CHEVRON AND THE ATTORNEY GENERAL'S CERTIFICATION POWER

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Congress has delegated power to the Attorney General to execute the nation's immigration laws, adjudicate individual noncitizens' cases, and fill interpretive gaps in the statute. The Attorney General has in turn delegated this authority, by regulation, to the Board of Immigration Appeals (BIA). Most BIA decisions are administratively final, and noncitizens appeal unfavorable decisions directly to federal courts of appeals. In a small but growing number of cases, however, the Attorney General will step in to decide a case himself de novo after the BIA has ruled. This power of intervention and decision, sometimes known as the "referral and review" power or "certification" power, has drawn some praise for being an efficient use of the broad power afforded to the executive branch in the immigration context, but more often has sustained criticism for potential abuse. In this Note, I analyze this certification power through the lens of Chevron*. In particular, I argue that* Chevron *deference to the BIA is appropriate because it serves the values of the* Chevron *doctrine—expertise, procedural regularity, and public accountability—but that* Chevron *deference to the Attorney General's certified opinions is inappropriate. Courts have a responsibility under Step Zero not to defer to an interpretation of law unless its issuance adheres sufficiently to fundamental tenets of administrative law. Certified opinions are insufficient on all counts: Deference to the Attorney General's interpretations of law issued in this manner serves none of the values of the* Chevron *doctrine.*

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INTRODUCTION

The law of asylum is thorny. The immigration code, built largely off the postwar Immigration and Nationality Act of 1952, is full of ambiguity. One especially vexing term is "particular social group," a phrase that appears in the original 1951 Refugee Convention and which is intended to allow a persecuted noncitizen to claim asylum in a host country.[1] Like many legal ambiguities, it can be interpreted gently or harshly, and it is an axiom of administrative law that the appropriateness of these interpretations is tied to the vicissitudes of politics and modernity. So it would not be entirely surprising for lawyers to learn that certain groups of Central American women in domestic violence relationships constituted a "particular social group" worthy of U.S. protection in 2014[2] but did not just four years later.[3] *Matter of A-B-*, the 2018 decision of the Attorney General that over-

[1] For the United Nations's original definition of a "refugee," see G.A. Res. 429 (V), Convention Relating to the Status of Refugees, at 14 (July 28, 1951). For the United States's closely related analog, see Immigration and Nationality Act (INA) of 1952 § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2018).

[2] *See* Matter of A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014).

[3] *See* Matter of A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018). *But see* Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (finding the interpretation in *Matter of A-B-* impermissible because it imposed an "effective[ly] categorical ban on domestic violence and gang-related claims").

turned the decision of the Board of Immigration Appeals (BIA or Board) in *Matter of A-R-C-G-*, was surprising not so much for its legal content[4] but for its procedural peremptoriness and tenuous legal reasoning. While no doubt the BIA could have reached the same result, the Attorney General's issuance of *Matter of A-B-* blurred the law that numerous precedential BIA decisions had helped bring into focus.

This about-face from *Matter of A-R-C-G-* to *Matter of A-B-* demonstrates the peculiarity of the relationship between the Attorney General, the actual agency head, and the BIA, the agency body that for most purposes acts as the agency head. Congress has delegated power to the Attorney General to execute the nation's immigration laws, adjudicate individual noncitizens' cases, and fill interpretive gaps in the statute.[5] The Attorney General has, since 1940, primarily delegated this authority to the BIA.[6] In the vast majority of cases, BIA decisions are administratively final, and noncitizens appeal unfavorable decisions directly to federal courts of appeals. In a small but growing number of cases, however, the Attorney General will step in to decide a case herself[7] de novo after the BIA has ruled. This power of intervention and decision, sometimes known as the "referral and review" power or "certification" power,[8] has drawn some praise for being an efficient use of the broad power afforded to the executive branch in the immigration context, but more often has sustained criti-

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[4] Many immigration activists, however, have remarked on the unnecessarily harsh policy result of denying abused women succor. *See, e.g.*, Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 373–74 (2019) (highlighting the vulnerability of asylees escaping intimate partner violence). I do not evaluate these arguments in this Note.

[5] *See* INA § 101(b)(4), 8 U.S.C. § 1101(b)(4) (2018) (establishing the Attorney General's authority to appoint and supervise immigration judges); INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (establishing that the Attorney General's authority on matters of immigration law is controlling); INA § 103(g), 8 U.S.C. § 1103(g) (granting the Attorney General the authority to establish regulations and review immigration proceedings). Since the passage of the Homeland Security Act, many statutory references to the Attorney General have been understood to refer to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 1517, 116 Stat. 2135, 2311 (codified as amended at 6 U.S.C. § 557 (2018)).

[6] *See* 8 C.F.R. § 1003.1 (2018); Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 155 nn.63–65 (1958) (discussing the early history of the BIA).

[7] To date there have been only two female Attorneys General. The pronouns in this Note are mixed to reflect the historical reality but also the aspirations of the constituency.

[8] I will use the phrase "certification power" to refer to the referral and review mechanism described in 8 C.F.R. § 1003.1(h)(1)(i) (2018) and the phrase "certified opinion" to refer to an opinion that the Attorney General has issued pursuant to that regulation.

cism for potential abuse.[9] More distressingly, the certification power has been used with alarming frequency in the Trump Administration.[10] The concomitant increase in federal litigation demonstrates the timeliness of this problem and calls for some attention to be paid to how the judiciary should reckon with this peculiar kind of agency decision.

This Note analyzes the certification power through the lens of *Chevron*.[11] Under ordinary administrative law principles, courts defer to executive branch agencies' interpretations of ambiguous statutes. Judicial deference to agency interpretations of law serves many values important to a stable and functional government, including the preservation of expertise, procedural regularity, and democratic accountability. Although the immigration statutes do not establish or even mention an administrative appellate body like the BIA, it has become the authoritative voice of immigration law in the administrative state.[12] *Chevron* deference to the BIA is therefore inarguably applicable, and rightly so, for the BIA's structure and function serves all the values of the *Chevron* doctrine. The Attorney General, on the other hand, is a mere figurehead in the day-to-day execution of immigration laws. This Note argues that, for the same reasons that courts grant *Chevron* deference to the BIA, they should not defer to the Attorney General's certified opinions that contain her interpretation of an ambiguous statute. This is because *Chevron* deference to the Attorney General's interpretation of questions of law serves none of the values of the *Chevron* doctrine; it ignores agency expertise, is procedurally aberrant, and undermines democratic accountability. The Attorney General is thus in no better position to interpret the statute than courts, causing her interpositions to fail at Step Zero.[13]

The argument that courts ought to give more deference to a panel of lower-level technical experts than the Head of Department is not as peculiar as it may seem at first blush. Until very recently, the opportu-

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[9] *See, e.g.*, Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1273–95 (2011) (arguing that *Chevron* deference should not apply to certified decisions because they are issued with insufficient process); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1671–72 (2010) (arguing that the Attorney General's ability, as a law enforcement officer, to overturn an adjudicative tribunal is problematic); Laura S. Trice, Note, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. REV. 1766, 1780–97 (2010) (arguing that certified opinions may run afoul of due process).

[10] *See infra* Appendix.

[11] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[12] For reference, the BIA decides tens of thousands of cases per year, *see infra* note 96, while the Attorney General decides only a handful, *see infra* Appendix.

[13] *See infra* Section I.A.

nity to even confront the scope of the certification power has rarely appeared. Further, it appears that more often than not, courts have already been refusing to defer to Attorney General-certified opinions, even as they pay lip service to *Chevron*. I argue that this empirically supported skepticism should be formalized in the doctrine.

This Note proceeds as follows. In Part I, I will explain the basic outline of the *Chevron* doctrine, the Attorney General's certification power, and *Chevron*'s current application in the immigration context. In Part II, I will demonstrate how the courts have, in practice, reacted to certified opinions rather skeptically. In Part III, I argue that the Attorney General's interpretations of law issued via the certification power fall outside of the *Chevron* framework at Step Zero and should not receive *Chevron* deference. Lastly, I conclude.

I
CHEVRON AND IMMIGRATION LAW

This Part identifies the current framework for judicial deference and its application to U.S. immigration laws.

A. The Chevron *Doctrine*

Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.[14] is arguably the most important case in administrative law. In a dispute about the meaning of a statute, a reviewing court exercises its traditional power to interpret a statute and "say what the law is."[15] At Step One of the *Chevron* framework, the court, using traditional judicial tools of statutory construction, determines whether Congress has clearly conveyed its intent in the text of the statute itself.[16] If the court decides that a statute is ambiguous, then it asks at Step Two whether the agency has given a "reasonable" interpretation of the statute.[17] If so, the court will uphold the agency's interpretation,[18] even if the court believes that a better interpretation of the statute exists.[19]

This two-step process of judicial deference was complicated somewhat by the addition of what scholars dubbed "Step Zero," at which the court decides whether Congress has entrusted the relevant

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[14] 467 U.S. 837.

[15] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[16] *See generally* JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, 6 ADMINISTRATIVE LAW § 51.01 (2019) (describing in detail *Chevron*'s two-step framework).

[17] *Chevron*, 467 U.S. at 844.

[18] *See id.*

[19] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

agency or executive branch official with power to interpret the statute at all.[20] The Supreme Court's view, which it articulated in three cases in the early 2000s[21]—the "Step Zero trilogy"[22]—is that the *Chevron* framework only applies if the Executive's interpretation of the law was issued in a sufficiently formal manner such that it has the "force of law."[23] Otherwise, the court applies a lower level of deference known as "*Skidmore* deference," which turns on the agency's interpretation's "power to persuade."[24] What exactly constitutes "force of law" is murky, but the Court has suggested that we know it when we see it: *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[25]

The *Chevron* framework applies across virtually all areas of law and all administrative agencies regardless of the agency's structure.[26] The doctrine serves valuable interests important to a functional and stable democracy. I focus here on three of the most fundamental and well-recognized of these interests: expertise, procedural regularity, and democratic accountability.[27]

1. Expertise

First, *Chevron* puts power into the hands of actors who best know how to wield that power. Agencies build familiarity with the statute they administer, issue rules to effectively implement the statute, and establish precedents and develop methods to guide agency adjudica-

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[20] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873 (2001) (coining the phrase "step zero").

[21] *See* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris County, 529 U.S. 576 (2000).

[22] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 211 (2006).

[23] *Mead*, 533 U.S. at 227; *see id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." (citing Merrill & Hickman, *supra* note 20, at 872)); Sunstein, *supra* note 22, at 221–28 (analyzing the "force of law" quandary).

[24] *Mead*, 533 U.S. at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[25] *Id.* at 226–27.

[26] *See* Sunstein, *supra* note 22, at 189–90 (collecting examples across various domains of law).

[27] *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 975–77 (3d ed. 2017) (discussing these justifications); Sunstein, *supra* note 22, at 196–97, 214, 218 (analyzing Step Zero and referring to the traditional *Chevron* rationales).

tors in applying the law. Knowing the ins and outs of the statute as well as the state of civil rights and global affairs that may affect their interpretations is entirely within the domain of an expert agency. And while the courts have had some influence in shaping these interpretations, the majority of the work is done by the agency. The *Chevron* doctrine works to subjugate the unelected courts' reading of a complex term to the extrapolative reading of the agency, which lives and breathes that term.[28] *Chevron* also avoids misinterpreting the intent of Congress, which has, after all, delegated the interpretation privilege to the agency.

All but the most senior officials within executive agencies,[29] unlike the judiciary, can spend their entire careers developing the necessary expertise to effectively carry out their federal mandates. Federal civilian employees enjoy employment protections at least on par with the private sector.[30] The average tenure for a full-time permanent employee is 13.5 years.[31] And the Court is unified in acknowledging that "agency expertise and administrative experience" is one justification for *Chevron*.[32] Not all questions of law require agency expertise to resolve,[33] and *Chevron* itself "does not condition deference on a showing that the resolution of the interpretive issue requires, or that the agency actually possesses, any sort of specialized expertise,"[34] despite this justification for the doctrine. But the complexity of today's U.S. Code and the country's vast bureaucracy means that agencies must "fill in, through interpretation, matters of detail related to . . . administration" of the statute by using their expertise.[35]

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[28] For an excellent layout of the expertise and accountability rationales in the context of analyzing Justice Breyer's approach to administrative law, see Cass R. Sunstein, *From Technocrat to Democrat*, 128 HARV. L. REV. 488, 489, 493 (2014).

[29] The most senior officials are appointed only with the "Advice and Consent" of the Senate. U.S. CONST. art. II, § 2, cl. 2.

[30] *See generally Policy*, U.S. OFF. PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight (last visited Nov. 1, 2019) (describing federal employees' access to salary schedules, student loan repayment, paid time off, telework, health and wellness, dependent care, and other benefits).

[31] *Profile of Federal Civilian Non-Postal Employees*, U.S. OFF. PERSONNEL MGMT., https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/profile-of-federal-civilian-non-postal-employees (last updated Sept. 30, 2017).

[32] Barnhart v. Walton, 535 U.S. 212, 225 (2002) (unanimous opinion).

[33] *E.g.*, Zivkovic v. Holder, 724 F.3d 894, 897 (7th Cir. 2013) ("[S]ome questions of law do not depend on agency expertise for their resolution.").

[34] MANNING & STEPHENSON, *supra* note 27, at 975.

[35] *Walton*, 535 U.S. at 225.

2. *Procedural Regularity*

The *Chevron* doctrine also encourages procedural regularity—the robust, deliberative process by which agencies promulgate interpretations of law. Consistent with a Step Zero analysis, *Chevron* deference is not warranted if an agency issues its interpretation too informally, such as in "opinion letters . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law."[36] Procedure in the agency is a legitimizing device that allow a court to accept outcomes it might not have arrived at itself. The Administrative Procedure Act, with its constraints on the manner in which agencies can issue their interpretations, works to advance regularity.[37] Judicial deference is roughly commensurate with the amount of procedure involved.

An effect of procedural regularity is also consistency across the nation. Resource constraints mean that the Supreme Court will weigh in on just a small fraction of the interpretive questions that agencies must address. Under a de novo judicial regime, therefore, "many interpretive questions [would] be decided by the courts of appeals," who themselves might "reach different conclusions regarding the meaning of the same federal statute."[38] Moreover, statutes do not present isolated interpretive questions, but have many "interdependent" issues.[39] It therefore "makes sense to have a single interpreter resolve these issues."[40] When courts roundly defer to agencies, litigants, parties, organizations, and other government actors can rely on a uniform interpretation unaffected by the circuit in which they live.[41] In the immigration context, for instance, a noncitizen will know that when the BIA has issued a final decision, she will not be at further risk of adverse action due to a later, less-well-reasoned reconsideration at the whim of a new political appointee.[42]

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[36] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[37] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59, 701–06 (2018)) (describing the Act's primary intention to "improve the administration of justice by prescribing fair administrative procedure").

[38] MANNING & STEPHENSON, *supra* note 27, at 976.

[39] *Id.*

[40] *Id.*

[41] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980, 986, 989 (2005) (allowing the FCC's reasonable interpretation to apply nationally despite a better, alternative interpretation of the statute).

[42] Note that the axe usually swings against the noncitizen, rather than in her favor. *See* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 859 (2016) ("[I]n 64.47% of the cases where the Attorney General reversed the Board's decision, the result was contrary to the interests of the alien . . . .").

