Article

Against Attorney General Self-Referral in Immigration Law

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This Article advances a rule-of-law-based critique of the Attorney General's immigration self-referral power. We argue that the Attorney General's self-referral and review power over pending immigration proceedings allows an appointed Executive Branch official to engage in unchecked and unilateral lawmaking and, therefore, should be abolished.

Scholars have typically understood legal stability, prospectivity, and the separation of policymaking from adjudication as requirements of the Anglo-American rule of law regime which protect individual freedom and equality. It is traditionally believed that by limiting policy-driven legislation to prospective, general laws which are enacted through an explicitly legislative process, individuals may be secure against the sudden disappearance of their vested legal interests and disruption of their plans of life. And while it is true that the common law permits judicial rulemaking to change laws with retroactive effect, the norms and ethics of the judicial process at least represent an effort to keep

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such changes rooted in preexisting law rather than reasons of state by requiring judges to be separate from the policymaking enterprise. The Attorney General's immigration rulemaking by adjudication features none of these protections.

In contrast, the Attorney General's self-referral power over immigration cases, by which a political officer can directly take control of a pending adjudication and use it to make precedential rulings motivated solely by policy considerations and with retroactive effect, constitutes an invisible, unpredictable, and insurmountable barrier for immigrant respondents. The referral power subjects the legal interests of immigrants—and of those U.S. citizens who share interests with immigrants as family members, employers, and otherwise—to instability and uncertainty, and uses individual immigrant respondents merely as means for the implementation of broader political goals. As our research illustrates, from 2017 to 2021 the Trump administration used the self-referral power in seventeen different significant cases, to make major changes to the definition of asylum, the docket management strategies of immigration judges, and the extent of immigration consequences for immigrants with criminal convictions. It even used the Attorney General referral and review power to expand the authority of the Attorney General to make binding law, by broadening the existing scope of the Attorney General referral and review power! In this, and myriad other ways, the referral power is incommensurate with the structures, practices, and norms of our contemporary judicial system, and the animating precepts of the constitutional framework that underpins that modern system. Accordingly, the referral and review power stands as a key case study of the importance of separation of powers and judicial independence for the rule of law.

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INTRODUCTION

The Attorney General self-referral power in immigration adjudication creates an invisible, unpredictable, and insurmountable barrier for immigrant respondents which is fundamentally incompatible with the basic precepts of the Rule of Law. Under this referral power, a politically appointed Executive Branch official, the Attorney General, can assume direct control of a case pending before the highest administrative body for interpreting and applying the immigration laws, the Board of Immigration Appeals (BIA).[1] The Attorney General can then issue a precedential and binding opinion that reshapes immigration law nationwide with immediate and retroactive effect.[2] There are no formal limitations on the Attorney General's discretion to interfere with pending cases before the BIA.[3] The Attorney General may, therefore, at any time, act to overturn decisions made by immigration judges or the BIA if those decisions do not align with the policy goals of the current Executive Branch or the personal goals of the incumbent Attorney General.[4]

Traditionally, the self-referral power was used sparingly in immigration proceedings, with a handful of unusual and noteworthy cases garnering the national spotlight after the issuance of Attorney General opinions.[5] Immigration law scholars, therefore, analyzed these key cases to illustrate the various ways in which agency-head adjudication in the immigration law context differed from other areas of administrative law.[6] In recent years,

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1. For a detailed account of the historical operation of the Attorney General self-referral power, see Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 851–52 (2016).

2. *See id.* at 856 ("Upon issuance, a decision by the Attorney General is binding on the government and parties, and precedential to the extent provided by the Attorney General.").

3. *See id.* at 852 ("The current regulations do not contain any criteria or standard that cases must meet in order to be referred for review, unlike prior versions of the regulation, but instead focus exclusively on who may refer cases for review.").

4. *See id.* at 896–97 (discussing the policymaking role of Attorney General self-referral).

5. *See id.* at 857–59 (describing historic rarity of Attorney General self-referral).

6. For a discussion of the pre-2017 use of the Attorney General self-referral power in immigration proceedings, see Bijal Shah, Response, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017) (describing tensions between the Attorney General's dual role as a political and

however, there has been an explosion of immigration rulemaking-by-self-referral, raising more fundamental and urgent concerns about the continued existence of this practice. Research by law students and immigration law advocates has shed light on the far-reaching effects that some of these most recent Attorney General self-referral decisions have had on both the practice of immigration law and the lived experiences of immigrant communities in the United States.[7] However, to date, no legal scholarship has addressed the more fundamental question of whether the Attorney General self-referral power in its present form remains lawful—i.e., whether or not its form, function, and scope are commensurate with the Rule of Law. This Article fills that gap.

This Article considers, as a case study, the use of the Attorney General self-referral power during the 2017–2021 presidency of Donald J. Trump.[8] In seventeen highly significant cases,

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administrative official and its impediments to orderly development of immigration law); David A. Martin, Response, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. ONLINE 1 (2016) (contextualizing self-referral power in the now-deceased *Chevron* doctrine); Margaret H. Taylor, Response, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016) (describing what the author calls "midnight agency adjudication"—the practice of administrative legislation-by-adjudication on the eve of a change in presidency); Christopher J. Walker, Response, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84 (2016) (fitting self-referral power into the author's dialogic theory of agency-judicial relations). *But see* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 144 (2019) (describing ostensible benefits of agency-head adjudication across administrative state).

7. *See, e.g.*, Emma K. Carroll, Comment, *One Step Forward, Two Steps Back: How Attorney General Review Undermines Our Immigration Adjudication System*, 93 U. COLO. L. REV. 189, 194 (2022) (criticizing self-referral power for prioritizing policy goals over legal values); V. Barbara Jensen, Note, *A Supreme Court unto Himself: The Disastrous Effects of the Attorney General's Self-Certification Power on Immigration*, 4 MINN. J.L. & INEQ.: INEQ. INQUIRY BLOG 1 (2021), https://lawandinequality.org/wp-content/uploads/2021/02/A-Supreme-Court-unto-Himself.pdf [https://perma.cc/74FK-ZAWP] (same); Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy Through Attorney General Referral and Review*, MIGRATION POL'Y INST. (Jan. 2021), https://www.migrationpolicy.org/sites/default/files/publications/rethinking-attorney-general-referral-review_final.pdf [https://perma.cc/6MRU-9RG7] (describing both legal and policy-quality challenges to self-referral).

8. Donald J. Trump served as the forty-fifth President of the United States from January 2017 to January 2021. For an overview of his immigration law and policy reforms, see Mae Ngai, *Immigration Policy and Politics Under*

the first Trump administration used the self-referral power to make lasting changes to the definition of asylum, the docket management strategies of immigration judges, and the extent of immigration consequences for immigrants with criminal convictions.[9] It even used the Attorney General referral and review power to expand the authority of the Attorney General to make binding law, by broadening the existing scope of the Attorney General referral and review power![10] In the four years that followed, Attorney General Merrick Garland largely limited the Biden administration's wielding of the self-referral power in immigration proceedings to reversing the Attorney General

Trump, *in* THE PRESIDENCY OF DONALD J. TRUMP 144–61 (Julian E. Zelizer ed., 2022).

9. *See generally* A-B-, 28 I. & N. Dec. 199 (Att'y Gen. 2021) (redefining "unwilling or unable to control" standard in the context of governmental responses to persecution by non-government actors), *vacated*, 28 I. & N. Dec. 307 (Att'y Gen. 2021); Negusie, 28 I. & N. Dec. 120 (Att'y Gen. 2020) (eliminating the duress exception to the "persecutor bar" in asylum proceedings); A-C-A-A-, 28 I. & N. Dec. 84 (Att'y Gen. 2020) (redefining the standard of review in asylum cases), *vacated*, 28 I. & N. Dec. 351 (Att'y Gen. 2021); Reyes, 28 I. & N. Dec. 52 (Att'y Gen. 2020) (reinstituting the categorical approach for crimes classified as aggravated felonies); O-F-A-S-, 28 I. & N. Dec. 35 (Att'y Gen. 2020) (introducing a heightened standard for relief under the Convention Against Torture); A-M-R-C-, 28 I. & N. Dec. 7 (Att'y Gen. 2020) (reconsidering the definition of "serious nonpolitical crime"); R-A-F-, 27 I. & N. Dec. 778 (Att'y Gen. 2020) (restating the legal definition of "torture"); Thomas, 27 I. & N. Dec. 674 (Att'y Gen. 2019) (revisiting the role of state court orders in removal proceedings); Castillo-Perez, 27 I. & N. Dec. 664 (Att'y Gen. 2019) (creating a presumption that immigration respondents with OWI/DUI convictions are ineligible for relief from removal); L-E-A-, 27 I. & N. Dec. 581 (Att'y Gen. 2019) (revisiting familial relationships as a basis for membership in a "particular social group" in order to qualify for asylum), *vacated*, 28 I. & N. Dec. 304 (Att'y Gen. 2021); M-S-, 27 I. & N. Dec. 509 (Att'y Gen. 2019) (barring the release from detention of certain asylum applicants); M-G-G-, 27 I. & N. Dec. 475 (Att'y Gen. 2018) (limiting the eligibility for release on bond from immigration detention); S-O-G-, 27 I. & N. Dec. 462 (Att'y Gen. 2018) (determining that immigration judges have no inherent authority to terminate or dismiss removal proceedings), *overruled by* Coronado Acevedo, 28 I. & N. Dec 648 (Att'y Gen. 2022); L-A-B-R-, 27 I. & N. Dec. 405 (Att'y Gen. 2018) (instituting a stricter standard for the grant of immigrant respondents' requests for a continuance); A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018) (limiting the availability of asylum for victims of persecution by nongovernmental actors), *vacated*, 28 I. & N. Dec. 307 (Att'y Gen. 2021); Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018) (determining that immigration judges and the BIA lack inherent authority to administratively close proceedings), *overruled by* Cruz-Valdez, 28 I. & N. Dec. 326 (Att'y Gen. 2021); E-F-H-L-, 26 I. & N. Dec. 226 (Att'y Gen. 2018) (vacating an asylum applicant's entitlement to an evidentiary hearing on his case).

10. *See* Pierce, *supra* note 7, at 17–19.

decisions made by its predecessor administration,[11] but took no steps to alter the parameters of the power itself. As of this writing, the second Trump administration has begun, and against this backdrop, the operation of the Attorney General self-referral power continues to serve as a powerful example of untrammeled executive power, rather than judicial neutrality and restraint. We therefore argue that its continued existence is incommensurate with the Anglo-American traditions of separation of powers, judicial independence, and the rule of law.

This Article proceeds in four Parts. In Part I, we provide an overview of the parameters of the Attorney General self-referral power in immigration proceedings. We describe the historical evolution of the power from its origin in the 1940s through its current use in the twenty-first century. We then discuss how, in common with other immigration and administrative law scholars, we find the recent use of the self-referral power to circumvent transparent legislative and regulatory rulemaking to be deeply problematic. As a case study illustrating the recent use of the Attorney General self-referral power, we discuss the Attorney General immigration decisions issued during the first Trump administration.

In Part II, we situate our critique of the Attorney General immigration self-referral power within the context of the Anglo-American tradition of judicial independence. We describe the theoretical and practical importance of the neutral enforcement of preexisting legal rights rather than casting those rights aside for policy purposes as a central tenet of the rule of law.

In Part III, we consider the potential pitfalls of administrative agency-head adjudication, with respect to the simultaneous exercise of judicial and quasi-legislative power by the executive branch in such cases. We posit that the Attorney General self-referral power in immigration proceedings provides a compelling case study for such critiques.

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11. *See generally* A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021) (vacating and remanding the *Matter of A-B-* decisions issued by Attorney General Sessions and Acting Attorney General Rosen); L-E-A-, 28 I. & N. Dec. 304 (Att'y Gen. 2021) (vacating and remanding the *Matter of L-E-A-* decision issued by Attorney General Barr); Cruz-Valdez, 28 I. & N. Dec. 326 (Att'y Gen. 2021) (overruling Attorney General Barr's *Matter of Castro-Tum* decision); A-C-A-A-, 28 I. & N. Dec. 351 (Att'y Gen. 2021) (vacating the *Matter of A-C-A-A-* decision issued by Attorney General Barr); Negusie, 28 I. & N. Dec. 399 (Att'y Gen. 2021) (self-referring the case for review and staying the BIA's proceedings).

Finally, in Part IV, we set forth our argument against the use of the self-referral power in immigration cases. We argue first that the self-referral power is arbitrary in nature, permitting a political appointee to directly adjudicate cases in their personal capacity, at their own untrammeled discretion. We argue second that the Attorney General's immigration self-referral power, by its very nature, undercuts the trappings of judicial neutrality and independence in which we cloak our system of immigration adjudication. And we argue third, and finally, that the self-referral power is inherently hypocritical. It is impossible for a politically appointed Attorney General to argue credibly that they can serve as passive, neutral decisionmakers in individual immigrants' cases when the power that they wield is used so frequently as an instrument of pure policymaking. We therefore conclude that the self-referral power should be abolished.

I. THE ATTORNEY GENERAL SELF-REFERRAL POWER IN IMMIGRATION PROCEEDINGS

We begin with a brief description of the power under examination, discussing its historical origins and its more recent, troubling, application.

A. THE ORIGINS OF THE ATTORNEY GENERAL SELF-REFERRAL POWER

The self-referral power of the Attorney General stems from the historical evolution of the coordinate roles of the Attorney General and the BIA in the adjudication of immigration cases. In 1940, the Department of Justice assumed responsibility for the fledgling Immigration and Naturalization Service (INS), which had, until then, been under the control of the Department of Labor.[12] As part of that bureaucratic reorganization, the Attorney General became the cabinet-level official charged with the administration and enforcement of the immigration laws.[13] Upon receiving this charge, Attorney General Robert H. Jackson issued Attorney General Order No. 3888, which created the BIA.[14] The BIA was intended to be completely independent of the

12. Reorganization Plan No. V, 5 Fed. Reg. 2223, 2223 (June 14, 1940).

13. *Id.*

14. *See* Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454, 2454 (July 1, 1940) (stating that "the Board of Review of the Immigration and Naturalization Service shall have authority to exercise the powers of the

INS and to be responsible directly to the Attorney General himself.[15] According to its authorizing regulations, "[t]he Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it."[16] In other words, the BIA was charged with the role of serving as the final body to which immigrant respondents who were denied admission to the United States or threatened with deportation from the United States could appeal their cases. But it was granted the power to act only insofar as the Attorney General, by regulation, may provide.[17]

Since its inception in 1940, the BIA has served as the "highest administrative body for interpreting and applying immigration laws."[18] Its Members are required to "exercise their independent judgment and discretion in considering and determining the cases coming before the Board" and "may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."[19] But, the BIA has no independent statutory authority, and its very existence remains dependent upon serving as the Attorney General's delegate. In 1954, the U.S. Supreme Court cautioned that the Attorney General should not seek to unduly influence or circumvent the BIA's decision-making processes.[20] But, such caution is largely unnecessary because

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Attorney General" in certain delineated cases); *see also* Gonzales & Glen, *supra* note 1, at 850 (discussing the origins of the BIA).

15. *See* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 34 (1977) (describing the creation of the BIA).

16. 8 C.F.R. § 1003.1(d)(1) (2025).

17. *Id.*

18. *Board of Immigration Appeals Practice Manual*, U.S. DEP'T OF JUST. (Jan. 8, 2021), https://www.justice.gov/eoir/foialibrary/BIAPM01122021/dl [https://perma.cc/D329-6XFP].

19. 8 C.F.R. § 1003.1(d)(1)(ii).

20. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) ("In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative,

the same regulations creating the BIA also created the self-referral power, which allows the Attorney General to take cases from the BIA and substitute his own decision-making for that of its appointed Members.[21]

In relevant part, the original regulation creating the BIA in 1940 provided that:

> In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19(c) of the Immigration Act of 1917, as amended**, or in any case in which the Attorney General so directs**, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision.[22]

In 1947, the regulation was amended to remove the substantive criteria necessary for referral.[23] Subsequent amendments focused on the mechanism for triggering referral, expanding the ability of INS officials (but not, of course, immigrant respondents) to seek review by the Attorney General without the agreement of the Members of BIA, effectively circumventing prior requirements that the BIA should "agree" to such referrals.[24] By 1964, the Commissioner of the INS was granted authority to refer cases directly to the Attorney General for review.[25]

Following the September 11, 2001 Al-Qaeda attacks on the World Trade Center in New York City, the administration and enforcement of U.S. immigration laws was once again reorganized.[26] The Homeland Security Act of 2002 established the

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the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.").

21. 8 C.F.R. § 90.12 (1940).

22. *Id.* (emphasis added).

23. Appeals from Orders Issued by Commissioner of Immigration and Naturalization: Miscellaneous Amendments to Chapter, 12 Fed. Reg. 4781, 4782 (July 18, 1947) (codified at 8 § C.F.R. 90.12 (1947)).

24. *See* Gonzales & Glen, *supra* note 1, at 851–52.

25. *See* Immigration and Naturalization Service, Department of Justice: Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9117 (Nov. 26, 1958) (codified at 8 C.F.R. § 3.1(h)(1)(iii) (1964)) ("The Board shall refer to the Attorney General for review of its decision all cases which . . . [t]he Commissioner requests be referred to the Attorney General for review.").

26. *See* Homeland Security Act of 2002, Pub. L. No. 107-296 § 101(b)(1)(A)–(B), 116 Stat. 2135, 2142 (codified as amended at 6 U.S.C. § 111) (establishing the DHS); *see also* President George Bush, Remarks on Signing the Homeland Security Act of 2002 (Nov 25, 2002), https://www.presidency.ucsb.edu/documents/remarks-signing-the-homeland-security-act-2002 [https://perma.cc/

Department of Homeland Security (DHS).[27] Under the terms of the Act, DHS assumed responsibility for the enforcement of the immigration laws, with its component agencies, Immigration and Customs Enforcement (ICE) (in the interior) and Customs and Border Protection (CBP) (at the border), responsible for the apprehension and eventual prosecution of those suspected of violating the immigration rules.[28] The immigration adjudication system, however, including the Executive Office for Immigration Review (EOIR) trial level immigration courts and the BIA, remained within the purview of the Department of Justice (DOJ).[29] Following this reorganization, the Attorney General self-referral regulations were once again revised, and the current version now reads as follows:

> The Board shall refer to the Attorney General for review of its decision all cases that:
>
> (i) **The Attorney General directs the Board to refer to him**.
>
> (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.
>
> (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.[30]

Here, as in the prior iteration of the regulation, the Attorney General has the power to unilaterally "take a case" from the BIA should he disagree with its ruling. Similarly, the Secretary of Homeland Security and other officials within DHS who are charged with the prosecution of immigration cases have the power to seek review of an adverse ruling by the BIA, but no such mechanism is available to the immigrant respondents in those cases.[31]

88ZK-MKWQ] (describing the purpose of the Homeland Security Act as to "protect our citizens against the dangers of a new era" which began on 9/11).

27. Homeland Security Act of 2002 § 101.

28. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9824 (Feb. 28, 2003) (transferring INS to DHS while retaining EOIR within the Department of Justice under the Attorney General).

29. *See id.*

30. 8 C.F.R. § 1003.1(h)(1) (2025) (emphasis added).

