Thomas & Thompson*, 27 I. & N. Dec. 674 (A.G. 2019); *Matter of Castillo-Perez*, 27 I. & N. Dec. 664 (A.G. 2019); *Matter of L-E-A*, 27 I. & N. Dec. 581 (A.G. 2019); *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019); *Matter of Negusie*, 27 I. & N. Dec. 481 (A.G. 2018); *Matter of M-G-G-*, 27 I. & N. Dec. 475 (A.G. 2018); *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018); *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018); *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018); *see also* Jeffrey S. Chase, *Mar. 29: The AG’s Certifying of BIA Decisions*, OPINIONS/ANALYSIS ON IMMIGR. L. (2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions>.

78. *E.g.*, *Matter of Hira*, 11 I. & N. Dec. 824, 827 (A.G. 1966) (considering the definition of “business” within the meaning of INA § 101(a)(15)(B)).

79. 9 I. & N. Dec. 396, 407 (A.G. 1961).

80. *Matter of A-F-*, 8 I. & N. Dec. 429, 444–46 (A.G. 1959).

81. *Matter of Becher*, 12 I. & N. Dec. 380, 387 (A.G. 1967).

82. *Matter of Y-K-W-*, 9 I. & N. Dec. 176, 176–77 (A.G. 1961).

determine what constitutes a “bona fide family relationship” in an adoptive family.⁸³ The AG demonstrated through existing case law that the statutory phrase “adopting parent or parents” is susceptible to multiple interpretations and then looked to the Legislative history that emphasized the importance of keeping families together.⁸⁴ The AG concluded that the statutory requirement is met if only one of the two adoptive parents have satisfied the custody and residency requirements.⁸⁵ Because this interpretation was at odds with Legislative history and the precedential case, *Matter of C-F-L*,⁸⁶ the AG reversed the BIA holding.

The fact that the AG did not self-refer these cases is important: With self-certification, AGs can use cherry-picked cases to drive policy changes.⁸⁷ However, in the vast majority of cases between 1940 and 2001, the cases were referred to the AG from the BIA for reasons neutral to the AG: a dissenting opinion to consider, a statutory basis enumerated in the regulation, or because of a question of difficulty or other issue needing resolution.⁸⁸

In the rare instances when the AG certified a case to himself during this period, all but one decision expanded the rights of the respondents by reversing or vacating the BIA decision below.⁸⁹ One other case the AG self-certified before 9/11 reviewed two cases that presented the same question. The AG re-examined the principles and analyses of each case to resolve

83. *Id.*

84. *Id.* at 178–79.

85. *Id.* at 180.

86. *Id.*

87. Self-certification “conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome.” Taylor, *supra* note 76, at 19.

88. *E.g.*, *Matter of J-*, 2 I. & N. Dec. 545, 551 (A.G. 1947) (“As a question of difficulty is involved, the [BIA] certifies its decision and order to the Attorney General for review.”); In the *Matter of G-*, 2 I. & N. Dec. 700, 702 (A.G. 1946) (“As the order involves the exercise of the seventh proviso . . . in accordance with section 90.12, title 8, C.F.R., the [BIA] refers the case to the Attorney General for review of its decision.”); In the *Matter of S-*, 2 I. & N. Dec. 588, 592 (A.G. 1946) (“It is further directed . . . this case be certified to the Attorney General for review of the [BIA’s] decision on the ground that a dissent has been recorded.”).

89. *Matter of P-*, 9 I. & N. Dec. 293, 295 (A.G. 1961) (holding that “the court’s recommendation against deportation [at respondent’s conviction] satisfied the statutory requirement” in section 24a(b) of the Act); *Matter of L-R-*, 7 I. & N. Dec. 318, 322 (A.G. 1957) (stating that the respondent’s conviction was not final because the sentence was suspended and holding that a conviction lacking in finality cannot support an order of deportation); *Matter of B-*, 6 I. & N. Dec. 713, 722 (A.G. 1955) (concluding that granting the suspension of deportation allows Congress to review his decision pursuant to § 244 of the Act, which if approved, will allow the respondent to become a permanent resident).

inconsistencies and reframe future analysis by the BIA, AGs, and the courts.⁹⁰

Longstanding precedent, whether of case history or statutory interpretation, was typically central to the legal analysis of AGs across administrations, as was respect for the legal analysis and decisions of past AGs—even across party lines.⁹¹ Where a precedential decision was overruled, the AG generally relied on Congressional intent and *stare decisis* to uphold the rights of the respondent.⁹² All in all, the first period of case certification, from 1940 to 2001, demonstrates an institutional desire to follow precedent, individually assess cases, and clarify extant laws and policies.