3. Accountability

Finally, the *Chevron* doctrine also advances principles of democratic accountability. A single Congress enacts a complex Code that will be carried out over the long term, but the President is chosen directly by the people in a given election year. The ability of the President to advance his agenda through the administrative state—establishing priorities, exercising enforcement discretion, and filling gaps in ambiguous statutes—is what constituents count on when they elect the President. Thus, as was the case in *Chevron* itself,[43] construing an ambiguous term in a way that reflects the current President's agenda, even if that construction is not the best one, is more democratic.

By contrast, the people do not elect federal judges. Thus, faced with congressional silence or ambiguity, "the question . . . becomes whether this policy decision should be made by the agency or by the court."[44] *Chevron* deference prevents members of the judiciary from imposing their own constructions of an ambiguous statute onto the people after the people have, via the ballot box, implicitly endorsed a preference for an opposing construction.[45] Because the people also elect members of Congress, *Chevron* naturally does not apply where the statute is unambiguous; Congress can always overrule or affirm an agency's interpretation by announcing its intent more explicitly with regard to a specific issue.[46]

B. Statutory Interpretation in Immigration Law

The immigration system is set up to evaluate immigrant and nonimmigrant applications for admissibility to the United States.[47] It also screens these applicants for inadmissibility grounds—grounds that will

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[43] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) (noting that the political branches—Congress who intended flexibility in the disputed term and the Agency who carried it out—are permitted to have varying interpretations over time, while the courts impermissibly impose rigidity).

[44] MANNING & STEPHENSON, *supra* note 27, at 976.

[45] *See Chevron*, 467 U.S. at 865–66 (acknowledging accountability rationale).

[46] And it has. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 601(a)(1), 8 U.S.C. § 1101(a)(42)(B) (2018) (overruling the Agency's original construction issued in *Matter of Chang*, 20 I. & N. Dec. 38, 47 (B.I.A. 1989)); Family Smoking Prevention and Tobacco Control Act § 901(a)–(b), 21 U.S.C. § 387a(a)–(b) (2018) (affirming the Agency's original construction by overruling the Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

[47] *See generally* INA §§ 201–03, 8 U.S.C. §§ 1151–53 (describing categories of persons eligible to be treated as immigrants, the numerical limitations on their entry, and preference allocation of immigrant visas).

prevent a noncitizen from obtaining permission to enter.[48] When a noncitizen is present within the country but was never authorized to be present or no longer has authorization to remain, the noncitizen may be removed.[49] These three functions—admissibility, inadmissibility, and removal—constitute the core of the U.S. immigration system.

1. The Immigration Bureaucracy

Actors within this system have many opportunities to interpret immigration statutes. Under an ordinary deportation case, for instance, a noncitizen appears before an Immigration Judge (IJ). After the IJ decides the case, the losing party may appeal to the Board of Immigration Appeals (BIA). The party who loses the BIA proceeding[50] ordinarily appeals the decision to a federal court of appeals, skipping the district court entirely. Subject to the judicial review provisions of INA section 242, and consistent with the *Chevron* framework, the courts of appeals decide questions of law de novo.

The statute gives the Attorney General power to decide questions of law.[51] But Attorneys General have never done this alone. Between 1921 and 1940, a Board of Review assisted the Secretary of Labor—then responsible for most of the country's immigration proceedings—in their quasi-adjudicative function.[52] When the Immigration and Naturalization Service (INS) became part of the Department of Justice (DOJ) in 1940, the Board did, too: The Attorney General issued an order establishing its existence that same year.[53] Further regulations in 1983 separated the BIA, within the

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[48] *See generally* INA § 212, 8 U.S.C. § 1182 (laying out all the criteria by which a noncitizen may be deemed "inadmissible").

[49] *See generally* INA §§ 237, 240, 8 U.S.C. §§ 1227, 1229a (describing the procedures for removal, also known as "deportation").

[50] As Stephen Legomsky adroitly points out, the noncitizen is usually the only one capable of appealing an adverse decision. Legomsky, *supra* note 9, at 1649. The immigration provision that governs judicial review refers to a provision partially codified in 28 U.S.C. § 2344, which in turn provides that challenges to agency actions "shall be against the United States." 28 U.S.C. § 2344 (2018); *see* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). And "[b]ecause the United States presumably cannot bring an action against itself, the latter sentence implies that only the party aggrieved by government action may petition for review." Legomsky, *supra* note 9, at 1649 n.64.

[51] *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (providing that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

[52] *See* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 33–34 (1977) (detailing the history of the Board).

[53] *See* Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454, 2454 (July 1, 1940) (establishing the existence of the Board within the DOJ).

Executive Office for Immigration Review, from the INS.[54] Detailed regulations establish the BIA and outline its structure and scope: membership requirements, standards and conditions of review, issuance of precedential opinions, and other procedures.[55] The BIA's existence has still never been codified in the immigration statutes, although it has been referred to by Congress in the INA[56] and in committee reports.[57]

2. The Certification Power

Despite the formalized existence of the BIA as the expert body, the Attorney General has reserved for himself the option to decide cases on his own after the BIA has issued an opinion. This "certification power" is worth quoting in its entirety:

> (h) *Referral of cases to the Attorney General*.
> (1) 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.[58]

The history of the certification power has been extensively chronicled elsewhere.[59] For our purposes it suffices to note that use of the certification power has increased in the last two decades after a long

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[54] *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056, 8056 (Feb. 25, 1983) (to be codified at 28 C.F.R. pt. 0) (separating the Board from the INS).

[55] *See* 8 C.F.R. § 1003.1 (2018) (establishing the Board's organizational structure, jurisdiction, and powers).

[56] *See* INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B) ("The order described under subparagraph (A) shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.").

[57] *See* H.R. REP. NO. 94-506, at 14 (1975) ("[T]he Committee has been assured by the Department of Justice that the Board of Immigration Appeals will be authorized to consider appeals from [the IJ's] decision."); *see also* Roberts, *supra* note 52, at 30 & n.1 (acknowledging that although "[the Board] has never been accorded statutory recognition," it has been recognized in House committee reports).

[58] 8 C.F.R. § 1003.1(h) (2018).

[59] *See, e.g.*, Gonzales & Glen, *supra* note 42 (presenting a historical and doctrinal overview of the Attorney General's certification power); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 155–65 (2017) (responding to Gonzales & Glen's argument); Trice, *supra* note 9, at 1771–72 (describing the review power).

lull.[60] After a relatively significant uptick in certified cases during the George W. Bush Administration (fifteen),[61] the Obama Administration exercised the power only four times, two of which were just reversals of decisions from the Bush era.[62] The Trump Administration has increased its use of the certification power, certifying eight cases in 2018 alone.[63]

Many commentators have remarked on the unsavoriness of the certification power. The statute commits broad power to the Attorney General in the execution of immigration functions,[64] and courts ordinarily give extreme deference to the Executive under what is known as the "plenary power" doctrine.[65] But section 1003.1(h)(1)(i) is unrestricted: The Attorney General may refer a case to himself at any time, no strings attached. The ability of a single executive official to remove, by an eighty-year-old regulation, an individual's case from the standard docket, decide it with no more procedure required than that the decision be written,[66] and overturn potentially decades of precedential BIA opinions feels categorically like an unconstitutional exercise of power. Indeed, scholars and commentators have attacked this scheme on the grounds that it violates due process,[67] gives rise to

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[60] Gonzales & Glen, *supra* note 42, at 860 ("[For] whatever . . . reason, . . . the exercise of the referral authority . . . shifted quite dramatically from 1940 to 2015, along every possible metric of analysis.").

[61] *See infra* Appendix.

[62] *See* Matter of Silva-Trevino, 26 I. & N. Dec. 550, 554 (Att'y Gen. 2015) (vacating Matter of Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008)); Matter of Compean, 25 I. & N. Dec. 1, 2–3 (Att'y Gen. 2009) (vacating Matter of Compean, 24 I. & N. Dec. 710 (Att'y Gen. 2009)).

[63] *See infra* Appendix.

[64] *See* INA § 103, 8 U.S.C. § 1103 (2018) (establishing the Attorney General's broad authority in executing immigration laws).

[65] *See generally* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 185–88 (8th ed. 2016) (discussing the plenary power doctrine).

[66] *See* 8 C.F.R. § 1003.1(h)(2) (2018).

[67] *See* Trice, *supra* note 9, at 1768 (arguing that the lack of procedure implicates due process concerns and undermines quality, accuracy, legitimacy, and acceptability of immigration adjudication); *cf.* Rosenfield, *supra* note 6, at 157–58 (noting the potential for lack of notice and opportunity to be heard); Allan van Gestel et al., Note, *Immigration—Exclusion and Deportation, Proceedings and Review, Under the McCarran-Walter Act of 1952*, 41 B.U. L. REV. 207, 212 & n.45 (1961) (noting that at least one court found a due process violation when the Attorney General referred a case without notice or opportunity to be heard). *But see* Gonzales & Glen, *supra* note 42, at 902–12 (arguing that the certification power comports with the minimum constitutional requirements for due process).

arbitrary and capricious actions,[68] engenders conflicts of interest,[69] and lacks sufficient independence.[70]

The certification power also has its defenders, however. Former Attorney General Alberto Gonzales recently co-wrote an influential piece advocating for greater executive control of immigration functions in an era of congressional partisan gridlock.[71] Notably, no Administration has been willing to give up the power entirely, although Administrations have used it to varying degrees.

C. Chevron *in the Immigration Context*

Despite the Supreme Court's pronouncements of exceptional principles in immigration law,[72] and the sanctioning of the federal gov-

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[68] *See* Shah, *supra* note 59, at 148–49 ("That the Attorney General's use of the referral and review mechanism has destabilized previously longstanding applications of statute, even if only partially or temporarily, casts doubt on . . . [the] argument that use of this tool has added consistency to the immigration law framework.").

[69] *See* Legomsky, *supra* note 9, at 1672 (arguing that "[a]llowing a law enforcement official to reverse the decision of an adjudicatory tribunal is problematic—particularly in proceedings in which the government is one of the opposing parties" because she "has an inherent incentive to care more about some shortcomings than others" and thus "[her] enforcement responsibilities might well dictate the relative priorities assigned to . . . conflicting interests" such as speed, efficiency, accuracy, and fairness of outcomes); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 650 (1981) (arguing that the "Attorney General assumes a posture of inevitable conflict when he is required to evaluate the merits of advocacy positions assumed by his own Department" and that the referral power "inappropriately injects a law enforcement official into a quasi-judicial appellate process, creates an unnecessary layer of review, compromises the appearance of independent Board decisionmaking," and "reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body"); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3–4 (2008) (noting that the Attorney General is also responsible for the Office of Immigration Litigation, which represents the government against the noncitizen, creating an obvious conflict of interest).

[70] *See* Rosenfield, *supra* note 6, at 156, 157–58 (referring to the certification power as "indefensible in principle" and "ultimately destructive of true BIA independence," and noting that its arbitrary use could put noncitizens in limbo for months or years, resulting in a "disquieting effect on the alien's and the general public's belief as to the BIA's independence"); Shah, *supra* note 59, at 141 ("[I]nterference by the Attorney General could weaken the legitimacy of the BIA . . . ."); *see also infra* note 196 (collecting sources articulating related reasons to have an independent Article I immigration court).

[71] *See* Gonzales & Glen, *supra* note 42, at 846 (arguing that the referral power is an effective tool against a "recalcitrant Congress"). For the most persuasive criticism of this position, see Shah, *supra* note 59. Shah argues that the certification power has undermined joint efforts by Congress, the judiciary, and agencies to improve our immigration system.

[72] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (granting extraordinary deference to executive); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting INS v. Abudu, 485 U.S. 94, 110 (1988))). *See generally* ALEINIKOFF ET AL., *supra* note 65, at 185–88 (discussing the plenary power doctrine);

ernment's plenary authority to regulate immigration despite no constitutionally enumerated power,[73] the Supreme Court has not signaled that *Chevron* applies differently to federal immigration agencies. Most likely this is because the principles undergirding *Chevron* are no different in the immigration context: The Code is complex, there are vast numbers of individual cases to adjudicate,[74] and Congress has explicitly given the agencies power to fill intentional and inadvertent gaps in the statute.[75] The Court has also openly recognized the BIA's expertise in interpreting ambiguous provisions of the immigration laws,[76] and has acknowledged the Code's complexity as a reason for granting *Chevron* deference.[77] The Supreme Court has, on multiple occasions, applied *Chevron* principles to decisions of the BIA.

1. The BIA and Chevron *Deference*

In *INS v. Aguirre-Aguirre*, the Court unanimously and unambiguously approved of *Chevron* deference to the BIA's interpretations of the INA.[78] Indeed, deference to the BIA was essential to the Court's holding, as it involved the proper meaning of the term "serious nonpolitical crime," as it appears in INA section 241(b)(3)(B)(iii).[79]

David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. REV. 583 (2017) (discussing immigration exceptionalism and the plenary power).

[73] *See* ALEINIKOFF ET AL., *supra* note 65, at 179–85 (explaining potential sources of constitutional authority to regulate immigration, hypothetically and as referenced in *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*), 130 U.S. 581 (1889)).

[74] *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: PENDING CASES (2019), https://www.justice.gov/eoir/page/file/1060836/download (placing the number of cases pending as of October 7, 2019 at 987,274).

[75] *See* INA §§ 103–04, 8 U.S.C. §§ 1103–04 (2018) (delegating various functions to the Secretary of Homeland Security, Attorney General, and Secretary of State).

[76] *See* INS v. Orlando Ventura, 537 U.S. 12 (2002). Though not a case decided pursuant to *Chevron* but on factual-finding deference, the Court unmistakably approves of deference to the BIA in part because of its expertise. *See id.* at 17.

[77] *See* Scialabba v. Cuellar De Osorio, 573 U.S. 41, 56–57 (2014) (noting that deference is especially appropriate "'in the immigration context,' where decisions about a complex statutory scheme often implicate foreign relations" and remarking in parentheses that "hardy readers who have made it this far will surely agree with the 'complexity' point" (quoting *Aguirre-Aguirre*, 526 U.S. at 425)).

[78] *See Aguirre-Aguirre*, 526 U.S. at 424 ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme."). There had been inklings of *Chevron*'s applicability in earlier cases, but nothing definitive. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) (suggesting that *Chevron* applied but discussing the issue minimally); *id.* at 453–55 (Scalia, J., concurring in the judgment) (challenging the majority's application of *Chevron*); *see also* Stone v. INS, 514 U.S. 386, 418 (1995) (Breyer, J., dissenting) (discussing briefly *Chevron*'s applicability to an agency regulation).

[79] 8 U.S.C. § 1231(b)(3)(B)(iii) (2018); *see Aguirre-Aguirre*, 526 U.S. at 418. The statute, formerly INA § 243(h)(2)(C), addresses withholding of removal. *See* INA § 241(b)(3)(B)(iii), 8 U.S.C. § 1231(b)(3)(B)(iii) (providing that withholding of removal does not apply "if the Attorney General decides that . . . there are serious reasons to

The decision could also be read to suggest, in persuasive dicta, that *Chevron* deference is also applicable to decisions of the Attorney General, since the Attorney General is the one charged with interpreting the statute.[80] But because Aguirre-Aguirre's case was not decided on certification by the Attorney General, the Court did not come close to specifically addressing that issue.

