Deporting *Chevron*: Why the Attorney General's Immigration Decisions Should Not Receive *Chevron* Deference

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The Trump Administration has transformed the landscape of immigration law. One of the most far-reaching — but least visible — tools it has used is the Attorney General's power to refer immigration decisions to itself for decision. The Attorney General can use this power to issue nationwide binding precedent, and to reinterpret immigration statutes and regulations in ways that impact the millions of non-citizens present in the United States. While sparingly used in prior administrations, recent Attorneys General have exercised the referral power at a skyrocketing rate, and have issued decisions curtailing the rights of asylum-seekers, forcing more non-citizens into detention, and limiting the power of immigration judges to decide cases in an evenhanded way.

Despite possessing such expansive power, the Attorney General receives only limited judicial oversight. Under the deferential Chevron *standard, courts will uphold an agency's interpretation of an ambiguous statute as long as the interpretation is reasonable. This often is the difference maker for courts, as agencies win in court much more often when they receive* Chevron *deference than when they do not.*

While scholars have addressed whether Chevron *should apply to a few discrete areas of immigration law, they have not addressed whether* Chevron *should apply to the Attorney General's immigration decisions. This Article fills that gap and argues that* Chevron *deference should not*

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apply because none of the three primary justifications for Chevron *deference — procedural formality, specialized expertise, or democratic accountability — are present in Attorney General immigration decisions. Rather, courts should apply more robust judicial review to ensure that the Attorney General's unilateral power to reshape immigration law does not go unchecked.*

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INTRODUCTION

Ms. Corrales and her daughter fled to the United States from Honduras to escape her partner, who had raped her, beaten her, and threatened to kill her and her children if she ever tried to leave him. After arriving in the United States, Ms. Corrales and her daughter applied for asylum.[1] By chance, their hearing date was moved forward from September 2019 to April 2018. At the hearing, the immigration judge granted them asylum, applying settled precedent from the Board of Immigration Appeals ("BIA") establishing that victims of domestic violence like Ms. Corrales may be eligible for asylum.[2] The government chose not to appeal, and the asylum order became final.

Ms. Corrales and her daughter lucked out. Less than two months after their hearing, Attorney General Jeff Sessions, with the stroke of a pen, unilaterally overruled the precedent that established their eligibility for asylum and issued a new precedent declaring that victims of domestic violence ordinarily should not receive asylum.[3] Had the hearing date not fortuitously been moved forward, Ms. Corrales and her daughter likely would have lost their case.

How was the Attorney General able to carry out such an administrative about-face? He invoked his regulatory authority to certify and refer a specific case to himself for decision,[4] and then used that case to issue his own precedential decision, one that instituted sweeping changes to immigration law. In doing so, he bypassed the traditional forms of agency decision-making. He avoided notice-and-comment rulemaking and declined to accept the results of the normal administrative adjudication process, which provides that individuals facing deportation receive a hearing before an immigration judge, followed by the opportunity to appeal, if necessary, to the BIA.[5]

Consequently, the Attorney General was almost completely unrestrained in his ability to reinterpret immigration law and to decide the case. He was neither bound by any agency precedent, nor limited to

[1] The case materials on which these facts are based are on file with the author. The asylum-seeker's name has been changed to respect her privacy.

[2] *See* A-R-C-G-, 26 I. & N. Dec. 388, 394-95 (B.I.A. 2014) (finding that a Guatemalan victim of domestic violence by her husband was a member of a cognizable "particular social group" for purposes of establishing eligibility for asylum), *overruled by* A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).

[3] A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018) (overruling A-R-C-G-, 26 I. & N. Dec. 388).

[4] 8 C.F.R. § 1003.1(h) (2020).

[5] *See infra* Part I.A.

the facts found by the immigration judge.[6] And his decisions likely will receive only limited judicial oversight under principles of "*Chevron* deference."[7] The question of whether courts should defer to the Attorney General's immigration decisions is one that has gone largely unexamined.[8] This Article argues that courts should not give *Chevron* deference to the Attorney General's decisions but instead should conduct a more searching and robust review.

The Attorney General's decision-making process contrasts sharply with the normal administrative framework for adjudicating removal proceedings. For individuals charged as deportable, the existing statutory and regulatory scheme provides that they receive a hearing before an immigration judge, who then makes findings of fact and conclusions of law in deciding whether the individual should be removed.[9] Following that decision, either the non-citizen or the government can appeal to the BIA, which will issue a decision. The BIA can designate its decisions as precedential and binding on all immigration judges across the nation as well as on the BIA.[10] Immigration judges and BIA members hear thousands of cases a year, allowing immigration law to develop gradually and deliberately through the process of common-law-style decision-making.

However, federal regulations also permit the Attorney General to override this entire process and make his[11] own precedent.[12] The Attorney General can review any BIA decision he wishes, can overrule existing BIA precedent, and can designate his own decisions as binding precedent. In short, the Attorney General can unilaterally promulgate his own controlling interpretations of immigration law in ways that

[6] *See infra* Part I.B. (describing the scope of the Attorney General's referral and review power).

[7] The term "*Chevron* deference" comes from the deference regime established by the Supreme Court in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See *infra* Part II, for a more detailed discussion of the *Chevron* doctrine.

[8] *See* Bijal Shah, Response, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 141 (2017) (noting that "the proper level of judicial deference to administrative decision-making in immigration" is an issue open for scholarly debate).

[9] *See* 8 U.S.C. § 1229a(a)-(c) (2018).

[10] *See* 8 C.F.R. § 1003.1 (2020) (delineating the BIA's powers).

[11] There is no ideal pronoun to use to refer to the Attorney General. I ordinarily would not use the word "he" to refer to the gender-neutral Attorney General. However, I chose to use "he" in this Article because the most recent Attorney General decisions, and the decisions most frequently discussed in this Article, were issued by male Attorneys General.

[12] 8 C.F.R. § 1003.1(h).

affect huge numbers of non-citizens, without being constrained in any way by prior agency deliberations or decisions.

The Attorney General's power to refer decisions to himself is an "understudied regulatory tool."[13] That is surprising, because this mechanism is a "potent" and "powerful" weapon for making profound changes in legal doctrine that seek to advance the executive branch's immigration policy agenda.[14] The Attorney General's referral authority "exemplifies the near-absolute power that the nation's top law enforcement officer has" over immigration adjudication.[15] Many of the most dramatic and consequential changes to the law governing deportation in the past three years have come through Attorney General referral decisions.[16]

And the Attorney General is ramping up his use of this power. While this authority was exercised only sparingly in the past, Attorneys General in the Trump Administration have used it at "a rate significantly higher" than predecessor administrations.[17] Moreover, the Administration has used this power to issue sweeping changes to the law, overturn established BIA precedent, and reinterpret immigration

[13] Christopher J. Walker, Response, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84, 85 (2016). Recently the University of Iowa published a long article by former Attorney General Alberto Gonzales and longtime government immigration attorney Patrick Glen discussing the history of the Attorney General referral system and defending its use, which solicited several responses. *See* Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 847 (2016). *See generally* 102 IOWA L. REV. ONLINE (containing several responses to the Gonzales and Glen article). Outside of that special issue, scholarship on Attorney General certification and referral has been relatively sparse. *See, e.g.*, Stephen H. Legomsky, Response, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458-62 (2007) (discussing Attorney General referral and review as part of a larger discussion of reforms to the immigration adjudication system as a whole); 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, 1768 (2010) (arguing that Attorney General certification is procedurally inadequate).

[14] Gonzales & Glen, *supra* note 13, at 847, 920; *see also* Trice, *supra* note 13, at 1767, 1771 (describing the Attorney General's power as "sweeping," "extraordinarily broad," and capable of "produc[ing] significant changes in the law that directly affect whole classes of immigrants in removal proceedings").

[15] Emma Platoff, *Immigration Judges are Expected to Be Impartial. But They Report to Jeff Sessions*, TEX. TRIB. (Aug. 15, 2018, 12:00 AM), https://www.texastribune.org/2018/08/15/immigration-judges-report-prosecutors-jeff-sessions-justice-department [https://perma.cc/5ELL-3TGW].

[16] *See infra* notes 77–81 and accompanying text.

[17] AM. BAR ASS'N, RESOLUTION 121A & REPORT 2-3 (Aug. 13, 2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/121a-annual-2019.pdf [https://perma.cc/CK8R-DYAY] [hereinafter ABA RESOLUTION].

statutes in ways that favor its own policy goals of restricting access to asylum, increasing detention, speeding up deportations, and closing off the southern border.[18] These decisions will affect millions of non-citizens who could be placed in removal proceedings.

One reason Attorney General referral is so powerful is that courts will provide only limited oversight of the Attorney General's decisions. Under principles of *Chevron* deference, courts will uphold any reasonable interpretation by the Attorney General of an ambiguous provision in an immigration statute, even if it is not the interpretation the court would make in the first instance and even if it deviates from the court's prior interpretation of that provision.[19] The central justifications for this form of deference are threefold. First, agencies are more politically accountable than life-tenured judges.[20] Second, agencies have specialized expertise which generalist judges do not have.[21] Third, Congress's decision to authorize agencies to use notice-and-comment rulemaking or to issue formal adjudications often represents an implicit delegation to the agency to interpret ambiguities in the statutes it administers.[22]

[18] Of the first thirteen Attorney General decisions issued since 2017, five have overruled existing BIA precedent. Further, the Attorney General is currently considering whether to overrule a sixth BIA precedent. *See* Thomas, 27 I. & N. Dec. 674, 674 (Att'y Gen. 2019) (overruling three BIA decisions regarding the immigration consequences of changes to a criminal sentence); L-E-A-, 27 I. & N. Dec. 581, 582 (Att'y Gen. 2019) (overruling prior BIA precedent establishing that family membership can constitute a particular social group); M-S-, 27 I. & N. Dec. 509, 510 (Att'y Gen. 2019) (overruling BIA precedent and expanding the scope of mandatory detention of non-citizens); A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018) (overruling BIA precedent providing that victims of intimate partner violence may be eligible for asylum); Castro-Tum, 27 I. & N. Dec. 271, 271 (Att'y Gen. 2018) (overruling BIA precedent and prohibiting the practice of administrative closure); *see also* Negusie, 27 I. & N. Dec. 481, 481 (Att'y Gen. 2018) (accepting review to determine whether to overrule BIA precedent establishing a duress exception to the persecutor bar for asylum). It has been widely reported that the Trump Administration's ultimate goal is to freeze the asylum process and close off the southern border entirely to immigrants and asylum seekers. *See, e.g.*, Jason Zengerle, *How America Got to 'Zero Tolerance' on Immigration: The Inside Story*, N.Y. TIMES MAG. (July 16, 2019), https://www.nytimes.com/2019/07/16/magazine/immigration-department-of-homeland-security.html [https://perma.cc/5CUC-9UMU].

[19] Chevron, U.S., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-84 (2005) (holding that the agency can get deference even if a court has previously interpreted an ambiguous statute in a different way).

[20] *See infra* notes 98–103 and accompanying text.

[21] *See infra* notes 106–110 and accompanying text.

[22] *See infra* notes 123–129 and accompanying text.