31. This asymmetry has always been a feature, not a bug, of the self-referral power. *See* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 318 (1956) (noting that under former 8 C.F.R. § 6.1(h), the BIA's decisions "will not be reviewed [by the Attorney General] . . . at the request of the alien"); Allan van Gestel et al., Note, *Immigration—Exclusion and Deportation, Proceedings and Review, Under the McCarran-Walter Act*

Significantly, the regulations governing the Attorney General's review of a pending immigration matter provide scant guidance about the review process itself.[32] Once a case is referred to the Attorney General for review—or once the Attorney General directs that review himself—the BIA's decision in a pending case becomes "non-final," and further proceedings, including the removal of the immigrant respondent from the country, are stayed.[33] But there is no provision in the regulations requiring notice to the immigrant that the Attorney General has taken up her case.[34] There is also no provision in the regulations describing procedures for consideration by the Attorney General during review—there are no guidelines about briefing, argument, or any other form of administrative procedure.[35] The immigrant, through counsel, is only informed of the Attorney General's review if the Attorney General deigns to give her the opportunity to present her case.[36] According to former Attorney General Alberto Gonzales, "modern Attorneys General have taken a number of different approaches to the question of how to proceed, and there is no one normal, preferred, or required set of procedures to be observed."[37] What results is a hodge-podge of decisions, some based on reasoned argument from both parties, others based exclusively on representations made to the Attorney General by the Government alone.[38]

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of 1952, 41 B.U. L. REV. 207, 212 (1961) ("There does not seem to be any provision in the regulations for the alien himself to appeal to the Attorney General.").

32. *See* 8 C.F.R. § 1003.1(h) (2025) (describing only the situations in which a case can be referred to the Attorney General and how the decision will be published).

33. *See* E-L-H-, 23 I. & N. Dec. 700, 702 (Att'y Gen. 2004) (ruling that a BIA decision referred to the Attorney General "is neither final nor effective during the pendency of the Attorney General's review" and cannot be executed during that period); *see also* Ren v. Gonzales, 440 F.3d 446, 448 (7th Cir. 2006) (observing that the Attorney General can withdraw a BIA decision and render it not judicially reviewable by self-referral, "thereby rendering the Board's decision nonfinal").

34. *See* 8 C.F.R. § 1003.1(h).

35. *See id.*

36. *See, e.g.*, R-, 5 I. & N. Dec. 29, 46 (Att'y Gen. 1952) ("At his request respondent's counsel was given a full opportunity to present his arguments and authorities to [the Attorney General] in an informal conference . . . . In addition a full hearing was held before [the Attorney General] . . . in which counsel for the respondent and for the Immigration and Naturalization Service were heard in extensive oral argument.").

37. Gonzales & Glen, *supra* note 1, at 855.

38. *See, e.g.*, *id.* at 855–56 (listing six resultant options).

The asymmetrical nature of Attorney General self-referral is further reinforced by the standard of review employed by the Attorney General when contemplating the BIA's decision.[39] The Attorney General claims the authority to review the BIA's decision *de novo*, and his authority to determine what is correct is not limited by the underlying findings of the BIA or the immigration judge at the trial stage.[40] Similarly, the Attorney General reviews all findings of fact *de novo* and may also consider additional evidence that was not reviewed by the immigration judge or the BIA.[41] Once the Attorney General issues a decision, that decision is binding on the parties and the government in the case at bar, and, crucially, the decision is also binding precedent, which overrules any conflicting prior BIA decisions.[42]

B. RECENT USE OF THE ATTORNEY GENERAL SELF-REFERRAL POWER

Immigration law scholars have long critiqued certain aspects of the practice of Attorney General self-referral in immigration proceedings. In particular, the lack of fairness and transparency in the review process for cases that involve refugees and asylum-seekers has drawn considerable criticism for many years.[43] Moreover, concerns about agency-head adjudication in

39. A-H-, 23 I. & N. Dec. 774, 779 n.4 (Att'y Gen. 2005) (explaining that the power to review BIA decisions *de novo* derives from the Attorney General's "full decision-making authority under the immigration statutes").

40. *Id.*; *see* Deportation Proceedings for Joseph Patrick Thomas Doherty, 13 Op. O.L.C. 1, 7 (1989) ("The Attorney General's decision is de novo; he is not confined to reviewing for error."); 8 C.F.R. § 1003.1(d)(1)(i) (providing that the BIA is bound by the decisions of the Attorney General, reached through a review of a BIA decision, a written order, or any other determination or ruling).

41. Gonzales & Glen, *supra* note 1, at 856.

42. *See* 8 C.F.R. § 1003.1(g)(1). *See generally* Immigr. & Naturalization Serv. v. Doherty, 502 U.S. 314, 327 (1992) ("[T]he BIA is simply a regulatory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes. He is the final administrative authority in construing the regulations, and in deciding questions under them.").

43. *See, e.g.*, Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1291–93 (2011) (criticizing the use of self-referral power before presidential turnover and the non-deliberative nature of proceedings in Attorney General reviews); Margaret H. Taylor, Response, *Refugee Roulette in an Administrative Law Context: The* Déjà Vu *of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 480–85 (2007) (discussing a variety of possible strategies to promote greater independence of immigration adjudicators); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals*

administrative proceedings are, of course, not unique to immigration law.[44] In other areas of administrative law, scholars have also noted longstanding concerns about oversight over the rulings of administrative judges when the very head of that agency (or his direct delegee) serves as the agency's final and highest appellate judge.[45] And in the immigration law context, Margaret Taylor has written about the use of the Attorney General self-referral power as a form of late-term policy entrenchment during administration transitions, which she describes as "midnight agency adjudication" by former Attorneys General in landmark immigration law cases during the George W. Bush and Obama administrations.[46] Taken collectively, these scholars' arguments support our assertion that the Attorney General self-referral process is fundamentally flawed. But the more recent examples of the first Trump administration's use of the Attorney General self-referral power to make sweeping changes to hitherto settled precepts of immigration law, in pursuit of bald political goals, provide the most compelling illustration of how and why the limitless powers of the Attorney General in this domain are incommensurate with the rule of law.

During his first four years in office, from January 2017 through January 2021, President Trump pursued a number of policies designed to limit immigrant admissions to the United States—ranging from the "Muslim Ban" that barred the admission of almost all nationals from Muslim-majority countries,[47] to the COVID-19-related border closures,[48] to the family separation

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Decisions, 85 N.Y.U. L. REV. 1766, 1768 (2010) (arguing for due process-oriented reforms in adjudication of self-referral cases).

44. *See* Walker & Wasserman, *supra* note 6, at 144 (noting scholarly criticism of agency-head adjudication).

45. *See, e.g.*, Christina L. Boyd & Amanda Driscoll, *Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies*, 41 AM. POL. RSCH. 569, 572–73 (2013) (noting agency heads' lack of "impartiality" and focus on political concerns).

46. Taylor, *supra* note 6 (discussing *Matter of Silva-Trevino*, *Matter of R-A-*, and *Matter of Compean*).

47. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (implementing the Muslim Ban); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (revising the first Muslim Ban executive order); *see also* Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans,* 75 WASH. & LEE L. REV. 1475 (2018) (describing iterations of the Muslim Ban).

48. *See, e.g.*, Proclamation No. 9992, 85 Fed. Reg. 12,855 (Mar. 4, 2020); Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present Within the People's

policy for immigrant children.[49] But perhaps his first administration's most aggressively-pursued policy goal was to drive down the admission of refugees and asylum seekers to the United States.[50] In large part, this policy was advanced by his administration unilaterally making sweeping changes to the grounds on which asylum-seekers might be granted state protection via unprecedented use of the Attorney General self-referral process.[51] In one of the most significant self-referral cases of the first Trump era, *Matter of A-B-*, former Attorney General Jeff

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Republic of China or the Islamic Republic of Iran, 85 Fed. Reg. 12,731 (Mar. 4, 2020); Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 16, 2020); Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled from or Were Otherwise Present Within the Countries of the Schengen Area, 85 Fed. Reg. 15,059 (Mar. 17, 2020).

49. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (codified at 8 C.F.R. pts. 212, 236); Flores v. Barr, 407 F. Supp. 3d 909 (C.D. Cal. 2019) (detailing the Trump administration policy on immigrant children), *aff'd in part, rev'd in part sub nom* Flores v. Rosen, 984 F.3d 720 (9th Cir. 2020); Press Release, U.S. Dep't of Just., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/8NVK-RSX5]; Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1154 (S.D. Cal. 2018) (challenging the Trump administration's "zero tolerance" policy on the grounds that it was indiscriminately applied to families seeking asylum, including those with infants and small children).

50. *See, e.g.*, President Donald J. Trump, Remarks by President Trump on the Illegal Immigration Crisis and Border Security (Nov. 1, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security [https://perma.cc/HLV3-3CYH] ("My administration is finalizing a plan to end the rampant abuse of our asylum system—it's abused—to halt the dangerous influx, and to establish control over America's sovereign borders . . . . Under this plan, the illegal aliens will no longer get a free pass into our country by lodging meritless claims in seeking asylum."); *see also* Stuart Anderson, *A Review of Trump Immigration Policy*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/stuartanderson/2020/08/26/fact-check-and-review-of-trump-immigration-policy/ [https://perma.cc/2QT4-BSNZ] (explaining that the Trump administration lowered the annual ceiling for refugees by eighty-four percent from the level previously set by Obama administration).

51. *See* Sarah Pierce & Jessica Bolter, *Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes Under the Trump Presidency*, MIGRATION POL'Y INST. 60–63 (July 2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/TW5B-QYT8] (describing the fifteen Attorney-General self-referrals that had been made by July 2020 under the Trump administration, which constituted "unprecedented use of the attorney general's ability to self-refer immigration cases for review").

Sessions announced that gender-based violence would no longer be recognized as persecution,[52] and in so doing, he effectively eliminated the most common basis for asylum for women from Central America.[53]

For many years, the availability of asylum on the basis of gender-based persecution, including intimate partner violence and or gang violence, had been somewhat contested,[54] but during the last term of the Obama administration, the BIA, the immigration courts, and individual U.S. Citizenship and Immigration Services (USCIS) adjudicators began to routinely recognize and grant gender-based asylum claims.[55] From 1999 to 2009, one

52. 27 I. & N. Dec. 316, 317, 346 (Att'y Gen. 2018) ("I understand that many victims of domestic violence may seek to flee from their home countries to extricate themselves from a dire situation or to give themselves the opportunity for a better life. But the 'asylum statute is not a general hardship statute.'" (quoting Velasquez v. Sessions, 866 F.3d 188, 199 (4th Cir. 2017) (Wilkinson, J., concurring))), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

53. *See* Chris Gelardi, *Jeff Sessions's Legacy Will Be Catastrophic for Asylum Seekers*, NATION (Nov. 8, 2018), https://www.thenation.com/article/archive/jeff-sessionss-legacy-will-be-catastrophic-for-asylum-seekers [https://perma.cc/D8NE-6HNQ] (noting that *Matter of A-B-* "delegitimized the two most common reasons Central American migrants seek legal asylum" and that "anecdotal evidence from lawyers suggests that . . . it has prompted both asylum officers and immigration judges to deny a significantly greater proportion of Central Americans' cases"); Jeffrey Hallock et al., *In Search of Safety, Growing Numbers of Women Flee Central America*, MIGRATION POL'Y INST. (May 30, 2018), https://www.migrationpolicy.org/article/search-safety-growing-numbers-women-flee-central-america [https://perma.cc/WZX8-Y59K] (describing the prevalence of women from Central America fleeing gender-based violence, and the ways in which such violence is a consequence of traditional bases for asylum such as political violence and instability).

54. *Compare* Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 LAW & ETHICS HUM. RTS. 109, 129–30 (2013) (describing pattern of skepticism about asylum claims on the basis of domestic violence), *with* Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, REFUGEE SURV. Q., March 2010, at 46, 49 (describing initial reluctance to accept private gender-based violence as a ground for asylum under international law in part because it was not seen as a state action); *id.* at 50–51 (describing 2002 UNHCR guidance that affirmatively took the position that gender-based violence is covered within the definition of refugee status, including based on a state's failure to protect women from gender-based violence). *See generally* Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 783–86, 802–04 (2003) (describing the development of gender-based asylum claims in the United States and Canada).

55. *See, e.g.*, Blaine Bookey, *Gender-Based Asylum Post-*Matter of A-R-C-G-*: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1,

case, *Matter of R-A-*, languished in the immigration adjudication system, with a series of rulings by the BIA[56] and Attorneys General Reno,[57] Ashcroft,[58] and Mukasey,[59] all considering whether the horrific physical and sexual abuse that the Guatemalan respondent, Ms. Rodi Alvarado, had suffered at the hands of her husband should rightly be considered "persecution" as it is defined in the Immigration and Nationality Act (INA), so that she would be eligible for asylum in the United States.[60] Eventually, DHS acknowledged that the harm Ms. Alvarado had suffered was "persecution," and she was granted asylum in December 2009.[61] In a companion case, *Matter of L-R-*, DHS also stipulated that a Mexican national seeking asylum in the United States to escape twenty years of physical, sexual, and mental abuse from her partner could be eligible for asylum.[62] Then, five years later, in *Matter of A-R-C-G-*, the BIA recognized that a woman who feared persecution in the form of intimate partner violence may

3–4 (2016) (explaining that *Matter of A-R-C-G-*, which in 2013 was the first binding precedent for immigration judges on domestic violence claims, allowed many more women seeking asylum on the basis of intimate partner violence to prevail in challenges against the Obama administration's practice of family detention, because of the increased likelihood of the ultimate success of their claims).

56. R-A-, 22 I. & N. Dec. 906, 907 (B.I.A. 1999) (rejecting a domestic violence-based asylum claim because the female victim had failed to show that her husband was motivated to harm her because of membership in a particular social group or because of her political opinion).

57. R-A-, 22 I. & N. Dec. 906, 906 (Att'y Gen. 2001) (vacating the BIA's 1999 decision and directing the BIA to stay reconsideration until final publication of a proposed rule changing asylum and withholding definitions (citing Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000))).

58. R-A-, 23 I. & N. 694, 694 (Att'y Gen. 2005) (remanding the case to the BIA following publication of the proposed rule at 65 Fed. Reg. 76,588).

59. R-A-, 24 I. & N. Dec. 629, 632 (Att'y Gen. 2008) (lifting the stay and remanding the case to the BIA for reconsideration).

60. For a detailed history of *Matter of R-A-*, see Barbara R. Barreno, Note, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 234–38 (2011).

61. *Id.* at 248 (citing Department of Homeland Security Response to the Respondent's Supplemental Filing of August 18, 2009, Matter of R-A-, 24 I. & N. Dec. 629 (Oct. 28, 2009)).

62. Department of Homeland Security's Supplemental Brief at 14–21, Matter of L-R- (B.I.A. Apr. 13, 2009), http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [https://perma.cc/TM3D-M2CW] (acknowledging the victim's inability to leave a violent domestic relationship and that a relationship with a partner could be grounds for a finding of particular social group membership).

meet the requirements to be granted asylum.[63] In its published opinion, the BIA established the precedent that Mexican and Central American women who suffered intimate partner violence and were unable to leave their relationships with their violent partners had experienced persecution and had a credible fear of future persecution because they were members of a particular social group.[64]

On June 11, 2018, Attorney General Sessions issued his opinion in *Matter of A-B-*, explicitly overruling and vacating the BIA's decision in *Matter of A-R-C-G-*.[65] In the opinion, he stated that the BIA's decision in *Matter of A-B-* and two other opinions treated *A-R-C-G-* as establishing a new category of cognizable, particular social groups eligible for asylum—namely, Central American domestic violence victims.[66] He stated this was wrong because intimate partner violence, and other forms of physical or sexual assault, constituted a "private" or "personal" matter resulting solely from the relationship of the parties.[67] In the same opinion, Attorney General Sessions stated that women who had been raped, abused, or otherwise harmed by gang members would also be ineligible for asylum because gang violence was mere ordinary criminal behavior and did not constitute "persecution" under the INA.[68] He concluded that "few" asylum claims based on domestic violence or gang-related violence—the claims most frequently brought by Central American women seeking asylum—"would satisfy the legal standard to determine whether an alien has a credible fear of persecution."[69]

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63. A-R-C-G-, 26 I. & N. Dec. 388, 392–94 (B.I.A. 2014) (finding for the respondent as a member of a particular social group of "married women in Guatemala who are unable to leave their relationship").

64. *Id. See generally Nexus—Particular Social Group*, U.S. CITIZENSHIP & IMMIGR. SERVS. 10–21 (Apr. 24, 2024), https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf [https://perma.cc/488W-GENZ] (expressing USCIS's interpretation of the "particular social group" ground for asylum).

65. A-B-, 27 I. & N. Dec. 316, 316 (Att'y Gen. 2018) ("*Matter of A-R-C-G-* . . . is overruled. That decision was wrongly decided and should not have been issued as a precedential decision."), *abrogated by* Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).

66. *Id.* at 317, 346.

67. *Id.* at 319 ("The opinion has caused confusion because it recognized an expansive new category of particular social groups based on private violence.").

68. *Id.* at 320 (distinguishing gang violence from government actions).

69. *Id.* at 320 n.1.

Following Attorney General Sessions' decision, USCIS issued a Policy Memorandum instructing asylum adjudicators that: "[C]laims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution."[70] Several federal courts attempted to address the uncertainty created by this guidance interpreting *Matter of A-B-*, with some stating that it operated as an outright bar to granting asylum on gender-based grounds and with others suggesting that such grants should be rare, but still possible.[71] Nevertheless, the practical effect, with the sweep of a pen, was the virtual elimination of this basis for asylum during the first Trump presidency.

Soon after the *Matter of A-B-* ruling, asylum officers at the U.S.-Mexico border began categorically finding that female asylum applicants had no credible fear of persecution if they had previously been victims of gang violence.[72] Six months later, USCIS introduced new bureaucratic and procedural measures

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70. *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with* Matter of A-B-, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 11, 2018), https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF [https://perma.cc/JYU3-7W76]. This memorandum was revoked on June 16, 2021. *Id.*

71. *See, e.g.*, Gonzales-Veliz v. Barr, 938 F.3d 219, 228 (5th Cir. 2019) (stating that asylum was not available for a Honduran victim of domestic violence following *Matter of A-B-* and acknowledging that although other Courts of Appeals disagreed, "[w]e cannot be hindered from performing our duty by an injunction in another jurisdiction that is currently being appealed and is predicated on a view of immigration law with which we disagree"); Grace v. Barr, 965 F.3d 883, 905 (D.C. Cir. 2020) (interpreting the guidance as not categorically barring gender-based asylum claims but rather directing officers to "analyze each case on its own merits in the context of the society where the claim arises" (quoting USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B- 1, PM-602-0162 (July 11, 2018))); *see also,* Meagan Maloney, Note, *A Particular Social Group in Asylum Proceedings— The Fifth Circuit's Categorial Ban on Victims of Domestic Violence*, 73 SMU L. REV. 371, 376 (2020) (criticizing Fifth Circuit interpretation of A-B- and arguing that it "effectively" interprets A-B- to create a categorical ban, notwithstanding court's caveat to the contrary).