Since *Aguirre-Aguirre*, the Court has addressed *Chevron* in the immigration context eight more times, explicitly reaffirming the applicability of the *Chevron* framework to BIA decisions at least seven of those times.[81] Despite these continued reaffirmances, however, a recent case begins to cast doubt on this relationship. Eight members of the Court formed a majority in *Pereira v. Sessions*, holding that the statute was unambiguous with respect to a time-stop rule under INA sections 239(a) and 240A(d)(1)(A).[82] But in concurrence, Justice Kennedy, in one of the last opinions he wrote while sitting on the Court,[83] bristled at the judiciary's "reflexive deference" when applying the *Chevron* doctrine.[84] Importantly, he expressed concern with how lower courts have applied *Chevron* by ignoring "the premises that underlie" it.[85] Justice Alito's dissent further argued that the Court ignored the *Chevron doctrine* when it accorded *Chevron deference*.[86] This distinction is important. The BIA had interpreted the statute differently in *Matter of Camarillo*,[87] indeed writing when it adopted the interpretation that there was another "equally plausible

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believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States").

[80] *See Aguirre-Aguirre*, 526 U.S. at 424–25.

[81] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2113–14 (2018); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017); Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015); *Scialabba*, 573 U.S. at 56; Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012); Judulang v. Holder, 565 U.S. 42, 52 & n.7 (2011); Negusie v. Holder, 555 U.S. 511, 516 (2009); INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001). The one case that addresses *Chevron* obliquely is *Judulang*, in which the Court applies ordinary arbitrary-and-capricious analysis to the BIA's "comparable-grounds" approach but remarks in a footnote that *Chevron* deference at Step Two would have resulted in the same analysis and result had the issue been strictly about statutory interpretation. 565 U.S. at 52 & n.7. One other opinion also mentions *Chevron* in dissent, but the Court's opinion does not substantively engage with the issue. *See* Dada v. Mukasey, 554 U.S. 1, 29 n.1 (2008) (Scalia, J., dissenting) (acknowledging deference could be warranted to BIA).

[82] 8 U.S.C. §§ 1229(a), 1229b(d)(1)(A) (2018); *see Pereira*, 138 S. Ct. at 2113.

[83] Justice Kennedy submitted his retirement letter six days after *Pereira*. *See* Letter from Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., to the President (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/Letter_to_the_President_June27.pdf.

[84] *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring).

[85] *Id.* at 2121.

[86] *See id.* (Alito, J., dissenting).

[87] 25 I. & N. Dec. 644, 647 (B.I.A. 2011).

reading."[88] Justice Alito found courts' willingness to find ambiguity and defer to—or find a lack of ambiguity and reject—an agency's plausible interpretations of a statute troubling. The non-majority *Pereira* opinions, along with the addition of Justices Gorsuch and Kavanaugh to the Court, may hint that *Chevron* is due for a serious reevaluation in the immigration context.[89] For now, however, deference to the BIA's interpretations remains safe.

In this Note, I wish to reaffirm the Court's instinct and argue that the Court's long-standing deference to the BIA's interpretations is doctrinally correct.[90] This is because deference to the BIA—as an expert and accountable agency that issues its decisions in accordance with a robust, deliberative process—preserves the primary values of the *Chevron* doctrine.

a. Expertise

First, the BIA has a long history and strong expertise in the interpretation of its own statute. Familiarity and expertise are necessary because the statute is exceedingly complex. Even before the modern bureaucracy, members on the Board of Review (established in 1921) assisted the Secretary of Labor in interpreting the immigration laws.[91] The immigration laws themselves were not nearly as complex as they are today; all of the federal exclusion and deportation laws were less than fifty years old at the time.[92] If a panel of experts was necessary then, the complexity of the modern immigration system has only increased the value of experts within the Agency. Today, entire doctrines have evolved from the meaning of particular, vague terms in the Code[93] and from the complex interplay between federal immigration

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[88] *Id.*; *see Pereira*, 138 S. Ct. at 2121–22 (Alito, J., dissenting).

[89] *See infra* notes 239–40 and accompanying text.

[90] There is room to debate this point, as those who have received unfavorable BIA opinions might suggest. *See* John S. Kane, *Deference as Death Sentence—The Importance of Vigilant Judicial Review of Refugee-Claim Denials*, 47 U. LOUISVILLE L. REV. 279, 284–85 (2008). One might also consider whether the development of Step Zero has implicitly abrogated the acceptability of deference to the BIA, but such an analysis is beyond the scope of this Note.

[91] *See* Roberts, *supra* note 52, at 33 (describing the origins and function of the Board of Review).

[92] *See* Page Act of 1875, ch. 141, 18 Stat. 477 (becoming the first exclusionary federal immigration law); *see also* Rosenfield, *supra* note 6, at 145 (noting that "few laws enacted by the Congress are longer and more complex" than the 1952 INA).

[93] Such terms include "particularly serious crime," INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2018), "particular social group," INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), and "crime involving moral turpitude," INA §§ 212(a)(2)(A)(i)(I), 237(a)(2)(A)(i), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i). The complexity of such terms can be overwhelming. *See, e.g.*, *Quick Reference Chart for Determining Key Immigration Consequences of Selected California Offenses*, IMMIGRANT LEGAL RES. CTR.

laws and other sources of law.[94] Some of these problems originate in the country's earliest immigration laws, and it must be experts familiar with their development over decades who interpret the provisions in this light.

This is the "common law" of immigration, to which BIA members are privy but to which that short-term presidential appointee, the Attorney General, is not. Immigration adjudicators hear a massive number of cases[95] and the BIA decides tens of thousands of cases per year.[96] BIA members are indisputably experts in this common law: The twenty permanent members of the current BIA have impressive résumés[97] and an average of over twenty-six years practicing specifically immigration law.[98] (By contrast, the longest-serving Attorney

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(Jan. 8, 2016), https://www.ilrc.org/sites/default/files/resources/california_chart_jan_2016-v2.pdf (exhaustively cataloguing crimes involving moral turpitude as considered in one state's courts).

[94] *See, e.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (explaining the "categorical approach" to analyzing state criminal convictions with respect to federal immigration laws); *see also* Judulang v. Holder, 565 U.S. 42 (2011) (deciding a problematic retroactivity question); INS v. St. Cyr, 533 U.S. 289 (2001) (same).

[95] *See* COMM'N ON IMMIGRATION, AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2-26, 2-31 to 2-32 (2019) (describing the "untenable level" of caseload at 1851 per immigration judge and recommending a reduction to no more than 700, on par with other federal agencies). A 2010 report had already found a very high average of 1243 proceedings and 1014 decisions per year, more than twice the per-judge rate at the Social Security Administration. *See* COMM'N ON IMMIGRATION, AM. BAR ASS'N, REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2-16, 2-37 (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf.

[96] *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: ALL APPEALS FILED, COMPLETED, AND PENDING (2019), https://www.justice.gov/eoir/page/file/1199201/download (putting the number of appeals filed in FY 2018 at 49,583 and the number of appeals completed at 29,790); Kane, *supra* note 90, at 299 ("[A]pproximately 200 immigration judges in fifty-three offices hear more than 250,000 immigration cases per year, of which approximately 25,000 are asylum petitions. Of the roughly quarter million total IJ cases, over 40,000 are appealed to the BIA, and the BIA issues thousands of AWOs each month." (citations omitted)); *id.* at 299 nn.124–26 (gathering additional data).

[97] *See Board of Immigration Appeals: Biographical Information*, EXECUTIVE OFF. FOR IMMIGR. REV., U.S. DEP'T JUST., https://www.justice.gov/eoir/board-of-immigration-appeals-bios (last updated Oct. 22, 2019). This is the composition of the BIA as of the writing of this Note. However, up to twenty-one members are allowed by regulation. *Id.*; *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 4–5, C-1 (2018) [hereinafter BIA PRACTICE MANUAL], https://www.justice.gov/eoir/page/file/1103051/download (describing the BIA's composition and depicting its context within the Department of Justice).

[98] As of the writing of this Note, only one BIA member, appointed recently by Attorney General Barr, had less than a decade of immigration experience: Adkins-Blanch (30); Cassidy (32); Kendall Clark (39); Cole (35); Couch (9); Creppy (39); Goodwin (18);

General since 1829, Janet Reno, served less than eight years.[99] No Attorney General has served more than twelve years.[100]) Although BIA members serve at the pleasure of the Attorney General,[101] they are also rarely fired, replaced, or reassigned,[102] and have long tenures with the government where they can, and have, built their expertise.

An individual Board member decides most cases, but a three-judge panel resolves cases when they fall into one of six consequential categories.[103] Three of these categories—"the need to resolve a case or controversy of major national import," "the need to settle inconsistencies among the rulings of different immigration judges," and "the need to establish a precedent construing the meaning of laws, regulations, or procedures"[104]—suggest that virtually all questions of law that might need to be resolved by the courts and thus subject to the *Chevron* doctrine will be decided by panel. The virtues of multi-member panels on the administration of justice are well-known and appreciated.[105] And questions of law on appeal from the IJ are

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Gorman (11); Grant (27); Greer (27); Guendelsberger (39); Hunsucker (31); Kelly (32); Liebowitz (18); Malphrus (14); Mann (33); Mullane (24); O'Connor (17); Wendtland (34); Wilson (21). *See Board of Immigration Appeals: Biographical Information*, *supra* note 97.

[99] *See Attorneys General of the United States*, OFF. ATT'Y GEN., U.S. DEP'T JUST., https://www.justice.gov/ag/historical-bios (last visited Nov. 23, 2019) (collecting dates of tenure for all Attorneys General).

[100] The longest tenure is that of William Wirt, who served from 1817 to 1829. *See Attorney General: William Wirt*, OFF. ATT'Y GEN., U.S. DEP'T JUST., https://www.justice.gov/ag/bio/wirt-william (last updated July 7, 2017).

[101] *See* Gonzales & Glen, *supra* note 42, at 850 ("The Board has authority to act only to the extent that the Attorney General, by regulation, so provides." (citing 8 C.F.R. § 1003.1(d)(1) (2015))); Roberts, *supra* note 52, at 34 ("Its members are appointed by the Attorney General, have no fixed terms, and serve at his pleasure.").

[102] There are few instances I could find of Attorneys General firing BIA members at will. There was some controversy around a Bush Administration "purge" of Clinton-appointed BIA members, which the Administration called "streamlining." *See* Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a 'Purge*,*'* L.A. TIMES (Mar. 12, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-mar-12-na-immig12-story.html. But this was notable for its rarity. Formal and informal mechanisms place limits on improperly motivated employment practices, which may explain the lack of BIA-member firing. *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 11–15 (2018) (discussing constraints on Executive control of adjudicative bodies like the BIA). Such constraints did not stop Bush Administration officials from using back-door hiring tactics later found to be improper by a watchdog division of the DOJ. *See* U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135–40 (2008), https://oig.justice.gov/special/s0807/final.pdf.

[103] *See* 8 C.F.R. § 1003.1(e)(6)(i)–(vi) (2018) (identifying the six conditions); BIA PRACTICE MANUAL, *supra* note 97, at 4.

[104] BIA PRACTICE MANUAL, *supra* note 97, at 4.

[105] *See, e.g.*, J. Brad Bernthal, *Procedural Architecture Matters: Innovation Policy at the Federal Communications Commission*, 1 TEX. A&M L. REV. 615, 663 (2014) ("Part of the

decided de novo,[106] bringing the BIA's expertise to bear on all cases relevant to this discussion. That all cases pertinent to the *Chevron* discussion are decided by panel de novo underscores the recognition of the BIA's opinions as grounded in expertise and worthy of *Chevron* deference.

Scholars generally agree.[107] Academics and courts alike have viewed the BIA as an "expert" body[108] that aspires to "good . . . opinions [whose issuance] cannot be overemphasized."[109] There have been numerous calls for the BIA's recognition by statute,[110] as it still only exists by regulation. While direct Head of Department supervision is not uncommon, agencies—especially those with such a massive caseload and a conspicuous public presence—typically have at least one appellate body constituted by statute. One scholar suggested that the increased power given to the BIA in the 1961 Act, along with the change making appeal of deportation orders go directly to the court of appeals, made the BIA a kind of substitute for the federal district courts.[111] The size of the BIA has fluctuated, from five members[112] to twenty currently,[113] but each three-member panel or single reviewing member relies on the BIA's own precedential opinions to guide their

justification of a multi-member panel, such as the FCC, is to get the benefits of redundancy (i.e., multiple expert viewpoints to guard against error)."); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986) (analyzing the legitimacy and desirability of multimember panels and concluding, in part, that "given a reasonable understanding of what the job of judging is and under reasonable assumptions about how well individual judges are likely to do it, enlarging the number of judges who sit on a court can be expected to improve the court's performance").

106 *See* BIA PRACTICE MANUAL, *supra* note 97, at 7–8.

107 *But see* Kane, *supra* note 90, at 284–85 (arguing that the BIA should not receive deference because of endemic problems with, inter alia, professionalism, errors of judgment, and the arbitrariness and cruelty of outcomes).

108 *See, e.g.*, Scialabba v. Cuellar De Osorio, 134 S. Ct. 2191, 2203 (2014) (according deference in part based on the expertise of the BIA).

109 Roberts, *supra* note 52, at 36.

110 *See, e.g.*, *id.* at 30 ("[I]t is high time that the Board receive statutory recognition and that its continued existence as an independent institution be endorsed by Congress."); *see also* Holper, *supra* note 9, at 1274 n.199 (suggesting that because the statutory mention of the BIA in the INA post-dates the regulatory certification power, the Attorney General's assumption of complete power over the BIA may be ultra vires (citing INA § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A) (2006))).

111 Roberts, *supra* note 52, at 36.

112 *See* Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 318 (1956) (noting, four years after the passage of the landmark 1952 INA, that the BIA had five members); Roberts, *supra* note 52, at 33 (noting five members stretching back to 1921).

113 *See* Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321 (Feb. 27, 2018) (to be codified at 8 C.F.R. pt. 1003.1(a)(1)).

interpretation of the statute.[114] Courts also thoroughly appreciate the BIA's expertise: *Aguirre-Aguirre* explicitly recognizes *Chevron* deference to BIA decisions,[115] but it was hardly the first decision to recognize the BIA's expertise over immigration matters.[116]

b. Procedural Regularity

Another goal of the *Chevron* doctrine, procedural regularity, is advanced by deference to the BIA. The regulations describing the scope and function of the BIA are detailed and comprehensive.[117] Like many adjudicative bodies, they are subject to various procedural protections. The BIA must adjudicate in an "impartial" manner,[118] review the complete record from the IJ,[119] issue written[120] decisions within 90 to 180 days,[121] abide by quorum limitations on en banc review,[122] discretionarily grant oral argument in panel-review cases,[123] and remand to an IJ if further factfinding is required.[124]

Noncitizens also rely on precedential BIA decisions to determine their eligibility for discretionary relief [125] or for affirmative asylum.[126] Noncitizens who receive an unfavorable IJ decision typically enjoy thorough BIA review as of right in the appellate chain, and rely on the availability of the BIA to insulate their claim from the randomness of being assigned a harsh or narrow-minded IJ. Because the BIA hears all cases involving questions of greater legal significance in three-member panels, noncitizens are further insulated from such harsh effects of a single-member override. The most important cases are heard en banc, effectively obviating the need for additional Attorney

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114 *See* BIA PRACTICE MANUAL, *supra* note 97, at 8–9 (discussing the precedential value of BIA decisions).

115 *See supra* notes 78–80 and accompanying text (discussing *Aguirre-Aguirre*).