Whether an agency's interpretation of the law receives *Chevron* deference often will be decisive as to whether the interpretation is upheld or rejected. At the circuit court level, agencies prevail more than three-quarters of the time when receiving *Chevron* deference (and more than eighty percent of the time when that interpretation is made in adjudication), but less than forty percent of the time when the agency's interpretation is reviewed *de novo*.[23]

Neither scholars nor the courts have squarely addressed whether the Attorney General's decisions should receive *Chevron* deference when the Attorney General refers a case to himself and issues his own interpretation of the law.[24] Some scholars have argued that *Chevron* deference should not apply to certain limited spheres of immigration law,[25] and others have criticized the Attorney General referral power on due process or fairness grounds.[26] While some lower courts have assumed that Attorney General decisions qualify for *Chevron* deference,[27] they have done so with little analysis or explanation.

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[23] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6-7 (2017); *infra* notes 138–143 and accompanying text.

[24] As a sign that this issue is of growing importance, it is starting to receive some attention. *See, e.g.*, Jaclyn Kelley-Widmer & Hillary Rich, *A Step Too Far:* Matter of A-B-*, "Particular Social Group," and* Chevron, 29 CORNELL J.L. & PUB. POL'Y 345 (forthcoming 2020) (arguing that the Attorney General's *A-B-* decision fails *Chevron* step two); Jonathan P. Riedel, Note, Chevron *and the Attorney General's Certification Power*, 95 N.Y.U. L. REV. 271, 274-75 (2020) (arguing that *Chevron* should not apply to Attorney General decisions).

[25] *See, e.g.*, Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 150 (2015) (arguing that *Chevron* should not cover immigration detention cases); Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 495 (2019) (arguing that there is an implicit *Chevron* exception for immigration cases involving personal liberty); Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 330 (2017) (arguing that immigration agencies should not receive deference when interpreting criminal law); Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 134-35 (2019) (arguing that *Chevron* should not apply to asylum and refugee cases).

[26] *See, e.g.*, ABA RESOLUTION, *supra* note 17, at 5 (asserting that "the precedential implications of using the Attorney General's referral power to overturn long-standing precedent, diminish substantive relief, and eliminate traditional docket management tools is troubling from a due process and systemic standpoint" and advocating that the Attorney General use rulemaking to adopt additional procedures governing Attorney General review); Trice, *supra* note 13, at 1782 (asserting that "[t]he process afforded by the Attorney General upon certification has at times departed significantly from the 'elementary and fundamental' requirements of due process" and suggesting procedural reforms to the certification process).

[27] *See infra* note 148 and accompanying text.

This Article fills that gap and argues that *Chevron* deference is inappropriate for Attorney General decisions. At first blush, it may seem that all three of *Chevron*'s rationales — delegated authority, expertise, and political accountability — apply to Attorney General referral decisions. However, a close examination of the Attorney General's referral power and the manner in which it is exercised shows that the *Chevron* factors militate against deference in this context. First, Attorney General certification circumvents the ordinary procedural safeguards that are often required to earn *Chevron* treatment. Second, the Attorney General has no specialized expertise in immigration law — as prior Attorneys General have admitted — and the certification process reduces the opportunities for expert input and deliberation. Third, the certification process is opaque, non-participatory, and less democratically accountable than other forms of administrative lawmaking, including notice-and-comment rulemaking.

Accordingly, when the Attorney General uses the certification power to reinterpret immigration law, courts should review the Attorney General's decisions under the less deferential standard established in *Skidmore v. Swift*.[28] This could make a significant difference in outcomes. Available evidence suggests that courts are more likely to reject agency decisions under *Skidmore* review than under *Chevron* review.[29] One could go even further and argue that the Attorney General's decisions should be reviewed *de novo*, because the Administrative Procedures Act ("APA") requires a court to "decide all relevant questions of law."[30] However, because that would eliminate *Chevron* entirely, and because this Article focuses on whether Attorney General decisions should be analyzed under *Chevron* even if it remains good law, this Article focuses on *Skidmore* review rather than on *de novo* review.

This Article does not challenge *Chevron*'s legitimacy for many forms of agency rulemaking. Indeed, it contrasts the Attorney General's referral power with other forms of regularized agency policymaking. Rather, it provides a framework for why *Chevron* deference is particularly inappropriate for Attorney General adjudication decisions. The reasons for declining to defer to the Attorney General's exercise of his referral power do not require rejecting *Chevron* in other contexts.

Part I of this Article discusses the structure for administrative decisions in deportation cases, including an examination of the

[28] 323 U.S. 134 (1944).

[29] *See infra* notes 138–145 and accompanying text.

[30] 5 U.S.C. § 706 (2018).

Attorney General's referral and certification power.[31] Part II addresses the concept of judicial deference to agency interpretations of statutes the agency administers, and explores the principles underlying *Chevron* deference.[32] Part III explains why the justifications for *Chevron* deference are weak with respect to Attorney General certification decisions and why *Chevron* deference should not apply.[33] Part III also addresses the concept of agency-head review and explains why, even though agency-head review is often a normal part of the agency adjudication process, it does not justify giving the Attorney General the benefit of *Chevron* review.[34] Part IV suggests replacing the *Chevron* framework with the less-deferential *Skidmore* test, thus enabling more searching and meaningful judicial review of the Attorney General's immigration decisions.[35]

I. THE STRUCTURE OF ADMINISTRATIVE AND JUDICIAL REVIEW OF DEPORTATION DECISIONS.

This Part provides a discussion of the immigration adjudication system for removal proceedings. It then describes the Attorney General's review power, situates it within that adjudication structure, and explains why it can be such a powerful lever for changing immigration law and policy.

A. The Immigration Adjudication Framework for Removal Proceedings

When a non-citizen faces the possibility of removal from the United States,[36] that individual's case is decided through an administrative adjudication system. In the Immigration and Nationality Act ("INA"), Congress created an immigration court system to hold hearings and issue rulings in deportation matters.[37] That system is run by the Executive Office of Immigration Review ("EOIR").[38] The EOIR is

[31] *See infra* Part I.

[32] *See infra* Part II.

[33] *See infra* Part III.

[34] *See infra* Part III.D.

[35] *See infra* Part IV.

[36] In 1996, Congress replaced the term "deportation" with the term "removal." *See* 8 U.S.C. § 1101 (2018). The two terms mean the same thing and are used interchangeably throughout this Article.

[37] 8 U.S.C. § 1229a(a)(1) (2018) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

[38] *See* DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office (last updated Aug. 14, 2018) [https://perma.cc/EL9Y-MX37].

housed within the Department of Justice, which is headed by the Attorney General.[39]

Deportation proceedings are adversarial. Proceedings start when the Department of Homeland Security ("DHS"), which acts as the prosecutor for deportation matters, issues a "Notice to Appear" charging a particular non-citizen as removable.[40] By statute, the non-citizen is then entitled to a hearing before an immigration judge in which the non-citizen may present evidence and challenge evidence presented by DHS.[41] The immigration judge must consider the evidence presented and issue a ruling as to whether the individual should be removed.[42]

This adjudication system is vast and affects millions of people. There are an estimated thirteen million non-citizens in the United States, both documented and undocumented, who could be placed in removal proceedings.[43] The number of pending cases across the nation's immigration courts now exceeds one million.[44] And these cases are just those that involve removal. Other aspects of the immigration system, such as naturalization and the issuance or revocation of visas, are handled by other immigration agencies, including the U.S. Citizenship and Immigration Services ("USCIS"), which is housed within DHS. Even though USCIS is not part of the Justice Department, the Attorney General's legal interpretations govern its actions.[45]

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[39] *See id.*

[40] 8 U.S.C. § 1229(a) (2018).

[41] *Id.* § 1229a(b)(4).

[42] *Id.* § 1229a(c)(1)(a) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing."). Recently, the Attorney General has ruled that some asylum seekers may not be entitled to a hearing before an Immigration Judge. E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018) (vacating as moot E-F-H-L-, 26 I. & N. Dec. 319 (B.I.A. 2014), which had held that asylum seekers are ordinarily entitled to a full evidentiary hearing before an Immigration Judge).

[43] *See* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 3 (2018).

[44] U.S. DEP'T OF JUSTICE: EXEC. OFFICE OF IMMIGRATION REVIEW, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS: PENDING CASES (Jul. 14, 2020), https://www.justice.gov/eoir/page/file/1242166/download [https://perma.cc/T5HB-LNAJ].

[45] For example, naturalization applications are processed and decided by USCIS. To qualify for naturalization, the applicant must possess "good moral character." 8 U.S.C. § 1427(a) (2018). The Attorney General has issued decisions defining "good moral character," which will govern how USCIS applies that standard to the applications it processes. *See* Castillo-Perez, 27 I. & N. Dec. 664, 664 (Att'y Gen. 2019) (holding that an individual with two or more DUI convictions presumptively lacks good moral character). Following the Attorney General's decisions reinterpreting "good moral

After the immigration judge issues its decision, either the non-citizen or DHS can appeal to the BIA.[46] Although immigration judge hearings are required by statute, Congress did not expressly require administrative appellate review. The BIA is a creature of regulation rather than statute.[47] It is a national appellate body that handles appeals from all of the nation's immigration courts. Currently, there are twenty-one Board members, who act as appellate immigration judges.[48]

Like appellate courts, the BIA reviews the immigration judge's factual findings, issues rulings of law and interprets immigration statutes and regulations in the course of issuing decisions. The BIA typically decides appeals through single-member decisions or three-member panels.[49] The appellate system also is quite large, as the BIA receives more than 30,000 appeals per year.[50] Although most decisions are unpublished, the BIA can designate its decisions as precedential, which then are binding on all immigration judges across the country and also on the BIA.[51] Precedential BIA decisions receive *Chevron* deference when reviewed by courts.[52]

character," USCIS issued new policy guidance explaining that it would apply the Attorney General's decisions in making "good moral character" determinations. U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY ALERT: IMPLEMENTING THE DECISIONS ON DRIVING UNDER THE INFLUENCE CONVICTIONS ON GOOD MORAL CHARACTER DETERMINATIONS AND POST-SENTENCING CHANGES (Dec. 10, 2019), https://www.uscis.gov/sites/default/files/policymanual/updates/20191210-AGOnDUIAndSentencing.pdf [https://perma.cc/5HG5-MVSR].

[46] *See* 8 C.F.R. § 1003.1(b) (2020).

[47] *See id.* § 1003.1.

[48] Organization of the Executive Office of Immigration Review, 84 Fed. Reg. 44,537, 44,538 (Aug. 26, 2019) ("In both substance and practice, Board members function as appellate immigration judges.").

[49] *See* 8 C.F.R. § 1003.1(e) (addressing process for deciding case appeals).

[50] Through March 31, 2020, the BIA had received more than 40,000 case appeals, and had a pending backlog of more than 95,000 appeals. *Executive Office for Immigration Review Adjudication Statistics: Cases Appeals Filed, Completed, and Pending*, U.S. DEP'T JUST. EXEC. OFF. IMMIGR. REV. (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1198906/download [https://perma.cc/Z95F-VMD7] [hereinafter *Case Appeal Statistics*]. By comparison, this number is greater than all of the civil appeals filed in the federal courts of appeals. *See* U.S. Courts, *Federal Judicial Caseload Statistics 2018*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (last visited Aug. 27, 2020) [https://perma.cc/NG5L-M826] (stating that 27,926 civil appeals were filed in the federal courts in 2018).

[51] 8 C.F.R. § 1003.1(g)(3) ("[S]elected decisions of the Board issued by a three-member panel or by the Board *en banc* may be designated to be published and to serve as precedents in all proceedings involving the same issue or issues.").

[52] *See infra* note 146 and accompanying text.