2. *The Nature of Case Certification: 9/11 to 2017*

Following the 9/11 terrorist attacks on the United States, there was a major shift in focus at a time of heightened security risk.⁹³ As a result, the Administration's focus shifted to areas such as aggravated felonies⁹⁴ and national security.⁹⁵

90. *Matter of S- & B-C-*, 9 I. & N. Dec. 436, 444 (A.G. 1961) (addressing the issue “whether misrepresentation by an alien in connection with the procurement of a visa or other documentation necessarily excludes him from admission to the United States”).

91. “A contemporaneous, uniform, and long-continued construction of a statute by the department of the Government charged with its administration, under which rights have been determined and adjusted, is not to be disturbed in the absence of compelling reasons.” In the *Matter of V-*, 6 I. & N. Dec. 1, 8 (A.G. 1954) (quoting AG Cummings, 39 Op. Att’y Gen. 194, 196 (1938)). *See, e.g.*, *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576, 590 (A.G. 1967) (“I do not feel that the court’s statement in *Burr* . . . requires reconsideration of the Attorney General’s carefully considered ruling in *Matter of G-*.”); *Matter of K-W-S-*, 9 I. & N. Dec. at 409 (“[T]he statutory language makes it clear that the underlying intent of the legislation was to preserve the family unit upon immigration to the United States.”) (emphasis omitted); In the *Matter of N-K-D-*, 4 I. & N. Dec. 388, 391 (A.G. 1951) (“These principles require extreme caution in their application, since, in the final analysis what is sought is the probable intent on the part of the legislature.”).

92. *E.g.*, *Matter of Y-K-W-*, 9 I. & N. Dec. 176, 176–80 (A.G. 1961) (reviewing and analyzing federal court cases and Congressional history to determine the instant case and overrule *Matter of C-F-L-*); *see also* In the *Matter of P-*, 4 I. & N. Dec. 610, 614 (A.G. 1952) (“A plain congressional purpose in providing preferential status for entry of immigrants closely related to American citizens was to facilitate and foster the maintenance of families, such as here involved.”).

93. “[I]n light of the terrorist attacks of September 11, 2001, there is increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process.” *Gonzales*, *supra* note 22, at 879.

94. *See* In re *Y-L-*, 23 I. & N. Dec. 270, 273 (A.G. 2002) (certifying the case to himself as AG to address issues of crime under the Administration policy).

95. *See* In re *D-J-*, 23 I. & N. Dec. 572, 574 (A.G. 2003) (considering a case referred to

With that change in focus came a frequently referenced Opinion from the Office of Legal Counsel (OLC) that concluded that the AG has de novo scope of review in all certified cases—as well as the ability to bring in new evidence at the level of certification review.⁹⁶ AG Ashcroft then inserted this opinion into most of his certified case decisions during the Bush Administration—as a footnote in his first citation, and then as substantial paragraphs in later cases—justifying the AG’s de novo scope of review of factual findings.⁹⁷ This new emphasis on the AG power of de novo review stands in stark contrast to that of previous administrations’ AGs before 9/11, who took the more traditional position that the hearing-level judge is the finder of fact.⁹⁸ Yet when addressing his 2002 decision to narrow the BIA scope of review for issues of fact from de novo to clear error, AG Ashcroft wrote that “[d]e novo review of factual findings is especially inappropriate in the immigration court context.”⁹⁹ He emphasized that even courts of appeals do not disturb factual findings of trial courts unless they are clearly erroneous,¹⁰⁰ although he did not similarly constrain the AG’s scope, maintaining de novo review for facts.