116 *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 144–48, 156–57 (1945) (disapproving the Attorney General's certified opinion interpreting the word "affiliation" with respect to communist ties and instead approving of the recently-created BIA's interpretation).

117 8 C.F.R. § 1003.1 (2018).

118 § 1003.1(d)(1).

119 § 1003.1(e)(3).

120 § 1003.1(f). *But see* § 1003.1(e)(4) (allowing for unwritten Affirmance Without Opinion (AWO) dispositions in limited circumstances).

121 § 1003.1(e)(8)(i).

122 § 1003.1(a)(5).

123 § 1003.1(e)(7).

124 § 1003.1(d)(3)(iv).

125 *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 323–24 (2001) (interpreting a statute to allow for post-plea discretionary relief because of noncitizens' reliance interests in the frequency with which such relief had previously been granted).

126 For instance, a spouse of a person who had been forcibly sterilized may have had a viable claim for asylum between 1997 and 2004 and relied on the United States' offer of refuge accordingly. *See* Matter of C-Y-Z- (*C-Y-Z- I*), 21 I. & N. Dec. 915 (B.I.A. 1997), *overruled by* Matter of C-Y-Z- (*C-Y-Z- II*), 23 I. & N. Dec. 693 (Att'y Gen. 2004).

General input on consistency or procedural regularity grounds.[127] And BIA precedential decisions issued within this stable procedural framework constitute the basis for legal advice, which is sometimes constitutionally required.[128] The fact that scholars have praised the BIA and called for its statutory recognition on this basis[129] further cements the legitimacy of the BIA in the immigration system's procedural framework.

c. Accountability

Deference to the BIA's decisions also promotes another goal of the *Chevron* doctrine: accountability to the public. There are at least two accountability justifications for BIA deference.

First, the BIA is still subject to any and all constraints placed on it by the Attorney General. The Attorney General is still the single Head of Department and can effectuate policy in a manner similar to other Heads of Departments across the federal bureaucracy. I do not argue in this Note that reducing *Chevron* deference to the Attorney General affects her rulemaking authority, her ability to change the membership or size of the BIA, or her ability to eliminate the BIA entirely. (The wisdom of doing so, because of constitutional and statutory constraints[130] or strategic considerations such as workload and volatility,[131] is a separate inquiry.) The Attorney General, whatever the immigration policy, has an incentive to select and appoint highly skilled and knowledgeable practitioners to the BIA, but this fact does not in any conceivable way reduce public accountability. Regardless

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127 *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458 (2007) ("When there is a designated appellate authority such as the BIA, an en banc decision of that tribunal can yield the same consistency as agency head review.").

128 *See* Padilla v. Kentucky, 559 U.S. 356 (2010) (requiring that noncitizens accused of crimes be counseled on the direct immigration consequences of their convictions under a guilty plea).

129 *See* Rosenfield, *supra* note 6, at 161 ("[T]he absence of statutory sanction and jurisdiction for the BIA is now a most regrettable and undesirable situation. The status of the Board of Immigration Appeals should no longer be left to the uncertainty of regulation.").

130 *See, e.g.*, Legomsky, *supra* note 127, at 458–59 (discussing some considerations in the relationship between the BIA and the Attorney General).

131 *See* Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 604 (3d Cir. 2011) ("Although we afforded the BIA's interpretation of 'particular social group' *Chevron* deference in [the past], this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally."); Marmolejo-Campos v. Holder, 558 F.3d 903, 919–20 (9th Cir. 2009) ("Agencies are *not* free, under *Chevron*, to generate erratic, irreconcilable interpretations of their governing statutes and then seek judicial deference. Consistency over time and across subjects is a relevant factor [under] *Chevron* . . . when deciding whether the agency's current interpretation is 'reasonable.'" (Berzon, J., dissenting) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987))).

of judicial deference to the BIA, the Attorney General can accomplish a shift in BIA composition in accordance with the public's wishes, but in ways that courts and future Administrations are more likely to sustain.

Second, the BIA is more accountable to the public than unelected courts. While the public may be mistrustful of unelected bureaucrats, the BIA's structure limits the situations under which it could railroad its interpretations in defiance of public accountability. No single member of the BIA could issue a binding precedential decision on a question of law—at least two out of three members on a panel must agree on a particular lawful interpretation. And the stability of the BIA as a consistent body—as opposed to the Attorney General, whose tenure may not last even a full presidential administration—in adjudicating at least that subclass of cases dealing with interpretations of ambiguous statutes, based on a body of precedent, creates public accountability in the same way judges relying on common law creates public trust in the court system. Deference to the BIA legitimizes the public's expectation of a well-functioning bureaucracy and serves the accountability rationale at least as much as deference to other Departmental Heads.

2. Attorney General-Certified Opinions and Chevron *Deference*

Deference to the BIA may be appropriate, but this is not the end of the story. Despite language in the Court's immigration opinions explaining that *Chevron* applies to the statutory scheme,[132] the Court has not squarely confronted the question of whether the Attorney General's certified opinions warrant *Chevron* deference. My Note captures this important and overlooked problem lying at the intersection of immigration and administrative law. I argue that the Attorney General's certified opinions lack the requisite expertise, deliberative process, and accountability structure that undergirds the *Chevron* doctrine. This Note thus argues that despite some language in *Aguirre-Aguirre* and other Supreme Court opinions identifying the applicability of *Chevron* to immigration law and the rightfulness of deferring to BIA opinions, *Mead* and the increasing skepticism of *Chevron*'s application in lower courts require that certified opinions fall out at Step Zero.

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[132] *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

II
SKEPTICISM IN THE COURTS

Before arguing in Part III, *infra*, that the Attorney General does not deserve *Chevron* deference, I will first explain how the courts have approached this matter so far. In an exhaustive review of federal court treatment of certified opinions since *Chevron* came down in 1987, I note two important points. First, courts have failed to directly confront the question of whether the Attorney General and the BIA are owed different levels of deference. At the same time, however, courts do tend to treat Attorney General-certified opinions more skeptically than *Chevron* would traditionally require.

One reason courts may not have addressed the question is that it has only meaningfully materialized in roughly the past two decades, and it has done so slowly. The confluence of the *Chevron* doctrine's development in the mid- to late-1980s and the increase in certified opinions in the George W. Bush Administration[133] means that this issue did not really become relevant until the early 2000s. This fact makes reliance on many pre-2001 Supreme Court cases as ostensible authority for deferring to certified opinions inapposite. It also means that the Court has the opportunity to confront the issue directly in coming Terms.

Even where courts have skillfully recognized the hierarchy and procedural differences between the two agency bodies, however, they typically analyze certified opinions very differently than BIA decisions under *Chevron*. As this Part illustrates, courts tend to show more skepticism towards certified opinions even as they pay lip service to *Chevron*. Courts often do not formally recognize or care that the Attorney General has this unique certification power or that the Attorney General and the BIA are not the same entity, yet they implicitly give the Attorney General a harder time in the handful of cases that have been decided on certification since *Chevron* and which involve statutory interpretation. This Part identifies and analyzes such decisions.

A. Judicial Treatment of Certified Opinions and Chevron

An excellent starting point for discussing judicial treatment of certified opinions is Bijal Shah's compilation of recent certified cases and their treatment by the federal courts.[134] Some certified cases involve issues that have been decided more than once, reflecting the

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[133] *See infra* Appendix.

[134] *See* Shah, *supra* note 59, at 155–65 (showing how the various circuits have approved, remanded, or rejected the interpretations of the Attorney General).

change of Administrations; for my purposes, I have joined them as a single event in the following analysis. Some certified opinions do not propound interpretations of law, and so are not analyzed under the *Chevron* doctrine.[135] Finally, I will not address the most recent certification decisions because they have not had time to be resolved in the federal courts.[136]

As litigation around certified opinions has materialized, judicial opinions have been unclear about the doctrinal approach taken towards the promulgations of the Attorney General. My analysis of such judicial opinions demonstrates that they fall into one of three general categories: paying lip service to *Chevron* while declining to defer; failing to acknowledge a distinction between the BIA and the Attorney General; and circumventing *Chevron* altogether.

1. Lip Service to Chevron

First, some courts acknowledge the *Chevron* doctrine and claim that they are applying it, but then do not defer to the certified opinion. Standing alone, this would be unremarkable, as it represents a faithful application of *Chevron*'s two-step process; but courts appear to give certified opinions a harder time than BIA opinions. One example of this phenomenon is *Matter of Silva-Trevino*.[137] There, the subject of the interpretation was the esoteric term "crime involving moral turpitude."[138] The Attorney General certified *Silva-Trevino* in 2008 after a Seventh Circuit decision favorable to the government[139] and determined that IJs could consider additional evidence outside the statute and record of conviction in order to "resolve accurately the moral turpitude question."[140] But the federal courts largely sided with the BIA over the Attorney General. In the Third, Fourth, Fifth, Ninth, and Eleventh Circuits,[141] the courts invoked *Chevron* and rejected the Attorney General's framework. Eventually, the Supreme Court

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[135] *See, e.g.*, Matter of E-F-H-L-, 27 I. & N. Dec. 226 (Att'y Gen. 2018); Matter of D-J-, 23 I. & N. Dec. 572 (Att'y Gen. 2003); Matter of Jean, 23 I. & N. Dec. 373 (Att'y Gen. 2002).

[136] As of the time of this writing, many recently referred cases have not been fully litigated in the federal courts. *See, e.g.*, Matter of M-G-G-, 27 I. & N. Dec. 469 (Att'y Gen. 2018). This also includes the arguably most incendiary of immigration cases in the Trump Administration, Matter of A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018), concerning the application of "particular social group" to certain domestic violence victims.

[137] 24 I. & N. Dec. 687 (Att'y Gen. 2008).

[138] INA §§ 212(a)(2)(A)(i)(I), 237(a)(2)(A)(i)(I), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)(I) (2018); *see Silva-Trevino*, 24 I. & N. Dec. at 688 (framing the question at issue).

[139] Ali v. Mukasey, 521 F.3d 737 (7th Cir. 2008).

[140] *Silva-Trevino*, 24 I. & N. Dec. at 708.

[141] *See* Shah, *supra* note 59, at 163 (collecting cases).

stepped in and determined, without invoking *Chevron*, that the BIA's approach trumped.[142] While no court explicitly used the reasoning articulated in this Note to prefer the BIA's interpretation over the Attorney General's, in practice this is exactly what they did: The judiciary has found ways to avoid deferring to certified opinions because the BIA's approach, though formally abrogable by the Attorney General, is the better approach under the circumstances.

Sometimes a court's "harder look" approach involves scrutinizing statutory language more pedantically than usual. An example of this is *Matter of A-H-*,[143] interpreting the phrase "is a danger to the security of the United States," as it appeared in the withholding provisions of the INA.[144] An applicant is ineligible for withholding of removal if the Attorney General determines that the applicant "is" such a danger. The BIA had interpreted this as a rather high threshold, but the Attorney General certified and reversed, saying that the level of danger "need not be a 'serious,' 'significant,' or 'grave' danger."[145] Instead, he interpreted the bar as entailing "any nontrivial degree of risk" "to the Nation's defense, foreign relations, or economic interests."[146] Here again, the federal courts paid lip service to *Chevron* but in fact picked apart and eventually rebuffed the Attorney General's interpretation. In A-H-'s actual case, the Fourth Circuit specifically stated that they "accord *Chevron* deference to the Attorney General's interpretation of the INA,"[147] but then declined to defer to the Attorney General's interpretation.[148] The Third Circuit similarly refused to defer to the Attorney General's interpretation in *Yusupov v. Attorney General*, focusing on the difference between "is" and "may."[149] The Ninth Circuit adopted this aspect of *Yusupov* as well.[150] The courts' choice to focus on this subtle distinction could be justified as ordinary statutory interpretation, but it could also be viewed as an overly pedantic way to avoid deferring to the Attorney General's "reasonable" but expertise-deficient rationale.[151] For instance, in

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142 Moncrieffe v. Holder, 569 U.S. 184, 206–07 (2013).

143 23 I. & N. Dec. 774 (Att'y Gen. 2005).

144 The current version of those provisions, which retain the same language, can be found at INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv), 8 U.S.C. §§ 1158(b)(2)(A)(iv), 1231(b)(3)(B)(iv) (2018).

145 Matter of A-H-, 23 I. & N. Dec. at 788.

146 *Id.*

147 Haddam v. Holder, 547 F. App'x 306, 309 (4th Cir. 2013).

148 *Id.* at 308.

149 518 F.3d 185, 201 (3d Cir. 2008).

150 *See* Malkandi v. Holder, 576 F.3d 906, 913–14 (9th Cir. 2009).

151 Note that the relevant provision of the asylum statute does not contain the word "is," nor does former INA § 243(h), the former withholding provision analyzed in *Matter of A-H-*. *See supra* notes 143–44 and accompanying text.

Yusupov, the Petitioner had argued that the "interpretation [was] unreasonable, and thus not entitled to *Chevron* deference," a fundamentally Step Two argument.[152] The court delved deeply into the difference between "is" and "may," holding that the Attorney General's position that a noncitizen is ineligible for withholding if they "may pose a risk to national security" was untenable.[153] The court ultimately concluded that the Attorney General's interpretation "fail[ed] at the first step of the *Chevron* analysis,"[154] acknowledging all the same that this "is"/"may" distinction could have simply been an "inartful" oversight.[155] In other words, the courts may have been forcing a Step Zero rationale—that is, inartful drafting has caused the interpretation to have too little "power to persuade"—into a Step One or Step Two analysis.

Finally, courts have been skirting *Chevron* deference in Attorney General-certified opinions by either finding a lack of ambiguity in the statute, which is commonly acknowledged to be quite ambiguous, or finding ambiguity in the clearest of text. Perhaps the most classic example of this is *INS v. St. Cyr*.[156] The interpretation at issue in *St. Cyr* came to the Supreme Court after the Attorney General issued a certified opinion in *Matter of Soriano*.[157] In a question about the retroactivity of a particular waiver provision, "[s]even out of eight courts of appeals . . . that heard related litigation ruled against the Attorney General's interpretation."[158] *St. Cyr*, a wide-ranging and serpentine decision, ended up having a much broader impact on retroactivity and the constitutional availability of habeas than was strictly at issue in the certified opinion, but it is worth noting that the Supreme Court was not interested in applying *Chevron* deference in a situation in which it clearly could have. The Supreme Court tortured the statutory language to find no ambiguity,[159] in a kind of Step One holding without the *Chevron* analysis. In the end, it was the BIA's interpretation that persevered and the Attorney General's interpretation that failed, in spite of the outcome that Step Two probably should have engendered.

An example of where federal courts have applied this watered-down variety of *Chevron*, in which a court readily finds or readily dis-

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152 518 F.3d at 195.

153 *Id.* at 201.

154 *Id.*

155 *Id.* ("The introduction of 'may' in the statement of the standard in *In re A–H–* perhaps is no more than an unintentional and inartful articulation on the part of the Attorney General.").

156 533 U.S. 289 (2001).

157 21 I. & N. Dec. 516 (B.I.A. 1996, Att'y Gen. 1996).

