A Supreme Court unto Himself: The Disastrous Effects of the Attorney General's Self-Certification Power on Immigration

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Introduction

Rashed Chowdhury fled to the United States in 1996, and was granted asylum in 2006.[1] He and his family have lived in the United States for the past 24 years.[2] Chowdhury fled from his position as a top-level Bangladeshi diplomat in Brazil when the Prime Minister of Bangladesh revoked immunity for participants in a coup that occurred in 1975.[3] Chowdhury was tried in absentia for crimes related to the coup, and sentenced to death in Bangladesh.[4] Chowdhury claimed, and the immigration judge who oversaw his case believed, that he had no role in the killings, and he was granted asylum.[5] This decision was upheld by the Board of Immigration Appeals (BIA) in 2006.[6] Yet, Attorney General William Barr recently referred this 14-year-old case to himself.[7] Because of the Attorney General's arbitrary decision to self-certify this case to himself, Chowdhury and his family are now at risk of being sent back to Bangladesh when their case should have been considered

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1. Betsy Woodruff Swan, *He Thought He Had Asylum. Now, He Could Face a Death Sentence.*, POLITICO (July 24, 2020), https://www.politico.com/news/2020/07/24/rashed-chowdhury-asylum-death-sentence-381075 [https://perma.cc/LN8B-47TK].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Matter of A-M-R-C-, 28 I&N Dec. 7, 7 (A.G. 2020).

closed long ago. This action raises questions of finality for others who have been granted asylum: Are they forever at risk of having their grants of asylum revoked?

The Attorney General has the power under 8 U.S.C. § 1103(g)(2) and 8 C.F.R. § 1003.1(h)(1) to overturn BIA decisions, as well as circuit court precedent, on nearly any immigration case they see fit.[8] This expansive power was given to the Attorney General long ago, when most immigration functions were housed under the Department of Justice.[9] As explained by legal theorists (and previous Attorneys General), the rationale for this expansive power is to allow policy makers to ensure uniform application of legal rules.[10] However, recent cases such as *L-E-A-*[11] and *A-M-R-C-*[12] show that these decisions do not result in clarity and uniformity, and instead result in confusion, a lack of finality, and circuit splits on important issues.

In August 2011, the Department of Homeland Security apprehended a removable Mexican national present in the United States who asked for asylum based on harassment by a gang, La Familia Michoacana.[13] The Mexican government appeared unable to control La Familia Michoacana,[14] and the Mexican national (hereinafter "L-E-A-") applied for asylum under 8 U.S.C. § 1158, claiming he had a "well-founded fear of persecution on account of . . . membership in a particular social group," comprising of his father's immediate family.[15] The immigration judge and the BIA denied relief, finding that L-E-A- was not eligible for asylum based

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8. *See, e.g.*, Matter of Silva-Trevino (*Silva-Trevino I*), 24 I&N Dec. 687 (A.G. 2008) (showing the Attorney General's broad power to overturn rulings on immigration cases); Matter of Silva-Trevino (*Silva-Trevino II*), 26 I&N Dec. 550 (A.G. 2015) (same).

9. *See* DAVID WEISSBRODT, LAURA DANIELSON & HOWARD SAM MYERS, III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 103 (7th ed. 2017).

10. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 877 (2016); Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr. & Jeffrey S. Lubbers, *Report for Recommendation 92-7: The Federal Administrative Judiciary*, 1992 ACUS 777, 780 (1992).

11. Matter of L-E-A-, 27 I&N Dec. 581, 596–97 (A.G. 2019) (upsetting settled precedent on whether families constitute "particular social groups").

12. Matter of A-M-R-C, 28 I&N Dec. 7, 7 (A.G. 2020) (calling for re-litigation of a fourteen-year-old case).

13. Matter of L-E-A-, 27 I&N Dec. 581, 583 (A.G. 2019).

14. *Id. Cf.* Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014) (finding, in a separate case, that persecution "implies some connection to government action or inaction") (quoting Ivanov v. Holder, 736 F.3d 5, 12 (1st Cir. 2013)).

15. 8 U.S.C. § 1101(a)(42)(A) (defining "refugee," which one must be in order to be eligible for asylum under 8 U.S.C. § 1158(b)(1)(A)).

on the criminal activity he experienced.[16] The BIA based their decision on La Familia Michoacana's motivation for harming respondent—they wished to increase profits by selling drugs.[17] The court reasoned the gang's motivation was not based on the immutable characteristic of L-E-A-'s family membership.[18] Nonetheless, the BIA specifically found that members of L-E-A-'s father's immediate family *were* a particular social group, an important legal distinction for others seeking asylum within the United States.[19]

Then, Attorney General Barr self-certified the case to himself, and overturned the BIA's decision.[20] He used his power to review the BIA decision, focusing on the specific issue of whether a family could be a "particular social group."[21] He wrote, "unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act] for purposes of asylum."[22] This single sentence upset years of precedent within the circuit courts and the BIA itself.[23] Before this, there was a nearly unanimous opinion that families did make up a social group, and immigration judges, immigration attorneys, and applicants had been moving forward on cases with this in mind.

This case shows the absurdity of the current regime, where a single individual is able to change precedent established by individuals with more experience and expertise, creating confusion and due process violations. The Attorney General, an individual who is appointed with little to no consideration of their experience in immigration,[24] can single-handedly decide to change settled

16. Matter of L-E-A-, 27 I&N Dec. 581, 583–84 (A.G. 2019).

17. *Id.* at 584.

18. Matter of L-E-A-, 27 I&N Dec. 40, 43–47 (B.I.A. 2017).

19. *Id.* at 43.

20. *See* Matter of L-E-A-, 27 I&N Dec. 581, 596–97 (A.G. 2019).

21. *Id.* at 586.

22. *Id.* at 595.

23. *See, e.g.*, Rios v. Lynch, 807 F.3d 1123, 1127 (9th Cir. 2015) (exemplifying a decision which was overturned by Attorney General Barr's ruling in Matter of L-E-A, 27 I&N Dec. 581 (A.G. 2019)); *see also, e.g.*, Lin v. Holder, 411 F. App'x 901, 903 (7th Cir. 2011); Crespin-Valladares v. Holder, 632 F.3d 117, 124–25 (4th Cir. 2011); Matter of Acosta, 19 I&N Dec. 211, 233 (B.I.A. 1985).

24. Attorney General Barr was appointed soon after the child separation policy was implemented, and news concerning this policy was still present in the headlines. Edwin Delgado, *Trump Administration Still Separating Families at Border, Advocates Say*, THE GUARDIAN (Feb. 12, 2019), https://www.theguardian.com/us-news/2019/feb/12/trump-el-paso-family-separations-migrants-

immigration policy through their interpretation of a statute in individual cases. Courts then routinely defer to this interpretation.[25] Self-certification may have once made sense when the Attorney General oversaw nearly all components of immigration law, but now immigration policy is decided by the Department of Labor, the Department of Homeland Security, the Department of State, the Department of Health and Human Services, and the Social Security Administration.[26] The argument that uniform policy can be applied by allowing a department head to override all lower decisions does not hold up under the current structure of immigration policy in the United States.