Post-9/11, the Bush Administration AGs embraced the certification power, analyzing criminal convictions and whether such personal tragedies as forced sterilization, female genitalia mutilation (FGM) or domestic violence

the AG by the Under Secretary for Border and Transportation Security because of national security concerns).

96. 12 Op. O.L.C. 1, 3 (A.G. 1988). The AG himself, responding to a suggestion from *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), concluded that section 1253(a) vests power in the AG. He further explained that because the regulations do not expressly restrict these powers, the AG retains the authority delegated to the IJs, including the power to make findings of fact. *Id.* at 1–2.

97. *See, e.g.*, *In re Y-L-*, 23 I. & N. Dec. at 270 n.1; *In re Jean*, 23 I. & N. Dec. 373, 374 n.2 (A.G. 2002); *In re D-J-*, 23 I. & N. Dec. at 575.

98. 8 U.S.C. § 1229a(b)(1) (2000). As one example, the AG deflected certifications that were based on questions of fact in *Matter of R-E-*, 9 I. & N. Dec. 720, 741 (A.G. 1962) (holding that the BIA is usually not the appropriate reviewer or judge of the facts of a case). Although the BIA had this same de novo scope of review at the time the Office of Legal Counsel (OLC) issued this opinion, the BIA’s standard of review for findings of fact and evidence review was changed to the “clearly erroneous” standard in 2002. 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002). The AG’s scope has not been revisited since 2002; it is still understood to be de novo review for questions of both fact and law. *See Matter of Castro-Tum*, 27 I. & N. Dec. 271, 281 (A.G. 2018) (citing *Matter of J-F-F-*, 23 I. & N. Dec. 912, 913 (A.G. 2006)).

99. Ashcroft *supra* note 13, at 1993.

100. Because of the trial-setting of immigration courts, IJs are uniquely positioned to directly question the respondent, fill in testimonial gaps, and inquire about perceived contradictions. *Id.*

qualified as persecution or torture.¹⁰¹ Since leaving office, AG Gonzales has written extensively about the potential for Executive Branch policymaking through certification, endorsing the benefits of working around the administrative rulemaking “strictures of the Administrative Procedure Act.”¹⁰²

C. Certification in the Trump Administration

The Trump Administration uses case certification in a profoundly different way, seemingly choosing cases through which to drive policy change rather than responding to cases of first impression or requests for policy and interpretive guidance, as had previous administrations. AGs under the Trump Administration also have made frequent use of this tool, with AG Sessions certifying eight cases to himself in his twenty-one months in office.¹⁰³

The first case AG Sessions certified to himself foreshadowed his approach to docket-management tools and signaled this administration’s prioritization of non-citizen removal over pathways to legal residency.¹⁰⁴ In *Matter of E-F-H-L*,¹⁰⁵ the BIA granted administrative closure to a respondent in removal proceedings who became eligible to apply for lawful permanent resident status.¹⁰⁶ Administrative closure allowed IJs to put cases on administrative hold while petitioners completed other administrative processes pending with USCIS, such as visa applications.¹⁰⁷ Therefore, using administrative closure

101. See Gonzales, *supra* note 22, at 847 (affirming that the certification process allows the AG to set new standards for the DOJ, overturn BIA precedent, assert authority over the BIA, “and effect profound changes in legal doctrine”).

102. *Id.* at 898 (asserting that the certification process creates a path to create legal solutions without having to resort to the more time-consuming rulemaking process under the APA); see also *id.* at 920 (highlighting that this process of referral and review of cases provides an opportunity to create binding immigration policy on all IJs and BIA members).

103. In his twenty-one months in office, AG Sessions certified eight cases to himself, fully reviewing and deciding five of them. See *Matter of S-O-G-*, 27 I. & N. Dec. 462, 462 (A.G. 2018); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 406 (A.G. 2018); *Matter of Castro-Tum*, 27 I. & N. Dec. 271, 272 (A.G. 2018); *Matter of A-B-*, 27 I. & N. Dec. 316, 346 (A.G. 2018); *Matter of E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018). For the cases AG Sessions certified and did not decide, see also *Matter of M-S-*, 27 I. & N. Dec. 476, 476 (A.G. 2018); *Matter of Daniel Girmai Negusie*, 27 I. & N. Dec. 481, 481 (A.G. 2018); *Matter of L-E-A-*, I. & N. Dec. 494, 494 (A.G. 2018).