158 Shah, *supra* note 59, at 159.

159 *See St. Cyr*, 533 U.S. at 326–27 (Scalia, J., dissenting).

misses ambiguity—even while deferring to the Attorney General's interpretation—is in *J-S-*[160] and *C-Y-Z-*. [161] In the interpretation of the word "persecution" as applied to the spouse affected by China's infamous "one child" policy,[162] several federal courts deferred to Attorney General Mukasey's certified opinion deciding that spouses are not per se included as persecuted persons. But the courts did not do so because they found the Attorney General's reasoning more persuasive than the BIA's. Instead, the Seventh Circuit avoided *Chevron* analysis altogether,[163] while the Third,[164] Fourth,[165] and Eleventh Circuits[166] found no reason to discuss the Attorney General's opinion because they found the statute unambiguous. This is particularly bizarre in the Third Circuit, where the court had previously found ambiguity in the statute.[167] It is further unusual because it would not have been unreasonable to defer to the Attorney General's reasoning in this particular circumstance in light of the fact that it did not directly conflict with the BIA's own interpretation, but rather narrowed it.[168] These cases demonstrate that even when federal courts invoke *Chevron*, they often—whether intentionally or not—avoid deciding the interpretive question at Step Two.[169]

2. Failure to Distinguish Between the BIA and the Attorney General

Second, many courts proceed without distinguishing between the BIA and the Attorney General. This is understandable, given the structure of the statute and the BIA's unusual position in the administrative state. But it is an important oversight because the priorities of

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160 Matter of J-S-, 24 I. & N. Dec. 520 (Att'y Gen. 2008).

161 Matter of C-Y-Z-, 23 I. & N. Dec. 693 (Att'y Gen. 2004).

162 Matter of Chang, 20 I. & N. Dec. 38, 43 (B.I.A. 1989). For information on the one-child policy, see generally *China to End One-Child Policy and Allow Two*, BBC (Oct. 29, 2015), https://www.bbc.com/news/world-asia-34665539.

163 Shi Chen v. Holder, 604 F.3d 324, 331 (7th Cir. 2010).

164 Xiang Ming Wang v. Att'y Gen., 378 F. App'x 216, 219–20 (3d Cir. 2010); Guang Lin-Zheng v. Att'y Gen., 557 F.3d 147, 156–57 (3d Cir. 2009) (en banc).

165 Yi Ni v. Holder, 613 F.3d 415, 424–25 (4th Cir. 2010).

166 Lawal v. U.S. Att'y Gen., 625 F. App'x 380, 382 (11th Cir. 2015) (per curiam); De Quan Yu v. U.S. Att'y Gen., 568 F.3d 1328, 1334 (11th Cir. 2009); Jie Sun v. U.S. Att'y Gen., 334 F. App'x 977, 979 (11th Cir. 2009) (per curiam).

167 Sun Wen Chen v. Att'y Gen., 491 F.3d 100, 107 (3d Cir. 2007), *overruled by Guang Lin-Zheng*, 557 F.3d at 148–49.

168 *See* Xian Tong Dong v. Holder, 696 F.3d 121, 125 (1st Cir. 2012) ("[T]he Attorney General took great care to make certain that his interpretation of section 1101(a)(42)(B) 'does not explicitly exclude spouses from its purview.'" (quoting Matter of J-S-, 24 I. & N. Dec. 520, 530 (Att'y Gen. 2008))).

169 Only the Ninth Circuit found ambiguity and deferred to the Attorney General. *See* Nai Yuan Jiang v. Holder, 611 F.3d 1086, 1092–93 (9th Cir. 2010).

the BIA and the Attorney General are often at odds, and the reasoning and procedures attending their respective changes in the doctrine are not equivalent. In *Mead*, the Court considered and rejected the idea that all lawfully issued agency pronouncements, regardless of who they come from, are equivalent and deserving of the same deference.[170]

Federal courts' failure to recognize the difference between the BIA and the Attorney General as promulgators of the relevant decisions appears in at least one Supreme Court case, [171] but it is prevalent in many lower court decisions. For example, in the litigation stemming from *Matter of Luviano-Rodriguez*[172] and *Matter of Marroquin-Garcia*,[173] the First Circuit failed to distinguish the BIA's approach from the Attorney General's approach regarding the longevity of expungements to subsequent removals.[174] The First Circuit has also miscited *Aguirre-Aguirre* and *Naeem v. Gonzales* to say that these BIA holdings were the same as Attorney General interpretations.[175] In litigation surrounding an interpretation of the very ambiguous phrase "particularly serious crime,"[176] at least two circuits misattributed the Attorney General's interpretation to the BIA.[177]

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170 United States v. Mead Corp., 533 U.S. 218, 227–31 (2001).

171 *See* INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) ("The INS argues that we should extend deference . . . to the *BIA's interpretation* of [the provision at issue]." (emphasis added)).

172 21 I. & N. Dec. 235, 237 (B.I.A. 1996) ("For many years this Board has recognized that a criminal conviction that has been expunged . . . may not support an order of deportation. . . . [A]n exception to this rule exists for expunged drug convictions." (citing Matter of Ibarra-Obando, 12 I. & N. Dec. 576 (B.I.A. 1966, Att'y Gen. 1967); Matter of G-, 9 I. & N. Dec. 159 (B.I.A. 1960, Att'y Gen. 1961); Matter of A-F-, 8 I. & N. Dec. 429 (B.I.A. 1959, Att'y Gen. 1959))).

173 23 I. & N. Dec. 705 (Att'y Gen. 2005); *see also* Matter of Luviano-Rodriguez, 23 I. & N. Dec. 718 (Att'y Gen. 2005) (applying the holding of *Marroquin-Garcia* to Luviano-Rodriguez's case the same day).

174 Rumierz v. Gonzales, 456 F.3d 31, 36–37, 40 (1st Cir. 2006).

175 *See, e.g.*, Xian Tong Dong v. Holder, 696 F.3d 121, 124 (1st Cir. 2012) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) and Naeem v. Gonzales, 469 F.3d 33, 36 (1st Cir. 2006)) (asserting that *Aguirre-Aguirre* and *Naeem* establish that the Attorney General's interpretation authority is entitled to *Chevron* deference).

176 INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2018); *see* Matter of Y-L-, 23 I. & N. Dec. 270, 274 (Att'y Gen. 2002) (certified opinion interpreting this phrase).

177 Both the Fifth and Seventh Circuits attributed the Attorney General's decision in *Y-L-* to the BIA. *See* Singh v. Holder, 516 F. App'x 387, 388 (5th Cir. 2013) ("The BIA determined in *In re Y-L-* that drug trafficking crimes are presumptively particularly serious crimes unless a petitioner demonstrates at least six enumerated criteria." (citing *Y-L-*, 23 I. & N. Dec. at 276–77)); Bosede v. Mukasey, 512 F.3d 946, 951 (7th Cir. 2008) ("The BIA has recognized that an alien can rebut the presumption by establishing 'unusual circumstances.'" (quoting *Y-L-*, 23 I. & N. Dec. at 276)).

3. Circumventing Chevron

Third, some courts circumvent *Chevron* entirely while reaching the same result that they would otherwise reach under *Chevron*. Both circumventing *Chevron* entirely by failing to discuss the merits of a particular case, on the one hand, and faithfully applying Step Zero, on the other, accomplish the same goal of removing the interpretive decision from the hands of the Executive.

Numerous examples exist in which the court could have—and probably should have—applied *Chevron* to uphold the Attorney General's interpretation, but instead failed to address the merits. Some cases dismiss the question for failure to exhaust administrative remedies[178] or on jurisdictional grounds.[179] Some courts issue nonprecedential opinions cursorily approving the Attorney General's opinion,[180] decline to accept any interpretation for the reason that it is unnecessary to disposition,[181] reject the Attorney General's approach on statutory grounds without mentioning *Chevron*,[182] or find collateral reasons to reject the Attorney General's opinion.[183] Interestingly, at least some courts ignore the Attorney General's interpretation altogether and apply the BIA's standard, despite it having been formally abrogated.[184]

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[178] *See, e.g.*, Gaviola v. Lynch, 636 F. App'x 37, 39 (2d Cir. 2016).

[179] *See, e.g.*, *Singh*, 516 F. App'x at 387–88; Gonzalez-Mendoza v. Holder, 356 F. App'x 28, 29 (9th Cir. 2009).

[180] *See, e.g.*, Baboolall v. Att'y Gen., 606 F. App'x 649, 650, 655 (3d Cir. 2015); *Singh*, 516 F. App'x at 387–88; *Gonzalez-Mendoza*, 356 F. App'x at 29; Davis v. Gonzales, 248 F. App'x 793, 794 (9th Cir. 2007).

[181] *See* Tianyi Yu v. Holder, 357 F. App'x 308, 309 (2d Cir. 2009) (declining to accept the Attorney General's interpretation issued in *Matter of A-H-*, discussed *supra* notes 143–55 and accompanying text).

[182] Baez-Orozco v. Lynch, 627 F. App'x 638, 638–39 (9th Cir. 2015) (not mentioning *Chevron*); Azim v. U.S. Att'y Gen., 314 F. App'x 193, 195–97 (11th Cir. 2008) (same); Jaadan v. Gonzales, 211 F. App'x 422, 429 (6th Cir. 2006) (approving of *Marroquin-Garcia* without substantive discussion or reference to *Chevron*).

[183] *See* Hernandez v. Sessions, 884 F.3d 107, 113–14, 114 n.3 (2d Cir. 2018) (Droney, J., concurring) (musing whether the Attorney General's interpretation lowered the standard for determining whether a noncitizen "is a danger to the security of the United States" so much as to violate international law (quoting INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv) (2012))); *see also* Judulang v. Holder, 565 U.S. 42, 52–53, 52 n.7, 62 (2011) (striking down the Attorney General's interpretation under arbitrary and capricious review, but remarking that the result would have been the same if it had decided the case on *Chevron* grounds).

[184] *See* Shah, *supra* note 59, at 161 n.229 (collecting cases in which the BIA's old standard was applied and noting that circuits are split).

B. Synthesis

This analysis reveals two important points. First, neither the Supreme Court nor lower courts have ever directly addressed the question of whether the Attorney General should receive the same level of deference as the BIA. This is notable because, under Step Zero, the weight that will be accorded to an agency decision depends upon the processes underlying the issuance of that decision.[185] Because the processes attending the BIA's decisions are very different from those attending the Attorney General's certified opinions,[186] judicial recognition of the distinction between these two agency bodies bears upon whether to give deference, respect, or nothing at all to the agency decision.

Second, the lower court opinions discussed in this Section demonstrate that the judiciary exhibits plenty of discomfort when deferring to certified opinions under Step Two. In all but one case, courts found *Chevron* deference unnecessary to their holdings because they were resolved at Step One.[187] In others, courts scrutinized the Attorney General's interpretations far more heavily than they would have the BIA's, and were nearly unanimous in rejecting the Attorney General's interpretations in several series of cases.[188]

Why do the courts work so hard to justify non-deference to the Attorney General when the vast majority of BIA interpretations are upheld? Such a rate of rejection does not suggest *Chevron* deference but rather something lesser—*Skidmore* respect, perhaps, or in some circumstances, even de novo interpretation. It is possible that, in practice, the courts do not believe that Congress ever intended for the Attorney General to have this power, despite the statutory language, because the Attorney General initially made the decision to delegate responsibility to the BIA. That possibility would make this a Step Zero question, yet no court has explicitly stated so. Instead, under blackletter *Chevron* doctrine, they would have to apply the doctrine and defer. The courts' nitpicking in these cases suggests that in practice, they credit the Attorney General's interpretations far less than modern *Chevron* doctrine often "requires." What this means is that, even though the courts appear to apply ordinary *Chevron* deference to the Attorney General, they are in fact not applying *Chevron* defer-

185 *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

186 *See supra* Section I.B.

187 Only the Ninth Circuit has resolved such a case at Step Two. *See* Nai Yuan Jiang v. Holder, 611 F.3d 1086, 1093 (9th Cir. 2010). And, as Shah notes, the panel did so "reluctantly." Shah, *supra* note 59, at 155 & n.183.

188 *See supra* notes 143–51 and accompanying text (discussing cases).

ence at all, but rather are ascertaining the congressional intent through ordinary means of statutory construction.

III
THE ATTORNEY GENERAL'S CERTIFICATION POWER AND *CHEVRON* DEFERENCE

Although some judicial opinions suggest that the Attorney General's certified opinions are entitled to *Chevron* deference, the courts have not uniformly or definitively adopted this position. In this Part, I explain why the values of *Chevron* are not served by deference to certified opinions.

In light of the clear statutory authority of the Attorney General to interpret the law and her consistent invocation of that power even as she delegates it,[189] the argument that she should receive less deference than the BIA in certain contexts may seem peculiar. But it is not nearly as peculiar in practice as it may seem in principle. The Attorney General's certified opinions should not receive *Chevron* deference because, unlike when applied to BIA decisions, deference serves none of the values of the *Chevron* doctrine. Lest the doctrine be empty of content, courts have a responsibility to resolve the matter at Step Zero to avoid granting "reflexive deference"[190] when the principles underlying the doctrine are absent.

A. Expertise

While the BIA's expertise is well-known and thoroughly acknowledged,[191] the Attorney General has virtually no expertise in the administration of immigration law. In contrast to *all* BIA members, not a *single* Attorney General since 1953 has ever had a career in immigration law prior to nomination, let alone held an adjudicatory position within the immigration bureaucracy.[192] Some Attorneys

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[189] For the Attorney General's defense of her own power, see Deportation Proceedings of Joseph Patrick Thomas Doherty, 12 Op. O.L.C. 1, 4 (1988). The Attorney General argued that "[t]he regulations setting out [the Attorney General's] review authority do not expressly or by implication circumscribe the Attorney General's statutory decisionmaking authority." *Accord* Gonzales & Glen, *supra* note 42, at 856 n.95 (collecting examples of the Attorney General asserting the broad scope of her own authority).

[190] Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

[191] *See supra* Section I.C.1.

[192] *See infra* notes 193–94 and accompanying text. Since the DOJ was placed in charge of immigration matters, only one Attorney General, James McGranery (1952–1953), had worked substantively in immigration law prior to nomination. *See Attorney General: James Patrick McGranery*, OFF. ATT'Y GEN., U.S. DEP'T JUST., https://www.justice.gov/ag/bio/mcgranery-james-patrick (last updated June 28, 2017). He was Attorney General for just eight months but certified three cases during that time. *See infra* Appendix (citing Matter

General have served in judicial roles,[193] but this fact alone does not support greater deference because the *Chevron* doctrine already subjugates *judicial* expertise in statutory construction to *agency* expertise in the statutes they specifically administer. Instead, most modern Attorneys General have been distinguished prosecutors, educators, politicians, diplomats, or in other kinds of government service.[194] These positions may be appropriate for the position of the Attorney General as top law enforcement officer, but not for a position as most capable interpreter of the immigration laws. Anyhow, courts do not apply *Chevron* and do not accord deference to the Attorney General in domains within which these Attorneys General have expertise, such as the interpretation of criminal statutes.[195] Why should the Attorney General receive deference when she interprets an immigration statute, in which she has no expertise, but receive no deference when she interprets a criminal statute, in which she has substantial expertise? Certainly, the potential for a conflict of interest (executive officials interpreting the laws they are to execute) is present in both circumstances.[196] There is no rational justification for this doctrine, especially not within the *Chevron* framework. This logic could be extended to "perhaps any area of law in which a political official exercise [sic] discretion beyond her core competencies," but its application here is

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of R-, 5 I. & N. Dec. 29 (Att'y Gen. 1952); Matter of M-, 4 I. & N. Dec. 532 (Att'y Gen. 1952); Matter of L-B-D-, 4 I. & N. Dec. 639 (Att'y Gen. 1952)).