This Note's goal is to examine the Attorney General's power to self-certify cases to themself and examine the problems it raises in terms of rationale, due process violations for asylum candidates such as L-E-A-, and larger constitutional issues. Part I will examine the background of the self-certification power, the rationale behind it, and its past uses. Part II will analyze the due process and constitutional concerns at play, finding the self-certification power anomalous with the current structure of immigration law and typical adjudicatory schemes. Part III will propose judicial and congressional solutions to limit the Attorney General's power. Specifically, this Note advocates for the Court to vacate all Attorney General decisions made by Attorneys General William Barr and Matthew Whitaker because of clear bias and proposes that self-certification itself is unconstitutional.

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immigration [https://perma.cc/2FS4-WURW]. Even then, the questions Senators asked Attorney General Barr in his nomination proceedings about immigration were not about his experience with immigration matters, but instead were about his opinions on policies. *See, e.g.*, SENATOR GRASSLEY'S QUESTIONS FOR THE RECORD FOR ATTORNEY GENERAL NOMINEE WILLIAM BARR, S. HRG. 116-65, at 470 (2019) ("What is your position for defining the threshold for an initial positive finding of credible fear and the grant of asylum?"); QUESTIONS FOR THE RECORD FOR WILLIAM P. BARR SUBMITTED BY SENATOR RICHARD BLUMENTHAL, S. HRG. 116-65, at 397 (2019) ("Can you commit to me that you will never support a policy that leads to mass family separation?").

25. For example, the Eleventh Circuit cited favorably *Silva-Trevino I* in Destin v. U.S. Att'y Gen., 345 F. App'x 485, 488 (11th Cir. 2009) ("Keeping in mind [] *Silva-Trevino* . . . we approve of the BIA's decision on this issue."), as did the Eighth Circuit in Bobadilla v. Holder, 679 F.3d 1052, 1056 (8th Cir. 2012). Shortly thereafter, however, the decision was overturned by the next Attorney General in *Silva-Trevino II*, 26 I&N Dec. 550 (A.G. 2015)

26. WEISSBRODT ET AL., *supra* note 9, at 103.

I. Background

A. The Attorney General's Power to Self-Certify Cases Is Expansive

The Attorney General's power to self-certify cases allows them to pick and choose legal issues upon which they want to change the rule of law with very few limits. Immigration courts see an enormous number of cases every year, and there are set appeal procedures that non-citizens must follow.[27] The Attorney General has the power to take cases from the BIA and make a decision on the underlying issue that is binding on the BIA and immigration judges.[28]

B. Typical Explanations for Review of Administrative Law Judge Decisions Do Not Fit in the Immigration Context

Administrative law judges (ALJs), including immigration judges, are used by several different agencies,[29] and these agencies take different approaches to their ability to review their judges' decisions.[30] The typical reasons for allowing review of ALJs' decisions, such as uniformity, do not fit in the immigration context. There are other, more effective and less politically charged ways to create uniform policy.

i. Agencies Take Different Approaches to Review Authority

Immigration judges are not the only ALJs making important decisions about individuals, nor is the Attorney General the only agency head changing decisions. There are many executive agencies, nearly 2,000 ALJs, and 10,000 administrative judges and adjudicators.[31] Section 557 of the Administrative Procedure Act (APA) confers on the reviewing agency "all the powers which it would have in making the initial decision."[32] This language gives such agency heads the authority to review judgments and

27. *See* 8 C.F.R. § 1003.3 (describing the procedures to appeal an immigration judge's decision to the BIA).

28. *See* 8 U.S.C. § 1103(g)(2); 8 C.F.R. § 1003.1(h)(1).

29. *Data on Administrative Law Judges*, BALLOTPEDIA, https://ballotpedia.org/Administrative_law_judge [https://perma.cc/546C-S8JK] (listing at least twenty-seven federal agencies that employed ALJs in 2017).

30. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458 (2007).

31. BALLOTPEDIA, *supra* note 29, at *Background*.

32. 5 U.S.C. § 557(b).

substitute their own decision if it differs from the original. One reason to allow such power is to ensure "inter-decisional consistency and to maintain control over basic policy."[33] However, if uniform application of the law is the goal, agency head adjudication is not the only way to achieve it.

Different agencies take different approaches to this power of review and some, like the Social Security Administration (SSA), choose not to use it at all. The SSA has the same authority as the Attorney General to review decisions by its approximately 1,800[34] ALJs. However, the SSA chooses not to utilize this power.[35] It relies on an Appeals Council for uniformity and allows appeals to federal district courts.[36]

ii. There Are Other, More Effective, Ways to Ensure Uniformity

The BIA could, and does, serve a similar role as the SSA Appeals Council. It reviews immigration judge decisions and ensures that the decisions are uniform across the country. The current setup allows complicated decisions to be examined by up to three individuals, all of whom are experienced attorneys, and most of whom worked as immigration judges.[37]

The Attorney General is not required to intrude upon case-by-case adjudication to ensure uniformity, and in fact, when their decisions change precedent, it can cause more confusion and less uniformity. As discussed above, the decision in *Silva-Trevino I* resulted in confusion for litigants and immigration judges.[38] The BIA also occasionally upsets precedent,[39] but they are experts in the field, more insulated from political pressure than the Attorney

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33. *See* Legomsky, *supra* note 30, at 458.

34. *Hearings and Appeals*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/DataSets/03_ALJ_Disposition_Data.html [https://perma.cc/KZU2-ZV4D].

35. *See* VERKUIL ET AL., *supra* note 10, at 797 ("The SSA-ALJ experience is the prime example of the tension between management control and decider independence. Tension has lessened primarily because of the strength of the ALJs. The political lessons of this experience are clear: management techniques are no match for claims of independence.").

36. *Appeals Process*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-appeals-ussi.htm [https://perma.cc/8AY2-SS39].

37. *Board of Immigration Appeals*, U.S. DEP'T. JUST., https://www.justice.gov/eoir/board-of-immigration-appeals-bios [https://perma.cc/534Z-TEB9] (showing sixteen of the twenty-three permanent members were once immigration judges).

38. *See supra* note 25.

39. *See, e.g.*, *In re* Adeniji, 22 I&N Dec. 1102, 1103, 1112–15 (B.I.A. 1999) (changing the rules on bond hearings from those established in Matter of Patel, 15 I&N Dec. 666, 666 (B.I.A. 1976)).

General, and decide important decisions en banc or in panels of three judges. These safeguards limit the amount of sudden changes in jurisprudence and allow for more procedural protections for litigants. The BIA is a better entity to ensure uniformity.