The immigration adjudication structure was set up so that adjudicators would maintain some level of impartiality. The BIA's regulations provide that Board members shall exercise "independent judgment and discretion" when deciding cases.[53] The Supreme Court has interpreted this language to mean that political appointees like the Attorney General cannot interfere with the BIA and cannot tell the BIA how to decide a case.[54] In addition, non-citizens possess some due process rights, including the right to a hearing before "a neutral, impartial arbiter."[55]

At the same time, immigration judges and BIA members are not Article III judges; they are employees of the Justice Department and thus subordinate to the Attorney General. Unlike Administrative Law Judges ("ALJs"), who are hired through the civil service process and can be fired only for cause, immigration judges and BIA members do not have employment protections, and are subject to removal and replacement by the Attorney General at any time.[56] This can substantially compromise (or create the appearance of compromising) agency judges' impartiality, as they may worry that they have to issue rulings that favor the Attorney General's policy agenda or otherwise risk losing their jobs. Former Attorney General Jeff Sessions, for example, repeatedly emphasized that immigration adjudicators are his subordinates and are not truly independent.[57] Various Attorneys General have attempted to stack the system with judges whose views are akin to their own. For example, Attorney General William Barr recently elevated six immigration judges to the BIA, all of whom have records of denying non-citizens' claims at extremely high rates.[58] Thus, while immigration

[53] 8 C.F.R. § 1003.1(d)(1)(ii).

[54] 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.").

[55] Abulashvili v. Att'y Gen., 663 F.3d 197, 207 (3d Cir. 2011) (citing Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007)).

[56] *See* 8 U.S.C. § 1101(b)(4) (2018) (stating that Immigration Judges are "subject to such supervision and shall perform such duties as the Attorney General shall prescribe"); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) ("Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission.").

[57] *See* Sweeney, *supra* note 25, at 141 (describing various actions by Attorney General Jeff Sessions to assert his control over immigration judges).

[58] Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, S.F. CHRON. (Aug. 23, 2019, 8:09 PM), https://www.sfchronicle.com/politics/

judges and BIA members often are immigration law specialists who focus exclusively on removal proceedings,[59] they also are subject to strong political pressures from the Attorney General that may affect their ability to fairly decide cases. For this reason, the immigration adjudication system has received substantial criticism, and numerous commentators have called for the creation of an independent immigration adjudication system that is not part of the Executive Branch.[60]

For most cases, the BIA's decision represents the end of the administrative process. However, subject to certain limitations, non-citizens who receive an adverse BIA decision can seek review in the federal courts of appeal.[61] At that level, the government is represented by the Office of Immigration Litigation ("OIL"), which is part of the Justice Department.[62] In other words, while the Justice Department acts as the adjudicator when cases are before the agency, it acts as the non-

article/AG-William-Barr-promotes-immigration-judges-with-14373344.php?psid=liwVN [https://perma.cc/WHE2-U6HE] ("The Trump administration has promoted six judges to the immigration appeals court that sets binding policy for deportation cases — all of whom have high rates of denying immigrants' asylum claims."). Similarly, ongoing litigation alleges that the administration's hiring practices "seem to skew in favor of essentially promoting candidates whose track records indicate the potential to stray from impartial adjudication in furtherance of the administration's goals." Complaint at 4, Am. Immigration Lawyers Ass'n v. U.S. Dep't of Justice (D.D.C. Mar. 17, 2020) (No. 1:20-cv-00752), EFC No. 2-1.

[59] To be sure, it is not certain that immigration judges and BIA members should automatically be treated as immigration-law specialists. The Attorney General has been accused of prioritizing one's political leanings over substantive expertise in appointing immigration judges, and has appointed individuals with no prior immigration law experience. Nolan Rappaport, *No Experience Required: U.S. Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, HILL (Feb. 3, 2020, 11:30 AM), https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience [https://perma.cc/5AG7-LQ4L] ("EOIR recently swore in 28 immigration judges, and 11 of them had no immigration law experience.").

[60] For a general critique of the politicized nature of the immigration adjudication system, see INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/6M63-FR4H] [hereinafter THE ATTORNEY GENERAL'S JUDGES].

[61] 8 U.S.C. § 1252 (2018). Although Congress has set some limitations on the court's jurisdiction to review removal orders, courts retain jurisdiction to review constitutional issues and questions of law. *Id.* § 1252(a)(2)(D).

[62] *Office of Immigration Litigation*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/civil/office-immigration-litigation (last visited Aug. 30, 2020) [https://perma.cc/36WF-VK8G].

citizen's adversary when cases are in the courts. This represents a potential conflict of interest that could undermine the impartiality of the immigration judges and BIA members tasked with deciding if an individual should be deported, in the sense that their supervisor, at the appellate level, is actively seeking to deport people and is pushing for legal interpretations that expand deportation power rather than limit it.

To be sure, the current immigration adjudication system has been widely criticized on a variety of grounds.[63] At the same time, it does represent an established structure, with regularized and formal procedures, in which judges who ostensibly are knowledgeable in immigration law will decide removal cases. Indeed, among the main criticisms of the immigration system is that there are too few procedural protections for non-citizens, that adjudicators have too little independence, and that they are subject to too much control by the Attorney General.[64] One of the most significant, but little discussed, ways that the Attorney General involves himself in immigration adjudication is through the certification and review process. That process is discussed in the next subpart.

B. The Attorney General's Power to Bypass the Adjudication Structure and Issue Its Own Precedential Decisions

As Part I.A discussed, the BIA is often a case's last stop at the agency before it goes to federal court. While the Attorney General has the power to hire and fire immigration judges and BIA members, he is not ordinarily involved in any particular deportation case. Congress, however, did provide the Attorney General with certain powers, although it did not define those powers with great clarity.[65] In addition to granting the Attorney General power to issue regulations through notice-and-comment procedures, Congress also authorized him to

[63] *See, e.g.*, Sweeney, *supra* note 25, at 135-46, 174-77 (describing both the level of political influence over immigration adjudication and the systematic "dysfunction" and "crisis" resulting from "serious institutional capacity challenges that compromise [the agency's] decisionmaking and limit the time and consideration it can give to any single case"); AM. BAR ASS'N COMM'N ON IMMIGRATION, 2019 UPDATE REPORT, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [https://perma.cc/9FZ6-7BCQ] (detailing failings of the current immigration adjudication system and calling for independent immigration courts); THE ATTORNEY GENERAL'S JUDGES, *supra* note 60.

[64] *See* Sweeney, *supra* note 25, at 135-46.

[65] *See* 8 U.S.C. § 1103(g) (2018) (delegating authority to issue regulations, perform functions carried out by EOIR, and administer the INA).

review "administrative decisions in immigration proceedings."[66] In a provision describing the powers of DHS, Congress also limited DHS's authority to issue binding rulings of law by clarifying that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[67]

For the many federal agencies that conduct adjudications, it is common for the head of the agency to have the power to review adjudication decisions made by lower agency officers. This is known as "agency head review."[68] The immigration adjudication system is no exception. Pursuant to regulations first adopted in 1940, the Attorney General has given himself the authority to review any BIA decision.[69] This includes the power to issue his own precedential ruling that decides the underlying case, and that sets forth the Attorney General's legal interpretations, which then become legally binding on all immigration judges and the BIA.[70]

While the regulations identify who may refer a case to the Attorney General for review, they place no limitation on the scope of the Attorney General's power to render a decision.[71] When the Attorney General reviews a case, he is not bound or limited by the case law of immigration judges or the BIA. He reviews all issues *de novo*, does not defer to prior factual findings or legal conclusions, and can even accept new evidence and make new factual findings.[72]

Attorney General certification enables the Attorney General to put his own stamp on immigration law. Through the certification power, he can make law, render policy judgments, and implement the administration's immigration policy agenda. Because of the lack of constraints on the Attorney General and the binding effect of his rulings, certification constitutes a "sweeping" and "potent" tool for refashioning the landscape of immigration law, with dramatic effects on the millions of non-citizens subject to removal proceedings.[73]

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[66] *Id.* § 1103(g)(2).

[67] *Id.* § 1103(a)(1).

[68] The reasons for agency head review, and the implications of the practice of agency head review for whether Attorney General immigration decisions should receive *Chevron* deference are discussed in detail in Part III.D, *infra*.

[69] 8 C.F.R. § 90.12 (1940). For a discussion of the history around the promulgation of this regulation, see Gonzales & Glen, *supra* note 13, at 849-52.

[70] 8 C.F.R. § 1003.1(g)-(h) (2020).

[71] *Id.*

[72] *See infra* notes 176–177 and accompanying text.

[73] *See supra* note 14 and accompanying text; *see also* Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619, 639 n.89 (2012) (describing Attorney General certification as a "powerful tool in that

To be sure, the Attorney General also has the authority to issue regulations pursuant to notice-and-comment rulemaking, and can issue interpretive rules and guidance that bind the agency even if they do not have the force of law.[74] However, it makes sense that the Attorney General might prefer to use the referral power, because then he can get the best of both worlds. The Attorney General can avoid the more deliberative and hence time-consuming notice-and-comment process, while — unlike when issuing an interpretive rule — still imbuing his rulings with legal force. Indeed, one former Attorney General specifically identified the lack of process accompanying certification as a major benefit, and as a reason why Attorneys General should consider using the certification process more often.[75]

Perhaps because of the dangers of exercising this sweeping power with little procedural protection or oversight, prior presidential administrations used this power rarely.[76] By contrast, the Trump administration has treated the certification power as a signature instrument for limiting the rights of non-citizens and promoting its restrictive immigration policy agenda. It has used this regulatory tool "at a rate significantly higher" than that of predecessor administrations — ten times in its first two years alone.[77] And it has done so in order to make dramatic substantive changes to immigration law, to overrule longstanding BIA precedent, and to significantly restrict access to the United States for migrants and refugees.[78]

The Attorney General has imposed new restrictions that deprive victims of domestic violence and gang threats from seeking asylum,[79] revoked the authority of immigration judges to put deportation cases

it allows the Attorney General to pronounce new standards for the agency and overturn longstanding BIA precedent").

[74] 8 U.S.C. § 1103(g)(2) (2018).

[75] *See* Gonzales & Glen, *supra* note 13, at 913.

[76] *See* Shah, *supra* note 8, at 130 (noting that over the past sixty years, Attorneys General have employed certification "relatively rarely").

[77] ABA RESOLUTION, *supra* note 17, at 2. The current rate surpasses the George W. Bush Administration by 150% and the Obama Administration by more than 1000%. *See id.* at 2 n.10; Gonzales & Glen, *supra* note 13, at 858 (describing usage rates of prior administrations).

[78] ABA RESOLUTION, *supra* note 17, at 2 ("Recently the certification process has been used, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies, but also substantive questions of law governing immigration proceedings that have resulted in reversing longstanding precedential decisions and limiting relief available under the asylum laws." (footnotes omitted)).