193 Alberto Gonzales, Robert Jackson, Thomas Clark, and Harlan Fiske Stone, among others, served in judicial roles, either before or after their tenure as Attorney General. *See generally Attorneys General of the United States*, *supra* note 99 (providing the biographies of all U.S. Attorneys General).

194 *See id.*

195 *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (noting that the Court "ha[s] never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference"); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("[T]he law of crimes must be clear. There is less room in a [criminal] statute's regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration. We are, in short, far outside *Chevron* territory here."); Sunstein, *supra* note 22, at 210 (noting that it would be a "preposterous conclusion" for the Department of Justice to be able to construe criminal statutes "as it sees fit").

196 Criticism of this setup has been prolonged and vigorous. *See, e.g.*, *Featured Issue: Immigration Courts*, AM. IMMIGR. LAW. ASS'N, https://www.aila.org/advo-media/issues/all/immigration-courts (last updated Jan. 7, 2020) (cataloguing such criticism and opining that "the Executive Office for Immigration Review (EOIR) is vulnerable to executive branch interference, a structural flaw which the current administration has exploited and which undermines the very integrity of the system"); Letter from Robert Carlson, President, Am. Bar Ass'n, Marketa Lindt, President, Am. Immigration Lawyers Ass'n, Maria Vathis, President, Fed. Bar Ass'n, & A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, to Members of the U.S. Cong. (July 11, 2019), https://www.aila.org/advo-media/aila-correspondence/2019/legal-associations-call-independent-court-system (calling on Congress to establish an independent immigration court system).

unimpeachable "because the Attorney General is removed from the agency's expertise in immigration."[197] In at least one criminal case, government attorneys have (incredibly) cited the Attorney General's lack of expertise in immigration affairs as a litigation strategy.[198] I would even venture that no modern Attorney General would be able to make it past a *Daubert* hearing in a federal court.[199]

Defenders of the Attorney General have not argued to the contrary. Gonzales and Glen note that the Attorney General typically relies on advisors to make decisions in immigration cases,[200] and that those advisors in turn "have no pretensions to expertise on immigration law or the specific legal and policy issues that most frequently arise in the context of immigration litigation."[201] The authors' solution is for the Attorney General to "rely[] on an advisor specifically versed in that area of law and with ongoing knowledge of how issues are being resolved by the agency and the federal courts" because of the "complexity" of immigration law.[202] But, obviously, this is the point of the BIA: As persons selected by the Attorney General specifically for their expertise, BIA members are those "advisors" who have been given adjudicative power. The Attorney General acknowledges she has no expertise in this field of law and has delegated her responsibility to experts; she does not need additional advisors to assist in the undermining of her own delegates' authority, unless the power is purely for political use. The only reason to rely on advisors to change the shape of immigration law is to provide a thin veneer of legitimacy when overruling a decision she does not care for on peremptory or transparently political grounds.

Given this lack of expertise, the Attorney General's regulatory authority is merely a political tool, a way to effectuate immigration policy and overturn interpretations of immigration law unsavory to incoming Administrations without the substantive checks and bal-

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197 Shah, *supra* note 59, at 141.

198 United States v. Reyes-Romero, 327 F. Supp. 3d 855, 899–900 (W.D. Pa. 2018) ("The Government seemingly contends that the Department of Justice is some sort of stranger to the important work of formulating federal immigration policy and leading its enforcement.").

199 *Cf.* Berry v. City of Detroit, 25 F.3d 1342, 1353 (6th Cir. 1994) (finding that a former sheriff and criminal justice consultant was not qualified to opine on police disciplinary tactics). *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (construing Rule 702 of the Federal Rules of Evidence and establishing the trial judge's gatekeeping function for permitting expert testimony).

200 Gonzales & Glen, *supra* note 42, at 854 ("The Attorney General himself is advised during the course of the proceedings by government attorneys.").

201 *Id.* at 917.

202 *Id.*

ances of congressional input.[203] The Attorney General already enjoys immense power in the administration of immigration law through the exercise of discretion (which is mostly immune from judicial review), the selection of all of her delegates, and the rulemaking process. She does not need, nor should she have, an additional method by which to exert plenary power. If she does assert this power, courts have an obligation to disapprove it when inconsistent with other judicial principles, such as those underlying *Chevron*. Some courts have done so.[204]

B. Procedural Regularity

Perhaps the most obvious argument for not granting deference to certified opinions is that the certification power is prone to abuse and creates volatility. Because the certification power incontrovertibly upsets the established procedural framework of immigration adjudication, courts should not sanction its use with potent *Chevron* deference.

There are a number of ways for the Attorney General to receive a case, including referral by the Chairman (himself appointed by the Attorney General), by a majority of the Board, or at the DHS Secretary's suggestion (when the Attorney General concurs).[205] But she can also receive a case merely by directing it to be referred to her.[206] There are no pre-qualifications, no guidelines, no criteria, no administrative exhaustion requirements, and no procedures. After certification, the Attorney General can—according to her own office's legal opinions—do anything with the case.[207] She reviews questions of law and fact de novo, can receive additional evidence, and issue it precedentially.[208] She can act against the advice of her own attorneys

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[203] *See* Margaret H. Taylor, *Midnight Agency Administration: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016) (describing political exercises of refer-and-review power). Gonzales and Glen argue that few cases challenge certified opinions when they are favorable to the alien, Gonzales & Glen, *supra* note 42, at 912, but this fact merely reinforces the notion that its exercise is transparently political in operation.

[204] *See supra* Part II; *see also* Zivkovic v. Holder, 724 F.3d 894, 897 (7th Cir. 2013) (noting that *Chevron* deference does not "appl[y] to every issue that arises in an immigration case, for the simple reason that some questions of law do not depend on agency expertise for their resolution"); Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) ("[W]e are doubtful about the appropriateness of *Chevron* deference in this setting. . . . An issue concerning a statute's effective date is not one that implicates agency expertise in a meaningful way, and does not, therefore, appear to require *Chevron* deference.").

[205] *See* 8 C.F.R. § 1003.1(h)(1)(ii)–(iii) (2018).

[206] *See id.* § 1003.1(h)(1)(i).

[207] *See supra* note 189.

[208] *See* Gonzales & Glen, *supra* note 42, at 856.

and interested stakeholders.[209] The noncitizen whose case is affected may not even know that the case was referred.[210] The noncitizen does not have a right to review from the Attorney General, though there is no procedural limitation to seeking such right.[211] The only requirement is that the decision be written and sent to the noncitizen after issuance.[212]

Gonzales and Glen characterize the certification power as an effective tool to implement executive policymaking in an era of partisan congressional gridlock—a tempting morsel of an idea in the end of the Obama presidency—at the expense of procedural regularity.[213] But the lack of procedure in the certification process is concerning, to say the least, and some scholars contend that it is violative of due process, insufficiently politically independent for an adjudicative agency, or even ultra vires by reason of a statutory amendment.[214] Bijal Shah ably critiqued Gonzales and Glen's arguments in part based on these procedural deficiencies.[215] Most affronting to foundational principles of adjudicatory law, however, is the Attorney General's ability to overturn decades of long-established BIA precedent with a stroke of a pen. Reliance interests evaporate overnight, as in *C-Y-Z-*, stale criminal convictions could become suddenly relevant, as in *Marroquin-Garcia*, and carefully crafted *Padilla* advice could suddenly become

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[209] For a potent example, see *Matter of A-B-*, 27 I. & N. Dec. 316 (Att'y Gen. 2018), in which "[t]he question the attorney general was seeking to answer was actually so settled that the Department of Homeland Security, the agency responsible for prosecuting immigration cases, submitted a timid brief to Sessions politely suggesting that he reconsider his decision to take on th[e] case." Bea Bischoff, *Jeff Sessions Is Hijacking Immigration Law*, SLATE (June 13, 2018, 2:27 PM), https://slate.com/news-and-politics/2018/06/in-matter-of-a-b-jeff-sessions-hijacked-immigration-law-by-abusing-a-rarely-used-provision.html. Immigration practitioners were appalled, not so much at the use of the referral power but at the bizarreness of the legal question and the procedural abuse of doing so. *See* Brief for Sixteen Former Immigration Judges & Members of the Board of Immigration Appeals as Amici Curiae Urging Vacatur of Referral Order & in Support of Respondent at 8, Matter of A-B-, 27 I. & N. Dec. 227 (Att'y Gen. 2018) ("[T]his case is rife with procedural violations and is consequently unripe for agency-head review."); *see also* Brief of American Immigration Lawyers Ass'n as Amicus Curiae at 1, Matter of M-S-, 27 I. & N. Dec. 476 (Att'y Gen. 2018), https://www.aila.org/infonet/aila-submits-amicus-brief-challenging-the-attorney (arguing that there are "fatal flaws (a lack of transparency, procedural irregularities, and a rush to decision) in the Attorney General's certification process").

[210] *See* van Gestel et al., *supra* note 67, at 212 ("[T]he alien is not advised when the Board has been deprived of authority to decide the case by virtue of the fact that the Attorney General is reviewing it.").

[211] Gonzales & Glen, *supra* note 42, at 853 & nn.72–73.

[212] 8 C.F.R. §§ 1003.1(f), (h)(2) (2018).

[213] *See* Gonzales & Glen, *supra* note 42, at 896–98 (defending the certification power on such grounds).

[214] *See supra* notes 67–70, 110 and accompanying text.

[215] *See* Shah, *supra* note 59, at 136.

erroneous.[216] The legitimacy of the administrative state is premised on the procedural regularity that is the exact opposite of such volatility.

C. Accountability

An ostensibly persuasive argument states that the certification power is the ultimate method of public accountability, as it allows a single officer to effectuate the Executive's immigration policy without bureaucratic burdens.[217] But this argument is, I believe, ultimately erroneous.[218]

First, deference to the Attorney General's opinions serves the accountability justification only in the most superficial way. Given the unique potency of the certification power, its use actually undermines accountability by devaluing public input, creating a public perception of arbitrariness, and deprioritizing incrementalism. Unlike the case of *Chevron* itself, in which the Court sanctioned a new, reasonable interpretation of law issued pursuant to procedurally regular notice-and-comment rulemaking, certification can change binding law overnight without an opportunity for public comment[219] and even against the advice of other bodies that are accountable to the public.[220] While the BIA can also reverse precedent, BIA membership is comprised of persons appointed by previous Administrations, making such membership more reflective of the American polity and American preferences over the long term.

A world without the certification power would effectively increase opportunity for public input without meaningfully changing the hierarchical relationship between the Attorney General and her delegates. The appointment and confirmation of a new Attorney General enhances political accountability but changes nothing about

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[216] *See supra* notes 125–26, 128 and accompanying text (describing such reliance interests).

[217] *See supra* Section I.A.3 (discussing the accountability rationale).

[218] For a more in-depth analysis of the democratic accountability justification in this context, see Richard Frankel, *Deporting* Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive* Chevron *Deference* 44–54 (Drexel Univ. Thomas R. Kline Sch. of Law, No. 2019-W-02, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492115.

[219] In modern times, Attorneys General sometimes solicit amicus briefs on important questions, then promptly ignore them. *See, e.g.*, Matter of A-B-, 27 I. & N. Dec. 227, 227 (Att'y Gen. 2018) (certifying the case and asking for amicus briefs); Matter of A-B-, 27 I. & N. Dec. 316, 319–20 (Att'y Gen. 2018) (ruling contrary to the overwhelmingly opposing views of various amici); *see also Agency Invitations to File Amicus Briefs*, EXECUTIVE OFF. FOR IMMIGR. REV., U.S. DEP'T JUST., https://www.justice.gov/eoir/amicus-briefs (last updated Nov. 21, 2019) (archiving previous solicitations for briefs).

[220] For an example of the competing interests that "accountability" writ large eclipses, consider the Trump Administration Department of Homeland Security's response to the Attorney General's own call for briefs in *Matter of A-B-*, provided *supra* note 209.

her ability to change the structure and scope of the BIA, or to overturn prior interpretations of law through rulemaking. But with the certification power, the public can do little to stop the Attorney General's decisionmaking excesses, even if they conflict with other public agencies' own views.[221] A formalist might argue that impeachment is always available,[222] but this is cold comfort: Fewer Cabinet officials (one) have been impeached than Presidents (three).[223] Checking the potency of the certification power through higher judicial scrutiny merely upsets the *form* rather than the *result* of decisionmaking. Channeling the Attorney General's authority towards rulemaking enhances public accountability by inviting commentary from interest groups serving the public. And the higher judicial deference attending rulemaking puts the law on stronger ground.

Moreover, closer judicial scrutiny of Attorney General opinions would enhance public accountability by requiring the Attorney General to consider the actual values held by the public rather than personal predilections about immigration outcomes. If the public perceives the functioning of the immigration bureaucracy as irrational and arbitrary, they will devalue its legitimacy, thereby damaging public accountability. Though the public has accepted uses of the certification power in the past, immigration today is at a fever pitch with border walls, travel bans, and "invasion" of migrants in the public conscience.[224] Public sensitivity to "fairness" in the immigration bureaucracy is already heightened. Even those who supported the 2016 change in administration may be uneasy about precedents that may be set by declaring "national security" emergencies.[225] And certified opinions, having never reached the public conscience before, are no

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221 Other relevant agencies could include the BIA itself, but also the various divisions of the Department of Homeland Security: USCIS, CBP, and ICE.

222 *See* JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44260, IMPEACHMENT AND REMOVAL (2015), https://fas.org/sgp/crs/misc/R44260.pdf.

223 William Belknap holds this dishonorable mention. He tearfully tendered his official resignation after his misconduct came to light, but the House filed articles of impeachment anyway, and the Senate held a trial after vengefully deciding it still held the power to impeach officers who had resigned. *See Senate Stories: War Secretary's Impeachment Trial*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/War_Secretarys_Impeachment_Trial.htm (last visited Nov. 24, 2019).

224 *See* Matthew J. Lindsay, Opinion, *Immigration as "Invasion": The History*, BALT. SUN (June 29, 2018, 6:00 AM), https://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0701-immigration-invasion-20180628-story.html (chronicling the new and not-so-new aspects of the Trump Administration's anti-immigrant rhetoric).

225 Some conservative figures have expressed their unease with this possibility. *See* Steve Benen, *If Today's 'National Emergency' Is at the Border, What About Tomorrow's?*, MSNBC: MADDOW BLOG (Jan. 11, 2019, 10:00 AM), http://www.msnbc.com/rachel-maddow-show/if-todays-national-emergency-the-border-what-about-tomorrows (remarking on conservative commentator Erick Erickson's now-deleted tweets on the

longer exempt from this public scrutiny.[226] If accountability can be fundamentally measured by the official's susceptibility to public input, then abuse of the certification power threatens democratic accountability more today than ever before, precisely because the public now perceives it as a greater problem.

Finally, closer judicial scrutiny would also enhance public accountability by assuring the public that the decision is able to be relied upon in future cases. The ability of the Attorney General to interpret the statute one way in January and another way in June[227] may accord with public will in a superficial way given the change in administrations, but in a more nuanced way, closer judicial scrutiny would help prevent flimsily supported reversals. This would allow employers relying on noncitizen labor to create longer-term hiring plans, allow defense attorneys to negotiate lasting and mutually favorable pleas, and encourage domestic violence victims to seek the correct form of immigration relief without fretting over the expiration of statutes of limitations. In other words, less deference *in this particular context* actually encourages accountability by ensuring that the Attorney General's turning of the ship will not end up capsizing it.[228] A credible claim can also be made that deferring to the Attorney General's certified opinions is unconstitutional on separation-of-powers grounds, but that is beyond the scope of this Note.[229]

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subject and noting Republican Senator Marco Rubio's CNBC interview in which he expressed similar discomfort).