104. *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018).

105. *Matter of E-F-H-L-*, 26 I. & N. Dec. 324 (BIA 2014) (citing 8 C.F.R. § 1240.11(c)(3) (2014)).

106. *Matter of E-F-H-L-*, 27 I. & N. Dec. at 226.

107. Paul W. Schmidt, *Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in our Captive, Dysfunctional U.S. Immigration Courts!*, AILA Doc. No.

often eliminated needless re-calendarings during the pendency of the other proceedings, as well as the need for re-calendarings when the outcome of the pending case made the removal case moot.¹⁰⁸ Departing from decades of precedent, upon self-certification, AG Sessions ended the respondent's administrative closure status and ordered that the case be placed back on the IJ's active docket, opening the respondent to possible removal during the pendency of his application for legal status.¹⁰⁹ This was just the first of AG Sessions' decisions that narrowed and eliminated avenues of protection for non-citizens and required re-docketing of many cases.¹¹⁰

A DOJ-commissioned study recommended administrative closure as one useful tool that could be further utilized to speed up processing of removal cases.¹¹¹ Nevertheless, the AG held in *Matter of Castro-Tum*¹¹² that IJs and the BIA generally lack the authority to administratively close cases—an authorization the AG could uphold in case decisions or provide through regulation. Similarly, AG Sessions targeted and attempted to foreclose the IJs' ability to use continuances and termination in two other certified cases.¹¹³

The directives set forth in these three certified cases curtailing administrative closure, continuance, and termination as docket-management tools have deep implications for immigration courts.¹¹⁴ These holdings not only constrain IJs from managing their caseloads but also allow for the potential re-

1805043, AM. IMMIGR. LAWS. ASS'N (May 4, 2018), <https://www.aila.org/infonet/former-chairman-of-the-bia-paul-w-schmidts-speech> (listing examples of pending cases that have traditionally justified administratively closing removal cases).

108. *Administrative Closure Post Castro-Tum: Practice Advisory*, AM. IMMIGR. COUNCIL, ACLU (June 14, 2018) [hereinafter *Administrative Closure*].

109. *Id.*; Jeffrey S. Chase, *Mar. 10: The AG's Strange Decision in Matter of E-F-H-L*, OPINIONS/ANALYSIS ON IMMIGR. L., <https://www.jeffreyschase.com/blog/2018/3/10/the-ag-s-strange-decision-in-matter-of-e-f-h-l> (last visited Oct. 19, 2019).

110. *Matter of S-O-G-*, 27 I. & N. Dec. 462, 468 (A.G. 2018) (holding that termination may only be used for the reasons specified in regulations 8 C.F.R. §§ 1239.2(c), (f), 1240.12(c) (2018)); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405, 418–19 (A.G. 2018) (holding that continuation may only be implemented “for good cause,” but then narrowly defining “good cause,” even though the regulation, 8 C.F.R. § 1003.29, does not so limit its usage).

111. *See Policy Brief: Recommendations from Independent Study of Immigration Courts Contradict DOJ Policy Changes*, AILA Doc. No. 18042303, AILA (Apr. 23, 2018) <https://www.aila.org/File/DownloadEmbeddedFile/75729>.

112. 27 I. & N. Dec. 271, 292 (A.G. 2018).

113. *Matter of S-O-G-*, 27 I. & N. Dec. 462 (termination); *Matter of L-A-B-R-*, 27 I. & N. Dec. 405 (continuances).

114. Daniel M. Kowalski, *Senators Raise Concerns Over Castro-Tum, Recalendarings*, LEXIS NEXUS LEGAL NEWS ROOM: IMMIGR. L. (Sept. 13, 2018), <https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/senators-raise-concerns-over-castro-tum-recalendarings>.

calendaring of hundreds of thousands of cases, further deepening the backlog.¹¹⁵ Another impact of these affirmative actions is to close down avenues for relief and protection, raising serious issues of due process for non-citizens.