[79] *See* L-E-A-, 27 I. & N. Dec. 581, 582 (Att'y Gen. 2019); A-B-, 27 I. & N. Dec. 316, 317 (Att'y Gen. 2018).

on hold or grant continuances while non-citizens await decisions on applications for relief from deportation,[80] ordered increased imprisonment of non-citizens, reduced immigration judges' authority to grant bond, and has broadened the grounds for denying non-citizens any form of relief from deportation.[81]

In addition, the Attorney General wants to give himself even more authority. The Justice Department has proposed a new rule that would expand the Attorney General's power to review cases that the BIA has not decided, and to review decisions of immigration judges whether or not those decisions have been appealed to the BIA.[82]

The Attorney General's certification power has been both defended and criticized. Some have argued that allowing agency heads to oversee adjudications and issue binding decisions is normal and has the advantages of creating uniformity, furthering administration policy priorities, and allowing better coordination with other agencies.[83] On the other hand, Attorney General review injects a political actor into what is supposed to be an impartial process, and it allows the Attorney General to render binding legal interpretations and policy statements with minimal procedural protection or oversight.[84]

While these criticisms and defenses raise important questions about the Attorney General review process, no court has yet held that the Attorney General's power is either *ultra vires* or unconstitutional. The only mechanism for challenging an Attorney General's decision is under traditional principles of statutory interpretation when the Attorney General's decisions face federal court review. Thus, the fate of the Attorney General's certification decisions likely turns on how robustly or deferentially federal courts review them. This raises the question of whether the Attorney General's decisions should receive *Chevron* deference.

II. PRINCIPLES OF *CHEVRON* DEFERENCE

Just like any other final agency decision as to removal, when the Attorney General issues a final ruling in a removal case, it can be

[80] *See* L-A-B-R-, 27 I. & N. Dec. 405, 419 (Att'y Gen. 2018); Castro-Tum, 27 I. & N. Dec. 271, 272 (Att'y Gen. 2018).

[81] *See* M-S-, 27 I. & N. Dec. 509, 519 (Att'y Gen. 2019).

[82] *Referral of Decisions in Immigration Matters to the Attorney General*, OFF. INFO. & REG. AFF., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1125-AA86 (last visited Aug. 21, 2019) [https://perma.cc/Q7E6-AASH].

[83] *See* Gonzales & Glen, *supra* note 13, at 861-98.

[84] *See, e.g.*, Trice, *supra* note 13.

challenged in court.[85] This Part describes the standards that federal courts use to review agency decisions. It introduces the now-famous *Chevron* deference standard and explains the three main rationales for deferring to an agency's interpretation of a statute. It then discusses the importance of *Chevron* and explains how the question of whether *Chevron* deference applies can be outcome-determinative as to whether an agency's decision is upheld or rejected. Finally, it discusses various reservations expressed by multiple Supreme Court Justices about the scope of and breadth of agency power under *Chevron* and suggests that the Court may be open to revisiting *Chevron* or limiting its reach, particularly in the immigration arena.

*A. Pre-*Chevron *Deference Standards*

It has been well-settled since the New Deal that Congress has broad power to delegate lawmaking functions to administrative agencies.[86] As agencies exercised these delegated powers, the question arose regarding how courts should review an agency's interpretation of a statute that Congress has authorized it to administer, and how much (if any) deference to give to the agency's interpretation.

The Supreme Court first addressed this question in the 1944 case of *Skidmore v. Swift*.[87] There, it adopted a sliding-scale test involving multiple factors. The Court held that the appropriate level of deference "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[88] In other words, the more persuasive, thorough, and consistent the reviewing court finds the interpretation to be, the more likely the court is to uphold the agency's interpretation. Under *Skidmore*, while a reviewing court gives some

[85] The Attorney General's decision can be challenged in one of two ways. As previously mentioned, the non-citizen in the case can file a petition for review in the federal courts of appeal. *See* 8 U.S.C. § 1252(b) (2018). In addition, in certain circumstances, aggrieved parties may be able to challenge the decision as violating the APA. *See* Grace v. Whitaker, 344 F. Supp. 3d 96, 123, 125-27 (D.D.C. 2018) (finding that portions of the Attorney General's decision in *A-B-* were arbitrary and capricious in violation of the APA). *But cf.* 8 U.S.C. § 1252(g) (providing that seeking review in the court of appeals is the exclusive avenue for non-citizens to challenge removal decisions).

[86] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (reaffirming that Congress has broad power to delegate "substantial discretion to executive agencies" to carry out the law).

[87] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[88] *Id.* at 140.

leeway to the agency, the court retains primary interpretive authority over the statute's meaning.[89] But just how much leeway the agency receives is subject to debate. Some have taken the view that *Skidmore* deference amounts to practically no deference at all, as it merely instructs courts to defer to interpretations that the court has independently determined to be most persuasive and to reject interpretations that the court finds unpersuasive, while others argue that it does require courts to consider the agency's rationale.[90] In either case, the deference regime changed significantly once the Court decided *Chevron*.

B. The Chevron *Decision*

Forty years later, the Supreme Court created a more rigid structure of agency deference in the now-seminal case, *Chevron v. Natural Resources Defense Council*.[91] The Court departed from *Skidmore* by giving the agency, rather than the court, primary interpretive power over statutes. In *Chevron*, the Court established a two-step framework (now sometimes referred to as a three-step framework), for reviewing an agency's interpretation of a statute that it is authorized to administer.[92] Under the first step, the court asks whether "Congress has directly spoken to the precise question at issue."[93] At this stage, the court reviews the statute utilizing the traditional tools of statutory construction and does not give any deference to the agency.[94] If the Court finds that the statute is clear, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[95]

If the statute is ambiguous, meaning that the statute allows for more than one reasonable interpretation, the reviewing court proceeds to step two. The Court indicated that statutory ambiguity reflects an implicit delegation to the agency by Congress to interpret the statute and resolve

[89] *See, e.g.*, Kristin Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1249 (2007) ("Unlike *Chevron*, *Skidmore* envisions the courts rather than the agencies as the primary interpreters of statutes.").

[90] *See id.* at 1252-55 (describing the "independent judgment" view of *Skidmore*).

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

[92] Numerous articles have described *Chevron*'s two-step framework and the policies underlying it. For two helpful descriptions, see Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1254-63 (2011); Sweeney, *supra* note 25, at 148-58.

[93] *Chevron*, 467 U.S. at 842.

[94] *Id.* at 843 n.9.

[95] *Id.* at 842-43.

the ambiguity.[96] As a result, the court must defer to the agency's interpretation of the statute as long as it is reasonable, even if it is not the interpretation that the court itself would have adopted.[97] "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[98] As a practical matter, an agency's interpretation is reasonable as long as it is not arbitrary and capricious and is reasonably tied to the available indicia of Congressional intent.[99]

The *Chevron* Court offered two main justifications for deferring to an agency's reasonable construction of an ambiguous statutory term: democratic accountability and comparative expertise. The first is that agency officials supposedly are more politically and democratically accountable than life-tenured federal judges. The Court explained that judges "are not part of either political branch of the Government" and "have no constituency."[100] By contrast, agencies are part of the Executive Branch, and "[w]hile agencies are not directly accountable to the people, the Chief Executive is."[101] Thus, it is permissible for an agency to fill a statutory gap by choosing the interpretation that best aligns with the administration's policy preferences.[102]

In other words, a statutory ambiguity constitutes an implicit delegation to an agency to decide, from a policy standpoint, which interpretation it likes best. If the agency offers a view that is unpopular, the voting public can hold it against the President in the next election.[103] Or, at least with respect to executive agencies like the Department of Justice where the agency head serves at the pleasure of the President, the President can respond to an unpopular decision by dismissing the

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[96] *Id.* at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.").

[97] *Id.*

[98] *Id.*; *see also id.* at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

[99] *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011) (stating the Chevron step two analysis overlaps with arbitrary and capricious review under the APA because under Chevron step two, a court asks "whether an agency interpretation is 'arbitrary or capricious in substance'" (citation omitted)).

[100] *Chevron*, 467 U.S. at 865-66.

[101] *Id.*

[102] *See id.* at 865 (stating that "an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments").

[103] *See, e.g.*, Kagan, *supra* note 25, at 502 n.61.

agency head and nominating a replacement.[104] Some scholars have argued that this justification is at its strongest when the decision comes directly from the agency head — such as the Attorney General — who is the most visible and politically accountable member of the agency, and the one who is in charge of setting agency policy.[105] While one can question whether this level of political involvement is wise or unwise as a policy matter, it demonstrates how an executive agency can be perceived as more responsive to the electorate than the courts.

A second justification for *Chevron* deference "is that the agency, because of its focus, has expertise in the subject matter at hand," whereas generalist judges do not.[106] Policy decisions involving complex statutes "depend[] upon more than ordinary knowledge respecting the matters subjected to agency regulations,"[107] and the Court explained that Congress could have decided "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so," than would the courts.[108] By contrast, "[j]udges are not experts in the field."[109] Because an agency has technical and expert knowledge in the area, knowledge that an Article III judge might not possess, the agency is better situated than the court to apply its specialized knowledge to resolve statutory ambiguities. "This practical agency expertise is one of the principal justifications behind *Chevron* deference."[110]

*C. The Court's Post-*Chevron *Focus on Procedural Formality as an Indicator of Congressional Intent to Delegate Interpretive Authority to the Agency*

In the ensuing years, the Supreme Court has imposed some additional limits on *Chevron*, perhaps out of concern over giving such broad

104 U.S. CONST. art. II, § 2 (establishing that the President may appoint officers of the United States with the consent of the Senate); Myers v. United States, 272 U.S. 52, 161 (1926) (holding that the power of appointment also includes the power of removal).

105 *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001) (arguing that *Chevron* deference is most appropriate when the agency head makes the decision or takes responsibility for it, because that fosters political accountability and responsiveness).

106 Sweeney, *supra* note 25, at 154.

107 *Chevron*, 467 U.S. at 844.

108 *Id.* at 865.

109 *Id.*

110 Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990). It is worth noting that there is some tension between the idea of expertise, which we think of as arising from specific factual knowledge that is protected from political interference, and the notion of democratic accountability.

deference to all agency interpretations of ambiguous statutes. Most notably, the Court has introduced what is now known as "*Chevron* step zero."[111] This step focuses on the first-order question of whether Congress intended to delegate the interpretive question to the agency. For example, the Court has held on occasion that *Chevron* does not apply to agency interpretations involving "major issues," concluding that Congress would not delegate questions of "deep 'economic and political significance'" to an agency without saying so expressly.[112]

But primarily, the Court has looked to the degree of procedural formality and regularity accompanying the agency's interpretive decision in determining whether the agency is acting pursuant to delegated authority. The Court first examined the importance of procedural formality in *Christensen v. Harris County*.[113] *Christensen* concerned whether courts should afford *Chevron* deference to an opinion letter from the U.S. Department of Labor stating it violates the Fair Labor Standards Act to require employees to use up compensatory time rather than save it for later.[114]

The Court held that an agency's interpretive rules — rules that are not subject to the notice and comment process, that can be issued without public input or deliberation, and that do not have the force of law — do not receive *Chevron* deference because Congress did not so intend.[115] The Court concluded that "[i]nterpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference."[116] Importantly, the Court specifically distinguished an "opinion letter" from "a formal adjudication or notice-and-comment rulemaking," which ordinarily would receive *Chevron* deference.[117] Interpretive rules instead would be evaluated under the less-deferential *Skidmore* framework.[118]

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111 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207-30 (2006).

112 King v. Burwell, 576 U.S. 473, 484-86 (2015) (citation omitted).

113 Christensen v. Harris Cty., 529 U.S. 576 (2000).

114 *Id.* at 581 (discussing the agency's opinion letter).

115 *Id.* at 587.

116 *Id.*

117 *Id.*

118 *Id.* ("Instead, interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . but only to the extent that those interpretations have the 'power to persuade[.]'" (citations omitted)).