226 *Matter of A-B-*, 27 I. & N. Dec. 316 (Att'y Gen. 2018), is an example of a case that may not have drawn much attention as a BIA decision, but, because of heightened awareness of the Attorney General's certification power, has drawn considerable ire from public interest groups and attention from the media. *See, e.g.*, *Recent Adjudication*, *In re A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018)*, 132 HARV. L. REV. 803 (2018); Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, JEFFREY S. CHASE (Mar. 29, 2018), https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions; Bischoff, *supra* note 209; Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control over Immigration Courts — By Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling.

227 *Compare* Matter of Compean, 24 I. & N. Dec. 710, 743 (Att'y Gen. 2009), *with* Matter of Compean, 25 I. & N. Dec. 1, 2–3 (Att'y Gen. 2009).

228 Even as the Executive carries out the will of the people, he must do so in a measured way, one that allows public override or else carries less force of law. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); SEC v. Chenery Corp., 332 U.S. 194 (1947).

229 This general concern has been voiced by *Chevron* scholars. *See* MANNING & STEPHENSON, *supra* note 27, at 977 ("A staple of separation-of-powers theory—going back at least to Montesquieu, running through the *Federalist Papers*, and formalized in the tripartite structure of the U.S. Constitution—is the notion that the separation of law-interpreting and law-enforcing power is an important safeguard against arbitrary and abusive government."); *see also* THE FEDERALIST NO. 47 (James Madison) (arguing that

Even assuming that democratic accountability is better served by complete deference to certified opinions than scrutiny by non-accountable judges, the accountability value is no more important than the other values inherent in the *Chevron* doctrine. *Mead* acknowledges that there is often tension between the values, and that the simple fact of a Head of Department adopting a particular view is insufficient to achieve *Chevron* values. In fact, the argument that deference is sui generis warranted when the administrative state acts in accordance with public will, advocated by Justice Scalia in dissent, was rejected by the *Mead* court.[230] In other words, the best way to resolve the tension between expertise, procedural regularity, and accountability is to evaluate the agency action under Step Zero. Certified opinions cannot clear the Step Zero hurdle.

CONCLUSION

I began this Note by explaining the justifications for the *Chevron* doctrine—expertise, procedural regularity, and political accountability—and describing how the doctrine operates in the immigration context. I also gave a brief overview of the "referral-and-review" or "certification" power—the Attorney General's ability, established by regulation, to take any case decided by the BIA and re-decide it according to her own predilections.

I then demonstrated through a review of several statutory interpretation cases that federal courts, while roundly deferring to the BIA, have hardly issued a clarion endorsement of Attorney General-certified opinions under the *Chevron* framework. Rather, the courts have rejected certified opinions more often than not, whether by avoiding the deference question altogether or by denying deference on the merits. Finally, I argued that for the reasons underlying the *Chevron* doctrine, the Attorney General's interpretations of law, at least when issued pursuant to the certification power, should fall out at Step Zero and not receive deference.

My argument is narrow and limited in scope. It does not actually affect anything the Attorney General may or may not do. And it only applies to the handful of cases decided by certification that involve questions of law and which actually reach the federal courts. My argument, however, has drastic implications for the small number of cases in which it applies. It may encourage the Attorney General to ensconce procedural limitations in regulations rather than peremptory

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the accumulation of power in one branch of government embodies the tyranny that the new government sought to avoid).

[230] 533 U.S. at 235–38.

adjudications, make more measured changes to immigration policy, consult with the BIA on an appropriate course of action, or even eliminate the self-referral power entirely in favor of substantive criteria for referral, which might restore at least the accountability and regularity principles of the *Chevron* doctrine to the certification process.[231]

Finally, my argument is realistic. Although some court opinions have language that exudes deference to the Attorney General,[232] others pay close attention to the principles underlying *Chevron* before they defer.[233] The Supreme Court has expressed discomfort with plenary Attorney General power over the BIA[234] and thus far has not had the occasion to pronounce unambiguously that certified opinions receive *Chevron* deference. Moreover, the Court has signaled that *Chevron* may be up for reevaluation, even in the immigration context, where executive authority is more easily tolerated pursuant to the "plenary power." Justice Kennedy's concurrence in *Pereira v. Sessions* at least raises the possibility that the Court will "reconsider, in an appropriate case, *the premises that underlie Chevron* and how courts have implemented that decision."[235] Although Justice Kennedy is no longer on the Court, several other justices clearly see a problem, including Chief Justice Roberts[236] and Justices Alito,[237] Thomas,[238]

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231 At least some Attorneys General thought that the BIA should have the final word absent "clear error." *See* Matter of R-E-, 9 I. & N. Dec. 720, 741 (Att'y Gen. 1962) ("This is not ordinarily an issue appropriate for reference to me . . . . The record is one upon which reasonable men can differ and have differed. Further consideration of the question has [not] . . . revealed any clear error on the part of the Board.").

232 *See, e.g.*, Luambano v. Holder, 565 F. App'x 410, 414 (6th Cir. 2014) ("In short, *Matter of Y–L–* is exactly the sort of agency determination to which *Chevron* requires us to give controlling weight."); Miguel-Miguel v. Gonzales, 500 F.3d 941, 947 (9th Cir. 2007) ("We are to afford the Attorney General's interpretation deference under *Chevron* . . . ."). *But see supra* Part II (arguing that the doctrine is not so clear in part because courts fail to recognize the procedural differences between BIA and Attorney General decisions).

233 *See, e.g.*, Miranda Alvarado v. Gonzales, 449 F.3d 915, 920–24 & 923 n.4 (9th Cir. 2006) (distinguishing *Matter of A-H-* but engaging in a lengthy discussion of *Chevron* and determining that the principles underlying *Chevron*, as expounded in *Mead*, dictate no deference to IJs' statutory interpretations).

234 *See, e.g.*, United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) ("[A]s long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.").

235 Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (emphasis added); *see also id.* at 2120 ("And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still.").

236 *See* City of Arlington v. FCC, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge.").

237 *See Pereira*, 138 S. Ct. at 2121 (Alito, J., dissenting) (concluding that the Court has misapplied and "ignor[ed]" *Chevron*).

Gorsuch,[239] and Kavanaugh.[240] And a conservative certified opinion that eventually gets to the Supreme Court may also unite the *Chevron*-distrusters with the four liberal-leaning justices. The result might be an opinion that weakens *Chevron* when agencies take their power too far but upholds it when the decision is built on foundations of expertise, public trust, and consistency.

The modern administrative state envisions deference to agency interpretations of law when the statute is ambiguous. But when the legal principles underlying such delegation are absent, the judiciary has a responsibility to decide questions of law outside the *Chevron* framework. For this reason, the Attorney General's interpretations issued via the certification power should be dispensed with at Step Zero.

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238 *See* Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that the EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes").

239 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring) ("We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things."); Trevor W. Ezell & Lloyd Marshall, Essay, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171 (2017) (analyzing Justice Gorsuch's recognized mistrust of *Chevron*).

240 *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1616 (2019) ("Justice Brett Kavanaugh describes *Chevron* as 'an atextual invention by courts' and as 'nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.'" (quoting Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review))).

APPENDIX: ALL ATTORNEY GENERAL-CERTIFIED OPINIONS ISSUED[241]

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
1	L-	1 I. & N. Dec. 1	8/29/1940	Roosevelt	Jackson (1/18/1940-8/25/1941)			x	
2	G-	1 I. & N. Dec. 8	11/22/1940	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
3	C-	1 I. & N. Dec. 14	1/16/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)			x	
4	W-	1 I. & N. Dec. 24	2/7/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
5	P-	1 I. & N. Dec. 33	3/7/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)			x	
6	B-	1 I. & N. Dec. 47	3/11/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
7	E-	1 I. & N. Dec. 40	3/20/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)		x		
8	G-	1 I. & N. Dec. 59	3/21/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
9	G-	1 I. & N. Dec. 73	4/24/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
10	F-	1 I. & N. Dec. 84	5/7/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
11	F-	1 I. & N. Dec. 90	5/13/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
12	B-	1 I. & N. Dec. 52	5/27/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)			x	
13	S-	1 I. & N. Dec. 111	6/21/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
14	B-	1 I. & N. Dec. 121	6/25/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
15	F-	1 I. & N. Dec. 64	6/30/1941	Roosevelt	Jackson (1/18/1940-8/25/1941)	x			
16	P-	1 I. & N. Dec. 127	11/22/1941	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			

[241] Abbreviations in the chart below are as follows: SA: Summary Approval; SD: Summary Disapproval; NS: Not Summary; PR: Procedural Remand to the BIA. I have defined "not summary" as a decision on the merits with reasoning longer than a single paragraph. This may account for some discrepancies between my work and that of Shah, Gonzales & Glen, and Rosenberg.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
17	K-	1 I. & N. Dec. 79	12/9/1941	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
18	H-	1 I. & N. Dec. 166	1/2/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
19	G-	1 I. & N. Dec. 96	1/14/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
20	D-	1 I. & N. Dec. 259	6/11/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)		x		
21	G-	1 I. & N. Dec. 278	6/27/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
22	H-	1 I. & N. Dec. 239	8/5/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
23	B-	1 I. & N. Dec. 204	8/5/1942	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
24	E-	1 I. & N. Dec. 337	1/16/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
25	S-	1 I. & N. Dec. 376	2/1/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)			x	
26	S.S. Hornshell	1 I. & N. Dec. 470	6/18/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
27	S-	1 I. & N. Dec. 476	6/19/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)		x		
28	G-	1 I. & N. Dec. 496	7/3/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
29	H-	1 I. & N. Dec. 509	8/16/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)			x	
30	Sam and Sarra C-	1 I. & N. Dec. 525	9/4/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
31	S-	1 I. & N. Dec. 606	11/19/1943	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
32	C-	1 I. & N. Dec. 631	1/14/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)			x	
33	S-	1 I. & N. Dec. 646	1/28/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)			x	

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
34	T-	2 I. & N. Dec. 22	2/24/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)			x	
35	P-	2 I. & N. Dec. 84	4/14/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
36	S.S. Atlantida	2 I. & N. Dec. 571	6/9/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
37	E-	2 I. & N. Dec. 134	7/12/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
38	J-	2 I. & N. Dec. 99	7/27/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
39	S-F- and G-	2 I. & N. Dec. 182	9/1/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
40	C-[242]	2 I. & N. Dec. 220	11/22/1944	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
41	K-G-	2 I. & N. Dec. 243	1/29/1945	Roosevelt	Biddle (8/26/1941-6/26/1945)	x			
42	A- and P-	2 I. & N. Dec. 293	3/15/1945	Roosevelt	Biddle (8/26/1941-6/26/1945)		x		
43	K-	2 I. & N. Dec. 253	5/26/1945	Truman	Biddle (8/26/1941-6/26/1945)	x			
44	A-	2 I. & N. Dec. 304	6/6/1945	Truman	Biddle (8/26/1941-6/26/1945)	x			
45	O'N-	2 I. & N. Dec. 319	6/13/1945	Truman	Biddle (8/26/1941-6/26/1945)	x			
46	E-	2 I. & N. Dec. 328	7/11/1945	Truman	Clark (6/27/1945-7/26/1949)			x	
47	S-	2 I. & N. Dec. 353	8/18/1945	Truman	Clark (6/27/1945-7/26/1949)	x			
48	Z-	2 I. & N. Dec. 346	8/24/1945	Truman	Clark (6/27/1945-7/26/1949)	x			
49	K-	2 I. & N. Dec. 411	1/7/1946	Truman	Clark (6/27/1945-7/26/1949)	x			

[242] Only the Heading of this case mentions approval by the Attorney General—there is no separate opinion or statement of approval.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
50	W-	2 I. & N. Dec. 466	2/26/1946	Truman	Clark (6/27/1945-7/26/1949)		x		
51	A-[243]	2 I. & N. Dec. 459	3/12/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
52	S.S. Alacran	2 I. & N. Dec. 507	3/14/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
53	C-A-	2 I. & N. Dec. 378	3/25/1946	Truman	Clark (6/27/1945-7/26/1949)		x		
54	V-D-	2 I. & N. Dec. 417	4/4/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
55	A-H-	2 I. & N. Dec. 390	5/15/1946	Truman	Clark (6/27/1945-7/26/1949)		x		
56	S-	2 I. & N. Dec. 588	5/27/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
57	R-	2 I. & N. Dec. 620	6/17/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
58	B-	2 I. & N. Dec. 627	6/21/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
59	T-	2 I. & N. Dec. 614	6/21/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
60	G-	2 I. & N. Dec. 692	7/15/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
61	W-	2 I. & N. Dec. 679	7/15/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
62	A-	2 I. & N. Dec. 683	7/15/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
63	R-	2 I. & N. Dec. 633	8/1/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
64	V-	2 I. & N. Dec. 606	8/1/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
65	C-	2 I. & N. Dec. 593	8/9/1946	Truman	Clark (6/27/1945-7/26/1949)	x			

[243] This case has an unusual procedural history not worthy of extrapolation here. The final ruling after remand was 3/28/1947.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
66	G-	2 I. & N. Dec. 700	8/14/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
67	A-	2 I. & N. Dec. 582	8/15/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
68	F-	2 I. & N. Dec. 427	8/19/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
69	M-	2 I. & N. Dec. 698	8/19/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
70	A-	2 I. & N. Dec. 731	9/9/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
71	F-	2 I. & N. Dec. 709	9/16/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
72	H-	2 I. & N. Dec. 296	10/2/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
73	C-	2 I. & N. Dec. 263	10/2/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
74	M-	2 I. & N. Dec. 721	10/14/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
75	B-	2 I. & N. Dec. 492	10/31/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
76	L-	2 I. & N. Dec. 486	11/4/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
77	P-	2 I. & N. Dec. 712	11/8/1946	Truman	Clark (6/27/1945-7/26/1949)			x	
78	P-	2 I. & N. Dec. 659	11/17/1946	Truman	Clark (6/27/1945-7/26/1949)		x		
79	M-	2 I. & N. Dec. 751	12/13/1946	Truman	Clark (6/27/1945-7/26/1949)	x			
80	L-	2 I. & N. Dec. 775	1/7/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
81	T-	2 I. & N. Dec. 767	2/6/1947	Truman	Clark (6/27/1945-7/26/1949)		x		
82	U-	2 I. & N. Dec. 830	3/20/1947	Truman	Clark (6/27/1945-7/26/1949)	x			