72. *See* Tal Kopan, *Impact of Sessions' Asylum Move Already Felt at Border*, CNN (July 14, 2018), https://www.cnn.com/2018/07/14/politics/sessions-asylum-impact-border/index.html [https://perma.cc/TL9V-6X5J] (quoting a BIA judge as writing in a denial of a domestic violence claim that "[t]he Attorney General has foreclosed the respondent's arguments").

affecting women seeking asylum based on intimate partner violence.[73] Within a year of *Matter of A-B-*, asylum adjudicators working with women at the Dilley Detention Center in Texas, who had previously found that ninety-seven percent of asylum applicants had a credible fear of future persecution based on the abuse that they had previously suffered, were finding that under the new rules, less than ten percent had a credible claim.[74] The women who were found to not have a credible fear of persecution were held in immigration detention pending further proceedings or sent back to their countries of origin to face further abuse.[75] Upon appointment in 2021, Attorney General Garland's first use of the self-referral power was to vacate his predecessor's *Matter of A-B-* ruling in its entirety.[76] But, of course, for the women who were held in detention, deported from the United States, and returned to the ambit of their abusers, the harm had already been done.

Matter of A-B- provides just one illustration of the way in which the first Trump administration was able to clearly and explicitly use the Attorney General's immigration self-referral power to overturn settled legal principles with the express goal of harming a discrete immigrant group. Attorney General Sessions himself acknowledged that one of the primary goals in this opinion was to deter Central American women experiencing intimate partner or gang violence from traveling to the United States to seek safe haven, in contrast with the Obama administration, which, he argued, had created "powerful incentives" for people to "come here illegally and claim a fear of return."[77] Attorney General Sessions explained on a separate occasion—

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73. *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 10–12 (D.D.C. 2020) (describing changes in bureaucratic process surrounding credible fear determinations).

74. *See* Amanda Holpuch, *Asylum: 90% of Claims Fall at First Hurdle After US Process Change, Lawsuit Alleges*, GUARDIAN (Nov. 13, 2019), https://www.theguardian.com/us-news/2019/nov/13/asylum-credible-fear-interview-immigration-women-children-lawsuit [https://perma.cc/JC37-LLQK] (describing the drop as unaccompanied by any public regulations, directives, or guidance about the credible fear interview process).

75. *See id.*

76. *See* A-B-, 28 I. & N. Dec. 307, 308–09 (Att'y Gen. 2021).

77. Katie Benner & Caitlin Dickerson, *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html [https://perma.cc/WS6T-3XEE].

when discussing the administration's mandatory detention and family separation policies for Central American asylum-seekers—that the purpose of the interlocking policies was to scare Central American women into not making the perilous journey north to the United States with their children, stating that "hopefully people will get the message."[78] The very purpose of his issuing a binding precedential ruling in an individual immigrant's case was to further a political policy goal—the goal of deterring arriving asylum seekers from seeking to vindicate their rights in the courts of the United States.

The first Trump administration made similar use of the Attorney General's self-referral power to radically reshape other areas of settled immigration law. In the asylum arena, in addition to the changes wrought by *Matter of A-B-*, Attorney General decisions were used to undermine the availability of asylum for individuals who had been coerced into supporting terrorist groups,[79] to redefine the standard of review applied by the BIA to decisions made by asylum officers and immigration courts in asylum cases,[80] and to overturn the rule that familial ties could be a basis for membership in a "particular social group."[81] With respect to the United States' longstanding international treaty commitments, as a signatory of the Convention Against Torture,[82] Attorney General decisions were used to redefine the

78. Philip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent [https://perma.cc/8ZFK-FAEM].

79. Negusie, 28 I. & N. Dec. 120 (Att'y Gen. 2020) (eliminating the duress exception to the "persecutor bar" in asylum proceedings).

80. A-C-A-A-, 28 I. & N. Dec. 84 (Att'y Gen. 2020) (requiring BIA to apply *de novo* review apparently even to immigration judge determinations of seemingly factual questions like whether an asylum applicant's membership in particular social group was "central reason" for their persecution), *vacated*, 28 I. & N. Dec. 351 (Att'y Gen. 2021).

81. L-E-A-, 27 I. & N. Dec. 581, 582 (Att'y Gen. 2019) (finding that an immediate family is not typically "distinct on a societal scale" regardless of whether it attracts violence from criminal actors), *vacated*, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

82. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (agreeing that signatories will act to prevent torture in their jurisdictions and avoid expelling individuals to other nations in which they would be tortured).

term "torture,"[83] and to introduce a heightened standard for relief from removal, withholding of removal, and deferral of removal.[84]

In the "crimmigration" context,[85] Attorney General decisions were used to alter the definition of "serious nonpolitical crime,"[86] to alter the methodology used by immigration judges employing the categorical approach to determine whether state criminal convictions meet the statutory definition of "aggravated felonies" under the INA,[87] and to create a presumption that immigrant respondents who had previously been convicted of driving under the influence would be ineligible for any form of relief from removal because they would be unable to show the requisite "good moral character" that they would need to show in order to qualify to remain in the United States.[88]

With respect to detention determinations by immigration judges, Attorney General decisions were used to limit judges' discretion to release immigrants on bond, pending the adjudication of their individual cases by the immigration courts.[89] And Attorney General decisions were also used to make significant changes to the procedures used in those immigration courts by revisiting the potential role of state court orders in removal

83. R-A-F-, 27 I. & N. Dec. 778, 778 (Att'y Gen. 2020) (defining torture as an act "specifically intended to inflict severe physical or mental pain or suffering" for the purpose of information-gathering, punishment, or discrimination).

84. O-F-A-S-, 28 I. & N. Dec. 35, 35 (Att'y Gen. 2020) (requiring there to be action undertaken by a state official acting "under color of law" in order for there to be a finding of torture under the Convention Against Torture).

85. "Crimmigration" refers to the intersection of immigration law and the criminal justice system. The term was first used by Professor Juliet Stumpf in her groundbreaking article on the crimmigration crisis. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

86. A-M-R-C-, 28 I. & N. Dec. 7, 7 (Att'y Gen. 2020) (defining a serious nonpolitical crime as being of "an atrocious or barbarous character").

87. Reyes, 28 I. & N. Dec. 52, 57 (Att'y Gen. 2020) (permitting a person to be removed on the basis of a prior criminal conviction, if the court employs an analysis combining multiple potential state criminal statutes, rather than limiting its analysis to a single statutory definition of the crime of conviction).

88. *See* Castillo-Perez, 27 I. & N. Dec. 664, 664 (Att'y Gen 2019) (creating a presumption that immigration respondents with OWI/DUI convictions are ineligible for relief from removal).

89. *See* M-S-, 27 I. & N. Dec. 509, 509 (Att'y Gen. 2019) (barring the release from detention of certain asylum applicants).

proceedings,[90] introducing a stricter standard for consideration of respondents' motions for a continuance,[91] and curtailing asylum applicants' entitlements to evidentiary hearings.[92] Most notably, Attorney General decisions were used to expand the very scope of the Attorney General's own powers, and, concurrently, to limit the powers of the BIA and the immigration courts by determining that the BIA and the courts lacked inherent authority to terminate, dismiss, or administratively close proceedings, whereas the Attorney General himself was empowered to do so.[93]

This unprecedented wave of immigration rulemaking by Attorney General self-referral during the first Trump administration illustrates the fundamental flaws inherent in a process that comprises unrestrained, unreviewable, and immediately enforceable rulemaking by an executive branch official. Scholars who, historically, supported Attorney General self-referral in immigration proceedings grounded their arguments in an implicit (but shared) understanding that office-holders would act with restraint and would only deploy this review mechanism in rare instances of grave national import.[94] It may, indeed, be true that administrations before 2017, and the Biden administration from 2021 through 2025, have (more or less) exercised such restraint and have not relied upon use of the Attorney General self-referral power to aggressively advance their immigration-related policy agendas. But the very fact that the review power was

90. *See* Thomas, 27 I. & N. Dec. 674, 674 (Att'y Gen. 2019) (revisiting the role of state court orders in removal proceedings).

91. *See* L-A-B-R- et al., 27 I. & N. Dec. 405, 405–06 (Att'y Gen. 2018) (instituting a stricter standard for the grant of immigrant respondents' requests for a continuance).

92. *See* E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018) (vacating an asylum applicant's entitlement to an evidentiary hearing on his case).

93. *See* Castro-Tum, 27 I. & N. Dec. 271, 271 (Att'y Gen. 2018) (determining that immigration judges and the BIA lack inherent authority to administratively close proceedings), *overruled*, Cruz-Valdez, 28 I. & N. Dec. 326, 328 (Att'y Gen. 2021) ("[I]t is appropriate to overrule [the] opinion in *Castro-Tum*. . . . [A]dministrative closure is 'plainly within an immigration judge's authority' under Department of Justice regulations." (quoting Meza Morales v. Barr, 973 F.3d 656, 667 (7th Cir. 2020))); *see also* S-O-G-, 27 I. & N. Dec. 462, 462 (Att'y Gen. 2018) (determining that immigration judges have no inherent authority to terminate or dismiss removal proceedings).

94. *See* Gonzales & Glen, *supra* note 1, at 858–60 (discussing relative rarity of Attorney General immigration decisions since 1950s, tendency of decisions up to 2015 to be focused on issues of national significance and deliberative in character).

deployed so comprehensively to radically reshape immigration law between 2017 and 2021[95] demonstrates that a similarly unrestrained approach could be taken by future administrations and/or by future Attorneys General, at any time. Indeed, as President Trump has returned to office, that time is most likely imminent. This undeniable truth is, as we explain in Part II of this Article, incommensurable with the founding generation's vision of separation of powers and the fundamental precepts of the rule of law.

II. THE HISTORY OF JUDICIAL NEUTRALITY AND THE RULE OF LAW

To the reader not familiar with agency-head adjudication, the notion that the Attorney General has the power to unilaterally change immigration law, and in the course of doing so make nakedly policy-oriented rulings on the cases of individual human beings, may seem shocking and alien to the basic presuppositions of our legal system. We urge such a reader to trust that intuition and now proceed to defend it, starting from the beginning.

A. STUART ENGLAND, THE ROYAL PREROGATIVE, AND THE CROWN AS "A JUDGE IN ONE'S OWN CASE"

To explain why the Attorney General self-referral power is incompatible with the rule of law, we must first revisit the basic principles of that concept in our Anglo-American legal tradition; chief among those principles is the guarantee that disputes will be resolved before an impartial adjudicator. The idea of judicial independence derives from the more basic idea of judicial neutrality, expressed in its most modest form in the classical rule of law principle, associated with John Locke,[96] and repeated by the

95. *See* cases cited *supra* notes 79–93.

96. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION § 13, at 8–9 (J.W. Gough ed., Basil Blackwell & Mott, Ltd. 3d ed. 1966) (1690) ("I doubt not but it will be objected that it is unreasonable for men to be judges in their own cases . . . . I desire to know what kind of government that is, and how much better it is than the state of nature, where one man commanding a multitude has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases, without the least liberty to any one to question or control those who execute his pleasure . . . ?"); *see also id.* § 131, at 64 ("And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and

U.S. constitutional framers,[97] that a person may not be judge in his or her own case (*nemo judex in causa sua*). In its application to private law, the idea of a person not being the judge in his or her own case seems fairly clear; imagine our outrage should a commercial dispute be adjudicated by just one of the parties. Under those circumstances, we would rightly suspect that the adjudication would be determined not by law, but by the interest of the adjudicator. Hence, we demand judges be neutral between the parties.

In the public law context, the principle of judicial neutrality runs into some conceptual difficulties rooted in Thomas Hobbes' idea that a sovereign might not be divided,[98] and so the state is, at some level, necessarily the judge of all disputes, even those brought for or against the government itself. So how can a jurist, employed by the state, ever be neutral in matters involving that state's government? Indeed, the historical development of the Anglo-American judiciary throws the very idea of judicial neutrality into question, because for most of English history the judiciary served as appendage of the Crown.[99]

In the Anglo-American tradition, concrete fears surrounding the Crown serving as "judge in its own case" drove much of the development of the idea of *nemo judex in causa sua*, particularly in the conflict in the seventeenth century between the Stuart monarchs and the common lawyers and Parliament, represented most famously in the person of Sir Edward Coke, the Chief Justice of Common Pleas.[100] That period illustrates two key objections to the Crown serving as judge in public law cases, matching two motivations that executives commonly have for interfering in the judiciary. The first objection is that royal influence over the judiciary might be used to reinforce unbounded executive

known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws . . . .").

97. *See, e.g.*, THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.").

98. *See generally* Jens Bartelson, *On the Indivisibility of Sovereignty*, REPUBLICS LETTERS, March 11, 2011, at 85, 89 (discussing Hobbes's account of the indivisibility of sovereignty).

99. *See generally* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 17–21 (5th ed. 2019) (describing the early English system of royal courts).

100. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 134–37 (2016) [hereinafter GOWDER, REAL WORLD] (describing background and key ideas about the courts in the Stuart-era conflict between Crown and Parliament).

power over individuals.[101] The most famous example is the *Five Knights Case*, in which King Charles I used his control over the courts to prevent there being any check on his ability to imprison individuals, to extort money from them.[102]

The second objection is that royal influence might be used to interfere with the legislative process in systems within which court rulings may carry the force of law (systems of *stare decisis*).[103] One example would be Stuart use of the prerogative courts to issue decrees rather than going through Parliament.[104] The courts could even be used in a second-order way, to rule on the validity of other kinds of extra-legislative legislating.[105] For example, in 1610, King James I called Coke and some other judges to the Privy Council to give an opinion on his claim of authority to regulate land use in London, where he wished to prohibit the populace from previously lawful activities, like building or making wheat, because he found such actions disagreeable.[106] The monarch argued that "the Royal Prerogative"

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101. *See, e.g.*, Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden (*Five Knights Case*) (1627) 3 Howell's State Trials 1, 59 (Eng.) (refusing the knights' writ of habeas corpus and allowing the knights to be imprisoned based solely on the king's command); Paul Gowder, *Law and Leviathan: Redeeming the Administrative State*, 31 LAW & POL. BOOK REV. 12, 25 (2021) (book review) [hereinafter Gowder, *Review of Law and Leviathan*] (discussing how the style of tyranny in the *Five Knights Case* is most likely to be seen in administrative adjudication of individual cases); *see also* GOWDER, REAL WORLD, *supra* note 100, at 134 ("[B]y imprisoning citizens and refusing to give the reasons or subject his actions to judicial control, the king reduces ordinary Englishmen to the status of villeins.").

102. *See generally* GOWDER, REAL WORLD, *supra* note 100, at 134 (describing the *Five Knights Case*).

103. *See generally* Gowder, *Review of Law and Leviathan*, *supra* note 101, at 26 ("[T]here's also Weak Stuart Tyranny . . . in which [agency] interpretation . . . in the spaces of unavoidable legal ambiguity . . . subtly shifts on a case-by-case basis to accommodate the desires of the executive to strike out against individuals or to quietly massage the law to achieve novel policy outcomes on the backs of individual interests.").

104. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 55–57 (2014) (describing how the Star Chamber used extralegal power to implement royal policy and law).

105. *Id.*

106. EDWARD COKE, PROCLAMATIONS (1610), *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 486–87 (Steve Sheppard ed. 2003). *See generally* Noga Morag-Levine, *The* Case of Proclamations *(1610),* Aldred's Case *(1610), and the Origins of the* Sic Utere/Salus Populi *Antithesis*, 40

allowed the Crown to change, by proclamation, the existing laws of the land without consulting Parliament.[107] But, in the *Case of Proclamations*, Coke refused to rubber-stamp such a power grab, announcing that the Royal Prerogative did not permit James I to outlaw previously legal actions without the legislature's consent.[108] In so ruling, Coke famously declared that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm" because "the King hath no prerogative but that which the law of the land allows him."[109]

We shall be referring to these problems again, so let's give them names: the *unbounded coercion* problem and the *judicial legislation by decree* problem, respectively. These problems led in part to demands for some system of judging that represented more than just the raw political will of the King.[110] Much of Coke's career can be interpreted in just this fashion, from his famous declaration in the *Case of Prohibitions* that "the King cannot take any cause out of any of his Courts, and give

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LAW & HIST. REV. 383 (2022) (describing the legal, political, and factual context of the *Case of Proclamations*).

107. Case of Proclamations (1611) 77 Eng. Rep. 1352, 1353, 12 Co. Rep. 74, 74 (summarizing the Lord Chancellor's arguments for maintaining the power and prerogative of the king). Coke is quite clear in his report of the case that he was asked to merely rubber-stamp the decision:

> To which the Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: and the Lord Privy Seal said, that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease: and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.

Id.

108. *Id.* at 1353–54, 12 Co. Rep at 74.

109. *Id.*

110. HAMBURGER, *supra* note 104, at 145–46 (describing how the lack of judicial independence in prerogative courts and repeated dismissal of judges who refused to conform to the will of the king led to the adoption of formal protections against external pressure).

judgment upon it himself,"[111] to his 1616 firing from the King's Bench for being insufficiently compliant with royal policy,[112] to his advocacy in Parliament for the Petition of Right in response to the *Five Knights Case*.[113]

B. THE UNITED STATES CONSTITUTION AND FAIR JUDICIAL PROCESS

The American constitutional framers doubtless had Coke and the seventeenth century conflict in mind. Moreover, they had their own experience with the political interference with courts in the colonial period: Two of the complaints of the Declaration of Independence directly referred to metropole manipulation of the judiciary,[114] and two others complained more broadly of judicial maladministration or the deprivation of rights associated with fair judicial process.[115] One of the major complaints leading to the revolution arose out of the establishment of the hated vice-admiralty courts, which enforced colonial taxation without juries and as an arm of metropole policy.[116] To illustrate the importance that the revolutionary generation placed on judicial neutrality, we can quote a famous tirade that John Adams wrote on those courts, which was sent by the Braintree Town

111. Case of Prohibitions (1607) 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64, 65.

112. Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 2–3 (1977) (recounting Chief Justice Coke's refusal to comply with the will of King James and his subsequent arbitrary removal from the bench).

113. GOWDER, REAL WORLD, *supra* note 100, at 134–39 (discussing Coke's contributions to the parliamentary debates of 1628).

114. THE DECLARATION OF INDEPENDENCE paras. 11, 17 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the Amount and Payment of their Salaries. . . . For protecting ['large Bodies of Armed Troops'], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.").

115. *Id.* at paras. 10, 20 ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers. . . . For depriving us, in many cases, of the benefits of Trial by Jury.").

116. CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 63 (1960) ("In America, a single judge would determine [trade violation cases], following civil-law procedures that made no provision for a jury. Many Americans concluded that this distinction place them in an unequal position, depriving them of a sacred right."); PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 50–52 (2021) [hereinafter GOWDER, U.S. RULE OF LAW] (discussing how vice-admiralty courts without juries were a prominent cause of the American Revolution).

Meeting to the Massachusetts General Assembly in 1765:

> But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge, whose commission is only during pleasure, and with whom, as we are told, the most mischievous of all customs has become established, that of taking commissions on all condemnations; so that he is under a pecuniary temptation always against the subject. Now, if the wisdom of the mother country has thought the independency of the judges so essential to an impartial administration of justice, as to render them independent of every power on earth,—independent of the King, the Lords, the Commons, the people, nay, independent in hope and expectation of the heir-apparent, by continuing their commissions after a demise of the crown, what justice and impartiality are we, at three thousand miles distance from the fountain, to expect from such a judge of admiralty?[117]

Accordingly, the Framers needed to come up with their own solution to the problem of judicial neutrality in public law cases. Fortunately, they'd read their Montesquieu,[118] and so their answer to the problem, and the root of the contemporary challenge to administrative adjudication, is the doctrine of separation of powers as applied to the judicial and executive branches of the federal government.[119] Fundamentally a rejection of the Hobbesian idea of the unified sovereign, the heart of the idea of judicial separation of powers has been translated into contemporary international discourse as the paradigm case of an "independent judiciary."[120] In that form, the idea is that if judges are organized in institutional contexts that confer on them distinct incentives from executives and insulation from executive authority, then

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117. 3 JOHN ADAMS, INSTRUCTIONS OF THE TOWN OF BRAINTREE TO THEIR REPRESENTATIVE (1765), *reprinted in* 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 465, 466 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1865).