Most recently, AG Barr revived a proposed regulation from 2008 that, *inter alia*, greatly expands the AG's certification power—and, by extension, his power to create binding immigration law.¹¹⁶ The G. W. Bush Administration proposed this regulation, which went through the notice-and-comment process but was never finalized.¹¹⁷ The regulation, having been previously proposed, could now be made final with no notice to the public nor opportunity for those affected to weigh in.¹¹⁸

A single line in the regulation grants the AG power to designate any currently nonprecedential BIA case as precedential, greatly expanding the certification powers of the AG.¹¹⁹ Previously, only the BIA, through majority vote of all its permanent members, could elect to make a case precedential and therefore binding.¹²⁰ Although this new regulation provides further guidance as to which cases should be made precedent through BIA election, the regulation does not specify any criteria the AG must consider in making a case precedential.¹²¹

For perspective on the power of the regulation, consider that the BIA designates only about twenty-nine cases as precedential each year but decides

115. *Id.*

116. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 31,463 (July 2, 2019).

117. Suzanne Monyak, *Revived Rule Ups Barr's Power to Shape Immigration Law*, LAW 360 (July 1, 2019), <https://www.law360.com/articles/1174543/revived-rule-ups-barr-s-power-to-shape-immigration-law> (explaining that “progress on the rules stalled as a new administration took over, leaving the draft regulation dormant for more than a decade”).

118. *Id.*

119. “Precedent Decisions. *Selected decisions . . . of the Attorney General . . .* will be published and serve as precedents in all proceedings involving the same issue or issues.” 84 Fed. Reg. at 31,470 (emphasis added).

120. 8 C.F.R. § 1003.1(g) (1958).

121. 84 Fed. Reg. at 31,470 (establishing amended § 1003.1(g)(3), which lists the following as issues for the BIA to consider when designating cases as precedential: “(i) Whether the case involves a substantial issue of first impression; (ii) Whether the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases; (iii) Whether the issuance of a precedent decision is needed because the decision announces a new rule of law, or modifies, clarifies, or distinguishes a rule of law or prior precedent; (iv) Whether the case involves a conflict in decisions by immigration judges, the [BIA], or the federal courts; (v) Whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations; and (vi) Whether the case warrants publication in light of other factors that give it general public interest.”).

more than 30,000 cases annually, all of which the AG may now choose from to make binding law or to overturn through self-certification.¹²² This ability, combined with de novo review of facts and law, gives the AG expansive, unilateral adjudicative power over individual claimants—with national jurisdiction—that no other judge or justice in the United States possesses.¹²³

IV. THE *ACCARDI* DOCTRINE AS A CAUTIONARY TALE

At its best, the certification process promotes consistency and predictability in agency interpretation and adjudication.¹²⁴ At its worst, an AG can unilaterally and retroactively change nationwide precedential law with no procedural protections for litigants and no input from affected parties.¹²⁵ One example is *Accardi v. Shaughnessy*.¹²⁶ In 1952, Petitioner Accardi appealed to the BIA for review of his deportation order. *Before* a decision was made in his appeal, the AG distributed to the members of the BIA a list of one hundred “unsavory characters” the AG designated for deportation.¹²⁷ Accardi was on the list and appealed his case to the Supreme Court, arguing he did not have a chance for a fair adjudication because the AG pre-determined his case before the BIA decided it.¹²⁸ In *Accardi*, the Supreme Court agreed that if the AG had pre-determined his case, Accardi did not have a chance for a fair adjudication and the pre-determination violated his due process rights.¹²⁹

In 2018, the AG directed the disposition of the remand of *Castro-Tum* by replacing the original IJ with a substitute the AG selected and flew in to adjudicate and dispose of the case as directed by the AG.¹³⁰ The AG then further removed dozens of cases from the same IJ’s docket to prevent the cases from being disposed against the AG’s wishes.¹³¹ It is not uncommon for a

122. Monyak, *supra* note 117.

123. The DOJ is also drafting regulations to further expand the BIA cases that the AG could self-certify, “including those that have not been appealed as well as those that are still pending before the [BIA].” *Id.*

124. See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 458 (2007) (discussing the widespread acceptance of administrative agency review by agency heads).

125. Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1770 (2010).

126. 347 U.S. 260 (1954).