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
83	K-	2 I. & N. Dec. 838	4/28/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
84	V-	2 I. & N. Dec. 816	5/14/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
85	G-R-	2 I. & N. Dec. 733	5/29/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
86	J-	2 I. & N. Dec. 545	6/9/1947	Truman	Clark (6/27/1945-7/26/1949)			x	
87	J-	2 I. & N. Dec. 892	6/17/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
88	G-	2 I. & N. Dec. 905	7/1/1947	Truman	Clark (6/27/1945-7/26/1949)			x	
89	R- D-	2 I. & N. Dec. 758	7/14/1947	Truman	Clark (6/27/1945-7/26/1949)			x	
90	S-	2 I. & N. Dec. 559	7/18/1947	Truman	Clark (6/27/1945-7/26/1949)			x	
91	A-	2 I. & N. Dec. 799	7/22/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
92	P-	3 I. & N. Dec. 5	9/11/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
93	C-[244]	2 I. & N. Dec. 895	10/9/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
94	B- and P-	2 I. & N. Dec. 638	12/10/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
95	J-	2 I. & N. Dec. 876	12/18/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
96	O-	2 I. & N. Dec. 840	12/18/1947	Truman	Clark (6/27/1945-7/26/1949)	x			
97	W-M-S- and W-O-W-	3 I. & N. Dec. 131	4/7/1948	Truman	Clark (6/27/1945-7/26/1949)	x			
98	S.S. Florida	3 I. & N. Dec. 111	5/19/1948	Truman	Clark (6/27/1945-7/26/1949)	x			

[244] The Attorney General withdrew his previous reversal of the BIA issued on 7/14/1947 and ended up approving the BIA decision.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
99	Z-	3 I. & N. Dec. 379	12/13/1948	Truman	Clark (6/27/1945-7/26/1949)		x		
100	R-	3 I. & N. Dec. 343	1/12/1949	Truman	Clark (6/27/1945-7/26/1949)	x			
101	M-	3 I. & N. Dec. 490	6/21/1949	Truman	Clark (6/27/1945-7/26/1949)	x			
102	O-	3 I. & N. Dec. 33	9/16/1949	Truman	McGrath (8/23/1949-4/3/1952)		x		
103	L-	3 I. & N. Dec. 767	10/28/1949	Truman	McGrath (8/23/1949-4/3/1952)	x			
104	H-	3 I. & N. Dec. 767	11/16/1949	Truman	McGrath (8/23/1949-4/3/1952)	x			
105	D-	3 I. & N. Dec. 787	12/2/1949	Truman	McGrath (8/23/1949-4/3/1952)	x			
106	A-	3 I. & N. Dec. 714	12/17/1949	Truman	McGrath (8/23/1949-4/3/1952)		x		
107	C-S-H-	3 I. & N. Dec. 582	12/31/1949	Truman	McGrath (8/23/1949-4/3/1952)	x			
108	C-	3 I. & N. Dec. 275	1/6/1950	Truman	McGrath (8/23/1949-4/3/1952)	x			
109	O-	3 I. & N. Dec. 209	2/4/1950	Truman	McGrath (8/23/1949-4/3/1952)		x		
110	V-	4 I. & N. Dec. 143	10/25/1950	Truman	McGrath (8/23/1949-4/3/1952)	x			
111	M-	4 I. & N. Dec. 82	11/6/1950	Truman	McGrath (8/23/1949-4/3/1952)	x			
112	I-	4 I. & N. Dec. 159	11/8/1950	Truman	McGrath (8/23/1949-4/3/1952)	x			
113	C-	4 I. & N. Dec. 130	12/20/1950	Truman	McGrath (8/23/1949-4/3/1952)			x	
114	G-Y-G-	4 I. & N. Dec. 211	1/17/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
115	P-	4 I. & N. Dec. 252	3/2/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
116	P-	4 I. & N. Dec. 248	3/5/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
117	H-	4 I. & N. Dec. 260	3/23/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
118	N-K-D-	4 I. & N. Dec. 388	7/26/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
119	R-	4 I. & N. Dec. 275	7/28/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
120	H-	4 I. & N. Dec. 290	8/17/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
121	S-	4 I. & N. Dec. 180	8/30/1951	Truman	McGrath (8/23/1949-4/3/1952)	x			
122	B-	4 I. & N. Dec. 5	9/11/1951	Truman	McGrath (8/23/1949-4/3/1952)		x		
123	D-F-	4 I. & N. Dec. 589	1/30/1952	Truman	McGrath (8/23/1949-4/3/1952)	x			
124	P-	4 I. & N. Dec. 610	3/18/1952	Truman	McGrath (8/23/1949-4/3/1952)			x	
125	W-	4 I. & N. Dec. 64	5/6/1952	Truman	Acting AG		x		
126	L-B-D-	4 I. & N. Dec. 639	6/11/1952	Truman	McGranery (4/4/1952-1/20/1953)		x		
127	M-	4 I. & N. Dec. 532	10/2/1952	Truman	McGranery (4/4/1952-1/20/1953)		x		
128	R-	5 I. & N. Dec. 29	12/29/1952	Truman	McGranery (4/4/1952-1/20/1953)			x	
129	M-	5 I. & N. Dec. 120	6/2/1953	Eisenhower	Brownell (1/21/1953-11/8/1957)		x		
130	L-	5 I. & N. Dec. 169	8/11/1953	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
131	B-	5 I. & N. Dec. 72	8/19/1953	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
132	A-	5 I. & N. Dec. 272	2/2/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
133	S-N-	6 I. & N. Dec. 73	7/23/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
134	T-	6 I. & N. Dec. 136	7/28/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
135	M-	6 I. & N. Dec. 149	9/13/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
136	SS. Greystoke Castle and M/V Western Queen	6 I. & N. Dec. 112	12/1/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
137	V-	6 I. & N. Dec. 1	12/21/1954	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
138	C-	6 I. & N. Dec. 20	3/14/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
139	S-	6 I. & N. Dec. 392	3/15/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
140	B-S-	6 I. & N. Dec. 305	7/19/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
141	T-	6 I. & N. Dec. 508	7/19/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
142	R-R-	6 I. & N. Dec. 55	7/29/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
143	N-	6 I. & N. Dec. 557	9/23/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
144	Y-C-C-	6 I. & N. Dec. 670	10/18/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
145	H-	6 I. & N. Dec. 619	10/18/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
146	S-	6 I. & N. Dec. 692	10/18/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
147	B-	6 I. & N. Dec. 713	12/7/1955	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
148	J-	6 I. & N. Dec. 287	2/16/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
149	J-	6 I. & N. Dec. 562	3/21/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
150	A-	6 I& N Dec. 651	3/27/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
151	G-M-	7 I. & N. Dec. 40	4/2/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
152	C- and S-	6 I. & N. Dec. 597	4/2/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
153	S-C-	7 I. & N. Dec. 76	5/8/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)	x			
154	B-	7 I. & N. Dec. 1	6/6/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
155	R-S-	7 I. & N. Dec. 271	9/13/1956	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
156	L-R-	7 I. & N. Dec. 318	2/18/1957	Eisenhower	Brownell (1/21/1953-11/8/1957)			x	
157	M-	8 I. & N. Dec. 24	9/5/1958	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
158	J-	8 I. & N. Dec. 78	2/26/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)	x			
159	DeF-	8 I. & N. Dec. 68	2/26/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
160	M-	8 I. & N. Dec. 118	3/20/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
161	C-F-L-	8 I. & N. Dec. 151	4/27/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
162	A-F-	8 I. & N. Dec. 429	10/12/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
163	DeG-	8 I. & N. Dec. 325	12/14/1959	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
164	L-Y-Y-	9 I. & N. Dec. 70	9/12/1960	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
165	K-	9 I. & N. Dec. 143	1/3/1961	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	
166	G-	9 I. & N. Dec. 159	1/17/1961	Eisenhower	Rogers (11/8/1957-1/20/1961)			x	

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
167	Y-K-W-	9 I. & N. Dec. 176	2/28/1961	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
168	P-	9 I. & N. Dec. 293	5/24/1961	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
169	K-W-S-	9 I. & N. Dec. 396	8/7/1961	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
170	Y-J-G-	9 I. & N. Dec. 471	9/22/1961	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
171	S- and B-C-	9 I. & N. Dec. 436	10/2/1961	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
172	S-	9 I. & N. Dec. 548	1/22/1962	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			X	
173	SS. Ryndam	10 I. & N. Dec. 240	4/12/1962	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
174	C-S-	9 I. & N. Dec. 670	5/24/1962	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
175	R-E-	9 I. & N. Dec. 720	6/18/1962	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
176	Picone	10 I. & N. Dec. 139	1/21/1963	Kennedy (John F.)	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
177	Martinez-Lopez	10 I. & N. Dec. 409	1/6/1964	Johnson	Kennedy (Robert F.) (1/21/1961-9/3/1964)			x	
178	McNeil	11 I. & N. Dec. 378	11/5/1965	Johnson	Katzenbach (2/11/1965-10/2/1966)			x	
179	Hira	11 I. & N. Dec. 824	9/30/1966	Johnson	Katzenbach (2/11/1965-10/2/1966)	x			
180	Becher	12 I. & N. Dec. 380	8/21/1967	Johnson	Clark (3/2/1967-1/20/1969)			x	

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
181	Ibarra-Obando	12 I. & N. Dec. 576	12/28/1967	Johnson	Clark (3/2/1967-1/20/1969)			x	
182	Sloan	12 I. & N. Dec. 840	8/30/1968	Johnson	Clark (3/2/1967-1/20/1969)			x	
183	Lee	13 I. & N. Dec. 214	5/1/1969	Nixon	Mitchell (1/21/1969-2/15/1972)			x	
184	Janati-Ataie	14 I. & N. Dec. 216	10/26/1972	Nixon	Kleindienst (6/12/1972-4/20/1973)			x	
185	Toscano-Rivas	14 I. & N. Dec. 523	1/9/1974	Nixon	Saxbe (1/4/1974-2/1/1975)			x	
186	Hernandez	14 I. & N. Dec. 608	3/7/1974	Nixon	Saxbe (1/4/1974-2/1/1975)			x	
187	Stultz	15 I. & N. Dec. 362	6/30/1975	Ford	Levi (2/7/1975-1/20/1977)			x	
188	Bogart	15 I. & N. Dec. 552	1/15/1976	Ford	Levi (2/7/1975-1/20/1977)			x	
189	Blas	15 I. & N. Dec. 626	3/10/1976	Ford	Levi (2/7/1975-1/20/1977)			x	
190	Cantu	17 I. & N. Dec. 190	10/19/1978	Carter	Bell (1/26/1977-8/16/1979)			x	
191	De Anda	17 I. & N. Dec. 54	6/22/1979	Carter	Bell (1/26/1977-8/16/1979)			x	
192	Belenzo	17 I. & N. Dec. 374	4/28/1981	Reagan	Civiletti (8/16/1979-1/19/1981)			x	
193	Hernandez-Casillas	20 I. & N. Dec. 262	3/18/1991	Bush (George H.W.)	Thornburgh (8/15/1988-8/15/1991)			x	
194	Hector Ponce De Leon-Ruiz[245]	21 I. & N. Dec. 154	6/29/1997	Clinton	Reno (3/11/1993-1/20/2001)				x
195	Carlos Cazares-Alvarez[246]	21 I. & N. Dec. 188	6/29/1997	Clinton	Reno (3/11/1993-1/20/2001)				x
196	N-J-B-	22 I. & N. Dec. 1057	8/20/1999	Clinton	Reno (3/11/1993-1/20/2001)				x

[245] Remanded after interim regulations that resolved the case.
[246] Remanded after interim regulations that resolved the case.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
197	R-A-[247]	22 I. & N. Dec. 906	1/19/2001	Clinton	Reno (3/11/1993-1/20/2001)				x
198	Y-L-	23 I. & N. Dec. 270	3/5/2002	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
199	Jean	23 I. & N. Dec. 373	5/2/2002	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
200	D-J-	23 I. & N. Dec. 572	4/17/2003	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
201	E-L-H-	23 I. & N. Dec. 700	12/1/2004	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
202	Luviano-Rodriguez	23 I. & N. Dec. 718	1/18/2005	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
203	Marroquin-Garcia	23 I. & N. Dec. 705	1/18/2005	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
204	R-A-[248]	23 I. & N. Dec. 694	1/19/2005	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)				x
205	A-H-	23 I. & N. Dec. 774	1/26/2005	Bush (George W.)	Ashcroft (2/2/2001-2/3/2005)			x	
206	J-F-F-	23 I. & N. Dec. 912	5/1/2006	Bush (George W.)	Gonzales (2/3/2005-9/17/2007)			x	
207	S-K-	24 I. & N. Dec. 289	9/14/2007	Bush (George W.)	Gonzales (2/3/2005-9/17/2007)			x	
208	J-S-	24 I. & N. Dec. 520	5/15/2008	Bush (George W.)	Mukasey (11/9/2007-1/20/2009)			x	
209	A-T-	24 I. & N. Dec. 617	9/22/2008	Bush (George W.)	Mukasey (11/9/2007-1/20/2009)			x	
210	R-A-	24 I. & N. Dec. 629	9/25/2008	Bush (George W.)	Mukasey (11/9/2007-1/20/2009)			x	
211	Silva-Trevino	24 I. & N. Dec. 687	11/7/2008	Bush (George W.)	Mukasey (11/9/2007-1/20/2009)			x	
212	Compean	24 I. & N. Dec. 710	1/7/2009	Bush (George W.)	Mukasey (11/9/2007-1/20/2009)			x	

[247] Remanded after proposed interim regulations.
[248] Remanded after proposed interim regulations.

No.	Case name (Matter of ~)	Citation	Date	Administration	Attorney General	SA	SD	NS	PR
213	Compean	25 I. & N. Dec. 1	6/3/2009	Obama	Holder (2/3/2009-4/27/2015)			x	
214	Dorman	25 I. & N. Dec. 485	5/5/2011	Obama	Holder (2/3/2009-4/27/2015)		x		
215	Silva-Trevino	26 I. & N. Dec. 550	4/10/2015	Obama	Holder (2/3/2009-4/27/2015)			x	
216	Chairez-Castrejon[249]	26 I. & N. Dec. 796	9/6/2016	Obama	Lynch (4/27/2015-1/20/2017)				x
217	E-F-H-L-	27 I. & N. Dec. 226	3/5/2018	Trump	Sessions (2/9/2017-11/7/2018)			x	
218	L-A-B-R-	27 I. & N. Dec. 405	8/16/2018	Trump	Sessions (2/9/2017-11/7/2018)			x	
219	A-B-	27 I. & N. Dec. 316	6/11/2018	Trump	Sessions (2/9/2017-11/7/2018)			x	
220	Castro-Tum	27 I. & N. Dec. 271	5/17/2018	Trump	Sessions (2/9/2017-11/7/2018)			x	
221	M-G-G-[250]	27 I. & N. Dec. 475	10/12/2018	Trump	Sessions (2/9/2017-11/7/2018)				x
222	S-O-G- & F-D-B-	27 I. & N. Dec. 462	9/18/2018	Trump	Sessions (2/9/2017-11/7/2018)			x	
223	Negusie[251]	27 I. & N. Dec. 481	Not yet decided	Trump	Sessions (2/9/2017-11/7/2018)				
224	L-E-A-	27 I. & N. Dec. 581	7/29/2019	Trump	Barr (2/14/2019-)			x	
225	M-S-	27 I. & N. Dec. 509	4/16/2019	Trump	Barr (2/14/2019-)			x	
226	Castillo-Perez	27 I. & N. Dec. 664	10/25/2019	Trump	Barr (2/14/2019-)			x	
227	Thomas & Thompson	27 I. & N. Dec. 674	10/25/2019	Trump	Barr (2/14/2019-)			x	

[249] Case referred on Oct. 30, 2015. Remanded to BIA in light of an intervening Supreme Court decision, Mathis v. United States, 136 S. Ct. 894 (2016).

[250] Case referred on Sept. 18, 2018. Remanded to BIA in light of likely mootness.

[251] Case referred on Oct. 18, 2018.