The Court's decision two years later in *United States v. Mead Corp.*[119] "followed hard on *Christensen*'s heels"[120] in emphasizing the importance of procedural formality as a critical factor in determining whether Congress intended to delegate interpretive authority to the agency. *Mead* concerned "whether a tariff classification ruling [letter issued] by the U.S. Customs Service deserves judicial deference."[121] The Court held that it did not, because such rulings — which are issued by lower-level agency officers and are applicable only to that individual matter — were not accompanied by sufficient procedural rigor to make *Chevron* applicable.[122] In emphasizing the importance of procedural formality, the Court explained that "a very good indicator of delegation meriting *Chevron* treatment" is congressional authorization "to engage in the process of rulemaking or adjudication that produces regulations or rulings for deference is claimed."[123] If Congress has delegated to the agency the power to both promulgate rules and conduct adjudications, it generally has the discretion to select either mechanism to issue interpretations.[124]

Procedural formality is important because it tends "to foster the fairness and deliberation" by the agency "that should underlie a pronouncement of such force" as to justify *Chevron* deference.[125] Thus, when Congress has not given an agency rulemaking or adjudication power the agency does not receive *Chevron* deference.[126] And merely having the power to declare agency action binding is not necessarily sufficient to justify *Chevron* deference if that power is exercised without using more formalized processes.[127] While the existence of formal procedures is not always required as a precondition for *Chevron*

[119] United States v. Mead Corp., 533 U.S. 218 (2001).

[120] Barron & Kagan, *supra* note 105, at 208.

[121] *Mead*, 533 U.S. at 221.

[122] *Id.* at 231.

[123] *Id.* at 229.

[124] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (stating that an agency "is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within" the agency's discretion); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[125] *Mead*, 533 U.S. at 230.

[126] *See id.* at 229 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (finding that the EEOC does not receive *Chevron* deference because Congress did not give it the power to promulgate notice-and-comment regulations)).

[127] *Id.* at 232 ("[P]recedential value alone does not add up to *Chevron* entitlement.").

deference,[128] administrative lawmaking practices that involve formal procedures are more likely to receive deference than those that do not. In *Mead*, because the tariff classification letters did not arise out of these formal processes, the Court held they should be reviewed under *Skidmore* rather than under *Chevron*.[129]

This connection between procedural formality and deference to the agency's lawmaking decision makes sense. When a rule is subject to more intense process — such as public participation and reasoned consideration of public comments for notice-and-comment rulemaking, or the opportunity to present evidence and make legal arguments before an unbiased administrative judge in the context of agency adjudications — there is (1) democratic involvement and deliberation, (2) an opportunity for the agency to utilize its specialized expertise, and (3) protection against arbitrary agency decision-making.[130] In other words, more formal process serves as a proxy for *Chevron*'s main justifications. In exchange for an agency providing procedural protections at the front end of the agency lawmaking process, a court will give more deferential review at the back end when the agency's legal decision is subject to challenge.[131] And conversely, when the agency bypasses those procedures at the front end, deferential review by courts at the back end may not be warranted.

Mead recognized this procedural bargain as the heart of *Chevron*. "Under *Mead*, agencies may proceed expeditiously and informally, in

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[128] *See id.* at 231 (noting that "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded").

[129] *Id.* at 234-35.

[130] *See, e.g.*, Holper, *supra* note 92, at 1264-67 (discussing the importance of procedural formality).

[131] *See id.* at 1266 ("Scholars argue that *Mead* allows agencies to engage in a cost-benefit analysis, weighing the cost of formal procedures, which command deference, against the more efficient and inexpensive formal rulings, which risk being overruled by a reviewing court."); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 822 (2002) ("[I]t is now clear, agencies must make a certain investment in administrative processes to obtain the *Chevron* payoff. In the vocabulary of *Christensen* and *Mead*, agencies must take whatever procedural steps are necessary to assure that their interpretation has the 'force of law.'"); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 530-31 (2006) (asserting that "courts tend to view formal process as a proxy for variables that the court considers important but cannot observe directly, such as the significance of the issue to the agency's mission or the degree to which the agency's judgment reflects a sensible balancing of the relevant considerations"); Riedel, *supra* note 24, at 278 ("Procedure in the agency is a legitimizing device that allow a court to accept outcomes it might not have arrived at itself.").

which case they can invoke *Skidmore* but not *Chevron*, or they may act more formally, in which case *Chevron* applies."[132] Although the Court did not expressly require formal procedures as a precondition for *Chevron* deference,[133] it established a correlation between the two that requires reviewing courts to consider the nature of the procedures involved when deciding whether an agency is or is not acting pursuant to delegated authority.

Since *Mead*, the Court has flirted with restraining *Chevron* in other ways. In addition to the major issues exception, the Court in *Barnhart v. Walton* suggested that *Chevron*'s applicability turns on a variety of factors, including "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[134] In doing so, the Court made *Chevron*'s applicability turn on factors that much more closely approximate the test for *Skidmore* deference, raising the question of whether the Court was uncomfortable with *Chevron* and may prefer a *Skidmore*-style regime. However, in a subsequent case, the Court reverted to its more traditional *Chevron* analysis, and the test from *Barnhart* was relegated to a concurrence by Justice Breyer that no other Justice joined.[135]

As a result, the procedural formality benchmarks of *Christensen* and *Mead* have remained critically important in deciding whether agency action reflects delegated authority to which *Chevron* deference applies.[136]

D. Chevron*'s Significance*

Although *Chevron* has sparked volumes of scholarly debate, criticism and analysis,[137] there is little doubt that it granted significant power to

[132] Sunstein, *supra* note 111, at 225-26.

[133] *See* Holper, *supra* note 92, at 1269.

[134] Barnhart v. Walton, 535 U.S. 212, 222 (2002).

[135] *See* City of Arlington v. F.C.C., 569 U.S. 290, 309 (2013) (Breyer, J., concurring) (advocating for the *Barnhart* test).

[136] "One of the principal justifications for granting deference to administrative agencies is that they operate pursuant to regular procedures that ensure thorough consideration and vetting of interpretive issues. When, as here, those procedures are short-circuited, that justification evaporates." Barton v. U.S. Att'y Gen., 904 F.3d 1294, 1302 n.5 (11th Cir. 2018), *aff'd sub nom.* Barton v. Barr, 140 S. Ct. 1442 (2020).

[137] *See* Barnett & Walker, *supra* note 23, at 2 (noting that *Chevron* has been cited more than 80,000 times, including "nearly 18,000 law review articles and other secondary sources").

agencies to make and interpret law.[138] Whether an agency's interpretation of a statute receives *Chevron* deference often will determine whether the interpretation is upheld or rejected.[139] To be sure, some scholars have pointed out that the Supreme Court does not always apply *Chevron* consistently, even in cases where the test would seem applicable.[140] However, lower courts take *Chevron* seriously and apply it regularly.[141] One study of lower federal courts found that when courts give agencies *Chevron* deference, they uphold the agency over 77% of the time overall, and over 81% of the time when the agency's interpretation is rendered in an adjudication.[142] Courts uphold immigration adjudications at a slightly lower rate, at just over 70% of the time, whereas non-immigration agencies prevailed in adjudication 84% of the time.[143] Significantly, in cases where the analysis proceeded to *Chevron* step two (whether the agency's interpretation is reasonable), circuit courts ruled in favor of the agency in more than 93% of cases.[144]

Those affirmance rates are higher than when courts do not apply *Chevron*. That same study showed that courts uphold agency action only 56% of the time under a *Skidmore* deference framework, and only 38.5% of the time when reviewing agency action *de novo*.[145]

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[138] *See, e.g.*, Linda D. Jellum, *The Impact of the Rise and Fall of* Chevron *on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 146 (2012) ("Put simply, *Chevron* and its ensuing reformulation dramatically altered the executive's power to create and interpret law."); Sweeney, *supra* note 25, at 146 ("In its 1984 *Chevron* decision, the Supreme Court both acknowledged and further enabled the broad exercise of power by administrative agencies in the modern regulatory state."); Trice, *supra* note 13, at 1793 ("*Chevron* deference can severely restrict federal courts' ability to reconsider interpretations that are flawed but not 'unambiguously foreclosed' by the statutory text."); *see also City of Arlington*, 569 U.S. at 314 (Roberts, C.J., dissenting) ("When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal.").

[139] *See, e.g.*, Kagan, *supra* note 25, at 504 ("We know from empirical research that when *Chevron* applies, its first step (is the statute ambiguous?) is nearly always decisive.").

[140] *See, e.g.*, *id.* at 517-31; Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010) (asserting that the Supreme Court does not consistently apply *Chevron*); *see also* Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867 (2015) (suggesting that *Chevron* has been less revolutionary than originally believed but acknowledging that the decision nonetheless has been influential).

[141] *See* Barnett & Walker, *supra* note 23, at 6-7.

[142] *See id.* at 6-7.

[143] *See id.* at 36.

[144] *Id.* at 6.

[145] *Id.* Another study found that the agency prevails 60.4% of the time under *Skidmore*. *See* Hickman & Krueger, *supra* note 89, at 1275.

Of course, just because the *Chevron* framework applies does not mean that the agency automatically wins. The agency's interpretation still must constitute a legitimate exercise of congressionally-delegated authority (step zero). It must be consistent with the statutory language and congressional intent (step one). Indeed, courts have, albeit infrequently, rejected Attorney General interpretations that they found to conflict with the INA's plain language.[146] And even where the statute is ambiguous, the agency's interpretation must be a reasonable one (step two). Challenging an agency's interpretation as unreasonable may be difficult, but it is not impossible. For example, a district court recently rejected as unreasonable under *Chevron* step two, the Attorney General's interpretation of the term "particular social group" in his *Matter of A-B-* decision.[147] But as the statistics cited above show, decisions like that of the district court appear to be the exception rather than the rule.

The Supreme Court has previously granted *Chevron* deference to legal interpretations made by the BIA, and lower courts do the same.[148] The

[146] For example, several federal courts rejected the Attorney General's decision regarding how to determine if a non-citizen has been convicted of a crime involving moral turpitude as inconsistent with the INA's plain language. *See, e.g.*, Prudencio v. Holder, 669 F.3d 472, 476 (4th Cir. 2012); Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 477 (3d Cir. 2009). Similarly, although not involving an Attorney General decision, the Supreme Court recently rejected the BIA's legal interpretation of what constitutes a Notice to Appear under the INA at *Chevron* step one. Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018) ("[T]he Court need not resort to *Chevron* deference, as some lower courts have done, for Congress has supplied a clear and unambiguous answer to the interpretive question at hand.").

[147] Grace v. Whitaker, 344 F. Supp. 3d 96, 123-27 (D.D.C. 2018). That decision, however, may be an outlier even on that particular issue, as the Second and Fifth Circuits have recently deferred to portions of the Attorney General's *A-B-* decision. Scarlett v. Barr, 957 F.3d 316 (2d Cir. 2020) (applying *Chevron* and deferring to the Attorney General's interpretation of the term "persecution" as requiring "complete helplessness" by the government); Gonzales-Veliz v. Barr, 938 F.3d 219, 235 (5th Cir. 2019) (deferring to the Attorney General's interpretation of a particular social group in *A-B-*, and finding it to be a "permissible" and "faithful interpretation of the INA"). *But cf.* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019) (refusing to defer to the Attorney General's decision in *Castro-Tum*, 27 I. & N. Dec. 271, 281 (Att'y Gen. 2018), on the ground the Attorney General issued an unreasonable interpretation of the agency's regulations regarding the practice of "administrative closure").