127. *Id.* at 261–62.

128. *Id.*

129. *Id.* at 268.

130. See *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAI7*, AILA Doc. NO. 18080801, AILA (Aug. 8, 2018), <https://www.aila.org/File/DownloadEmbeddedFile/76937> (discussing AG Sessions replacing the IJ for *Castro-Tum*).

131. *Id.*

judge to direct that a remand be consistent with his ruling or to decree that the remand must be with a different judge (any judge other than the original judge, rather than a specific judge on remand). However, in this case and those the AG removed from the same IJ's docket, if a replacement judge was hand-selected to deliver the decision that the AG dictated, thus predetermining the disposition, the situation is not dissimilar to the AG's impermissible actions in *Accardi*, where the AG signaled the outcome he wanted.¹³²

V. PROCEDURAL SAFEGUARDS, CHECKS, AND BALANCES

“No person shall be deprived of . . . liberty . . . without due process of law”

The AG certification process is unconstrained by Legislative review and has the potential for due process violations, especially when the primary goal of the AG is to advance administration policy, rather than uphold the rights of respondents.¹³³ The Courts of Appeals and Supreme Court can overrule an AG decision, but the INA strictly limits which sections allow judicial review.¹³⁴ “Congress should restore judicial review of the political decisions of agency leadership” to provide oversight that agencies stay within the limits they were granted by Congress.¹³⁵

A. Administrative Law Structures

At first glance, there is nothing unusual about an agency head issuing decisions to interpret and frame relevant law in a manner consistent with Executive policy.¹³⁶ Administrative law is commonly adjudicated from within an agency precisely because the agency head is a policymaker who can oversee adjudications and ensure that the policies of the agency are consistently applied.¹³⁷ A similar structure is found in the Federal Trade Commission (FTC) and the U.S. Patent and Trademark Office (USPTO), among many

132. The AG, by stepping into the process and directing the “front-end screening” process of the legislation, is usurping congressional power, whereas the Executive Branch traditionally exercised influence more on the “back end,” through enforcement. Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173, 183 (2015).

133. Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 131 (2017) (arguing that the AG's use of the case referral process for political ends occurs without the Legislative checks and balances that impose some accountability on Presidential actions).

134. *Judicial review of orders of removal*, 8 U.S.C. § 1252(a)(1)–(3) (2018).

135. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 56 GEO. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348681.

136. *2010 ABA Proposal*, *supra* note 62, at 6–12.

137. Trice, *supra* note 125, at 1770.

others.¹³⁸ However, what distinguishes the immigration court system within the DOJ from the other administrative agency models is that the latter operates under the APA with protections for adjudicatory independence, whereas the immigration courts are not under the APA and do not have such protections.¹³⁹ Without protections and procedural safeguards—not only to promote decisional independence of the judges but also to protect against overreach and abuse of power—independence is optional.

Although the models vary between agencies, each one has an in-agency review process, the decisions of which can be appealed to the appropriate court of appeals circuit or, in the case of the USPTO, to its own special appeals court.¹⁴⁰ For example, the Occupational Safety and Health Administration (OSHA) Act employs a split-enforcement model to insulate the rule-making and enforcement functions of OSHA (within the DOL) from the adjudicatory functions of the independent Occupational Safety and Health Review Commission.¹⁴¹ These parallel agencies were created to provide an extra amount of independence to the adjudicators under the protections and strictures of the APA.¹⁴² In yet another model, adjudicators are housed within specialized, subject matter-based Legislative courts established through acts of Congress.¹⁴³

Because Article I of the U.S. Constitution authorizes the legislature to create such courts, these Legislative tribunals are commonly referred to as Article I courts.¹⁴⁴ The U.S. Tax Court and the U.S. Court of Appeals for Veterans Claims are two examples of Article I tribunals that are each completely

138. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMM'N (Apr. 2019), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>; see also *Patent Trial & Appeal Board*, U.S. PATENT & TRADEMARK OFF., <https://www.uspto.gov/patents-application-process/patenttrialandappealboard> (last modified Oct. 28, 2019).

139. See *Administrative Law Judges*, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/> [hereinafter *Administrative*].