C. The BIA and the Attorney General Receive and Decide Cases in Very Different Ways

Immigration courts completed between 203,325 and 243,128 cases per year in Fiscal Years 2013 to 2017.[40] Of those, 26,474 to 31,277 cases per year were appealed and decided by the BIA.[41] Individual immigration judges decide matters on a case-by-case basis, using individualized facts ascertained through submitted evidence and oral hearings to determine a non-citizen's removability as well as eligibility for relief. At their hearings, immigrants are allowed to hear the case against them, and present evidence and arguments; they also have the right to be represented by an attorney, but at their own cost.[42] Individual immigration judge's decisions are not published or precedential, they apply only to the individual non-citizen sitting before them.[43] If a party decides to appeal a decision, it goes to the BIA, an administrative body made up of twenty-three adjudicators appointed by the Attorney General.[44] Members of the BIA are required to hold law degrees and have seven years of experience with litigation or administrative law,[45] most of the members were immigration judges, and all have previous experience with immigration law.[46] Decisions are typically made by a single member of the panel, but if there are novel or complex issues, decisions are heard by a panel of three judges.[47]

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40. U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK FISCAL YEAR 2017, at 10 (2017), https://www.justice.gov/eoir/page/file/1107056/download [https://perma.cc/AC6U-7QET].

41. *Id.* at 37.

42. *See* 8 U.S.C. § 1229a(b)(4)(A) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings[.]").

43. *See Immigration Law Research Guide: 3. Administrative Decisions*, UCLA HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/c.php?g=183356&p=1208993 [https://perma.cc/PT9Q-A6B40].

44. 8 C.F.R. § 1003.1(b); 8 C.F.R. § 1003.1(a); *Board of Immigration Appeals*, *supra* note 37.

45. *Appellate Immigration Judge (Board Member)*, U.S. DEP'T OF JUST., https://www.justice.gov/legal-careers/job/appellate-immigration-judge-board-member [https://perma.cc/K9AU-L8ET].

46. *Board of Immigration Appeals*, *supra* note 37.

47. 8 C.F.R. § 1003.1(e)(6).

Of the cases seen by the BIA, the Attorney General selects only a handful to review, and their choices are often seen as political. The Attorney General may review a BIA decision upon request from the BIA, Department of Homeland Security officials, or by self-certification.[48] The specific number of cases seen varies widely from Attorney General to Attorney General, and many commentators perceive a partisan tilt.[49] Janet Reno, the Attorney General under the Clinton Administration, decided only three cases in eight years, and the Attorneys General in the Obama administration, Eric Holder and Loretta Lynch, decided only four cases in eight years—including two decisions vacating previous Attorney General decisions.[50] Meanwhile, John Ashcroft, Alberto Gonzales, and Michael Mukasey, Attorneys General under George W. Bush, decided fifteen precedential decisions.[51] At the the time of this Writing, Jeff Sessions, Matthew Whitaker, and William Barr, the Attorneys General in the Trump Administration, have issued at least twenty-seven decisions in only three years.[52]

The timing and content of a decision can both be signals that an Attorney General's decision has a political tilt. *Silva-Trevino I* is a clear example of how the Attorney General's power can be seen as politically influencing the BIA based on the timing of the decision.[53] *Silva-Trevino I* was decided in 2008 after President Obama was elected, but before he was inaugurated, by President Bush's Attorney General, Michael Mukasey.[54] The timing of the decision, seen by some as an example of "midnight adjudication," made some commentators question the legitimacy of the decision.[55]

The decision itself was seen as making it more difficult for a non-citizen to argue that a conviction is not a crime involving moral

48. 8 C.F.R. § 1003.1(h)(1)(i)–(iii); *see* Matter of Leon-Orosco & Rodriguez-Colas, 19 I&N Dec. 136, 148 (A.G. 1984).

49. *See, e.g.*, Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. L. (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions [https://perma.cc/4DSG-43SJ]; David Hausman, *How Jeff Sessions Is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges [https://perma.cc/HFA8-NJZT].

50. Chase, *supra* note 49.

51. *Id.*

52. *See Precedent Decisions Listing*, U.S. DEP'T OF JUST., http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html [https://perma.cc/DG52-BW7R] (archiving cases).

53. *See* Silva-Trevino I, 24 I&N Dec. 687 (A.G. 2008).

54. *See* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18, 20 (2016).

55. *See id.* at 35.

turpitude (CIMT).[56] Several Supreme Court decisions followed, all of which prohibited an immigration judge from going beyond the categorical or modified categorical approach to assess facts beyond the record of conviction in determining what constitutes a CIMT.[57] Finally, in 2015, Attorney General Eric Holder issued *Silva-Trevino II* and entirely vacated *Silva-Trevino I*.[58]

Another example of a case that has been perceived as partisan based on its content is *Matter of A-B-*.[59] *Matter of A-B-* involved a woman from El Salvador who suffered extreme abuse from her ex-husband.[60] The BIA held that the respondent was eligible for asylum, based on its understanding that the El Salvadoran government was "unwilling or unable to protect the respondent."[61] Attorney General Sessions certified the case to himself, and overturned *Matter of A-R-C-G-*, a precedential decision issued by the BIA in 2014, which had established "married women in Guatemala who are unable to leave their relationship" as a "particular social group."[62] Attorney General Sessions' decision made it more difficult for women who were victims of domestic violence, and who could not safely return to their country, to apply for asylum. The D.C. District Court has issued a nationwide injunction on applying this decision which was upheld by the D.C. Circuit.[63]

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56. A CIMT renders a non-citizen deportable. 8 U.S.C. § 1251(a)(2)(A)(i). Attorney General Mukasey created a three-step approach for determining when a conviction constitutes a crime of moral turpitude. *Silva-Trevino I*, 24 I&N Dec. 687 at 696–704. His process involved looking at the realistic probability of someone being convicted under the statute for conduct that was not morally turpitudinous. *Id.* at 697. If a statute is divisible, Attorney General Mukasey required immigration judges to look at the record of the conviction and, if it was still unclear, to consider "any additional evidence deemed necessary or appropriate" in determining if a conviction was for a CIMT. *Id.* at 687.

57. This prohibition means an immigration judge cannot closely examine the record of conviction, but instead must make a determination on its "turpitude" by comparing the state offense of conviction to the corresponding federal offense. *See* Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); Kawashima v. Holder, 565 U.S. 478, 483 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 582 (2010); *see also* Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014).

58. *See* Silva-Trevino II, 26 I&N Dec. 550, 550 (A.G. 2015).

59. *See* Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

60. *Id.* at 320–21.

61. *Id.* at 321.

62. *See* Matter of A-R-C-G-, 27 I&N Dec. 388 (B.I.A. 2014).

63. *See* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018); Grace v. Barr, 965 F.3d 883, 887 (D.C. Cir. 2020).