118. *See generally* Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990) (describing Montesquieu's influence on the Framers).

119. *Id.* at 25–27 (discussing how Montesquieu influenced the Framers in their advocacy for separation of powers).

120. See, for example, a speech by former Justice Sandra Day O'Connor in Beijing. Sandra Day O'Connor, Commentary, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1 (2003) (holding out American separation of powers as a global model for judicial independence and the rule of law).

the executive may bring a private person before the courts without being judge in his own case.[121]

In the abstract, it is reasonable to distinguish two categories of tools that might be used to protect judicial independence: the institutional and the cultural. In the first category, we have basic constitutional provisions like life tenure[122] and protected salaries,[123] which protect judges from coercion. The logic employed by the Framers was that if Presidents cannot fire their judges like James I fired Coke, and cannot punish them for decisions they don't like, then those judges have less incentive to prejudge cases in favor of the president.[124] In that category also belong rules of judicial procedure and ethics like the prohibition on ex parte communication with courts[125] and the obligation of recusal when one's impartiality might be questioned[126] which close off avenues of influence between the powerful and judicial decisions in particular cases involving them. In the latter are ideas like the socialization of judges to genuinely believe in legal institutions and the underlying ideals of legal justice which they represent[127] and the socialization of the people at large to support their courts,[128] as well as the ongoing public scrutiny of those courts and the public participation in them through juries (which may also be viewed as an institutional constraint to the extent it directly empowers people who are not taking a

121. *See generally* Williams v. Pennsylvania, 579 U.S. 1, 8–9 (2016) (citing the prohibition on being judge in one's own case to bar a former prosecutor from serving as a judge in a case in which he participated as a prosecutor).

122. U.S. CONST. art. III, § 1.

123. *Id.*

124. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the importance of judicial independence in a limited constitution).

125. *See, e.g.*, CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(4) (JUD. CONF. OF THE U.S. 1997).

126. *See, e.g.*, *id.* at Canon 3(C)(1).

127. *See, e.g.*, E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262–63 (1975) ("It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity . . . [i]n the case of an ancient historical formulation like the law, a discipline which requires years of exacting study to master, there will always be some men who actively believe in their own procedures and in the logic of justice.").

128. *See generally* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009) (giving account of judicial power according to which it serves as a signaling device for coordinated popular action).

government paycheck to influence the decision of cases, and hence prevent the powerful from corrupting adjudication).[129]

The public law conception of the principle against a person being judge in his or her own case—the separation of the executive from the courts—meets important practical and moral demands. Executives have a broad category of motivations to engage in either unbounded coercion or judicial legislation by decree, which broadly fall under the category of "reasons of state." The executive might perceive that an individual is a threat to public order, for example, and order them locked up, and then interfere with the judiciary to keep them imprisoned. Or the executive might perceive some policy change to be necessary but be unable to achieve it through the ordinary legislative process, and hence order a precedent to be created through some adjudication. However, any kind of judicial action entered into by an executive for reasons of state risks individual legal rights and reliance interests being totally disregarded.

In addition to the moral importance of the rule of law in the abstract in terms of, depending on one's account, equality[130] or liberty,[131] there is a distinct moral importance to the neutral enforcement of preexisting legal rights rather than casting those rights aside for policy purposes. Immanuel Kant's theory of right can serve to draw out this moral importance. For Kant, a human is fundamentally a *rational* being; that is, a being who forms ends and then seeks to utilize means available to pursue those ends.[132] But setting ends requires the capacity to acquire

129. *See generally* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182–85 (1991) (giving an account of jurors as exercising popular control over adjudication); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (defending the use of jury nullification as a correction to racial bias in administration of the laws).

130. *See, e.g.*, GOWDER, REAL WORLD, *supra* note 100, at 7 ("The rule of law is morally valuable because it is required for the state to treat subjects of law as equals.").

131. *See, e.g.*, 17 FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 221 (Ronald Hamowy ed., 2011) (arguing that in a rule of law system "we are not subject to another man's will and are therefore free").

132. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 86–87 (2009) (explaining the root of Kantian theories of right in human rational nature).

security (i.e. rights) in the means to pursue them.[133] While for Kant—as for other liberal theorists—the primary case of such rights is property rights, the logic of that reasoning extends to all other kinds of legal rights as well, to the extent those rights guarantee a sphere of activity within which one's ends may be pursued.[134] The primacy of property ought to be seen as a historical contingency, related to the association between the rise of liberal theory and the rise of the bourgeoise; this association is perhaps nowhere more visible than in James Madison's famous essay entitled "Property" in which he assimilates other legal rights, such as free speech and religious freedom, to property.[135] In Madison's words:

> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.[136]

This also contributes to an explanation of the parallel protection of "liberty" as well as "property" in our two Due Process clauses.[137]

Understanding legal rights as similar to property allows us to see the moral importance of neutral adjudication: To divest someone of their preexisting legal rights is to undermine their capacity for autonomy, and such divestiture is only permissible to the extent that it is itself consistent with their autonomy. In a well-ordered state, legal methods of adjudication that respond to preexisting law and to legal argument from the person whose rights are at risk can be reconciled with that person's autonomy even if they lose their case, in at least two respects. First, because, as Kant saw, a system of law is necessary to establish the capacity to have enforceable rights in property or in other

133. *Id.* at 86 ("[I]t must be possible to have rights to things other than your own person or powers, insofar as these other things could be available as means for setting and pursuing your own purposes.").

134. For example, similar reasoning can apply to freedom of speech. *See, e.g.*, *id.* at 51 ("The [right to independence] provides the basis for rights of freedom of expression, limited only by the rights of others . . . .").

135. JAMES MADISON, PROPERTY (1792), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906).

136. *Id.*

137. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

domains of autonomy; hence the just administration of such a system is a condition for autonomy in the first place.[138] Second, because a genuine adjudication (as opposed to a non-neutral, sham adjudication) that comports with the principle of *audi alteram partem* (listen to both parties) brings the rational capacity of the individual into the decision—at least permitting the individual and their powers of reason to participate in, and influence, the legal determination.[139]

In a well-functioning system of judicial independence, in which the courts are motivated primarily by legal rather than policy considerations, those individual interests that are protected by preexisting law will be insulated from sacrifice associated with short-term policy exigencies. They may never be completely insulated, for some short-term policy considerations may be sufficiently urgent that the law must give way—hence, for example, property is commandeered in times of war, buildings are knocked down to serve as firebreaks under the tort doctrine of public necessity, and our constitutional law is replete with balancing tests that invoke the magnitude of a state interest to insist that an individual right give way.[140] But the interposition of independent judges, if the system functions as designed, contributes to bringing it about that the policy exigencies must be genuinely urgent before such a sacrifice will be permitted.[141]

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138. RIPSTEIN, *supra* note 132, at 146 (discussing the defects of Kant's state of nature and how the three branches of government resolve each defect).

139. *See* GOWDER, REAL WORLD, *supra* note 100, at 20 (arguing that listening to a litigant expresses respect for that litigant's judgment and reason).

140. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (balancing government and individual interests in procedural due process test); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 380 (2016) (discussing the balancing test (strict scrutiny) under Equal Protection Clause); Surocco v. Geary, 3 Cal. 69, 73–74 (Cal. 1853) (finding plaintiffs cannot recover for the destruction of their house due to public necessity); United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871) (describing extraordinary and unforeseen circumstances in which commandeering of private property may be necessary).

141. Such a claim does not presuppose a kind of naive legal formalism, according to which judges view the legal domain as autonomous from the policy domain and do not allow their decisions to be influenced by their own political or policy views. By contrast, it merely requires that one reject a kind of naive attitudinalism, according to which judges are indistinguishable from politicians. If judges care *less* about policy and *more* about law than politicians, their independent control over legal decisions will bring it about that judges will require more intense policy preferences to set aside their legal views than would politicians who controlled the courts on their own.

This separation of policy exigency from individual legally-protected interest corresponds to Kant's notion that it is impermissible to treat another as a mere means for the pursuit of one's own ends.[142] Because legal rights, on this Kantian framework, correspond to a socially recognized sphere of individual autonomy,[143] to cast legally protected rights aside in the pursuit of marginal improvements in the general good is to fall into the error that John Rawls identified in utilitarian theories of justice: to disregard "the distinction between persons" and the ineluctable moral importance of each individual.[144] In other words, to make a decision in a real person's case—with their interests at stake and when they are facing serious, individual consequences—simply on the basis of broader policy goals without a jot of consideration to how the individual standing before one and their preexisting legal interests and rights might be affected is to disregard that person's individuality and rational nature altogether, to quite literally treat them merely as a statistic or as an obstacle for the pursuit of some extra-litigation collective objective.

Moreover, this moral wrong is more serious in the course of something that purports to be an adjudicative process. When the King shows up to dictate the result of an adjudication on policy grounds, not only are the individual's vested interests in the expectations created by their legal rights thrown aside, but so also their process-based autonomy interests. As Lon Fuller aptly argued, the essence of an adjudicative process lies in its orientation to reason-based decision-making and correlative obligation in litigants to offer arguments for their positions.[145] But if there's some overriding policy-based consideration dictated by an external authority—if the King calls the judge and says "I need this case to go this way in order to increase my tax revenue"—then

142. More specifically, to treat another's rational nature as a mere means. This follows from Kant's idea that humanity's rational nature is an end in itself, morally speaking. *See* ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 115–16 (1999). As we have already established, on the Kantian approach our legal rights are an outgrowth of our rational nature as beings who form and pursue ends. *See supra* text accompanying notes 130–137.

143. *See* RIPSTEIN, *supra* note 132, at 14–17 (describing importance of independence on Kantian moral theory and relationship of independence to legal rights).

144. JOHN RAWLS, A THEORY OF JUSTICE 24 (rev. ed. 1999).

145. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

the litigant's arguments can have no impact on the outcome. They might as well have not bothered showing up.[146] To fill out the insult to the autonomy and dignity of the litigant, consider an offhand remark of Fuller's: that we would condemn a judge who fell asleep at the bench.[147] We are so offended at such behavior, it seems clear, because it quite vividly suggests that the litigants and their arguments are truly unimportant to the judge—they don't even make a dent on the judicial consciousness. And that is a dramatic form of disregard to display in an adjudicative process.[148] In terms of the maxims of legal Latin, when the government is one of the litigants, we expect that a violation of *nemo judex in causa sua* will also lead to a violation of *audi alteram partem*.

Practically speaking, the general social and economic benefits of the broader idea of the rule of law are also associated with judicial independence—this may, perhaps, be of particular

146. *See id.* at 390–91 (criticizing the proposal of a socialist professor to conduct wage adjudications on the basis of general labor policy on the grounds that "the bond of the affected party's participation has largely been destroyed" by a sham hearing that ought not to be adjudicative at all, where "the grounds of decision are largely unrelated to what occurred at the hearing").

147. *Id.* at 366. In his litigation days, Gowder actually was once involved in a case in which the judge appeared to be dozing during oral argument—although he is pleased to report that he was merely second chair in that matter, and hence was not responsible for the advocacy that apparently bored the judge so—and can confirm the feelings of outrage and despair that attend a litigant in such a position. Horrifyingly, the record of American courts does contain a number of cases in which even criminal convictions where the judge had fallen asleep or appeared to fall asleep during trial were upheld. *See, e.g.*, People v. Sheley, 90 N.E.3d 493, 494 (Ill. App. Ct. 2017); State v. Johnson, 453 P.3d 281, 283 (Kan. 2019); Lampitok v. State, 817 N.E.2d 630, 640–41 (Ind. Ct. App. 2004); United States v. White, 589 F.2d 1283, 1289 (5th Cir. 1979).

148. As Fuller further explains, even some of the more mundane conventions of judicial process are recognitions of this participatory interest—for example, the requirement that the judge's ultimate decision be justified by the arguments raised by the parties, rather than the court's independent reasoning. Fuller, *supra* note 145, at 388. In Fuller's words, "if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant—then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning." *Id.* This is a point that has been recognized at least since Athens. *See* DEMOSTHENES, AGAINST TIMOCRATES, *reprinted in* DEMOSTHENES AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, AND ARISTOGEITON ¶ 151, at 469 (J.H. Vince trans., 1935) (353 B.C.), (quoting an Athenian judicial oath which runs together obligation to listen to the parties and to only decide on the charge before the court: "I will give impartial hearing to prosecutor and defendant alike, and I will give my verdict strictly on the charge named in the prosecution").

interest to utilitarians and others who reject a Kantian approach to rights.[149] A judiciary that protects private rights against executive-driven policy exigency thereby undergirds stable social expectations that can promote reliance and the capability for long-term, complex enterprises. Individuals may take calculated risks with an awareness of the bounds established by law to the harm they may suffer if those risks go badly—for example, making investments in a community knowing that the law prohibits their property from simply being expropriated. Similarly, an opportunity to be heard—as noted, only genuinely available before a neutral judge—is empirically associated with broad systemic benefits associated with a perception of legitimacy, such as wider public willingness to comply with the law.[150] More abstractly, judicial independence may be understood as a necessary tool to permit society to commit to a determinate set of legal decisions, and hence both to protect private autonomy against unstable law but also to protect public autonomy in its capacity to see an intended course of action through to completion.[151]

These long-recognized and formalized attributes, which are broadly associated with adherence to the rule of law—i.e., judicial neutrality and independence accompanied by the due process guarantees of party autonomy, adequate notice, and a meaningful opportunity to be heard—are a hallmark of proceedings before the federal and state judiciary in the modern United States. Yet administrative proceedings, including immigration proceedings, which involve the adjudication of important claims of right against the government of the United States, are not subject to the same standards. In Part III we, therefore, discuss how and why administrative adjudication may depart significantly from the rule-of-law norms of courts of law.

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149. For a discussion on the general relationship between the rule of law and economic development, see Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008).

150. *See generally* Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 SWISS J. ECON. & STAT. 219 (1997) (summarizing literature on the association between compliance with the law and procedural fairness, including judicial neutrality, respect, and the opportunity to participate).

151. *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 366–67 (1999) (defending a commitment-oriented account of judicial independence); GOWDER, REAL WORLD, *supra* note 100, at 59–62 (arguing that rule of law is useful to leaders by separating enforcement from the bearing of the costs of enforcement).

III. THE CHALLENGE TO ADMINISTRATIVE ADJUDICATION

Our focus in this Article is on the legitimacy (or lack thereof) of the Attorney General self-referral power. That process exists, however, within the broader context of administrative adjudication in general, and immigration adjudication in particular—both of which have been criticized resoundingly by an august array of legal scholars.[152] Administrative adjudication in the United States, with judges under the managerial control of the executive branch issuing legally binding decisions about individual rights, has often been the subject of scholarly critique. Critics of administrative law from the right, such as Philip Hamburger, have compared administrative adjudication to the most infamous of the Stuart-era "prerogative courts," the Star Chamber.[153] And while Hamburger has been criticized for a certain shakiness about administrative law,[154] and perhaps even about his understanding of the English history and law on which his argument is built,[155] the worry has an unmistakable appeal.

152. *Compare* HAMBURGER, *supra* note 104, at 192–93 (carving out exception to his broader critique of administrative adjudication for immigration because it allegedly concerns "persons not subject to American law"), Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (arguing that immigration adjudication "has fallen below the minimum standards of legal justice"), *and* Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J. L. & PUB. POL'Y 5 (2013) (outlining the modern administrative state's inconsistency with the rule of law), *with* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra* note 104), *and* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020) (defending administrative law).

153. HAMBURGER, *supra* note 104, at 55–56 ("What could not be done directly through proclamations or indirectly through interpretation might nonetheless be accomplished by means of regulations—not yet administrative regulations issued by administrative agencies, but prerogative regulations issued by prerogative courts, particularly the Star Chamber."). Hamburger emphasizes precisely the merger of policy and law in his description of the Star Chamber, calling it "the leading prerogative court, which implemented royal policy as well as law." *Id.* And even though, on Hamburger's account, the core vice of the Star Chamber seems to have been the enactment of regulations, *see id.* at 56, he also suggests that its abolition stood in for the idea that the executive could no longer tamper in the judiciary. *Id.* at 141.

154. *See generally* Vermeule, *supra* note 152 (claiming that Hamburger misunderstands administrative law).

155. *See* Paul Craig, *English Foundations of US Administrative Law: Four Central Errors* (Oxford Legal Stud. Legal Rsch. Paper, Paper No. 3/2017, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852835 [https://perma.cc/87ZF-WTRR] (arguing that Hamburger misunderstands English legal history).

After all, new rules announced in adjudication tend to have a retroactive effect on the case before them.[156] So, when a litigant before an administrative tribunal discovers that they lose a case they expected to win because a new President is in office, and that new President wishes to institute a different policy from his or her predecessors, and that policy is to be implemented via a change to the interpretation of underlying law made in some administrative tribunal, our victim seems to have had her supposedly secure legal interests sacrificed on the altar of some overriding policy goal—precisely to be treated as a mere means.[157]

In view of the fact that a number of administrative agencies are notorious for announcing policy changes via agency adjudication—most famously the National Labor Relations Board[158]—the practice of administrative adjudication raises the inherent worry that individual legal rights are to be sacrificed for overall policy goals. Those worries are exacerbated to the extent more serious individual interests are placed at risk—a normative truism captured in our law via the *Mathews v. Eldridge*[159] balancing test—and to the extent the rules are less stable, for example, in controversial policy areas.

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156. *See generally*, *e.g.*, Safari Club Int'l v. Zinke, 878 F.3d 316, 333 (D.C. Cir. 2017) ("[A]djudications immediately bind parties by retroactively applying law to their past actions.").

157. The novel legal rules announced by common law judges are also retroactive. *See* Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW & PHIL. 1, 22 (2004) (describing the pervasiveness of judicial changes in the law that have retroactive effects). However, independent judges can mitigate this complaint with reference to the Dworkinian idea that such judges at least are deriving their new rules from the extant legal materials, rather than their own naked preferences about the best outcome. *See id.* at 24 (explaining Ronald Dworkin's solution to the problem of judicial retroactivity and challenges to it); *see also* THOMPSON, *supra* note 127, at 262–63 (explaining that internal socialization of legal officials generates pressure toward faithful and just rulings). Accordingly, both the practical and the moral advantages of the separation of powers are preserved: Those preexisting legal materials at least potentially give litigants some notice about the bounds of their expectations, and, insofar as preexisting legal rights represent the sphere of autonomy and dignity to which an individual is entitled, a judicial decision relying on them cannot truly be said to sacrifice that autonomy or dignity for some vision of the greater good (at least when one assumes a judiciary that remains reasonably faithful to its institutional role).

158. *See generally* SUNSTEIN & VERMEULE, *supra* note 152, at 53–54 (describing the NLRB practice of making policy via adjudication).

159. 424 U.S. 319, 334–35 (1976) (balancing individual and government interests in due process).

A. ADMINISTRATIVE SEPARATION OF POWERS AND DECISIONAL INDEPENDENCE

Congress and the courts have not been entirely quiescent in the rise of administrative adjudication, for the worries that we have described are not merely academic worries, but, rather, have influenced the underlying legal framework of administrative law. Accordingly, they have undertaken efforts to provide a kind of simulacrum of separation of powers within the executive branch itself.