140. See, e.g., *Administrative Appeals*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/oip/page/file/1122656/download> (last visited Oct. 19, 2019) (explaining the administrative appeals process for Freedom of Information Act requests).

141. See generally *The Split-Enforcement Model for Agency Adjudication*, ADMIN. CONFERENCE OF THE U.S. (adopted Dec. 4, 1986), at 1 [hereinafter *Split-Enforcement Model*] (explaining the goals and challenges of split-enforcement models such as those developed from the Occupational Safety and Health Act of 1970 and the Federal Mine Safety and Health Amendments Act of 1977).

142. *2010 ABA Proposal*, *supra* note 62, at 6-12-6-13; *Split-Enforcement Model*, *supra* note 141, at 1-2.

143. *Article I Tribunal*, BALLOTPEdia, https://ballotpedia.org/Article_I_tribunal (last visited Oct. 19, 2019).

144. *Id.*

independent from the agencies who otherwise make and enforce the policies in each of these administrative areas.¹⁴⁵ In each case, agency or Article I adjudicators benefit from APA protections that IJs do not have.¹⁴⁶

B. Step One: Oversight and Safeguards for Certification

With the framework of the federal government as a guide, Congress passed the APA to provide internal checks and balances and guard against the potential abuse of power in administrative proceedings.¹⁴⁷ Yet, the current immigration system is at odds with those very safeguards, operating counter to the goals of both the APA and the Constitution.¹⁴⁸ Because the AG is the head law enforcement officer tasked with implementing the policies of the President, the position is inherently at odds with the responsibilities of an impartial, neutral arbiter and head of the IJs and BIA.¹⁴⁹

Immigration courts have reached this point of crisis through the unique combination of their untenable placement within the DOJ and the extreme ends to which the certification process has been put. By intentionally using the certification process for policy advancement,¹⁵⁰ to issue directives to adjudicators,¹⁵¹ and to restrict the rights of non-citizens,¹⁵² the AGs in the Trump Administration have increasingly destabilized the immigration system by undermining its structural integrity through case certification.

Backlogs, delays in adjudication, changing administration priorities, AG-issued directives, and quotas shaping the management of IJ and BIA dockets have stretched the limits of today's immigration court system, with calls for reform coming from all interested parties. Additionally, the court system must be overhauled because of the lack of both fundamental fairness and due process—and in order to address the extreme case backlog. Most plans

145. *Id.*

146. *See Administrative Closure*, *supra* note 108. *See generally* Vanessa K. Burrows, *Administrative Law Judges: An Overview*, CONG. RES. SERV. 10–11 (Apr. 13, 2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf> (outlining the different roles of ALJs within agencies and distinctions between AJs, such as IJs, and ALJs).

147. APA, 5 U.S.C. § 554 (2018).

148. *Hearings* (statement of Judge Tabaddor), *supra* note 4, at 2–4.

149. *Id.*

150. *See Matter of A-B-*, 27 I. & N. Dec. 316 (2018) (expanding the holding beyond the facts of the domestic violence case to emphasize that petitioners fleeing gang violence, like domestic violence victims, usually will not be able to prove a nexus to a Particular Social Group to qualify for asylum).

151. *See Gonzales*, *supra* note 22, at 847.

152. *See Matter of M-S-*, 27 I. & N. Dec. 509 (2019) (holding that a non-citizen may be denied bond and detained indefinitely while removal proceedings are pending).

proposed to reform this system highlight the importance of removing the immigration courts from the DOJ, but none specifically target the regulation that grants referral of cases to the AG for review.

Because regulations must lie within the grant of power in a statute from Congress,¹⁵³ the Legislative Branch should enact a statute limiting the certification powers by (1) conferring a clear error scope of review for questions of fact, (2) assuring due process rights for respondents through more restrictive safeguards, and (3) providing procedural oversight of the certification process. This would allow Congress to take back some of the vast authority it has given the AG, while simultaneously providing stability and a greater sense of decisional independence to the immigration court and BIA. Additionally, Congress should remove the AG's power to direct the BIA to certify cases to the AG and require that a panel of at least two BIA members refer cases to the AG, removing the power to self-certify and case shop.