[148] *See, e.g.*, Scialabba v. Cuellar de Osorio, 573 U.S. 41, 56 (2014) ("Principles of Chevron deference apply when the BIA interprets the immigration laws."); Judulang v. Holder, 565 U.S. 42, 53 (2011) ("Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore."); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("It is clear that the principles of *Chevron* deference are applicable to [the immigration] statutory scheme."); *see also* De Leon-Ochoa v. Att'y Gen. of U.S., 622 F.3d 341, 348 (3d Cir. 2010) ("We review legal

Attorney General, in the process of issuing adjudication decisions interpreting immigration laws, has staunchly argued that its decisions are entitled to *Chevron* deference.[149] Moreover, lower courts also have afforded deference to Attorney General certification decisions interpreting immigration law.[150] However, the Supreme Court has never directly addressed whether an Attorney General's interpretation of the law issued through its referral and certification authority is entitled to *Chevron* deference. Given the Attorney General's increased use of the certification power, the Supreme Court could be called on to address this question, and, as explained below, there is reason to believe that the Court is looking to revisit *Chevron*, as several Justices have expressed growing concern about *Chevron*'s reach and scope.

E. Could Chevron *Be Limited?*

Although receiving *Chevron* deference often equates to agency victory, there are some chinks in *Chevron*'s armor. While this Article does not challenge *Chevron*'s basic premise or its applicability to other areas of administrative law, several Justices have expressed discomfort with *Chevron*'s rigid framework and have suggested an openness to limiting or even overturning it. "[A]s administrative agencies have grown in influence and power, the [Court's] concern has shifted from worry about a judiciary overstepping its bounds to fear of runaway

questions *de novo,* with appropriate deference for the BIA's reasonable interpretations of statutes it is charged with administering." (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984))).

[149] *See, e.g.*, *Jean-Louis*, 582 F.3d at 472 ("The Attorney General urges that deference is owed to his interpretation of these provisions [of the INA]."); L-E-A-, 27 I. & N. Dec. 581, 591-92 (Att'y Gen. 2019) (arguing that *Chevron* applies to the Attorney General's interpretation of the term "particular social group"); A-B-, 27 I. & N. Dec. 316, 326-27 (Att'y Gen. 2018) (same); Gonzales & Glen, *supra* note 13, at 919 (asserting that Attorney General decisions "would be entitled to *Chevron* deference before the courts").

[150] *See, e.g.*, Xian Tong Dong v. Holder, 696 F.3d 121, 124 (1st Cir. 2012) (finding that the Attorney General's decision would be entitled to *Chevron* deference); Yu v. U.S. Att'y Gen., 568 F.3d 1328, 1333 (11th Cir. 2009) ("Even if we were to find that the statute's language was somehow ambiguous on this issue, we conclude that the Attorney General's identical interpretation of § 1101(a)(42)(B) in J-S- is reasonable and entitled to deference."); Miranda Alvarado v. Gonzales, 449 F.3d 915, 921-22 (9th Cir. 2006) ("Congress has generally delegated authority to the Attorney General to interpret immigration statutes and . . . a considered, precedential statutory interpretation adopted by the Attorney General or his delegatee, the BIA, is entitled to Chevron deference as an interpretation that has 'the force of law.'" (citation omitted)). Some have asserted that courts view Attorney General decisions more skeptically under *Chevron* than BIA decisions. *See* Riedel, *supra* note 24, at 293-301.

executive agencies in danger of trampling the other two branches of government."[151]

Five current Justices, including the recently-appointed Neil Gorsuch and Brett Kavanagh, have expressed concern about what they see as the growing power of administrative agencies in general, and about the role of *Chevron* in particular. As a circuit judge, Justice Gorsuch wrote that deferring to agency interpretations of statutes arguably violates constitutional separation of powers principles and is inconsistent with Article III's mandate that judges shall say what the law is.[152] In addition, both Justice Gorsuch and Justice Kavanaugh have suggested that *Chevron* may be inconsistent with the APA, which directs courts (not agencies) to "'interpret . . . statutory provisions' and overturn agency action inconsistent with that interpretation."[153] Justice Thomas has expressed a related separation of powers concern that *Chevron*'s authorization for agencies to make law that fills in statutory gaps or ambiguities created by Congress improperly confers legislating power to the Executive Branch.[154] Now-retired Justice Kennedy, in one of his last opinions before stepping off the bench, wrote that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[155]

While other Justices may not be willing to jettison *Chevron* entirely or declare it unconstitutional, they have suggested limitations. Chief Justice Roberts has warned of what he sees as "the danger posed by the growing power of the administrative state" and has called for courts to play a more robust role in determining whether Congress has in fact

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151 Sweeney, *supra* note 25, at 149.

152 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154-55 (10th Cir. 2016) (Gorsuch, J., concurring).

153 *Id.* at 1153 (quoting 5 U.S.C. § 706 (2018)); *see* Hon. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150, n.161 (2016) (book review) (stating that *Chevron* "has no basis in the Administrative Procedure Act," which requires the reviewing court, rather than the agency, to "decide all relevant questions of law" (quoting 5 U.S.C. § 706 (2018))); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring) (stating that "there are serious questions, too, about whether [the *Chevron*] doctrine comports with the APA and the Constitution").

154 *See* Michigan v. EPA, 135 S. Ct. 2699, 2713-14 (2015) (Thomas, J., concurring) ("For if we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power." (internal citations and quotation marks omitted)).

155 Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring).

delegated interpretive authority to an agency as to a particular issue.[156] In addition to crystallizing the "major issues" exception, Chief Justice Roberts has indicated that the mere fact that an agency administers a particular statute should not automatically justify *Chevron* deference. Rather, courts must analyze each interpretive issue on a case-by-case basis, and that while a general delegation to an agency may be sufficient in many cases, it will not necessarily justify *Chevron* deference in all cases.[157] Justice Breyer has recommended taking more of a *Skidmore*-style totality of the circumstances approach to determining whether Congress delegated interpretive authority to the agency on a particular question.[158]

Additionally, the Court may have reservations about rigidly applying *Chevron* to immigration cases addressing deportation. Some scholars have suggested that the Supreme Court only intermittently applies *Chevron* in the immigration context, even in cases involving agency interpretations of statutes.[159] Based on this variance, they have concluded that, in practice if not in name, the Court treats *Chevron* and other deference regimes "like *canons* of statutory construction, rather than as *precedents* formally binding on future courts."[160] That observation is important, because the applicability of a canon depends on the persuasiveness of its underlying rationale to the context at hand.[161] If *Chevron*'s core rationales have less persuasive force in the context of Attorney General referral decision-making, then the Court may be less inclined to give the Attorney General deference.

With this new level of uncertainty hanging over *Chevron*'s future, some scholars have questioned whether *Chevron* should apply to

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156 *See* City of Arlington v. F.C.C., 569 U.S. 290, 312, 315 (2013) (Roberts, C.J., dissenting).

157 *Id.* at 322-23 ("If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the 'specific provision' and 'particular question' before the court." (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984))).

158 *See supra* note 129 and accompanying text.

159 *See, e.g.*, Kagan, *supra* note 25, at 520-27 (describing recent Supreme Court decisions involving deportation and explaining how *Chevron* was not central to the Court's decisions).

160 *See* Raso & Eskridge, *supra* note 140, at 1734; *see also* Taveras v. Att'y Gen. of U.S., 731 F.3d 281, 285 (3d Cir. 2013) (stating the court normally reviews questions of law *de novo*, "subject to applicable canons of deference").

161 Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ("[C]anons are not mandatory rules. They are guides that need not be conclusive . . . . And other circumstances evidencing congressional intent can overcome their force." (internal citation omitted)).

various types of immigration issues, such as immigration detention and habeas corpus,[162] criminal-law-based removal grounds,[163] asylum and withholding of removal determinations,[164] and matters implicating a non-citizen's personal liberty.[165]

In this same vein, and in light of the marked increase in the Attorney General's exercise of his certification power, it is important to consider whether the Attorney General should receive the benefit of *Chevron* deference when using this "novel and understudied regulatory tool."[166] This is a question that academics have not addressed.[167]

This Article argues that the Attorney General's certification decisions do not deserve *Chevron* deference because none of *Chevron*'s three primary justifications — democratic accountability, agency expertise, or indications of delegated authority — have salience in this context. This Article does not challenge the concept of administrative deference as a general matter, nor does it argue that *Chevron* should be overruled. Rather, as explained in the next Part, it argues that the particular features of the Attorney General certification process make it particularly unsuited for *Chevron* deference.

III. APPLYING *CHEVRON*'S RATIONALES TO ATTORNEY GENERAL DECISIONS

Upon initial examination, it may seem that a binding, precedential decision made by an agency head like the Attorney General, which resolves a statutory ambiguity in a way that both creates a uniform legal

162 Das, *supra* note 25.

163 Sharpless, *supra* note 25.

164 Sweeney, *supra* note 25.

165 Kagan, *supra* note 25, at 535-37.

166 Walker, *supra* note 13, at 85-86.

167 Shah, *supra* note 8, at 141 (noting that "the proper level of judicial deference to administrative decision-making in immigration" is an issue that is open for scholarly debate). Professor Mary Holper has previously argued that one particular Attorney General decision should not be evaluated under *Chevron* because it suffered from some unique and since unrepeated procedural irregularities. Holper, *supra* note 92, at 1242 (addressing Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008)). But Professor Holper did not address, as this Article does, whether the Attorney General certification process as a whole should receive *Chevron* treatment. Jonathan Riedel also questions whether the Attorney General should receive *Chevron* deference, but he argues strongly than that the BIA should receive *Chevron* deference because of its purported expertise, whereas this Article views the BIA, given its lack of independence, with greater suspicion. *See* Riedel, *supra* note 24, at 286-92. Others have argued that certain Attorney General decisions should be rejected as unreasonable under *Chevron* step two. *See* Kelley-Widmer & Rich, *supra* note 24. But that article concedes that *Chevron* is the appropriate governing framework whereas this Article challenges that assumption.

standard and furthers the executive's policy objectives, is exactly the kind of agency action that should receive *Chevron* deference.[168] First, Congress has delegated some authority to the Attorney General to make "controlling" determinations on "questions of law"[169] and to "review . . . administrative determinations in immigration proceedings."[170] Additionally, the Attorney General, as the head of the Department of Justice, is charged with setting immigration policy and establishing uniform rules that govern the agency.

Second, the Attorney General is politically accountable. The Attorney General serves at the pleasure of the President and may be dismissed at any time, and therefore must be attentive to the President's immigration policy priorities.[171] The current administration has made immigration a politically-visible issue, and it seems clear that the Attorney General's restrictive interpretations of immigration law are consistent with the President's immigration agenda.[172]

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168 *See* Gonzales & Glen, *supra* note 13, at 860-61 (explaining that the Attorney General traditionally has used this power to give definitive interpretations on questions of law, resolve open legal questions, and set policy); David A. Martin, *Improving the Exercise of the Attorney General's Immigration Referral Power: Lessons from the Battle Over the "Categorical Approach" to Classifying Crimes*, 102 IOWA L. REV. ONLINE 1, 2-4 (2016) (emphasizing "the importance and propriety of the Attorney General's role in light of the interpretive authority that agencies enjoy under the Supreme Court's *Chevron* doctrine[,]" and stating that Attorney General decision-making is most useful in cases calling for policy judgment and exercise of the agency's "expert understanding of the full regulatory scheme"); Trice, *supra* note 13, at 1771 (noting that the Attorney General often certifies cases to itself in order to establish legal rules and to advance policy goals).