The idea of executive branch separation of powers is not absurd on its face.[160] From a post-Hobbesian functional standpoint, there is nothing special about the words "judicial branch" and "executive branch." The benefits of judicial independence might, in principle, be achieved within an executive branch, as long as the adjudicators within that branch enjoy adequate institutional and cultural supports for that independence. For example, most of the effects of life tenure could, we suggest, be achieved by robust civil service protections providing a reliable guarantee of termination only for genuine cause, and the development of an organizational culture that socializes administrative adjudicators toward preferring the preexisting legal materials rather than naked policy considerations as a motivating factor in their decisions. Such a structure is something that could be built within the executive branch, given an agency with a strong ethical culture.

The Administrative Procedure Act (APA)[161] therefore sets out statutory requirements aimed at preserving some degree of judicial independence in adjudications subject to it, including the prohibition on ex parte contact or supervisory relationships between the adjudicator and anyone who participated in the investigation of the case,[162] and the requirement of an impartial

160. *See, e.g.*, Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016) (examining notion of administrative separation of powers); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (proposing mechanisms to install checks and balances within the executive branch).

161. 5 U.S.C. §§ 551–59.

162. *Id.* §§ 554(d), 557(d).

decisionmaker.[163] The legislative history of the APA reflects a concern with impartiality rooted in the separation of powers.[164] As the Supreme Court said, the APA had "the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[165] As the Court also pointed out, Congress intentionally created administrative law judges with special statutory protections within the civil service as "a special class of semi-independent subordinate hearing officers."[166]

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163. *Id.* § 556(b) ("The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner.").

164. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 41–42 (1950) ("The President's Committee . . . voiced in 1937 the theme which . . . was reiterated throughout the legislative history of the Act. . . . The Committee's report . . . said: '. . . the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge.'" (quoting THE PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 36 (1937))).

165. *Id.*

166. Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 132 (1953) (quoting S. REP. NO. 79-752, at 6 (1945)); *cf.* 5 U.S.C. § 7521 (providing that administrative law judges may only be subject to adverse employment consequences upon a showing of good cause). Indeed, these protections are in some danger, for, as Justice Breyer pointed out in his concurrence in *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2057–64 (2018) (Breyer, J., concurring in part and dissenting in part), if we read *Lucia* together with *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), we may be forced to conclude that the strong civil service protections for ALJs are *unconstitutional*, insofar as they excessively impede the President's power to terminate executive officers. *See Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part and dissenting in part) ("*If* the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges . . . then to hold that the administrative law judges are 'Officers of the United States' is, *perhaps*, to hold that their removal protections are unconstitutional."). This would, as Justice Breyer pointed out, entirely unravel the Congressional design for independent administrative adjudication. *Id.* at 2060–62. The Fifth Circuit has recently made this danger very real. *See* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 449, 464 (5th Cir. 2022) (striking down removal protections for SEC ALJs as unconstitutional in light of *Lucia* and *Free Enterprise Fund*), *aff'd*, 144 S. Ct. 2117 (2024). The Supreme Court upheld the Fifth Circuit's decision on different grounds, ruling that the fines imposed by the SEC violated the Seventh Amendment's jury trial right, but explicitly declined to address the permissibility of ALJs being insulated from Presidential termination. Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024) ("The Seventh Amendment . . . applies [in SEC antifraud actions] and a jury is required. Since the answer to the jury trial question resolves this case, we do

Despite those Congressional efforts, critics of administrative law have noted evidence of significant pro-government bias in administrative proceedings.[167] Some reports can be quite astonishing. For example, in 2015, it came out that one Securities and Exchange Commission (SEC) administrative law judge explained why she would not terminate charges against some brokers as follows: "So for me to say I am wiping it out, . . . it looks like I am saying to these presidential appointee commissioners, I am reversing you. And they don't like that."[168] Another reportedly "told the defendants during settlement discussions on a case they should be aware he had never ruled against the agency's enforcement division" and for that reason "said the defendants might therefore want to do a deal with the agency rather than fight their case at a hearing before him."[169] The Head Judge of the Patent Trial and Appeals Board apparently has the power to manipulate the composition of hearing panels in the middle of an adjudication for the purpose of influencing the result, and apparently one particular holder of this judicial office also served as a keynote speaker for an advocacy organization interested in invalidating patents while on the bench.[170]

That being said, such isolated cases may not be proof of a broader administrative bias, and our state and federal court judges are often not paragons of neutrality either.[171] On the

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not reach the nondelegation or removal issues."). As of this writing, the system of ALJs continues to exist, but it appears to be on life support.

167. *See, e.g.*, Richard A. Epstein, *Structural Protections for Individual Rights: The Indispensable Role of Article III—or Even Article I—Courts in the Administrative State*, 26 GEO. MASON L. REV. 777, 783–85, 787–88 (2019) ("It should come as no surprise that in the five year period from October 2010 to March 2015, the ALJs strongly favored the SEC's views, and in turn, the full commission later adopted the ALJ's decision about ninety-five percent of the time.").

168. Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970 [https://perma.cc/3SZ4-NHED].

169. *Id.*; Epstein, *supra* note 167, at 788.

170. Epstein, *supra* note 167, at 783–85; Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring) (describing a PTAB hearing in which the Acting Chief Judge altered the composition of the hearing panel midstream, allegedly for the purpose of setting aside an earlier panel decision).

171. *See, e.g.*, Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997–98 (2017) (describing the "judicial tendency to relax constitutional scrutiny of police tactics based on an officer's professional insight" in criminal procedure cases).

whole, regardless of whether ordinary administrative law has succeeded in achieving some version of judicial independence, it is unquestionable that the attempt has been made. The formal procedures of administrative adjudication in most agencies (though not, as we posit, in immigration) incorporate some Congressional effort to protect the principle of *nemo judex in causa sua*, and at least judges in those agencies who fail to be independent can be subject to harsh criticism on the basis not just of abstract rule of law principles, but also on the basis of the legislative ends universally attributed to Congress.

B. INTERMIXING LEGISLATIVE POWER WITH EXECUTIVE ADJUDICATION

Rule of law critiques of administrative law have focused not merely on the exercise of judicial power by the executive, but also the simultaneous exercise of legislative power. Indeed, due to the prominence of the (recently overruled) *Chevron* doctrine,[172] under which federal courts were to defer to administrative interpretation of congressional legislation in most practical cases,[173] many of the critics of administrative law have focused on the quasi-legislative power of agencies.[174]

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172. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

173. *See id.* at 842–43 (explaining the two-step analysis for *Chevron* deference). Formally speaking, *Chevron* only required federal courts to defer when a statute was ambiguous and an agency interpretation was reasonable. *See generally* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1466 (2020) (explaining *Chevron* doctrine). However, George L. Priest and Benjamin Klein reveal that the cases that appear in courts are likely to involve ambiguous statutes, as the parties would likely settle if the law were clear. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (providing an economic model to explain the distribution of cases that settle as compared to those that go to trial). In the administrative context, the cases where *Chevron* was at issue were likely to be those where there was a genuine question about the propriety of an administrative interpretation of a statute. Accordingly, we can infer that *Chevron* required courts to award deference in most cases at trial or on appeal involving an agency interpretation of a statute.

174. *See* HAMBURGER, *supra* note 104, at 3–5 (arguing that under the modern administrative state, the executive branch exercises legislative power); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310 (2003) (explaining that whenever Congress delegates its power to another institution, that institution has the authority to exercise legislative power); Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L.

From the rule of law standpoint, there are several distinct challenges to this "administrative legislation." The primary challenge focuses on the idea of stability. Scholars have long identified stability as an important requirement of the rule of law,[175] largely on the basis of the idea that unstable law is unpredictable, and law needs to be predictable to effectively guide behavior and in order that ordinary people may effectively plan their lives in ways that require long-term knowledge of their legal rights.[176] The emphasis on stability has particular salience to those rule of law scholars and advocates who focus on economic regulation and growth, what one of us has described elsewhere as the "private law conception of the rule of law,"[177] for long-term legal certainty and the protection of private rights are widely believed to be crucial to promote investment and economic productivity.[178]

REV. 939, 940 (2016) (characterizing the executive branch's exercise of legislative power as "extralegal"). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that the Constitution does not prohibit Congress from delegating a degree of legislative power to administrative agencies).

175. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (describing eight ways in which a legal system may fail, one of which is by "introducing such frequent changes in the rules that the subject cannot orient his action by them").

176. *See generally* GOWDER, REAL WORLD, *supra* note 100, at 68 (describing the conventional argument connecting the rule of law to individuals' ability to make long-term plans).

177. Paul Gowder, *The Dangers to the American Rule of Law Will Outlast the Next Election*, 2020 CARDOZO L. REV. DE NOVO 126, 144–45 (2020) (distinguishing between "the public law and private law dimensions of the rule of law" and defining the private law conception as a concern for the security of "property rights, enforceable agreements, and, more abstractly, stable expectations which allow people to make complex plans, and, thereby, in part, promote economic development").

178. *See, e.g.*, Joseph L. Staats & Glen Biglaiser, *Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law*, 56 INT'L STUD. Q. 193 (2012) (making an empirical case for the relationship between stable legal institutions and increased foreign investment); Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFS., Mar.–Apr. 1998, at 95, 98 (describing the rule of law as being "integral" for developing countries to transition to free markets); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803 (1989) (offering a theory about relationship between economic development and rule of law institutions that permit government to bind itself to respecting private property); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1370–71 (2001) (offering empirical case,

This idea is embedded in other areas of American law, most importantly in Takings Clause jurisprudence, where one element of a test for when a "regulatory taking" (i.e., a change in the legal regulation of some piece of property that the courts will treat as an expropriation of that property) has occurred is the extent to which it upsets "investment-backed expectations" of the property owner.[179]

The instability danger from administrative lawmaking reflects Alexander Hamilton's famous point about presidential "energy"[180]: While there are countless veto players who must be overcome before any policy change can occur through the ordinary legislative process,[181] the executive has—or at least claims—the power to order unilateral changes to administrative lawmaking;[182] accordingly, administrative lawmaking is likely to be much more unstable in the face of short-term political shifts than ordinary legislation. This was vividly illustrated in recent American politics, prominently in the simultaneous inability of even a Republican-controlled Congress to repeal the Affordable Care Act (ACA) (despite it being the signature policy goal on which they ran in 2016) and the capacity of the President to issue numerous regulatory changes to undercut its actual impact on the ground.[183]

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on the basis of theory involving colonial choices to set up states oriented toward looting or stable law, for relationship between rule of law and wealth).

179. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that the Court will consider relevant factors, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations" in determining whether a regulatory taking has occurred).

180. THE FEDERALIST NO. 70 (Alexander Hamilton) (describing the properties of "energy" in executive branch).

181. *See generally* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 2 (2002) (defining veto players as the individuals in a legislature who must agree to change the status quo to make a policy change).

182. *See, e.g.*, Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative, 90 Fed. Reg. 10,583 (Feb. 19, 2025) (purporting to order widespread changes in regulatory action across the entire federal government).

183. *See* WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY 90–91, 121–26 (2020) (describing the Republican party's failed efforts to repeal the ACA in Congress and the Trump administration's use of administrative process to undermine it); *see also* Frank J. Thompson, *Six Ways Trump Has Sabotaged the Affordable Care Act*, BROOKINGS (Oct. 9, 2020), https://www.brookings.edu/blog/fixgov/2020/10/09/six-ways-trump-has-sabotaged-the-affordable-care-act [https://perma.cc/3LXY

The APA contains some provisions to guard against the risk of instability associated with administrative legislation. Most important is the requirement that rulemaking proceed through a process of "notice and comment," which both imposes some friction on the rulemaking process and provides for at least a modicum of popular input, and hence democratic accountability.[184] While the notice and comment process appears formally toothless, the federal courts do periodically overturn executive action for failing to comply with it, or for the related inability of an agency to use some alternative means to convince the court that it has considered all the relevant issues in the rule it proposes to make.[185] For that reason, the notice and comment provision (at least when combined with the APA's rule against arbitrary and capricious agency action) should be understood as a real constraint on the capacity of the president to destabilize law through unilateral regulatory action.

However, there is a giant hole in the notice and comment process: As noted above, administrative agencies can also make rules via their adjudicative processes.[186] Moreover, there is some administrative law doctrine suggesting that the retroactive application of agency rulemaking by adjudication is permissible

-XHQU] (describing the administrative undermining of the ACA in further detail).

184. *See* 5 U.S.C. § 553 (outlining the process and requirements for notice and comment rulemaking). The notice and comment rulemaking process also facilitates another goal of the rule of law, increasing public awareness of legal rules, by broadening the time that such measures may receive press and public attention.

185. *See, e.g.*, Azar v. Allina Health Servs., 139 S. Ct. 1804, 1807 (2019) (overturning a Department of Health and Human Services change in Medicare reimbursement rates that was issued without notice and comment rulemaking under a special Medicare notice provision); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1898–99 (2020) (holding that the DHS's decision to rescind the Deferred Action for Childhood Arrivals memorandum was arbitrary and capricious because it failed to consider reasonable policy alternatives and account for the reliance interests of the program's beneficiaries); Cigar Ass'n of Am. v. FDA, 964 F.3d 56, 64 (D.C. Cir. 2020) (refusing to uphold an FDA tobacco warning regulation on the grounds that the agency failed to provide adequate notice).

186. *See, e.g.*, 5 U.S.C. § 554 (e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.").

even if the retroactive application of notice and comment regulation is not.[187]

This rather significantly raises the stakes for administrative judicial independence, associated with the broader worry about judicial legislation by decree noted above.[188] Because administrative adjudication comes with such immense quasi-legislative power, and because the exercise of that power may be the most swift method by which a presidential administration can bring about policy change, especially in areas of law with a high volume of administrative litigation, we contend that presidents and their senior officials have substantial incentives to corrupt the adjudicative process in just the ways described in the prior section. When they do that, the consequence from the perspective of an individual litigant is that their case is not adjudicated on the basis of a good faith consideration of their legal rights and their legal arguments. From the perspective of a judicial system relying on legal reasoning to generate respect-worthy precedent, there is no reason to believe that any legal arguments offered in such a mock adjudication will have been given serious consideration. Such a process is not an adjudicative process before a tribunal at all in any meaningful sense, it is merely a sheer exercise of executive will.

At an abstract level, the problem of administrative legislation and adjudication might be conceptualized as an incompatibility among cross-branch logics. Recall again Hamilton's identification of the President with "energy."[189] He elaborated further on what qualities give rise to energy: "That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[190] We may describe that as the logic of the executive.

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187. *See* SUNSTEIN & VERMEULE, *supra* note 152, at 59–60 (discussing the distinction between retroactive adjudication and prospective rulemaking).

188. *See supra* Part II (introducing the problem of judicial legislation by decree).

189. *See* THE FEDERALIST NO. 70, *supra* note 97, at 354 (Alexander Hamilton) ("Energy in the Executive is a leading character in the definition of good government.").

190. *Id.*

To further develop this argument to its logical conclusion: a properly functioning executive is oriented toward swiftly and decisively addressing both internal and external threats. That orientation requires, as Hamilton identified, unilateralism to preserve the capacity for swiftness. It also requires some degree of flexibility and instability (which may be a fair approximation of Hamilton's "activity") represented as the ability to quickly pivot in the face of a changing and uncertain landscape of external threats, and with it, the preservation of internal discretion to facilitate those pivots. Hamilton also reminds us that the executive is oriented toward secrecy in virtue of the hostility of many of the actors against which its efforts are arrayed.[191] But those executive virtues are the opposite of the legal virtues: As Fuller argued, laws—and the legislative and judicial processes that write and interpret them—are supposed to be stable, public, and deliberative.[192] Embedding legal processes into the executive, while permitting them to be organized according to executive logics, vitiates their ability to serve their legal functions.

C. EXISTING CRITIQUES OF ADMINISTRATIVE LAW

It will not be surprising, given the worries noted above, that many scholars and jurists have vigorously criticized the existing system of administrative law. As James Madison said in Federalist 47, "[t]he 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."[193] Anti-administrative law scholars, often associated with libertarian ideological positions[194] and challenges to the post-New Deal regime of economic regulation,[195] have asserted that administrative law is

191. *See id.*

192. FULLER, *supra* note 175, at 39 (explaining importance of public and stable rules); Fuller, *supra* note 145, at 369–70 (describing deliberative characteristics of adjudicative process and reason-giving requirements entailed by it).

193. THE FEDERALIST NO. 47, *supra* note 97, at 245 (James Madison).

194. *See, e.g.*, RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 9 (2020) (identifying critique of administrative law by the "classical liberal tradition" and "conservative and libertarian movements").

195. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 823–24 (2018) (arguing that "liberty and republicanism . . . are under siege today from [the] bloated, arbitrary and capricious, dictatorial, elitist, electorally

indeed tyrannical.[196] They have identified the challenges to legal order represented by the conjunction of these powers in rule of law terms similar to those articulated in this Part.[197]

Justice Neil Gorsuch, before he joined the Supreme Court, eloquently expressed the rule of law worries that are attendant on the use of agency adjudication in an unusual concurrence to his own majority opinion for the Tenth Circuit:

> Transferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions. Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared "ambiguous" (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed "reasonable." Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail. Neither, too, will agencies always deign to announce their views in advance; often enough they seek to impose their "reasonable" new interpretations only retroactively in administrative adjudications.[198]

Perhaps the most interesting critique of the administrative state, however, is Philip Hamburger's.[199] While his core argument does not specifically appeal to the notion of the "rule of law" as such,[200] it draws heavily on the English legal history of the attempt by Parliament and the common lawyers (such as Coke) to check the power of the Stuart monarchs, a history that is

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unaccountable, and largely unconstitutional administrative state" that grew out of the New Deal era).

196. *See, e.g.*, D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 49 (2017) (contextualizing the critique of administrative law as illegitimate and unconstitutional in the Madisonian definition of tyranny).

197. *See, e.g.*, EPSTEIN, *supra* note 194, at 59–61 (arguing that appearance and reality of political bias in agency adjudications is rooted in the combination of legislative, judicial, and executive power).

198. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

199. *See* HAMBURGER, *supra* note 104.

200. Actually, he renounces it. *Id.* at 7 ("It is commonplace to talk rather loosely about the rule *of* law. This formulation, however, is so vague as to be a distraction from the real problems with administrative law, and it therefore needs to be left aside if such problems are to be understood.").

typically identified with the pursuit of rule of law ideals.[201] For Hamburger, the powers of the contemporary administrative state bear a striking resemblance to the prerogative powers claimed by King Charles I and his ilk, rejected and defeated by Coke and his parliamentary allies, and later recognized as anathema to America's constitutional framers.[202]

For example, Hamburger identifies administrative rulemaking with the claimed power of the King to pronounce laws by proclamation, without Parliament.[203] He likewise identifies administrative interpretation of law with the claimed power of the King to conduct "lawmaking interpretation."[204] Most importantly for present purposes, however, Hamburger identifies administrative adjudication with the prerogative tribunals of the Crown, such as the infamous Star Chamber; tribunals which could be relied upon to implement the King's arbitrary will through adjudication.[205]

Hamburger's description of the prerogative courts closely matches many of the rule of law concerns noted in this Part. Among other forms of lawlessness, on Hamburger's account, judges in the prerogative courts were not independent—their recognized duties were not to implement the law pursuant to their best judgment but rather to implement royal policy,[206] and for that reason they were unlikely to experience themselves as

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201. *See generally id.* One of us has discussed the relationship between Hamburger's critique of administrative law (and that of other libertarian scholars) and the rule of law elsewhere. *See* Paul Gowder, *Is Criminal Law Unlawful?*, 2023 MICH. ST. L. REV. 61, 120–23 (2023) (arguing that many rule of law critiques of administrative law apply with greater force to criminal law, but that scholars, including Hamburger, have devoted little attention to this important domain); *see also* Gowder, *Review of Law and Leviathan*, *supra* note 101, at 12 (contextualizing Hamburger as one of the major scholarly critics of the American administrative state).