Such safeguards are important because they would require a more deliberative process for the AG as agency head, without eliminating certification powers that permit agency oversight and adjudication by the AG.

C. Step Two: *ALJs and Transforming the Immigration Courts*

There is increasing pressure from the NAIJ, the Federal Bar Association, American Immigration Lawyers Association (AILA), the individual practitioners, members of Congress, and other interested parties to transform the current immigration courts into Article I courts.¹⁵⁴ Existing proposals for immigration court reform include Congress establishing Article I immigration courts that would operate as independent agencies,¹⁵⁵ trial-level hearings,¹⁵⁶ or a combination of trial and appellate level review.¹⁵⁷ Many argue

153. ANDREW F. POPPER ET AL., *ADMINISTRATIVE LAW, A CONTEMPORARY APPROACH* 493–94 (3d ed., 2009).

154. *E.g.*, Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 *DUKE L.J.* 1635 (2010).

155. See *NAIJ Blueprint for Immigration Court Reform 2013*, NAT'L ASS'N OF IMMIGR. JUDGES (NAIJ), at 9 (2013) [hereinafter *NAIJ Blueprint*] (proposing that immigration courts be reconstituted as an Article I Court within an independent agency, under the supervisory oversight of either the Department of State (DOS) or the DOL but not addressing any reforms for the BIA); Maurice A. Roberts, *Part II: Judicial, Administrative, and Legislative Aspects, Proposed: A Specialized Statutory Immigration Court*, 18 *S.D. L. Rev.* 183, 199 (1980) [hereinafter Roberts, *Proposed*] (suggesting that a “new independent statutory agency” could be established within DOJ to house both trial and appellate level review tribunals).

156. *NAIJ Blueprint*, *supra* note 155, at 9.

157. Roberts, *Proposed*, *supra* note 155, at 200 (arguing that Congress could create a new Article I court without much disruption, to house both trial and appellate levels).

for IJs and the BIA members to be established as ALJs.¹⁵⁸ Some proposals offer a single level of appellate review,¹⁵⁹ while others call for a new Article III court to further remove adjudication from the Executive Branch.¹⁶⁰

The incremental reforms of recent administrations have not addressed the structural flaws that undergird the real problems.¹⁶¹ Regardless of the court model, it is essential to establish adjudicatory independence for all judges at the trial and appellate levels. This should be done by converting the current positions of immigration judges and BIA members into full-fledged ALJs. Additionally, EOIR must also be removed from DOJ oversight and control to reconstitute it as a two-tier Article I immigration court with both trial and appellate level review with the final right of appeal to the federal courts of appeals.¹⁶²

CONCLUSION

Human rights and liberties must be safeguarded against abuse of power and Executive overreach.¹⁶³ Congress has allowed the AG to aggregate tremendous power through AG oversight and control of the immigration court system and the AG's ability to make binding immigration law through unbridled case certification. It is imperative that Congress act to restructure the immigration court and BIA outside of the DOJ and control of the AG, reconstitute judges and BIA members as ALJs, and institute limits to the AG certification process to uphold the principles upon which our democracy was founded. Only when the system promotes independent adjudication and provides for consistent treatment in all cases will immigration laws be effective, and the rights of citizens and non-citizens be equally protected.

158. See, e.g., Legomsky, *supra* note 154, at 1686; Roberts, *Proposed*, *supra* note 155, at 198–99.

159. See Roberts, *Proposed*, *supra* note 155, at 202 (proposing only one level of appellate review).

160. See, e.g., Legomsky, *supra* note 154, at 1636 (recommending that new courts be staffed with Article III district court and courts of appeals judges in two-year rotations).

161. See, e.g., *Strengthening and Reforming America's Immigration Court System: Hearing before the S. Comm. on the Judiciary, Subcomm. on Border and Immigr.*, 115th Cong. (2018) (statement of Kip T. Bollin).

162. See *Hearings* (statement of Judge Tabaddor), *supra* note 4, at 2–6 (stating that immigration courts need additional technological, financial, and staffing support for adjudicators to manage their courtrooms and cases sufficiently); see also *Non-ALJ Adjudicators*, *supra* note 62.

163. *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.C. Cir. 2018).