D. Political Tilt—Either Actual or Perceived—Makes the Attorney General's Power of Review Especially Problematic

Political tilts are particularly concerning to attorneys and policymakers when considering the scope of the Attorney General's power; the Attorney General assumes a plenary power of review.[64] Their decisions also take nationwide effect, are always precedential, and can overturn BIA decisions, guide future decisions, and override previous decisions of Attorneys General.[65] Although the Supreme Court has held that the BIA may not be subject to political influence,[66] it is unclear how the Attorney General's power does not insert the political influence of the President into BIA decisions.

i. The BIA and Attorney General Do Not Follow Circuit Court Decisions Faithfully

Additionally, BIA decisions are appealable to circuit courts on matters of statutory construction and constitutional questions. Although agency interpretations of their statutes are accorded deference by courts,[67] circuit courts do not always agree with BIA interpretation.[68] Typically, the BIA will respect the circuit court precedent within that circuit.[69] However, the Supreme Court held in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* (*Brand X*) that a court's prior judicial construction of a statute is only controlling if the court decision explicitly stated that its construction follows from the unambiguous terms of the statute.[70] If the court does not explicitly say that their reading is based on the unambiguous language of the statute, then the agency may neglect to follow the court's construction.

Following *Brand X*, the Department of Justice has stated that the BIA and the Attorney General do not need to follow all circuit

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64. Matter of J-S-, 24 I&N Dec. 520, 531 (A.G. 2008).

65. *See, e.g.*, Silva-Trevino II, 26 I&N Dec. 550 (A.G. 2015).

66. *See* Shaughnessy v. Accardi, 349 U.S. 280 (1955); Accardi v. Shaughnessy, 347 U.S. 260 (1954); Yi v. Reno, 925 F. Supp. 320 (M.D. Pa. 1996).

67. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

68. For example, several circuit courts took a critical lens of *Silva-Trevino I*. *See* Prudencio v. Holder, 669 F.3d 472, 2012 WL 256061, at *9 (4th Cir. 2012); Sanchez Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011); Jean-Louis v. Att'y Gen. of the U.S., 582 F.3d 462, 473–74 (3d Cir. 2009).

69. *See* Matter of Olivares, 23 I&N Dec. 148 (B.I.A. 2001) (applying Fifth Circuit law); Matter of Cazares, 21 I&N Dec. 188 (B.I.A. 1996); *see also* Ladha v. INS, 215 F.3d 889, 896 (9th Cir. 2000) (holding the BIA must follow circuit court precedent).

70. 545 U.S. 967, 982–83 (2005).

court precedent in immigration cases.[71] The Department of Justice has an almost-executive veto power over circuit court decisions that do not clearly find that statutory language is unambiguous.

ii. The Attorney General Upset Circuit Court Precedent in *Matter of L-E-A-*

Matter of L-E-A- is an example of the Attorney General abruptly changing circuit court precedent. Previously, family groups were considered a "particular social group" under asylum law.[72] Persecution based on a family group would qualify someone for asylum. The BIA first addressed this issue in *Matter of Acosta* in 1985.[73] The BIA found that "kinship ties" are an immutable characteristic and form a valid particular social group.[74] This reasoning was used to determine that subclans are a particular social group.[75] Several circuit courts upheld this same reasoning.[76] With one decision, the Attorney General was able to effectively overrule several circuit court decisions and implement a different interpretation. Considering that this decision built on the reasoning in *Matter of A-B-*, which has been held to be arbitrary and capricious by the D.C. District Court,[77] it is an especially egregious example of the Attorney General's power.

II. Self-Certification Is Unnecessary and Harmful: There Are More Effective Mechanisms for the Attorney General to Implement Policy

Another common reason given for allowing Attorney General adjudication is the requirement that a new administration be able to implement new policy goals.[78] However, this argument is easily refuted. Executive officials can use notice-and-comment rulemaking to change policy.[79] Notice-and-comment rulemaking allows

71. Matter of R-A-, 24 I&N Dec. 629, 631 n.4 (A.G. 2008).

72. *See, e.g.*, Matter of C-A-, 23 I&N Dec. 951, 959 (B.I.A. 2006) ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.").

73. 19 I&N Dec. 211, 233 (B.I.A. 1985).

74. *Id.*

75. *Id.*

76. *See, e.g.*, Flores-Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015); Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Lin v. Holder, 411 F. App'x 901, 903 (7th Cir. 2011).

77. *See* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

78. Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, N.Y.U. L. REV. 1766, 1768 (Nov. 2010).

79. 5 U.S.C. § 553.

individuals and organizations to consider rules before they are implemented and allows them to provide comments that the agency must consider.[80]

Rulemaking also has the benefit of allowing agency heads to announce policy in a way that is not constrained by the facts of a particular case.[81] Decisions are announced more explicitly and therefore more clearly, and non-citizens and immigration advocates would still have legal recourse to challenge rules if they appeared arbitrary and capricious.[82]

A. The Typical Reasoning for Giving Agency Heads Interpretation Power Does Not Fit in the Immigration Context

The aforementioned policy goals—uniformity and the ability to implement policy—are both based on an understanding that one department would be responsible for an entire policy paradigm. In immigration law, this understanding does not ring true; immigration policy is split amongst several different departments:[83] the Department of Homeland Security is responsible for enforcement of immigration laws, as well as most administration of immigration benefits;[84] the Department of State handles visas;[85] the Department of Labor handles work authorizations;[86] and the Department of Justice largely only deals with immigration court and deportations.[87]

It does not make sense for the Attorney General, who is not appointed based on their immigration expertise, to retain this power as an artifact of a time when more of immigration law was housed in the Department of Justice.[88] As immigration is now housed amongst several different cabinets, it is no longer reasonable to believe that the Attorney General will be able to

80. *Id.*

81. *See* Legomsky, *supra* note 30, at 458. This ability is particularly helpful when you consider how the Attorney General framed his decision in *Matter of L-E-A-* as a way to simply clarify prior rulings, not as a way to announce a new rule. 27 I&N Dec. 581, 582 (A.G. 2019) ("Consistent with these prior decisions, I conclude that an alien's family-based group will not constitute a particular social group . . . ."). This is confusing to practitioners and immigration judges who are unsure how to approach cases with similar facts.

82. 5 U.S.C. §§ 553, 706.

83. WEISSBRODT ET AL., *supra* note 9, at 103.

84. *Id.*

85. *Id.* at 110.

86. *Id.* at 116.

87. *Id.* at 112–15.

88. *Id.* at 103.

articulate uniform, comprehensive immigration policy. Instead, the Attorney General has only a small responsibility to the immigration system, in the niche area of deportations.[89] None of the past ten Attorneys General had any previous immigration experience, and they lack the expertise needed to make nuanced adjudicatory decisions.[90] It makes far more sense to rely on the BIA to articulate decisions.

For example, the Attorney General recently made it impossible for immigration judges to administratively close cases,[91] which was permissible for decades in order to reduce burden and give flexibility in enforcement.[92] The BIA allowed this action because it saw it as an excellent docket management tool, and necessary in the immigration context for various groups of immigrants.[93] It is doubtful that the Attorney General had a nuanced grasp of what would result from limiting this power. Courts are now significantly backlogged and are unable to use a valuable resource to reduce caseload.[94] Administrative closure was likely considered by other departments in writing their own policies, and the Attorney General having the power to immediately end it results in confusion for those departments. It also harms non-citizens in proceedings as well as immigration judges. The Fourth Circuit has already ruled against the decision, finding that 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously give immigration judges and the BIA the authority to administratively close cases.[95]

B. There Are Several Due Process Rights and Constitutional Principles at Risk within the Current System

Not only does the Attorney General's ability to self-certify cases for final resolution harm policy goals, but it also violates basic

89. *Id.*

90. *Attorney General of the United States*, U.S. DEP'T OF JUST. (Mar. 5, 2020), https://www.justice.gov/ag/historical-bios [https://perma.cc/K5K5-Z2EU] (listing biographies for all past Attorneys General).