202. HAMBURGER, *supra* note 104, at 6–12.

203. *Id.* at 42–43, 50.

204. *Id.* at 51–53 (comparing administrative interpretation of statutes to James I's exercise of interpretive power).

205. *Id.* at 133–34 (explaining that the Crown, like the administration, relied on prerogative courts to enforce its prerogative legislation).

206. *Id.* at 147, 237 (equating administrative agencies with prerogative judges who lacked judicial independence and were required to defend the Crown's policy); *cf.* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of Courts*, 33 GEO. IMMIGR. L.J. 261, 263–66 (2019) (recounting the self-reported experience of immigration judges as cogs in a hierarchical bureaucracy rather than genuine legal adjudicators).

having a distinctive responsibility for legal fidelity but instead an organizational loyalty to the larger bureaucracy in which they are embedded.[207] Moreover, Hamburger suggests that the prerogative tribunals also carried out a legislative function, issuing regulations and decrees in the form of legal interpretations.[208] While such decrees may not have proceeded from adjudications properly understood (i.e., with parties before them), the Star Chamber, on Hamburger's account, also directly brought together legislation and interpretation, for example determining what kinds of buildings constituted nuisances and then ruling against them internally.[209]

As noted above, Hamburger has been criticized for misunderstanding modern American administrative law.[210] Indeed, Cass R. Sunstein and Adrian Vermeule have published an entire book expounding their theory that judicially created doctrines have been effective at holding administrative agencies to a Fullerian conception of the rule of law.[211] And yet, the immigration law apparatus as a whole, and the Attorney General self-referral power as one particularly noteworthy part of that whole, stand as a dramatic counterexample to Sunstein and Vermeule's portrayal of a uniformly lawful administrative state.[212] For example, Sunstein and Vermeule insist that modern administrative law doctrine prohibits "telephone justice," that is, the direct intervention by high executive officials in ongoing adjudication.[213] Yet, the Attorney General's self-referral power comprises

207. HAMBURGER, *supra* note 104, at 233 (explaining that administrative officers lack the sense of duty and power that "real judges" possess and will therefore "act merely on behalf of [their] agency").

208. *Id.* at 55–57 (comparing administrative regulations to the prerogative regulations issued by the Star Chamber).

209. *Id.* at 117 (describing the history of how administrative boards of health came to exercise both legislative and judicial power).

210. Vermeule, *supra* note 152, at 1547–48 (critiquing Hamburger's analysis as lacking real understanding of administrative agencies).

211. SUNSTEIN & VERMEULE, *supra* note 152, at 11 (arguing that administrative law has "converged" on "surrogate safeguards" that protect the rule of law).

212. One of us has discussed Sunstein and Vermeule, and the challenge the immigration adjudication regime poses to their rosy picture of administration, elsewhere. *See* Gowder, *Review of Law and Leviathan*, *supra* note 101, at 19–39 (describing some of the features of the immigration system that are inconsistent with the rule of law).

213. SUNSTEIN & VERMEULE, *supra* note 152, at 82–84 (surveying Supreme Court and circuit caselaw holding that presidents may not intervene in certain

precisely that mechanism, such that it is the apotheosis—or perhaps we should say the nadir—of telephone justice as an ordinary black-letter element of its adjudicative process. As we discuss in Part IV below, perhaps Hamburger's criticisms are not so off the mark after all.

IV. AGAINST THE ATTORNEY GENERAL SELF-REFERRAL POWER IN IMMIGRATION PROCEEDINGS

In Part I of this Article, we analyzed the Attorney General's self-referral power in immigration law, tracing its historical evolution from its early use during the mid-twentieth century to its most far-reaching operation (to date) during the years of the first Trump administration. In Part II, we set forth the fundamental principles that together comprise the rule of law in our Anglo-American common law tradition, and then discussed the foundational role played by those principles in the establishment of the United States judiciary and the rules governing its composition, role, and procedures. In Part III, we situated the administrative state within the framework of the modern American legal system and considered the challenges posed by agency adjudication, in general, to faithful adherence to the core principles of the rule of law. As we note above, nowhere is this challenge starker than in the context of the immigration court system,[214] in particular, the process of Attorney General review of ongoing adjudication.

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administrative adjudications). More precisely, Sunstein and Vermeule carefully refer only to the President in their discussion of "telephone justice," thus ignoring the risk that high political officials, such as the Attorney General, who are entirely under the control of the President may interfere in the President's name. *See* Gowder, *Review of Law and Leviathan*, *supra* note 101, at 30–31 (recalling Attorney General Sessions' invocation of the self-referral power to reverse a BIA decision increasing domestic violence survivors' access to asylum, a policy President Trump favored).

214. Attorney General self-referral is, of course, far from the only troubling aspect of the immigration adjudication system, but it is the focus of this piece. While we touch upon other aspects of the system that are problematic when viewed through a rule-of-law lens in this Part of the Article, our focus is on Attorney General self-referral and review. We discuss several other concerning attributes of our immigration system in more detail in other work. *See, e.g.*, Paul Gowder, *Immigration, Government Terror, and the Rule of Law*, 107 IOWA L. REV. ONLINE 94, 95–96 (2022) (discussing the relationship between immigration and the rule of law concept of terror); Stella Burch Elias, *Law as a Tool of Terror*, 107 IOWA L. REV. 1, 5–8 (2021) (enumerating some of the ways the contemporary immigration system terrorizes immigrants); GOWDER, U.S. RULE OF LAW, *supra* note 116, at 134–69 (articulating a broader critique of arbitrary power in the immigration system).

Building on this analysis, in this Part of the Article, we now turn to the crux of our argument—namely, that the Attorney General self-referral power is incommensurate with our nation's commitment to the rule of law and, therefore, should be abolished because it is arbitrary in character, inconsistent in its application, and inherently hypocritical in its operation.

A. THE ARBITRARY CHARACTER OF THE ATTORNEY GENERAL SELF-REFERRAL POWER

The Attorney General's power of self-referral is a critical challenge to the integrity of any efforts to subject the immigration system to the rule of law. This authority permits a political appointee to directly adjudicate cases in their personal capacity, at their own untrammeled discretion.[215] It is thus identical to the power which Coke aimed to deny James I in the *Case of Prohibitions*, namely, to take a case out of his courts and rule on it himself.[216] Moreover, because the power may be used not just to dictate the outcome in an individual case, but to set precedent which influences future exercises of the agency's authority as well as (to the extent Congress has delegated interpretive or rulemaking authority to the executive branch) potentially that of the judiciary as well, the Attorney General has an incentive to disregard the individual character of immigration adjudication altogether and directly intervene on the law to achieve policy outcomes. This directly invokes the Kantian worries noted in Part II, insofar as an individual litigant and the legal arguments that litigant makes are merely reduced to means for the achievement of policy ends. Perhaps unsurprisingly, when litigation becomes merely an instrument for the swift achievement of policy changes and for the evasion even of niceties like notice and comment rulemaking, procedural irregularity can run rampant as the logics of the law are replaced by the logics of the executive. Consider the following description of one exercise of the self-referral power, which comes from the Third Circuit, describing the methods the Attorney General used to tinker with the definition of a crime of moral turpitude in *Matter of Silva-Trevino*, a 2009 case that pre-dates our case study of the 2017–2021 Trump

215. *See supra* Part I (defining the self-referral power).

216. *See* Case of Prohibitions (1607) 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64, 65 ("[T]he King cannot take any cause out of any of his Courts, and give judgment upon it himself . . ."); *see supra* text accompanying notes 109–112 (describing Coke's opposition to kings influencing adjudications).

administration, but that nonetheless illustrates the pitfalls of the unrestrained application of the self-referral power:

> Despite requests by Silva-Trevino's counsel, the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. In fact, neither the [Immigration Judge] decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views.[217]

Were Madison given an opportunity to read that case, it's easy to think that he'd have flagged it as precisely the kind of "tyranny" that results from the consolidation of legislative, judicial, and executive power.[218] By manipulating adjudication, the Attorney General could try to change the law without going through the legislative process or even the administrative notice and comment rulemaking process (which would have given those stakeholders "the opportunity to register their views").[219] Because that legislative motivation was wholly independent of Silva-Trevino's individual interest or preexisting legal entitlements, the Attorney General had no reason to observe any procedural proprieties that would have permitted any argument from Silva-Trevino to impinge on their predetermined decision—and plenty of reason not to observe any such proprieties—the Third Circuit recognized that the putative "adjudication" was nothing but a sham process used to cover up a raw exercise of executive will.

Moreover, because the standard application of adjudicative legal change is retroactive, this policy-motivated and predetermined judgment can be applied to the individual who stands before the "court"—that individual's well-being can be entirely sacrificed to an abstract policy judgment used to prejudge their case. And because such retroactive lawmaking is carried out by the executive under executive logics—that is, by a lone official, deliberating (or not) in secret, under potentially expedited or summary process, attending to the shifting day-to-day imperatives of politics and policy, and with no particular obligation

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217. Jean-Louis v. Att'y Gen., 582 F.3d 462, 470 n.11 (3d Cir. 2009).

218. *See* THE FEDERALIST NO. 47, *supra* note 97, at 245 (James Madison) ("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.").

219. *See Jean-Louis*, 582 F.3d at 470 n.11.

toward stability or consistency, it can come as a particular surprise to the individual litigant who finds their preexisting legal expectations ripped away with no notice whatsoever. As we note in Part I, not only is the individual immigrant respondent not entitled to any notice that the Attorney General has "taken up the case," but in the most egregious instances the immigrant only learns of the Attorney General's intervention when a negative ruling is issued in the case.[220] This is precisely the worry that now-Justice Gorsuch expressed in his self-concurrence in *Gutierrez-Brizuela v. Lynch*.[221]

The reader who is unfamiliar with broader debates about administrative law may be interested to learn that *Gutierrez-Brizuela v. Lynch* was widely seen as a signal of how Justice Gorsuch would rule on administrative law cases when he assumed his Supreme Court seat, and hence widely cheered by critics of administrative law as a signal (which turned out to be correct) that the *Chevron* regime was potentially about to end.[222] But the administrative law reader might be surprised to learn that *Gutierrez-Brizuela v. Lynch* was an immigration case. Interestingly, although the underlying decision of the BIA, which Gorsuch was so unhappy to enforce, was an ordinary BIA ruling complete with a legal argument,[223] Gorsuch describes that ruling as "a matter of policy discretion."[224] In doing so, he seems to be acknowledging, in a backhanded sort of way, what critics of the immigration system (and broader critics of administrative law, in other contexts) have known more generally—namely, that due to the famous lack of independence of the overall system of immigration adjudication, decisions of the BIA are, or at least can

220. *See* Taylor, *supra* note 6, at 28–29 (describing the secrecy surrounding the Attorney General's decision to certify Silva-Trevino's case to himself).

221. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–50 (2016) (Gorsuch, J., concurring) (arguing that political branches engaging in adjudication "might be tempted to bend existing laws, to reinterpret and apply them retroactively in novel ways and without advance notice"); *see also* Gowder, *Review of Law and Leviathan*, *supra* note 101, at 34–36 (discussing Justice Gorsuch's concurring opinion in *Gutierrez-Brizuela*).

222. *See, e.g.*, Diane Klein, *Gorsuch, Gutierrez-Brizuela, and Goodbye, Chevron*, DORF ON LAW (Feb. 1, 2017), https://www.dorfonlaw.org/2017/02/gorsuch-gutierrez-brizuela-and-goodbye.htm [https://perma.cc/3Y8Z-SG67] (recounting Justice Gorsuch's concurring opinion in *Gutierrez-Brizuela* to predict that he would favor overturning *Chevron* once appointed to the Supreme Court).

223. *See generally* Briones, 24 I. & N. Dec. 355 (B.I.A. 2007).

224. *Gutierrez-Brizuela*, 834 F.3d at 1144.

be, functionally exercises of the will of the Attorney General even without the direct use of the referral power.[225] In view of that lack of independence, however, it is particularly astonishing when the Attorney General feels the need to intervene in person—or, to put matters differently, when even an immigration adjudication system largely dominated by the policy goals of the executive nonetheless feels bound by the law to resist the executive's policy goals, and hence forces a policy-motivated Attorney General to directly intervene on the system.[226]

As we discuss in detail in Part I, the arbitrary character of the self-referral power is evident from even a cursory examination of the decisions that were issued during the first Trump administration. In *Matter of A-B-*, Attorney General Sessions overruled a prior BIA precedential ruling interpreting the requirement that a person applying for asylum must be persecuted as a member of a "particular social group" to determine

225. Both immigration judges and the BIA are famously supine toward the policy judgments of presidents. *See generally* Daniel E. Chand, *Protecting Agency Judges in an Age of Politicization: Evaluating Judicial Independence and Decisional Confidence in Administrative Adjudications*, 49 AM. REV. PUB. ADMIN. 395, 398 (2019) (explaining difference between APA judges with some independence protections and non-APA judges like immigration judges); Jain, *supra* note 206, at 291 (describing bureaucratic, top-down functioning of immigration adjudication system). Recent empirical research has concluded that immigration decisions appear to be less responsive to the politics of the President who appointed an adjudicator and more responsive to the politics of the President who happens to be in office at the time of an adjudication. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 630 (2020). One particularly infamous example came in 2002, when the Attorney General, annoyed with a backlog of cases, ordered a speedup in BIA appeals, with the result that there were immigration appeals being disposed of in less than *ten minutes* and a dramatic increase in the rate of immigration judges who were affirmed. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES (Jan. 5, 2003), https://www.latimes.com/archives/la-xpm-2003-jan-05-na-immig5-story.html [https://perma.cc/B9H2-HQKP]. In other words, simply as a result of the Attorney General's calling an efficiency drive, thousands of immigrants were deprived of meaningful appellate review and deported.

226. To the extent that ordinary immigration adjudicators are thoroughly supine to the policy preferences of the President currently in office when those preferences are consistent with preexisting law, we would expect that Attorney General self-referral would appear in practice only when motivated by the desire to create radical change in precedent or to implement a legally dubious policy—that is, when the reliance interests of individuals in preexisting law are most likely to be upset, and hence when serious procedural protections would be *most* important to protect individual interests.

that women fleeing domestic violence are not, on that basis, eligible for asylum.[227] We cannot know the fate of other women like A-B- who were excluded from the United States in the wake of the issuance of the Attorney General decision, but, whatever it was—sent back to an abusive partner to be seriously injured or killed seems most likely—it was a fate to which A-B- herself was, if Attorney General Sessions had his way, to be consigned, notwithstanding any reliance interests she may have had in preexisting law.[228] The first Trump administration then doubled down

227. 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018), *vacated*, A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

228. Arbitrary Attorney General power giveth and arbitrary Attorney General power taketh away. In 2021, Biden's Attorney General Merrick Garland vacated *Matter of A-B-*. *See* A-B-, 28 I. & N. Dec. 307 (Att'y Gen. 2021). According to the U.C. Law Center for Gender and Refugee Studies, which represented A-B-, she has now received asylum. *Matter of A-B-*, CTR. FOR GENDER AND REFUGEE STUD., https://cgrs.uclawsf.edu/our-work/litigation/matter-b [https://perma.cc/A4XQ-VDGZ].

As this Article goes to press, Donald Trump has begun his second Presidential term. Given the consistency of his anti-immigrant rhetoric and the history of his first Attorney General being responsible for the change to the particular social group rule in the first place, we fear that the next Attorney General will once again rule that women fleeing domestic violence are not entitled to relief by his or her personal fiat. It is precisely this sort of legal whiplash that institutions like Attorney General self-referral generate.

Now consider the position of A-B- herself. Notwithstanding the nominal finality of a grant of asylum, she was subjected to years of personal legal whiplash when her safety and home were being kicked back and forth between the political parties with complete institutional disregard for the human being whose basic conditions of life served as the football. It's hard to imagine that she doesn't continue to experience a profound fear that somehow, law or no law, asylum or no asylum, the Trump administration will find some pretense to deport her.

The fear that A-B- doubtless experiences is, regrettably, entirely rational. Here's the awkward thing about arbitrary power: It tends to be taken up by arbitrary people and used arbitrarily. Those with zero regard for legal niceties have a distressing capacity to use nearly unbounded power, when the rest of us are fools enough to grant it to them, in an entirely unbounded way, driven by reasons unwelcome in the law but familiar to ordinary human psychology such as anger, retaliation, spite, or brute political stuntsmanship. Moreover, the harms that arbitrary people can do with arbitrary powers are all too often a one-way ratchet: It's easy to use the legions of heavily armed personnel in the Departments of Justice and Homeland Security to lock people up, deport them, traumatize their children by separating them from their parents, and even send them to likely death by gangs or dictators. It's much harder, and often impossible, to use arbitrary power on the other side to fix it—you can't give someone the years they spent deported or locked up back, it's much harder to defend one's own interests in an adjudication when one has been shipped across the world,

you can't un-traumatize a child, and you certainly can't bring someone back to life when the previous guy's bad-faith asylum policies have put them in a grave. Good people can do much less good with arbitrary power than evil people can do evil with it. *That is why well-organized legal systems with a realistic awareness of the possibility that evil might get itself into office don't give such powers out.*

Of course, lawless compromises to the immigration adjudication system only matter if the executive bothers to carry out adjudications. Unfortunately, Congress has granted the executive branch many lawless powers in the immigration domain, and the current occupant of the Oval Office has claimed more still. Congress has, for example, enacted the Alien Enemies Act of 1798, 50 U.S.C. §§ 21–24, purporting to authorize the President to unilaterally order the extrajudicial deportation of immigrants from states with whom the United States is at war, and Trump has reportedly declared an "invasion" of Venezuelan gang members—although there has been some ambiguity even in the extent of the declaration. *See* Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua, 90 Fed. Reg. 13,033 (Mar. 14, 2025). *But see* Jeff Zeleny & Kit Maher, *Trump Says He Didn't Sign Proclamation Invoking Alien Enemies Act*, CNN, (Mar. 22, 2025), https://www.cnn.com/2025/03/21/politics/trump-signature-alien-enemies-act-proclamation/index.html [https://perma.cc/9CL6-2C8H] (recounting inconsistent messages from Trump and from White House staff about provenance of Alien Enemies Act order). We are puzzled, of course, by how the Alien Enemies act could possibly be constitutional on its face, but it certainly is not constitutional in the way it was applied, to wit, ordering people shipped directly to a maximum-security prison in El Salvador without any due process. *See* Alanna Durkin Richer & Regina Garcia Cano, *A Timeline of The Legal Wrangling and Deportation Flights After Trump Invoked the Alien Enemies Act*, ASSOCIATED PRESS (Mar. 19, 2025), https://apnews.com/article/trump-deportation-courts-aclu-venezuelan-gang-timeline-43e1deafd66fc1ed4e934ad108ead529 [https://perma.cc/ESN4-RUG7] (describing process-free deportations). The President of El Salvador has promised to imprison the victims of these deportations for at least a year. Nayib Bukele, X (formerly TWITTER), (Mar. 16, 2025) https://x.com/nayibbukele/status/1901245427216978290 [https://perma.cc/NB6Q-HWBY] (describing duration of time in prison as "one year (renewable)"). The unconstitutionality of imposing a punitive prison term on individuals without due process, even if they are removable immigrants, has been clearly established for 129 years. Wong Wing v. United States, 163 U.S. 228 (1896) (holding thusly). Of course, because *no judicial process was offered to these alleged gang members*, we have no assurance that any of them are guilty of crimes or in fact even Venezuelans at all. Some may even be U.S. citizens. We do know—because the government has admitted as much—that one of the victims of the El Salvador prison flights was erroneously deported in violation of a withholding of removal order—yet the government has not brought him back—and, as of this writing, prominent conservative Fourth Circuit Judge J. Harvie Wilkinson III has written a paean to the rule of law effectively begging the President to obey the Supreme Court's command that the government "facilitate" his return. *See* Garcia v. Noem, No. 25-1404, 2025 WL 1135112, at *3 (4th Cir. Apr. 17, 2025) ("We yet cling to the hope that it is not naïve to believe our good brethren in the Executive Branch perceive the rule of law as vital to the American ethos. This case

on this approach in *Matter of L-E-A-*,[229] taking another "particular social group" asylum case away from the BIA, to narrow the standard for who gets to claim persecution even further—two full years after poor L-E-A- had a BIA decision in his favor,[230] and in a case in which the DHS had *stipulated* that the asylum applicant's family relationship in question counted as a "particular social group."[231]

In *Matter of Castro-Tum*[232] and *Matter of M-S-*,[233] Attorneys General Sessions and Barr, respectively, overruled prior BIA precedential decisions to keep immigration judges from

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presents their unique chance to vindicate that value and to summon the best that is within us while there is still time.").