169 *See* 8 U.S.C. § 1103(a)(1) (2018) (providing that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

170 *Id.* § 1103(g)(2).

171 President Trump already has fired his Attorney General twice, with one firing specifically resulting from a disagreement over the legality of his immigration policies. He fired interim Attorney General Sally Yates after she refused to defend the legality of his "travel ban," and he fired (or forced to resign) Attorney General Jeff Sessions following the midterm elections in 2018. *See, e.g.*, Peter Baker, Katie Benner, & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html [https://perma.cc/RFX4-P6BW].

172 *See* Lisa Lerer, *Trump's No. 1 Obsession (No, It's Not Impeachment)*, N.Y. TIMES (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/us/politics/on-politics-trump-immigration.html [https://perma.cc/68S6-K34K] (discussing President's Trump fixation on immigration and his intent to make it a 2020 campaign issue). While many administrative agency decisions may fall below the political radar, several of the Attorney General's recent decisions have not. Not only have they been widely reported in the mainstream media, but they have prompted responses from other branches of government. Recently, twelve U.S. Senators submitted a letter to the Attorney General requesting that he rescind his recent decision restricting the rights of asylum seekers in

Third, with respect to expertise, as the head of the Executive Office of Immigration Review — the agency that conducts removal hearings — he could be seen as possessing the type of "expert understanding of the full [immigration] regulatory scheme[,]" that supports *Chevron* deference.[173] The Attorney General may be particularly likely to take cases where he can provide authoritative interpretations of immigration statutes, which is precisely when *Chevron* comes into play.[174]

Yet, a closer review of the Attorney General's certification authority raises significant questions about the force of each of *Chevron*'s rationales. This Part applies each of *Chevron*'s rationales to Attorney General certification and suggests that they do not support affording *Chevron* deference in this context. First, it explains that deference is not justified because Attorney General decisions circumvent the ordinary procedural checks-and-balances that the Supreme Court has emphasized are fundamental to the *Chevron* inquiry. Second, it describes why Attorney General decisions do not reflect specialized agency expertise and may actually undermine any expertise the agency does possess by taking decisions away from agency officials with greater expertise. Third, it argues that the Attorney General certification hinders democratic accountability rather than promoting it because the process is opaque and is less open and participatory than other forms of agency lawmaking. Fourth, it addresses the fact that review by an agency head is a common feature across many agencies and explains why that does not alter the conclusion that Attorney General certification decisions fall outside *Chevron*'s reach.

A. Delegated Authority

As previously stated, the Supreme Court explained in *Mead* that it is the presence of formal rulemaking or adjudication procedures that often denotes congressional delegation of interpretive authority.[175] And it appears that Congress has delegated some authority to the Attorney General to administer and interpret immigration statutes and make

L-E-A-, 27 I. & N. Dec. 581 (Att'y Gen. 2019). *See* Letter from Amy Klobuchar et al., United States Senators, to William P. Barr, United States Attorney General (Aug. 21, 2019), https://www.feinstein.senate.gov/public/_cache/files/0/5/05f3e794-2c0b-4b7d-8673-a56386f1fa80/37E124D26D2AD1AA6A206796808A11B8.8-21-19-lea-letter.pdf [https://perma.cc/48TD-Z32G].

[173] Martin, *supra* note 168, at 3.

[174] *See id.* at 2-4.

[175] *See supra* note 131 and accompanying text.

"controlling" determinations of law,[176] and to "review . . . administrative determinations in immigration proceedings."[177] Thus, if the Attorney General's review power were a natural component of the immigration adjudication system — one that incorporated the regular processes and constraints of administrative decision-making — then perhaps there would be a strong claim that the Attorney General's decisions should receive "*Chevron* treatment."[178]

But, as explained below, what is most notable about the Attorney General's review process is just how untethered it is from that formal structure. The Attorney General has almost wholly unbounded power to determine questions of law, unconstrained by the traditional processes accompanying either rulemaking or adjudication. In this way, it runs afoul of the bargain that lies at the heart of *Chevron*. The Attorney General's pronouncements gain the force of law, but without subjecting those pronouncements to the procedural and deliberative rigor necessary to justify *Chevron* treatment. Ultimately, the Attorney General's certification power is so fundamentally lacking in procedural

[176] *See* 8 U.S.C. § 1103(a)(1) (2018). Even though the Attorney General has often relied on this delegation of authority when exercising its certification power, *see, e.g.*, *Castro-Tum*, 27 I. & N. Dec. 271, 282 (Att'y Gen. 2018) (citing 8 U.S.C. § 1103(a)(1)), it is not evident that the scope of Congress's delegation is as broad as the Attorney General suggests. It is true that Congress stated that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1). Importantly, however, it did not do so in the subsections of the statute describing the immigration powers of the Attorney General. *See id.* § 1103(g). Rather that language appears in the section defining the immigration powers of the DHS, and the language appears in a *proviso* meant to articulate limits on DHS's authority. *See id.* § 1103(a). In other words, it is entirely possible that Congress intended that language to operate as a constraint on the power of DHS, not as an affirmative grant of authority to the Attorney General. *Cf.* Gonzales-Veliz v. Barr, 938 F.3d 219, 227 (5th Cir. 2019) ("Under 8 U.S.C. § 1103(a)(1), the 'determination and ruling by the Attorney General with respect to all questions of law' *controls how the Department of Homeland Security carries out its duties*." (quoting 8 U.S.C. § 1103(a)(1)) (emphasis added)).

Another reading of this provision is that it is an expression of the allocation of authority between agencies. The Attorney General's determinations of law are "controlling" on DHS in that DHS must abide by the Attorney General's legal rulings. But that is far different than saying that the Attorney General has the authority to make controlling legal interpretations with the force of law that are binding on private individuals and non-citizens. Indeed, if this language really is as broad as the Attorney General has asserted it to be, then there would be no need for the Attorney General to go through the process of notice-and-comment or adjudication to make law. The Attorney General could simply make any pronouncement it wanted at any time and declare it be a "controlling" determination of a "question[] of law" with legally binding effect. *See* 8 U.S.C. § 1103(a)(1).

[177] 8 U.S.C. § 1103(g)(2).

[178] United States v. Mead Corp., 533 U.S. 218, 229 (2001).

protections that it does not constitute a valid exercise of delegated authority in a manner that warrants *Chevron* deference.

By certifying a case for review, the Attorney General removes it from the normal administrative process. Once the Attorney General decides to review a case, there are virtually no procedural constraints on his authority at all.[179] The Attorney General is not bound by immigration judge decisions, BIA precedent, or even the Attorney General's own prior precedential decisions. The Attorney General reviews all issues in the case *de novo*, including factual findings, and even has asserted that it can make its own factual findings.[180] Unlike government parties, private parties have no right to request that the Attorney General certify a case.[181] Affected parties also have no right to notice or an opportunity to be heard after the Attorney General certifies a case.[182] This is troubling, because even though the Attorney General is ostensibly resolving a dispute between two parties, in reality, he can use that dispute as a platform to make any legal interpretation he wants — one which will bind immigration judges and BIA members in future cases, even if not on the courts.

In short, the Attorney General can change immigration law with the stroke of a pen whenever he wants, and without undergoing any administrative review or process, let alone the normal checks of an administrative adjudication system. All the Attorney General has to do, under the guise of resolving a dispute, is pluck a case that involves a legal question he wants to address, from the more than 40,000 appeals the BIA receives every year,[183] and use that case as a launching pad to alter the landscape of immigration law.

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[179] *See, e.g.*, Shah, *supra* note 8, at 134 (describing Attorney General decisions as "both unanchored by minimal procedure and also binding on administrative decisions nationwide").

[180] *See* D-J-, 23 I. & N. Dec. 572, 575 (B.I.A. 2003) ("When I undertake review of such decisions pursuant to a referral under 8 C.F.R. § 1003.1(h), the delegated authorities of the IJ and BIA are superseded and I am authorized to make the determination based on my own conclusions on the facts and the law."); Deportation Proceedings of Joseph Patrick Thomas Doherty, 12 Op. O.L.C. 1, 4 (1988) (concluding that the Attorney General has "full authority to receive additional evidence and to make de novo factual determinations"); Gonzales & Glen, *supra* note 13, at 856 (stating that the Attorney General's authority when reviewing cases "includes the de novo review of factual findings and the receipt of additional evidence not considered by the Board or the immigration judge").

[181] *See infra* notes 244–245 and accompanying text.

[182] The lack of a right to notice or an opportunity to be heard is examined in more detail in Part III.C.2, *infra*.

[183] *See Case Appeal Statistics*, *supra* note 50.

The Attorney General's view that he has the power to make legal interpretations and pronouncements of law, unbounded by any procedural constraint, looks much more like the way agencies issue interpretive rules and guidance rather than legally binding rules.[184] Interpretive rules do not have to undergo much procedural rigor and can simply be policy statements by the head of an agency. But, as a result, they do not have the force of law and do not receive *Chevron* deference.[185] That is what the Attorney General's review power looks like — an opportunity for the Attorney General to say whatever it wants, at any time, without having to seek public comment or go through any formal review whatsoever. If the Attorney General's decisions more closely resemble interpretive rulemaking, then they should be reviewed like interpretive rules and should not receive *Chevron* deference simply because of the happenstance that the Attorney General decided to use a case, rather than a speech or a policy memo, to issue a new interpretation of immigration law.

The certification mechanism's departure from the established adjudicatory process is significant. While agency adjudications issued with the force of law often will be presumed to represent an exercise of delegated authority, that presumption rests on the existence of regularized bureaucratic procedures as a protection against arbitrary decision-making.[186] Indeed, some have argued that because of the immense power that agencies wield, abandoning the internal agency checks and balances that accompany either adjudication or rulemaking

[184] *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) (stating that interpretive rules do not undergo notice and comment and therefore do not have the force of law).

[185] The Supreme Court has identified interpretive rules as reflecting a tradeoff between formal process and losing the force of law. Interpretive rules are "comparatively easier for agencies" to issue because they do not require notice-and-comment, but that "convenience comes at a price" as interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015). In short, agencies may be entitled to jettison procedural regularity when articulating agency policy, but the result is that those pronouncements should not have the force of law and should not be analyzed under *Chevron*.

[186] *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) ("Procedural formality, whether imposed under constitutional law or administrative law, always has been a necessary feature of governmental legitimacy."); *see also* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 79-82 (2017) (discussing the value of administrative bureaucracies and independent civil servants for creating internal checks and balances that prevent agencies from overreaching or aggrandizing too much power).

— such as when the Attorney General exercises unbounded authority to unilaterally change immigration law — raises distinct constitutional problems.[187] Those bureaucratic checks and balances are what formalize the adjudicative process such that it can constitute a legitimate exercise of delegated authority. Without that process, the Attorney General can simply say whatever he wants about immigration and call it binding law. Even if the Attorney General is allowed to do that, he should not get *Chevron* deference as a result.[188]

The Attorney General wants the formal effect that comes with issuing binding law while using the equivalent of the informal process associated with non-binding interpretive rules. Indeed, defenders of the Attorney General's certification power have specifically touted the freedom from procedural constraints that comes with the certification and that is not present in either traditional administrative adjudication or notice-and-comment rulemaking. Former Attorney General Alberto Gonzales and longtime government attorney Patrick Glen, in arguing against establishing procedures to govern the Attorney General's use of the referral authority, voice approval for the "lack of institutional strictures on the exercise of the referral authority[,]" laud that no "particular procedure *must* govern every case that is referred and accepted for review," and note that "[t]his freedom is of obvious benefit to modern Attorneys General . . . ."[189] That all may be true, and it may be true that flexibility is a benefit to the Attorney General (though not necessarily the non-citizen on the other side of the courtroom). But that flexibility should come at a price. And the price should be the recognition that such a wholesale lack of process removes Attorney General review from the realm of congressionally-delegated lawmaking and from *Chevron*'s reach.