91. *See* Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).

92. *See The End of Administrative Closure: Sessions Moves to Further Strip Immigration Judges of Independence*, CLINIC LEGAL (Apr. 4, 2018), https://cliniclegal.org/resources/removal-proceedings/end-administrative-closure-sessions-moves-further-strip-immigration [https://perma.cc/S5P7-MLEH] (asserting administrative closures had been occurring since the 1980s); *see, e.g.*, Matter of W-Y-U-, 27 I&N Dec. 17 (B.I.A. 2017); Matter of Avetisyan, 25 I&N Dec. 688 (B.I.A. 2012).

93. *The End of Administrative Closure*, *supra* note 92.

94. Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J.F. 567, 577 (2020).

95. *See* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).

due process guarantees and constitutional principles. It allows a single partisan appointee to decide cases without allowing an appellant to raise defenses to the questions of law considered. This process also violates the separation of powers, as it allows an executive branch employee to overrule both Article I and Article III judges on matters of statutory interpretation. This is even more troubling because immigrants are not able to pursue constitutional rights in immigration court.

i. Adjudication by the Attorney General Erodes the Rights of Immigrants

Not only are the traditional explanations of agency head adjudication out of place in the immigration context, this review also erodes fundamental constitutional rights of immigrants. Self-certification power erodes various due process rights as well as creating dubious constitutional issues in the realm of separation of powers and nonacquiescence. These issues are magnified because immigrants are not able to pursue all constitutional rights in immigration court.[96]

a. Immigrants Are Still Entitled to Many Constitutional Protections, Including Due Process Rights

Although non-citizens are not entitled to all constitutional rights,[97] the Constitution extends many rights to all "persons" within the United States.[98] These rights include the right to be free from unreasonable search and seizure[99] as well as due process rights.[100] The Supreme Court affirmed this in *Plyler v. Doe*, where it found the Equal Protection Clause in the Fourteenth Amendment applied to non-citizen children in Texas who had been denied free primary education.[101]

The Supreme Court has established that these rights do not apply to non-citizens who are not in the United States,[102] but once

96. Superintendent, Mass. Corr. Inst. v. Hill, 472 U.S. 445, 450 (1985).

97. For example, the right to vote is limited to citizens. U.S. CONST. amend. XV, § 1 ("The right of Citizens of the United States to vote shall not be denied or abridged by the United States . . . .").

98. U.S. CONST. amend. V ("[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law[.]").

99. U.S. CONST. amend. IV. This is generally respected but has been abridged in cases of national security. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

100. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

101. 457 U.S. 202, 210 (1982).

102. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); *Zadvydas*,

a non-citizen has entered the country "the legal circumstance changes."[103] Once a non-citizen has affected entry, the Constitution applies, regardless of whether their presence is "lawful, unlawful, temporary, or permanent."[104] The Due Process Clause applies not only for criminal cases but also for cases involving deportation,[105] although there are potential differences in the extent to which protections apply.[106]

There are several due process rights that have been affirmatively acknowledged by courts. The rights encompassed by the Due Process Clause are not clearly delineated within the Constitution, but a list by Judge Henry Friendly that remains highly influential includes: the right to an unbiased tribunal, notice, opportunity to present reasons and evidence, knowledge of opposing evidence, to have a decision based solely on the evidence, access to counsel, to have a record made, and for there to be a statement of reason for the decision, to have a public hearing, and judicial review.[107]

Immigrants have certain rights to a fair trial, such as having a right to an attorney in proceedings, but only at their own costs.[108] This means many individuals appear *pro se* in immigration court.[109] The widely different success rates of immigrants represented by counsel and those that are not should raise due process concerns, particularly when children are in court without legal

533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). This has created some confusing jurisprudence involving immigrants who have been paroled into the United States but have not been determined to be admissible. *See* Leng May Ma v. Barber, 357 U.S. 185, 188–90 (1958).

103. *Zadvydas*, 533 U.S. at 693.

104. *Id.*

105. *See* Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903) (establishing that non-citizens have the right to notice of charges and an opportunity to be heard in immigration court); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

106. *Compare Zadvydas*, 533 U.S. at 693 (finding indefinite detention is a violation of due process), *with* Nielsen v. Preap, 139 S. Ct. 954, 972 (2019) (suggesting due process concerns may not be as applicable when facing an unambiguous statute), *and* Mathews v. Diaz, 426 U.S. 67 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

107. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–95 (1975).

108. *See* I.N.A. § 240(b)(4)(A).

109. *See* INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/2CEG-NDFX] (finding that only 37% of immigrants nationally secured legal representation for their removal hearings).

representation.[110] However, the courts have not found that this lack of counsel in immigration proceedings runs afoul of the Constitution.

Courts have also held that there are due process rights related to evidence that apply to immigrants in immigration courts.[111] For example, evidence that was coerced from immigrants may be suppressed in removal hearings.[112] Additionally, although hearsay evidence is allowed to be considered, the evidence must be reliable.[113] The Ninth Circuit has also found a violation of due process when an affidavit was submitted by a non-citizen's spouse on the day of the hearing with no notice to the immigrant that she would be a witness.[114]

b. The Right to Fully Participate in Hearings is Violated by Self-Certification

There have also been rulings that find due process concerns when an immigrant is unable to fully participate in their hearing due to language barriers.[115] For example, if an immigrant is unable to understand proceedings due to a language barrier, and is not provided with an interpreter, this may be a violation.[116] The Seventh Circuit has found that non-citizens who are not able to access an interpreter are deprived of the due process guarantee of a meaningful opportunity to be heard.[117] There is also precedent to suggest that the government may be required to provide an interpreter if one is needed for a non-citizen to participate in proceedings.[118]

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110. One study found that detained immigrants who were represented were twice as likely to obtain relief than those who were not represented by counsel. *Id.* at 3.

111. *See, e.g.*, Navia-Duran v. INS, 568 F.2d 803, 811 (1st Cir. 1977) (holding that the petitioner's coerced statements, which led to her deportation, were inadmissible and in violation of due process).

112. *See, e.g.*, *id.*

113. *See, e.g.*, Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. 2003) (finding a denial of asylum based on hearsay violated the due process rights of a non-citizen).

114. *See* Cunanan v. INS, 856 F.2d 1373 (9th Cir. 1988).

115. *See* Niarchos v. INS, 393 F.2d 509 (7th Cir. 1968) (providing in dicta that a hearing without an interpreter was troubling to the idea of fundamental fairness in administrative proceedings).