If and when some semblance of the rule of law is restored to the United States, perhaps after Mr. Trump's impeachment and removal, it will be incumbent on Congress to begin the restoration by comprehensively reviewing the U.S. code and repealing all those provisions that purport, however unconstitutionally, to hand out arbitrary powers to the executive branch. In the immortal words of John Locke, criticizing Thomas Hobbes's vision of arbitrary executive power in the form of the absolute sovereign:

> Betwixt subject and subject, they will grant, there must be measures, laws and judges, for their mutual peace and security; but as for the ruler, he ought to be absolute, and is above all such circumstances; because he has power to do more hurt and wrong, 'tis right when he does it. To ask how you may be guarded from harm or injury on that side where the strongest hand is to do it, is presently the voice of faction and rebellion. As if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats, or foxes, but are content, nay, think it safety, to be devoured by lions.

LOCKE, *supra* note 96, § 93, at 47. The lion is at the door, and it is increasingly clear that the coming years will once again prove the wisdom of Locke's warning.

229. 27 I. & N. Dec. 581 (Att'y Gen. 2019), *vacated*, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

230. L-E-A-, 27 I. & N. Dec. 40, 40 (B.I.A. 2017).

231. 27 I. & N. Dec. at 584.

232. 27 I. & N. Dec. 271, 271 (Att'y Gen. 2018) ("I hold that immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure."), *overruled by* Cruz-Valdez, 28 I. & N. Dec. 2021 (Att'y Gen. 2021).

233. 27 I. & N. Dec. 509, 509 (Att'y Gen. 2019) (holding with respect to immigrants who "start in expedited [removal] proceedings" that such an immigrant "unless paroled . . . must be detained until his asylum claim is adjudicated" and may not be released on bond).

suspending or closing cases on their own and to keep them from releasing asylum applicants on bond—with a combined effect of subjecting many more individuals, including the individuals in those hearings and again wholly without regard to any reliance interests they may have developed or, in all likelihood, any legal arguments they offered, to detention and deportation.[234] The very operation of the Attorney General self-referral power during the first Trump administration served to undermine any notion of consistency and predictability in immigration proceedings, leaving immigrant respondents unable to ascertain whether they would have any opportunity to be heard, whether their matter would be adjudicated by a court authorized to dispose of their case, and if such a hearing were able to occur what process, if any, they would be due. There is every reason to believe that the second Trump administration will aspire to the same outcome in the months and years to come.

After the fall of *Chevron*, immigration advocates contend that the scope of executive power in immigration—like all other policymaking powers of the administrative state—should now be somewhat limited.[235] In principle, this should entail that the Attorney General will no longer be able to unilaterally alter the law by announcing a new interpretation of some ambiguous statutory command. However, limited is not the same as eliminated; under *Loper Bright*, the Attorney General will continue to be able to unilaterally change the law with respect to matters that Congress has delegated to the executive branch.[236] And it is arguable that delegation appears in the plain text of the INA, which states that:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to

234. *See* Elizabeth Montano, *The Rise and Fall of Administrative Closure in Immigration Courts*, 129 YALE L.J.F. 567, 580 (2020) (explaining that administrative closure was alternative to immediate deportation that preserved immigrants' opportunities to pursue rights in parallel proceedings that could moot deportation).

235. *See* Brian Green et al.*, Think Immigration:* Chevron *Is Dead! Thoughts on the Immigration Impact of* Loper Bright Enterprises, AM. IMMIGR. L. ASS'N BLOG (July 2, 2024), https://www.aila.org/library/think-immigration-chevron-is-dead-thoughts-on-the-immigration-impact-of-loper-bright-enterprises [https://perma.cc/MY6L-2VLC] (predicting reduced deference to executive in immigration cases).

236. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258–59, 2268 (2024) (explaining that courts will still permit agencies to exercise discretion when delegated by Congress).

> the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling.[237]

It therefore seems likely that the second Trump administration will argue that judicial deference to immigration agency rules and BIA decisions continues to exist, even though *Chevron* has been overruled, and that similarly, the Attorney General continues to have the power to unilaterally change those decisions within an adjudication. Moreover, agency interpretations (which in this case just become the Attorney General's interpretations) even beyond the scope of their directly delegated authority, may still be entitled to some degree of deference out of respect for executive branch judgments (*Skidmore* deference).[238] Finally, it is unclear how consistently the federal courts will apply the new post-*Chevron* lack of deference regime to immigration in light of the traditional extra degree of deference granted to the executive in the domain of immigration under the plenary power doctrine.[239] For example, in *Trump v. Hawaii*, the Supreme Court made sweeping statements about the unsuitability of judicial review of the political branches surrounding entry to the United States in light of the effect of such review on the Executive's sovereign prerogatives, even in the face of the allegation that those prerogatives were exercised in violation of the core religious freedom provisions of the First Amendment.[240] While it is unclear as yet how the courts will apply *Loper Bright* in the immigration context, the immigration-specific deference routinely granted the executive strongly suggests that it is unlikely to be sufficient to simply rely on the courts to rein in the self-referral power.

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237. 8 U.S.C. § 1103(a)(1). There have already been troubling rumblings emanating from the executive branch suggesting that this provision will be used as an excuse to claim a general delegation in immigration law that preserves *Chevron*-like executive power. *See* Nancy Morawetz, *Immigration Law After* Loper Bright*: The Meaning of 8 U.S.C. § 1103(A)(1)*, 99 N.Y.U. L. REV. ONLINE 282, 283 (2024) (critiquing executive branch claims of broad delegation).

238. *Loper Bright*, 144 S. Ct. at 2258–59, 2261, 2262–63, 2268–69 (noting that courts may still look to agency interpretations for guidance in carrying out their own interpretive tasks, as suggested by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

239. *See* discussion *infra* at Part IV.B.

240. 138 S. Ct. 2392, 2418–22 (2018).

B. THE INCONSISTENCIES OF SYMBOLIC SIGNALING IN IMMIGRATION PROCEEDINGS AND THE PRACTICE OF THE ATTORNEY GENERAL SELF-REFERRAL PROCESS

The standard defense of routine distortions of judicial process in the immigration system as a whole revolves around the longstanding plenary power doctrine, and the assertion that, because of foreign policy considerations, the political branches of the federal government enjoy almost unfettered discretion in the immigration rulemaking arena.[241] The plenary power doctrine, since the era of Chinese Exclusion,[242] rests on the foreign policy prerogative of the Executive Branch and the claim that migrants, and particularly prospective migrants seeking admission at the border, do not stand in the same relationship to U.S. legal order as do citizens and (to some extent) previously admitted lawful permanent residents.[243] Because a sovereign state has a presumptive entitlement to regulate its own borders, the request of a prospective migrant to enter the United States is commonly seen as essentially a matter of foreign affairs discretion rather than "law," an idea which has been reflected and extended in immigration law doctrines such as those precluding judicial review of visa decisions made by consular officials.[244]

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241. For an overview of the traditional understanding of the plenary power doctrine, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (defining "plenary power" as the Supreme Court's refusal "to review federal immigration statutes for compliance with substantive constitutional restraints"); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 8 (2002) (arguing that plenary power is inferred from sovereignty rather than based in the text of the Constitution, which imposes few restraints on its exercise, and so its implementation is largely insulated from judicial review).

242. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (announcing doctrine of broad political deference in immigration cases, thereafter known as "plenary power").

243. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (acknowledging due process rights of lawful permanent residents); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (treating a previously resident immigrant as a new entrant for the purposes of lack of due process rights at the border); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (dismissing the notion of procedural due process rights for persons seeking entry at the border); *id.* at 544 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

244. *See* Kerry v. Din, 586 U.S. 86, 101 (2015) (rejecting a due process claim to constrain the arbitrary power of a consular officer to deny a visa); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (rejecting the application of the First

In a sense, the idea of plenary power is the legal form of the logic of the Executive.[245] And while the Supreme Court's foundational case law in this area has acknowledged that there are gradations of legal membership—those already within the borders have more claim to process rights than those seeking admittance from outside;[246] those who have the status of lawful permanent resident more still;[247] those with close ties to U.S. citizens or companies and other organizations may indirectly benefit from legal claims of those full members to their presence[248]—the overall doctrine still maintains the premise that migrants, especially those standing on the threshold of admission, are asking for a favor rather than exercising a legal right. This assertion that "less process is due" is reinforced in the Supreme Court's case law underscoring that immigration adjudication is a civil matter, not a criminal proceeding, and so the rights of immigrant

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Amendment to entitle a person denied a visa for their political speech to seek judicial review of a "facially legitimate and bona fide" decision by the Attorney General, even on the basis of listener interests of U.S. citizens). For some mysterious reason, even Hamburger buys into this idea, casually accepting in a single sentence without argument the notion that there are no legal obligations that the United States has toward those seeking to immigrate, and hence that the executive is free to subject immigrants to all the lawless tribunals he spends an entire massive book condemning. HAMBURGER, *supra* note 104, at 192.

245. For a detailed exploration of the Executive's primacy in immigration-related law and policy, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009).

246. *Compare* Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."), *with* Ekiu v. United States, 142 U.S. 651, 659 (1892) (upholding executive power to bar entry of immigrant at the border and power of Congress to vest "final determination" of facts giving rise to inadmissibility judgment in executive branch).

247. *See* Landon v. Plasencia, 459 U.S. 21, 22 (1982); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

248. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (suggesting that constitutional protections like the Fourth Amendment may apply to noncitizens with a "substantial connection" to the United States). *But see* Dep't of State v. Muñoz, 144 S. Ct. 1812, 1822–25 (2024) (holding that a U.S. citizen does not have a due process right to live in the United States with their noncitizen spouse).

respondents are not coterminous with those of criminal defendants in proceedings with more harsh penalties.[249]

However, while the Supreme Court may assert that "less process is due" in immigration adjudication than in regular court proceedings, the United States consciously draws on the symbology of judicial process in administering its immigration laws. Those who adjudicate immigration cases are called "immigration judges" (IJs),[250] even though they lack the standard decisional independence protections of administrative law judges attached to other agencies.[251] Immigration proceedings occur in "immigration courts," the physical layout of which—a raised judge's bench, a witness stand, counsel tables, and a public gallery—mirror those of a conventional state or federal court.[252] Since 1994, it has been the official policy of the EOIR that immigration "judges" must wear judicial robes, just like Article III judges do.[253] The use of this symbology has meaning and purpose—

249. *See* Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); *see also* Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the Fourth Amendment's exclusionary rule does not apply to deportation proceedings). *But see* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1109 (2008) (arguing that immigration law and the practice of immigration enforcement have changed fundamentally in the twenty-five years since *Lopez-Mendoza* was decided, undermining the assumptions on which the majority in 1984 based its arguments against the use of the exclusionary rule); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007) ("There is an embryonic literature on the growing convergence of two critical regulatory regimes—criminal justice and immigration control."); *see also* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499–505 (2002) (arguing that overlap between immigration status and minoritized racial identities will and should increase salience of immigration issues in civil rights campaigns).

250. 8 C.F.R. § 1003.10 (2025) ("Immigration judges").

251. Chand, *supra* note 225, at 398.

252. 8 C.F.R. § 1003.9(d) ("Immigration Court").

253. OFF. OF THE CHIEF IMMIGR. JUDGE, EXEC. OFF. FOR IMMIGR. REV., OPPM 94-10, WEARING OF THE JUDICIAL ROBE DURING IMMIGRATION JUDGE HEARINGS (Oct. 17, 1994) [hereinafter OPPM 94-10], https://www.justice.gov/eoir/efoia/ocij/oppm94/94-10.pdf [https://perma.cc/XCS2-9J3H] (requiring immigration judges to wear judicial robes). This directive appears to continue to be in force, as it was referenced as recently as 2017, in a directive which carved out an exception to the robe requirement for proceedings involving children. OFF.

following the forms and norms of the "regular" judiciary reinforces the institution's claims to legitimacy. Indeed, scholars have presented persuasive empirical evidence suggesting that the use of these symbols promotes the acceptance of judicial decisions with which an individual might disagree.[254] As those scholars have suggested:

> These judicial symbols frame the context of court decisions and seem to convey the message that courts are different from ordinary political institutions; that a crucial part of that difference is that courts are especially concerned about fairness, particularly procedural fairness; that because decisions are fairly made, they are legitimate and deserving of respect and deference; and consequently that a presumption of acquiescence attaches to the decisions.[255]

The United States intends to send precisely this message. As the 1994 memorandum requiring immigration judges to wear robes explains, that order follows on from a course of events according to which "[t]he dignity of and the respect for the United States Immigration Court has risen considerably," which in turn is perceived as a consequence of the "demeanor and the judicial temperament" of immigration judges.[256] Because of their "demeanor" and "temperament," immigration judges have led "all parties appearing before the [c]ourt" to believe that those judges "respect the seriousness of the proceedings and know full well the importance of their role in the dispensation of justice for those appearing before the Immigration Court."[257] Evidently in order to continue that salutary progress in the public's perceptions of the immigration adjudication system, and "[t]o enhance the solemnity of the proceedings," the Chief Immigration Judge by that memorandum orders judges to wear a "traditional black judicial

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OF THE CHIEF IMMIGR. JUDGE, EXEC. OFF. FOR IMMIGR. REV., OPPM 17-03, GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN 5 (Dec. 20, 2017) [hereinafter OPPM 17-03], https://www.justice.gov/eoir/file/oppm17-03/download [https://perma.cc/3AR8-XZ8U] (modifying OPPM 94-10 to give immigration judges discretion to waive requirement of wearing robe when it "may be disconcerting for younger respondents").

254. James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 837 (2014) (finding evidence of judicial trappings associated with public acceptance of Supreme Court decisions, at least as to those already inclined to support the institution in the abstract).

255. *Id.* at 840–41 (describing "positivity theory" of judicial legitimacy).

256. OPPM 94-10, *supra* note 253.

257. *Id.*

robe," described as "a traditional symbol of dignity and authority."[258] In a later memorandum, the Chief Judge specifically asserts that both the conduct of proceedings in a courtroom and the judicial robe signify that immigration judges are *independent*.[259] Amit Jain conducted a number of structured interviews with immigration judges and found that several saw the robe as particularly significant just because it invoked the legitimacy of a court.[260] According to a story that Jain describes as "probably untrue," the robes came after "a hearing officer quelled a detention center riot by donning a black robe, standing on a table, and declaring, 'We have heard your complaints, and they will be answered.'"[261]

Even the federal courts appear to perceive the immigration adjudication system as a quasi-judicial process. Judicial decisions overruling the determinations of the BIA frequently invoke standards of judicial neutrality and decorum to criticize the underlying conduct of immigration judges at the trial level. For example, the Third Circuit noted, in reversing a BIA decision based on the abusive conduct of an immigration judge, that "[w]e began with a reminder of the 'dignity,' 'respect,' 'courtesy,' and 'fairness,' that a litigant should expect to receive in an American courtroom."[262] The Second Circuit made similar observations: "[A]s a judicial officer, an immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party."[263] That court elaborated with a direct appeal to the theory according to which fair process and the appearance of neutrality and dignity enhances the overall system of judicial and governmental legitimacy:

> As an officer of the United States government, an IJ represents the government and exercises its authority ex officio. By his or her conduct, the IJ embodies the view that the government is deserving of that authority because, among other reasons, it treats all with respect. Overly aggressive, overtly hostile, or sarcastic questioning is not part of that process since it demeans the witness, demeans the government, and

258. *Id.*

259. *See* OPPM 17-03, *supra* note 253, at 5 ("Like the courtroom, the robe is a symbol of the Immigration Judge's independence and authority.").

260. Jain, *supra* note 206, at 289–91.

261. *Id.* at 290.

262. Cham v. Att'y Gen., 445 F.3d 683, 690–91 (3d Cir. 2006).

263. Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006) (citing Giday v. Gonzales, 434 F.3d 543, 550 (7th Cir. 2006)).

> demeans the judicial system. Like any judge, an IJ must display the patience and dignity befitting a person privileged to exercise judicial authority.[264]

Moreover, U.S. law codifies the "presumption of acquiescence" noted by James Gibson et al. above.[265] Most significantly, our law criminalizes, and harshly penalizes, those who return to the United States after having been subject to a removal process.[266] The criminalization of post-adjudication return reflects the expectation that the orders the United States gives will be obeyed, and draws on the expressive significance of the criminal law—on the notion that a person who commits a crime violates some kind of social obligation, does something wrongful.[267]

It is, however, important to note that this system of symbolic appeals, and these demands that immigration adjudicators act like judges and operate their hearings like courtrooms, and that those whose rights are affected by immigration adjudication treat the rulings coming from that system like they do the rulings of judges in state or federal courts, are all manifestly inconsistent with the many ways in which the standard procedural protections of a court of law do not apply in immigration proceedings. In immigration courts, for example, immigration judges may take an "adverse inference" from an immigrant respondent's silence,[268] hearsay evidence is admissible,[269] and the contents of the ICE charging document, Form I-213, are presumed

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264. *Id.*

265. Gibson et al., *supra* note 254, at 840.

266. *See* 8 U.S.C. § 1326 (laying out the criminal penalties applicable to "reentry of certain removed aliens").

267. *See generally* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) (arguing that criminal punishment expresses "resentment and indignation" and "judgments of disapproval and reprobation"). Elsewhere, one of us has identified this as the "condemnatory property" of a legal command, particularly a criminal law. Paul Gowder, *The Health Insurance Mandate Really Is a Tax, and That's a Good Thing Too*, *in* THE AFFORDABLE CARE ACT DECISION: PHILOSOPHICAL AND LEGAL IMPLICATIONS 104–05 (Fritz Allhoff & Mark Hall eds., 2014).