116. *See id.*

117. Nazarova v. INS, 171 F.3d 478, 484 (7th Cir. 1999) ("A non-English-speaking alien has a due process right to an interpreter at his or her deportation hearing because, absent an interpreter, a non-English speaker's ability to participate in the hearing and her due process right to a meaningful opportunity to be heard are essentially meaningless.").

118. *See, e.g.*, United States v. Leon-Leon, 35 F.3d 1428, 1431 (9th Cir. 1994) ("By

When the Attorney General self-certifies cases to themself to decide, they violate the right to participate in proceedings as there is no right to participate in the decision.[119] The Attorney General is not required to notify parties which questions of law they are considering when they self-certify a case to themself, nor are they required to allow parties to submit briefs.[120] As the parties are unable to provide detailed briefing on the particular issue, they are foreclosed from effectively participating in their case.

c. The Due Process Right to Notice Is Violated in Attorney General Review

The due process right to notice is also violated as the Attorney General is not required to give notice to parties that they have self-certified the case. There is also no requirement that they give parties an opportunity to comment, and no requirement that they even tell parties what question of law they are considering.[121] In general, agency decision making procedures must provide adequate and timely notice.[122] Several agency procedures have been found to unconstitutionally infringe on due process rights due to a lack of notice.[123] It is clear that the procedure for self-certification violates this important right.

In *Silva-Trevino I*, one of the concerns raised by the parties was that the original BIA decision was an unpublished case in which neither party had argued for a change in the understanding of what a CIMT was.[124] The Attorney General did not give notice to the parties that he was considering the issue, and did not allow either party to brief or argue the issue.[125] Silva-Trevino's counsel actively sought more information about the reason for the referral to the Attorney General, and did not receive any response.[126]

Through the usage of self-certification, the Attorney General issued an opinion that significantly changed precedent on issues

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failing to translate crucial inquiries at the deportation hearing, the [immigration judge] deprived Leon-Leon of this reasonable opportunity.").

119. Trice, *supra* note 78, at 1778.

120. *Id.*

121. *See generally* Trice, *supra* note 78 (explaining Attorney General review requires no notice-and-comment process).

122. *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 829 (6th ed. 2019) (describing proper administrative agency procedure).

123. *See, e.g.*, Padilla-Agustin v. INS, 21 F.3d 970 (9th Cir. 1994) (finding an INS appeals form did not provide adequate notice on how to raise issues).

124. 24 I&N Dec. 687, 687 (A.G. 2008).

125. *Id.*

126. Trice, *supra* note 78, at 1778–79.

that were not in controversy with prior courts.[127] Silva-Trevino had no notice that these issues were going to be discussed and not even a clear reason to believe that they would be considered. Without notice, Silva-Trevino and his counsel were not able to write briefs on the issues in favor of their position, and the Attorney General was able to make these decisions in an echo chamber. In response to a motion to reconsider on due process grounds, Attorney General Mukasey stated that "there is no entitlement to briefing when a matter is certified for Attorney General review."[128]

The Attorney General's plenary power to redecide BIA decisions with no requirement for individuals affected by these decisions to provide briefing on the questions decided is an unconstitutional due process violation. Without notice, this adjudication can be done at a rapid speed, without briefing on multiple perspectives on an issue, and it imbues the BIA with partisan policies.

ii. Separation of Powers Should Require a Neutral Arbiter to Decide Cases, Not a Political Officer

Although this is a weak argument to use in a court case based on Supreme Court precedent to the contrary,[129] there is an interesting legal argument that an executive officer who generally enforces the law being given the ability to adjudicate cases violates the principle of separation of powers.[130] The Supreme Court at one point found that having these decisions related to "burdensome and severe"[131] consequences decided by individuals within agencies that also tackle enforcement was problematic.[132] This decision was based

127. *Id.*

128. *Id.* (citing Att'y Gen. Order No. 3034-2009 (Jan. 15, 2009) (on file with New York University Law Review)).

129. Withrow v. Larkin, 421 U.S. 35, 58 (1975) ("The combination of investigative and adjudicative functions does not, without more, constitute a due process violation . . . ."); Richardson v. Perales, 402 U.S. 389, 410 (1971) ("Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."); *see also* HICKMAN & PIERCE, *supra* note 122, at 916 ("Indeed the Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated.").

130. *See* Taylor, *supra* note 54 ("Attorney General review might also be seen as objectionable because it conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome.").

131. Mahler v. Eby, 264 U.S. 32, 39 (1924).

132. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950); *see* HICKMAN & PIERCE, *supra* note 122, at 917 (describing the Court's actions as suggesting it may adopt

on the APA which prevented an enforcement arm of an agency from making adjudicatory decisions.[133] Congress statutorily overturned this, and the Supreme Court walked back their original suggested sentiment regarding the due process required in agency adjudication.[134]

This issue is compounded because not only is the Attorney General typically seen as an enforcer of laws, but they are also a political agent.[135] The Attorney General is selected by the President, and is considered to be tasked with advancing the interests of the President through the agency.[136] There has been empirical research that has found that there is a political effect when a new Attorney General is appointed.[137] Even the Supreme Court precedent has found that if there is reason to believe that "the risk of unfairness is intolerably high" there may be a due process violation when a prosecutor is undertaking adjudicatory duties.[138] This is because due process includes the right to a neutral, or unbiased, adjudicatory decision maker.[139]

If a decisionmaker is perceived as biased, this may be a violation of due process. A point of view, even if indicative of a closed mind, is not enough to be considered biased, neither is prejudgment about "legislative facts" or "advanced knowledge of adjudicative facts."[140] However, personal prejudice towards an individual is enough, including perhaps simply disliking a party if it is to an excessive degree,[141] as is whether an individual stands to gain from a decision.[142] The Court has articulated this personal prejudice as requiring "deep-seated favoritism or antagonism that would make fair judgment impossible."[143] Clearly, this is a high bar. It is important to note that the Attorney General, although seen as a

these formal requirements of separation of function as a "constitutional floor for adjudicating important disputes").

133. *Wong Yang Sung*, 339 U.S. at 46.

134. *See* HICKMAN & PIERCE, *supra* note 122, at 917 (citing Marcello v. Bonds, 394 U.S. 302 (1955)).

135. *See* Christina L. Boyd & Amanda Driscoll, *Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies*, 41 AM. POLITICS RES. 569, 570 (2013).

136. *See id.*

137. *See id.*

138. Withrow v. Larkin, 421 U.S. 35, 58 (1975).

139. HICKMAN & PIERCE, *supra* note 122, at 866.

140. *Id.* at 867.

141. *See* Liteky v. United States, 510 U.S. 540 (1994).

142. *See id.*

143. *Id.* at 555.

prosecutor, is responsible for these same ethical rules when their role requires adjudicatory acts such as issuing opinions.[144]

The Court has found that the Attorney General was likely to be biased in cases involving the United States' interests before.[145] In *Gutierrez De Martinez v. Lamagno* the Court found that where the Attorney General had the power to certify cases that would result in the United States being able to easily dismiss cases adverse to its own interests, there was a high chance that the Attorney General would "feel a strong tug" to fulfill those interests.[146] There was a concern over the fairness of this system.[147] There is reason to believe that the Court could find that there is a similar issue with the current administration.

The Attorney General is a political appointee with personal political opinions, and they presumably bring these political biases into their decisions. Those political opinions are not likely enough to make them unfit to decide cases, even if they appear to be a sign of closed-mindedness towards an issue such as asylee rights. However, if there is evidence that an official is biased against an individual based on an individual's "personal characteristics" such as "race, religion, or ethnic origin" that would be enough to find an official might be disqualified from ruling on matters involving that individual.[148] There is no APA provision governing the disqualification of agency heads.[149] Regarding Attorneys General Jeff Sessions and William Barr, the case has been made by various groups that they share very racist opinions towards people of color.[150] Based on statements they have made, it can be inferred that these two individuals would be biased in adjudicating disputes involving non-citizens of color. There is certainly a perception of unfairness amongst immigration attorneys regarding various

144. HICKMAN & PIERCE, *supra* note 122, at 876.

145. Gutierrez De Martinez v. Lamagno, 515 U.S. 417, 428 (1995).

146. *Id.*

147. *Id.*

148. HICKMAN & PIERCE, *supra* note 122, at 885.

149. *Id.*

150. *See* Michelle Ye Hee Lee, *Jeff Sessions's Comments on Race: For the Record*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/02/jeff-sessionss-comments-on-race-for-the-record/ [https://perma.cc/GML5-B7ES]; *see, e.g.*, *Oppose the Confirmation of William Barr to be Attorney General of the United States*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Jan. 2019), https://civilrights.org/resource/oppose-the-confirmation-of-william-barr-to-be-attorney-general-of-the-united-states/ [https://perma.cc/GZW2-NNRQ] (addressing concerns about the nomination of William Barr to be Attorney General and criticism of prior Attorney General Sessions regarding their policies to restrict civil and human rights).

Attorneys General's decisions.[151] A court could and should find a due process violation based on this bias.

Additionally, as President Trump is urging a restriction on the flow of immigration, the current Attorney General is likely being asked to fulfill this need. A decision maker is not disqualified "simply because he has taken a position, even in public, on a policy issue related to the dispute . . . ."[152] And the Court has been extremely willing to allow agencies to advance policies through agency adjudication, even when there is evidence that the agency has expressed prejudgment of the issues.[153] There is an argument that, because evidence of a closed mind is nearly impossible to create, it would be hard to prove that an adjudicator's mind is truly irrevocably closed, and therefore, a closed mind is rarely going to disqualify an adjudicator.[154] Additionally, the Court is willing to recognize that every single person has personal biases. The Court has even held that trying to restrict the ability of judges to share their biases is a violation of freedom of speech.[155]

This personal pressure put on the Attorney General may create a different type of bias that the court is more willing to consider impermissible. The Fifth Circuit found that when Congress puts pressure on an adjudicatory body to rule one way or the other in a specific case, it is an impermissible interference with the agency's judicial function.[156] The D.C. Circuit narrowed this by finding that "political pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."[157] President Trump's statements involving immigration have been decried as racist and harmful by many groups,[158] and it's highly likely that his Attorney General is receiving direction to put in place decisions that further President

151. *See, e.g.*, Hausman, *supra* note 49 (addressing Attorney General Sessions using his power to attack immigrants' rights).

152. Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976).

153. FTC v. Cement Inst., 333 U.S. 683, 700 (1948).

154. HICKMAN & PIERCE, *supra* note 122, at 897.

155. *See* Republican Party v. White, 536 U.S. 765 (2002) (holding that restrictions in Minnesota on the campaigning of judges were unconstitutional).

156. *See* Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

157. Aera Energy LLC v. Salazar, 642 F.3d 212, 220 (D.C. Cir. 2011).

158. *See, e.g.*, David A. Graham, Adrienne Green, Cullen Murphy & Parker Richards, *An Oral History of Trump's Bigotry*, THE ATLANTIC (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/ [https://perma.cc/N67X-R3JM] (describing many instances in which President Trump was accused of being racist).

Trump's goals. This is extremely problematic, and immigrants affected by adjudication tainted by this bias should have recourse.

iii. The Ability of an Executive Officer to Veto Circuit Court Decisions Raises Serious Constitutional Issues

Another troubling aspect of Attorney General review is that the Attorney General can effectively overturn circuit court precedent. Although the Department of Justice and Department of Homeland Security must follow Supreme Court precedent,[159] there is not a clear answer on whether they must acquiesce to circuit court decisions, even in the cases that arise within that circuit.[160] Traditionally, the BIA has acquiesced to the decisions of a circuit court within that circuit,[161] but has not found district court decisions binding even within that district.[162] However, following a Supreme Court case finding that a court's prior judicial statutory construction is only entitled to deference if the court held that the construction was due to an unambiguous reading of the statute,[163] Attorney General Mukasey directed the BIA to take a less deferential view of circuit precedent.[164] As discussed above, Attorney General Barr has self-certified cases to himself to render decisions overturning precedential circuit court decisions.

This nonacquiescence to circuit court precedent is, admittedly, not unique to the Attorney General and Department of Justice. The Internal Revenue Service routinely refuses to acquiesce to circuit court decisions, and the Supreme Court has not addressed the legality of the practice directly.[165] There are arguments that nonacquiescence is defensible.[166] The full Court has never

159. HICKMAN & PIERCE, *supra* note 122, at 186.

160. *Id.*

161. IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1715 (16th ed. 2018).

162. *Id.* at 1716.

163. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

164. KURZBAN, *supra* note 161, at 1715; Matter of R-A-, 24 I&N Dec. 629, 631 n.4 (A.G. 2008).

165. HICKMAN & PIERCE, *supra* note 122, at 189.

166. *See id.*; Holland v. Nat'l Mining Ass'n, 309 F.3d 808, 810, 815 (D.C. Cir. 2002) (finding that an agency's voluntary acquiescence with circuit precedent entitled it to *Chevron* deference, but compulsory acquiescence would not, and that review of the acquiescing action "vindicate[s] the authority of the circuits to rule on statutory meaning independently of each other"); Human Life, Inc. v. FEC, 263 F.3d 379 (5th Cir. 2001) (finding that a nation-wide or even circuit-wide injunction preventing the FEC from enforcing a regulation was too broad, and the agency should only be bound to the injunction preventing enforcement against the party to the litigation).

considered the merits of nonacquiescence, but there is some evidence that they would not find the practice problematic.[167]