268. *See* Guevara, 20 I. & N. Dec. 238, 241–42 (B.I.A. 1991) ("[U]nder certain circumstances, an adverse inference may indeed be drawn from a respondent's silence in deportation proceedings.").

269. *See* Grijalva, 19 I. & N. Dec. 713, 713 (B.I.A. 1988) (holding hearsay evidence is admissible in deportation proceedings unless its use is fundamentally unfair); Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980) (holding that hearsay evidence may be relied on, even if contradicted by direct evidence).

to be accurate[270]—each of these examples illustrates the way in which procedures in the immigration courtroom are incommensurate with the symbolism that its appearance invokes. The use of courtrooms and robes is how we administer judicial proceedings in which legal rights are determined, not how sovereigns hand out discretionary resources which may be given or withheld at will.[271] The language invoked within the immigration adjudication system in the quoted memos reflects a kind of aspiration to a judicial self-understanding—the Chief Immigration Judge even claims that immigration judges are involved in "the dispensation of justice."[272]

Clearly, in its system of immigration adjudication, the United States intentionally adopts the trappings of legal order, and with it the promise of a kind of reciprocity in the operation of a legal system: The state asks for the obedience of those subject to its law, and promises in return to administer that law in accordance with the rule of law and the moral agency of the public.[273] The United States purposefully avails itself of the trappings of judicial legitimacy in its immigration system. But in reality, in its immigration adjudication, the state offers no reciprocal obligations in exchange for the promise of obedience. In doing so, it has the potential to undermine trust in the judiciary more broadly. In Jain's words, "a bureaucracy masquerading as a court exacerbates the flaws of both."[274] Or, in the words of the Seventh Circuit, again treating the system of immigration adjudication as part of the general judicial process of the United States:

> [B]ecause even the appearance of partiality is destructive of confidence in the judicial system, we all have the right to expect fair, even-handed treatment by whoever exercises judicial authority of any kind. It is a

270. *See* Ponce-Hernandez, 22 I. & N. Dec. 784, 785 (BIA 1999). *But see* Kathleen H. Pierre et al., *The ICE Trap: Deportation Without Due Process*, 70 UCLA L. REV. DISCOURSE 136, 160–61 (2022) (describing inaccuracies in I-213 forms); Dree K. Collopy et al., *Challenges and Strategies Beyond Relief*, *in* IMMIGRATION PRACTICE POINTERS 518, 523–25 (2014–15 ed. 2014) (counseling practitioners to challenge contents of I-213).

271. *See, e.g.*, SUNSTEIN & VERMEULE, *supra* note 152, at 90–94 (discussing suggestions that lawlike process may be inappropriate for allocative decisions, such as FCC spectrum allocation).

272. OPPM 94-10, *supra* note 253.

273. *See generally* KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER 130 (2012) (interpreting Lon Fuller to defend this sort of reciprocity).

274. Jain, *supra* note 206, at 267.

> hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect. That expectation must be met regardless of the citizenship of the parties or the nature of the litigation. In a country built on the dreams and accomplishments of an immigrant population, a particularly severe wound is inflicted on that principle when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness.[275]

The Attorney General self-referral process, however, is impossible to reconcile with the Seventh Circuit's ideals of judicial neutrality and independence. The practice of Attorney General review of pending immigration cases effectively abandons all pretense of impartiality by the agency-head adjudicator. When a politically appointed, and therefore presumptively partial, Executive Branch official assumes control of a case pending before the immigration "courts" that assumption of control circumvents the established process of an immigration case, which proceeds from an initial immigration court hearing to an appeal to the BIA before (potentially) concluding with a petition for judicial review before the federal circuit courts. The intervention of the Attorney General to stay these (anticipated and relied upon) proceedings and to replace them with his own written opinion definitively deciding the matter obviously disrupts immigrant respondents' expectations of procedural due process before the immigration courts. As we describe in Part I of this Article, there is no statutory or regulatory roadmap for Attorney General review.[276] There are no provisions in the regulations describing procedures for consideration by the Attorney General during that review—no requirements for briefing, argument, or any other form of procedure commensurate with judicial process.[277] In this respect, even the trappings of a legitimate judicial process in the standard course of immigration proceedings—potentially misleading as they may be—are abandoned during the Attorney General self-referral process.

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275. Iliev v. Immigr. & Naturalization Serv., 127 F.3d 638, 643 (7th Cir. 1997).

276. *See supra* notes 32–42 and accompanying text (describing the lack of statutory and regulatory guidance for Attorney General review).

277. *See* 8 C.F.R. § 1003.1(h)(1) (2025) (directing the Board to "refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him" but including no guidance about how the Attorney General shall proceed with the review except for the bare requirement that the decision be rendered in writing and served on the noncitizen).

C. THE INHERENT HYPOCRISY OF THE ATTORNEY GENERAL SELF-REFERRAL POWER

The unalloyed application of the plenary power doctrine to immigration adjudication, if taken to its outer theoretical boundary, would render existing executive as well as judicial practice entirely hypocritical. But that potential for hypocrisy is perhaps most visible in the use of the referral power itself, as the Attorney General will sometimes make transparently false assertions of that official's capacity or willingness to act as a neutral adjudicator. This appears quite vividly in *Matter of A-B-*, discussed in Part I, in which the Attorney General directly addressed the objection that he had pre-judged the case before him:

> The respondent also argues that the certification violated her due process rights because alleged "irregularities" in the certification "reflect prejudgment of her claim and lack of impartiality, in contravention of her right to a full and fair hearing by a neutral adjudicator." There is no basis to this claim. The respondent and some amici complain that I have advanced policy views on immigration matters as a U.S. Senator or as Attorney General, but the statements they identify have no bearing upon my ability to faithfully discharge my legal responsibilities in this case. I have made no public statements regarding the facts of respondent's case, and I have no "personal interest in the outcome of the proceedings."[278]

Observe first that the Attorney General carefully does not directly deny that he has prejudged A-B-'s case. But even so, everyone on earth knows that the weaker proposition that "there is no basis" to A-B-'s challenge to his neutrality was untrue, if only because of the sheer implausibility of the use of the Attorney General's time to conduct an ordinary adjudicative process.

The Attorney General is a member of the President's Cabinet, and the head of the largest legal organization in the country, indeed on the planet.[279] Nor is the DOJ merely a law firm—in addition to all of the U.S. attorneys and the other attorneys in the various divisions of the DOJ (civil rights division, antitrust division, etc.), the organizational chart atop which the Attorney

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278. A-B-, 27 I. & N. Dec. 316, 324–25 (Att'y Gen. 2018) (citations omitted), *vacated*, 28 I. & N. Dec. 307 (Att'y Gen. 2021). Similar claims were made in *Matter of L-E-A-*, 27 I. & N. Dec. 581, 585 (Att'y Gen. 2019) (citing and quoting part of the quoted passage from *A-B-*), *vacated*, 28 I. & N. Dec. 304 (Att'y Gen. 2021).

279. *About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/32QU-HRUV] ("From its beginning as a one-man, part-time position, the Department of Justice has evolved into the world's largest law office and the chief enforcer of federal laws.").

General sits[280] includes, *inter alia*, the entire federal prison system under the aegis of the Bureau of Prisons—which as of this writing holds 142,626 total prisoners,[281] in 122 prisons[282]—the FBI, the DEA, the BATF, and many other core U.S. government law enforcement and administration entities. In 2018, when *Matter of A-B-* was decided, the DOJ had requested a nearly twenty-eight billion dollar budget allocation to support 107,000 employees—a 3.8% decrease from their allocation the previous year.[283] The Attorney General is seventh in line to assume the office of President under the Presidential Succession Act.[284] The Attorney General has no imaginable incentive to set aside their duties in running the entire legal apparatus of the executive branch of a superpower to take the adjudication of a single immigration case—the case of an anonymous person with no media coverage, no broader political or social salience, no known connection to matters ordinarily requiring Cabinet-level attention such as acts of war or terrorism—on their personal initiative—except in situations where the result to be announced and the policy goal to be achieved thereby was already known. Let's be serious. The institutional role of the Attorney General is not one in which that official has any reason whatsoever to self-certify a case to render their own decision with a genuinely open mind.

Nor is there any secret about the self-referral's status as an instrument of pure policymaking. Two years before *Matter of A-B-,* Alberto Gonzales, who served as Attorney General under George W. Bush, together with Patrick Glen, whose author footnote identified him as a then-current "Senior Litigation Counsel, Office of Immigration Litigation" in the DOJ, published a law review article making quite explicit that the purpose of the self-referral power is to achieve Presidential policy ends rather than to correct errors in individual cases.[285]

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280. *Agencies*, U.S. DEP'T OF JUST., https://www.justice.gov/agencies/chart/map [https://perma.cc/YU5M-HH6J].

281. *Population Statistics*, FED. BUREAU OF PRISONS (last updated Jan. 23, 2025), https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/G6Q8-N4JL].

282. *About Our Facilities*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/federal_prisons.jsp [https://perma.cc/A46L-QM4L].

283. *FY 2018 Budget Request at a Glance*, U.S. DEP'T OF JUST. 1, https://www.justice.gov/jmd/page/file/968216/download [https://perma.cc/P3D6-H944].

284. 3 U.S.C. § 19.

285. *See* Gonzales & Glen, *supra* note 1, at 841.

In Gonzales and Glen's words:

> [E]xecutive policy pronouncements such as DACA do not exhaust the executive branch's scope of action in advancing its conception of immigration policy in the face of a recalcitrant Congress. An additional tool, used only twice by the Obama Administration, is the authority of the Attorney General to adjudicate immigration cases under the Immigration and Nationality Act . . . . This authority, which gives the Attorney General the ability "to assert control over the BIA and effect profound changes in legal doctrine," while providing "the Department of Justice final say in adjudicated matters of immigration policy," represents an additional avenue for the advancement of executive branch immigration policy that is already firmly embodied in practice and regulations. It thus may be a less controversial method by which to advance immigration policy than the executive-decree style thus far utilized by the Obama Administration.[286]

Gonzales and Glen thus openly admit that the purpose of the self-referral power is as a substitute for something like an executive order. Such a claim is manifestly inconsistent with the notion that such a power would be used in a case where the Attorney General is uncertain of the result to be reached.[287]

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286. *Id.* at 846–47 (quoting Taylor, *Refugee Roulette in an Administrative Law Context*, *supra* note 43, at 484 n.35).

287. Gonzales and Glen also make a number of observations consistent with our suggestion that self-referral is unrealistic in the absence of a preexisting policy goal to be achieved due to the heavy responsibilities of the Attorney General. *See id.* at 895 (offering as potential explanation for decreased number of Attorney General decisions in recent years "that a busier Attorney General, whose broad oversight functions look significantly different and more expansive in 2015 than they did in 1940, simply has less time to exercise review authority in immigration cases notwithstanding any desire to do so"); *id.* at 910 (arguing against requiring the Attorney General to permit briefing from those subjected to the self-referral process on the grounds that "[u]nlike the Board, however, whose total focus is immigration, the Attorney General's immigration duties are only a small part of a cabinet portfolio that encompasses every major legal issue in the United States. To opine that more time can be spent on a few immigration cases each year simply because they will be the only immigration cases the Attorney General decides misses the point and fails to place Attorney General review within the context of the myriad tasks and responsibilities that come with the position."); *id.* at 913 (praising the lack of defined procedures for self-referral cases on grounds that "[t]his freedom is of obvious benefit to modern Attorneys General, who must juggle a huge variety of duties in a wide range of legal contexts. But this flexibility also benefits aliens, whose cases might be referred and reviewed by an Attorney General who knows that only a minimum amount of commitment to the case might be needed for the administration to take the gains it wants from referral."). *A minimum amount of commitment!* Some adjudication.

Later, they also backhandedly acknowledge that the policy motivation of Attorney General self-referral undermines the fidelity of adjudication to law:

> It is the Board [of Immigration Appeals], rather than the Attorney General, that might represent the stultification of agency policymaking, since it largely takes its cues from the courts of appeals. The Attorney General is best placed to engage in the imaginative interpretations deemed so necessary to the advancement of executive branch policy.[288]

"Imaginative interpretations" would be a slur against a judge, suggesting that the judge was less interested in pursuing legal justice than in twisting the law to achieve some external end. This, of course, is precisely what the Attorney General does.

Gonzales and Glen also admit that the use of the self-referral power represents an evasion of even the quasi-legislative process of notice-and-comment rulemaking, observing that "Attorney General review is more efficient and certain than regulatory reform, while providing nearly identical benefits in the form of clear guidance on policy issues" and that "Attorney General referral and review provides for the prompt and definitive resolution of an issue without the strictures of the Administrative Procedure Act that characterize the rulemaking process."[289]

In short, transparent hypocrisy is built directly into the self-referral process, as it would be built into any process in which a high political official with a vast array of responsibilities might occasionally grab a case from the courts and adjudicate it *ex cathedra* while still being obliged, for the sake of the appearance of due process, to pretend to listen to the legal arguments offered by the private person who stands before them. Such cases are always and necessarily prejudged. However, the trappings of a judicial process—the pretense established by the mandatory robes and the courtrooms and the memoranda about "demeanor" and "temperament" and "administration of justice"—require the Attorney General to pretend that those whose lives are disposed of via the self-referral process are somehow genuine litigants whose arguments might be listened to. A Schmittian state of exception in which executive authority is used to cut a hole in ordinary legality is dressed up in the language of judicial neutrality.[290]

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288. *Id.* at 898.

289. *Id.*

290. *See generally* ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (E.A. Shils et al. trans., 1941) (offering the

The hypocrisy reflected in *Matter of A-B-* renders the moral injury to the individual and to the judicial system even worse than Fuller's example of a judge who falls asleep on the bench.[291] At least the somnolescent judge doesn't pretend to be fairly adjudicating the case. Illustrating the corrupting power of such hypocrisy, we observe that it leaked into the District of Columbia Circuit: Reviewing a case decided on the basis of *Matter of A-B-* which required the court to determine the reviewability of the policy of *Matter of A-B-* under a statute authorizing judicial review only for "a written policy directive, written policy guideline, or written procedure,"[292] the D.C. Circuit struggled to distinguish a rulemaking and an adjudication, and openly worried about the prospect of the Attorney General using the cloak of adjudication as a way to avoid making rules:

> The decision's overarching purpose, moreover, is to interpret section 1158's phrase "membership in a particular social group," which Congress incorporated into section 1225(b) by defining "credible fear of persecution" as "a significant possibility . . . that the alien could establish eligibility for asylum under section 1158." In short, like the Guidance, *A-B-* qualifies as a "written policy directive" or "written policy guideline" "issued by . . . the Attorney General to implement [section 1225(b)]."
>
> Arguing to the contrary, the government points out that *A-B-* "was an *adjudication* in full removal proceedings under 8 U.S.C. § 1229a." True enough, but we have often recognized that agencies can and do announce new policies in adjudications. Were this sufficient to remove the decision from section 1252(e)(3)'s scope, moreover, then the Attorney General could immunize credible-fear policies from judicial review by simply announcing them in section 1229a adjudications. Such a result would conflict with section 1252(e)(3)'s purpose: to authorize, as its title makes clear, "[c]hallenges on [the] validity of the [expedited-removal] system."[293]

In other words, the United States attempted to use the cloak of quasi-judicial process to insulate a decision which the court

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theory of "dual state" in Nazi Germany, according to which ordinary economic life was operated under a lawful "normative state," but the regime retained a reserve capacity to invoke the "prerogative state" in which arbitrary power was available over individuals for political purposes).

291. *See* Fuller, *supra* note 145, at 366 ("The voter who goes to sleep before his television set is surely not subject to the same condemnation as the judge who sleeps through the arguments of counsel.").

292. 8 U.S.C. § 1252(e)(3)(A)(ii).

293. Grace v. Barr, 965 F.3d 883, 895 (D.C. Cir. 2020) (alterations in original) (internal citations omitted) (first quoting 8 U.S.C. § 1225(b)(1)(B)(v); then quoting *id.* § 1252(e)(3)(A)(ii); then quoting Brief for the Appellants at 24, 965 F.3d 883 (No. 19-5013); and then quoting 8 U.S.C. § 1252(e)(3)).

recognized was, in reality, motivated by policy ends (its "overarching purpose"). The way to cure the immense hypocrisy of cloaking the arbitrary disposal of serious individual rights by the executive in a veneer of judicial process is to eliminate it: to require that immigration adjudication be conducted in the absence of prejudgment. The Attorney General's self-referral power must be abolished. Even immigrants, whose rights are not coterminous with those of U.S. citizens, are entitled to a neutral judge.

CONCLUSION

The Attorney General self-referral power's time has passed, and it must now be abolished. As we demonstrate in Part I of this Article, Attorney General review, which was originally conceived as a rarely used safety-valve mechanism for the most challenging of immigration cases, has now been transformed in the early twenty-first century into a bald political tool that an administration with an unprecedentedly aggressive political agenda may use without restraint to bypass the due process protections of the Constitution. A close examination of the pattern and practice of the exercise of this authority from 2017 to 2021 shows that the continued existence of the Attorney General's self-referral power is incommensurate with our constitutional commitments to the Rule of Law.

As we discuss in Part II of this Article, the Framers of the Constitution were vehemently opposed to untrammeled executive control of judicial decision-making. They enshrined in our Constitution the same values that led Coke to declare in 1607 that: "[T]he King cannot take any cause out of any of his Courts, and give judgment upon it himself."[294] As we note in Part III, agency-head adjudication in the modern administrative state may pose a challenge to the enduring functional operation of this precept today, but it nonetheless continues to apply.

For the Attorney General to interfere directly in pending immigration cases, in other words for him to take those causes out of his "courts" and to give judgment upon them himself, runs contrary to the foundational precepts of the Rule of Law. As we posit in Part IV of this Article, this executive interference in the adjudicatory process is particularly egregious in immigration proceedings, which routinely involve individuals who have built

294. Case of Prohibitions (1607) 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 64, 65; Gowder, *Review of Law and Leviathan*, *supra* note 101, at 22.

up reliance interests going to the heart of their lives on the legal rules then in place. Immigrant respondents may have built families, careers, and property holdings in the United States, and may have abandoned substantial resources and ties in their home countries to come to our shores. Asylum seekers, whose security of life and limb may be put in jeopardy if they are removed from the United States, may depend on the legal fidelity of an immigration system refraining from refouling them to persecution or torture. Thus, when the Attorney General arbitrarily decides to adjudicate an immigration case *ex cathedra*, and for reasons of state, that decision is incommensurate with the Rule of Law. And when the process for Attorney General self-referral is embedded in a system that purports to embody the delivery of impartial justice, that dresses up administrative officials in robes and calls them judges and claims they offer fair hearings, but at the same time allows binding rulings by the Attorney General to entirely circumvent those "hearings," that is inconsistent with the Rule of Law. The continued operation of Attorney General self-referral in immigration proceedings is an insult not merely to the autonomy and dignity of the individual immigrants who finds themselves brought before such a prerogative tribunal, but to the law itself. As we reel from the many challenges to the rule of law in immigration law and elsewhere in the second term of President Donald J. Trump, and as we observe ongoing efforts to radically overhaul our immigration laws by circumventing the checks and balances of our established systems of judicial review, one thing is clear: The self-referral power cannot stand.

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