If an agency is refusing to apply precedent, it raises the question of whether a circuit court can hear cases, or whether their opinions could be viewed as unconstitutional advisory opinions. Article III courts were created to hear cases and controversies, and the Supreme Court has held that they are not able to issue advisory opinions.[168] If an agency does not want to acquiesce to circuit court precedent, they can ignore the precedent and continue to fulfill their congressionally given directive, applying their legal theory to future cases. The Attorney General can effectively revise the precedent of a circuit court decision through a self-certified case decision on the same legal issue.[169] However, the Supreme Court is unlikely to consider this to be an advisory opinion, as long as the Attorney General's decisions are forward-looking and are in relation to a separate set of facts. By viewing these decisions as advisory, the Court would be blocking off its own ability to review these decisions, something the Court is unlikely to find appealing. Even so, the question still raises concerning constitutional considerations.

iv. These Issues Are Exacerbated as Immigrants Are Not Able to Pursue Constitutional Rights in Immigration Court

Having constitutional rights and being able to easily enforce those rights are different things. Immigrants are not able to have all of their due process rights considered by immigration judges or by the BIA.[170] Because immigration judges do not consider the constitutionality of the statutes that they enforce, non-citizens must typically exhaust their merit-based claims in immigration court before they can have a due process concern heard by a circuit

167. HICKMAN & PIERCE, *supra* note 122, at 188. Justice Rehnquist granted a stay of a district court order for the SSA to follow circuit court precedent and find individuals eligible for benefits. He argued that separation of powers actually stood on the side of the SSA, and found that courts have limited oversight of agencies' initial decisions, and only can exercise review of those decisions. Heckler v. Lopez, 463 U.S. 1328 (1983).

168. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

169. *See, e.g.*, Silva-Trevino I, 24 I&N Dec. 687 (A.G. 2008); Silva-Trevino II, 26 I&N Dec. 550 (A.G. 2015) (showing the Attorney General's broad power to overturn rulings on immigration cases).

170. Zadvydas v. Davis, 533 U.S. 678, 692 (2001) (citing Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 450 (1985)) ("[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'").

court,[171] at which point they may be in another country if they were deported or they may have been granted relief. In either case, the due process concern is unlikely to be considered by a circuit court judge, as the non-citizen is either unlikely to have the capability of bringing a case from another country, or may be uninterested in pursuing a case once they have the relief they sought. Many due process concerns are heard from non-citizens who have been detained for a significant amount of time.[172]

III. Solutions

A. The Supreme Court Could Limit the Attorney General's Power Without Clearly Deciding Whether Their Usage of Review Was Unconstitutional

If any of these questions were to explicitly be discussed at the Supreme Court, the government would look for support in cases holding that Congress has the plenary power to create immigration law and that the judicial branch must defer to executive and legislative branch decision-making in that area. Even considering this plenary power, Congress and the executive agencies are subject to important constitutional limitations.[173] If the Court determines that Congress or the Attorney General are approaching these constitutional limits, they have to decide how to approach the legal question.

Historically, the Court has avoided constitutional questions when possible. If "Congress has made its intent" in the statute clear, the Court "must give effect to that intent."[174] However, the Court is often willing to find a statute is at least slightly ambiguous, partially by using a canon of construction wherein they find that Congress would not want to write a statute that was unconstitutional.[175] The Court could approach these issues as being constitutional issues that Congress would not have intended to raise without a clear statement of intent, thereby limiting the Attorney General's powers that way.

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171. 8 U.S.C. § 1252(d)(1).

172. *See* ACLU, PROLONGED DETENTION FACT SHEET 1 (2014), https://www.aclu.org/other/rodriguez-et-al-v-robbins-et-al-prolonged-detention-fact-sheet [https://perma.cc/DWZ5-H7TM] (finding that the average length of detention for a non-citizen applying for relief from removal in the Ninth Circuit was 421 days).

173. *See* INS v. Chadha, 462 U.S. 919, 941–42 (explaining Congress must choose "a constitutionally permissible means of implementing" that power).

174. Miller v. French, 530 U.S. 327, 336 (2000).

175. *See* Zadvydas v. Davis, 533 U.S. 678, 696–99 (2001) (applying the constitutional avoidance doctrine).

There are a few ways the Supreme Court could address this issue. The Attorney General upset precedent with *Matter of L-E-A-*, and cases contesting this new interpretation of the law are going to make their way to circuit courts. In fact, *Grace v. Whitaker* already has made it to a circuit court as a challenge to *Matter of L-E-A-*.[176] The Supreme Court should step in when a circuit split inevitably appears regarding "a particular social group."[177] When they do, they should go beyond finding that the Attorney General's decision in *Matter of L-E-A-* was arbitrary and capricious and should also answer the question of whether the procedures used to decide cases violated due process guarantees.

The Court should consider whether the Attorney General's self-certification power, particularly in a highly political climate, is in violation of the Constitution. This Note argues they should find that Attorney General Barr is not a neutral arbiter based on his statements indicating a bias towards individuals of color.[178] Any decisions that he has made, as well as those of the previous Attorney General Jeff Sessions, should be vacated based on their clear bias.[179] This Note also argues that beyond these particular decisions, the Court should find that the procedure of self-certification and nonacquiescence in Attorney General and BIA decisions is unconstitutional. Of course, the Court is unlikely to strike this tone. The Court could also find a way to read the statute in a constitutional way, likely by limiting the Attorney General's ability to review BIA decisions in some way. The Court should, at minimum, require that the Attorney General's decisions must comport with circuit law where possible, or that their decisions are not binding in circuits that they conflict with.

B. Congress Should Step in, and Remove this Power, and Require Acquiescence from the BIA on Circuit Court Decisions

Courts have limited ways to resolve these issues because of Congress' plenary power to regulate immigration, therefore Congress is a better body to rectify these issues.[180] Congress is also a better vehicle for substantive change to statutory regulations.[181]

176. *See* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

177. 8 U.S.C. § 1101(a)(42)(A).

178. *See* discussion *supra* notes 150–51.

179. Michelle Ye Hee Lee, *supra* note 150.

180. *See* Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

181. U.S. CONST. art. I.

Congress should immediately reevaluate this system of Attorney General adjudication. Ideally, they would insulate BIA members from political pressures—there are several calls for the BIA and immigration judges broadly to become Article I or Article III courts, which would suffice to create a buffer from political pressure. The BIA, if one of these proposals were adopted, would be insulated from executive agency head interference. It should then be the final arbiter on cases, mimicking the Social Security Appeals Counsel. Courts would retain their ability to review BIA decisions, and Congress should statutorily require the BIA members and immigration judges to follow circuit court precedent when possible. These reforms would create a system that respects constitutional structures and gives non-citizens the due process rights to which they are entitled.

Conclusion

The current structure of the Attorney General's power to self-certify cases is extremely problematic. It raises multiple due process and constitutional concerns including violating the right to notice, the right to a neutral arbiter, and the separation of powers. The Court should consider the constitutionality of the ability of the Attorney General to self-certify cases and to change precedent radically without notice. However, Congress is a better body to rectify this issue. Congress should immediately rewrite the Immigration and Nationality Act to remove this power of review, and allow BIA decisions to be final, unless appealed to an Article III court. Measures should be taken to remove political pressures on the BIA and immigration judges as well. These changes would adequately protect the rights of non-citizens and would not require the Supreme Court to rule on these complex issues.