Importantly, Gonzales and Glen defend giving the Attorney General maximum flexibility on the ground that federal court review provides a check against renegade Attorney General behavior.[190] But as has been shown, federal court review under *Chevron* is a very weak backstop.[191]

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187 *See* Metzger, *supra* note 186, at 71-72.

188 *See, e.g.*, Holper, *supra* note 92, at 1295-1301 (arguing that that challenges to the Attorney General's Silva-Trevino decision should not be analyzed under *Chevron* because decision did not carry the hallmarks of procedural formality ordinarily required for *Chevron* deference).

189 Gonzales & Glen, *supra* note 13, at 913.

190 *Id.* at 914 ("The better rule is to permit the Attorney General discretion to consider how to approach each referred case, knowing that the federal courts will be the final arbiters of the permissibility of the decision issued.").

191 *See supra* notes 139–145 and accompanying text.

Thus, if robust judicial review is a necessary corollary to giving the Attorney General certification power, that is an additional reason not to apply *Chevron*.

One recent certification decision provides a telling example of how certification can become a way to try to give legally-binding force to what is essentially an interpretive rule. In June 2020, the Attorney General decided to review two BIA decisions from 2006 in order to address certain statutory bars to seeking asylum.[192] At that point, fourteen years after the BIA's decision and beyond the point at which the decisions had long become final, the Attorney General's "review" of those decisions can hardly be considered an adjudication in any meaningful sense. Rather, it looks more like the Attorney General trying to redefine the law without being subject to the normal constraints of the administrative process.

Additionally, the certification process does not "foster the fairness and deliberation" by the agency that the *Mead* Court emphasized "should underlie a pronouncement of such force" as to justify *Chevron* deference.[193] First, there is no requirement that the Attorney General consult with agency experts. The Attorney General need not (and apparently does not) consult with other members of the adjudication structure when deciding cases. Instead, he seeks advice, if at all, from a completely separate part of the Justice Department, the Office of Legal Counsel ("OLC").[194]

Thus, the level of deliberation and accounting for the different views of public constituencies may decline when the Attorney General refers a case to itself. Ordinarily, the agency court of last resort is the BIA, which, when it issues precedent decisions, sits as a three-member panel or as an *en banc* tribunal.[195] Scholars have hypothesized that decision-making by multimember bodies is more deliberative and takes into account more points of view than does a decision made by a single

[192] A-M-R-C-, 28 I. & N. Dec. 7 (Att'y Gen. 2020). The BIA decisions from 2006 are available at https://www.justice.gov/eoir/page/file/1287366/download (last visited Aug. 10, 2020) [https://perma.cc/LF26-DHDH] and https://www.justice.gov/eoir/page/file/1287361/download (last visited Aug. 10, 2020) [https://perma.cc/7XNR-UJVX].

[193] United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[194] *See* Gonzales & Glen, *supra* note 13, at 917.

[195] *See* 8 C.F.R. § 1003.1(g)(3) (2020) (stating that "selected decisions of the Board issued by a three-member panel or by the Board en banc may be designated to be published and to serve as precedents in all proceedings involving the same issue or issues"). While the Board is empowered to issue single member decisions, it only does so in unpublished non-precedential cases that involve straightforward or settled issues. *See id.* § 1003.1(e) (outlining procedures for when a single Board member may issue decisions and when an appeal should be decided by a three-member panel).

individual like the Attorney General, even when that individual gets input from advisers or others.[196] By taking the case for himself and away from the BIA, the Attorney General arguably discourages deliberation.

Second, the *Mead* Court's emphasis on fairness also militates against deference. The Attorney General's unusual dual role as the head of a supposedly-impartial adjudication system while also serving as the prosecutor once removal cases go to federal court creates the appearance of a conflict of interest and raises serious questions about how fair the Attorney General can be.[197] At the agency level, the Attorney General is the chief adjudicator. In court, the Attorney General is a litigant in an explicitly adversarial position to the non-citizen fighting removal. Perhaps if that conflict could be mitigated through procedural constraints, the Attorney General could make a stronger case for deference. But his simultaneous role as both judge and prosecutor raises the very concerns about unchecked agency power that have given several Justices pause about applying *Chevron* expansively.[198]

The only nod the Attorney General makes to traditional administrative process is that he is limited to reviewing cases that have already gone through BIA review on appeal.[199] But even that limit is regulatory only, and thus subject to change by the Attorney General. In fact, the Attorney General has proposed expanding his power to review not just completed appeals, but also to certify immigration judge decisions that have not been appealed.[200] This decreases the opportunity for parties to meaningfully brief the issues in the case and also removes the BIA from the decision-making process entirely.[201] The Attorney General also recently promulgated a rule that gives the EOIR policy director, a non-judicial, politically-appointed officer, the power to

196 *See*, *e.g.*, Legomsky, *supra* note 13, at 461 (stating that Attorney General review "entails the substitution of one person's judgment for the collective judgment of several adjudicators. And the probability that a strong ideological bias will influence the result is greater when one person is deciding than when the decision is rendered by a randomly selected multi-member panel"). Ironically, the Executive Branch has argued in other contexts that multimember bodies "must engage in at least some degree of deliberation and collaboration," whereas lone decisionmakers do not. *See* Brief for Respondent at 13, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7).

197 *See supra* notes 55–60 and accompanying text.

198 *See supra* notes 153–158 and accompanying text.

199 *See* 8 C.F.R. § 1003.1(h)(1).

200 *See supra* note 82 and accompanying text.

201 *Cf.* Kim, *supra* note 43, at 42-43 (arguing that having the BIA decision as part of the formal administrative record enhances the legitimacy of the decision).

adjudicate appeals that have been pending more than ninety days for detained cases or six months for non-detained cases.[202] This also diminishes procedural regularity by taking cases away from Board members who are required by law to provide impartial and independent judgment, and moving them to a political office that is neither judicial nor constrained by any requirement to be independent. In short, not only can the Attorney General essentially ignore the entire administrative structure for adjudicating cases, it has taken active steps to dismantle that structure and to further politicize the immigration adjudication process.[203]

Finally, some of the specific powers the Attorney General has asserted for itself on review may run afoul of the way that Congress has delegated adjudicative authority to the agency. For example, the Attorney General has argued that his powers are sweeping and encompassing, and include, among other things, the power to accept new facts and make independent factual findings.[204] Yet, Congress specifically established an administrative adjudicative framework for removal proceedings. That structure requires immigration judges to determine the facts and gives non-citizens the right to present evidence to an immigration judge and to confront evidence presented to the immigration judge. Congress provided that immigration judges "shall conduct proceedings" regarding removal,[205] that those proceedings are the sole means of determining removal,[206] that the immigration judge has the power "to receive evidence,"[207] and that a party charged as removable or inadmissible has the right to present and confront evidence.[208] These congressionally-mandated structures mean little if the Attorney General can bypass them to receive his own evidence and make his own factual

[202] *See* Organization of the Executive Office of Immigration Review, 84 Fed. Reg. 44,537, 44,539-40 (Aug. 26, 2019).

[203] *See* Hon. Ashley Tabaddor, *Statement by Immigration Judges Union on Major Change Announced to Immigration Courts*, NAT'L ASS'N IMMIGR. L. JUDGES (Aug. 23, 2019), https://immigrationcourtside.com/wp-content/uploads/2019/08/Press-release-8.23.2019.pdf [https://perma.cc/ZY6J-ED7A] (arguing that that the Attorney General's new rule "ends any transparency and assurance of independent decision making over individual cases . . . by collapsing the policymaking role with the adjudication role into a single individual").

[204] *See supra* note 180 and accompanying text.

[205] 8 U.S.C. § 1229a(a)(1) (2018).

[206] *Id.* § 1229a(a)(3). The statute does contain certain exceptions that allow others to make removal decisions in certain narrow contexts, such as expedited removal. *See id.*

[207] *Id.* § 1229a(b)(1).

[208] *Id.* § 1229a(b)(4)(B).

determinations without regard to what an immigration judge may have done.[209]

As others have shown, the risk that the Attorney General will abuse his power to issue decisions without procedural constraint is real. Professor Mary Holper has argued the Attorney General did not validly exercise congressionally-delegated authority when issuing *Matter of Silva-Trevino*,[210] because the lack of process involved was insufficient to satisfy *Mead*.[211] In that case, the Attorney General certified the case to himself without giving notice to the public, he issued a decision without giving interested parties the opportunity to weigh in, and he issued in the waning days of the George W. Bush administration, after a new President had been elected.[212] The procedural irregularities of *Silva-Trevino* are relatively atypical, as most recent Attorneys General have provided notice and an opportunity for briefing when certifying cases for review. Even so, Professor Holper's analysis provides a blueprint for considering whether the Attorney General's review process as a whole is so untethered to the administrative adjudication process and so free from procedural constraint that it does constitute a valid exercise of congressionally-delegated authority and should not be analyzed under *Chevron*.

Because the Attorney General's certification power is so fundamentally lacking in procedural protections, and because there is virtually no constraint on the Attorney General once he certifies a case, the Attorney General's review power does not reflect a valid exercise of congressionally-delegated authority and its decisions should not be evaluated under *Chevron*.

B. Agency Expertise

The second justification for *Chevron* deference — that agencies bring to bear specialized expertise when interpreting statutory ambiguities — similarly does not support giving deference to Attorney General certification decisions. The concept of agency expertise calls to mind

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[209] Professor Catherine Kim has suggested that Congress's creation of this adjudication structure signifies its intent to create a fully independent adjudication system, and thus any interference by the Attorney General through certification falls outside the scope of its statutory authority, though she acknowledges that the statutory language in this respect is unclear. Kim, *supra* note 43, at 45 & n.272.

[210] Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

[211] *See* Holper, *supra* note 92, at 1242.

[212] *See id.* at 1252-53 (describing the process the Attorney General used in making his decision).

individuals who have specialized knowledge, that is, access to facts and details that a generalist would not know and that the expert can apply to unsettled legal questions. Expertise ideally is as fact-based and as apolitical as possible, and we conventionally think of agency experts as individuals who are insulated from the influence of political appointees.[213] That type of expertise appears to be alarmingly absent from the Attorney General's decision-making process, because the Attorney General has substantially less expertise than the agency officials from whom he is wresting decision-making authority.

Referring a case to the Attorney General likely diminishes the level of agency expertise involved. In choosing to take a case for review, the Attorney General is wresting it away from agency officials that have specialized knowledge — career immigration judges and BIA members. While the BIA also has been justly criticized for being politically biased and lacking expertise, Board members likely possess greater expertise than the Attorney General. Former Attorney General Alberto Gonzales has frankly admitted — in an article defending the Attorney General's certification power — that the Attorney General has less expertise than the BIA, because "[u]nlike the Board, however, whose total focus is immigration, the Attorney General's immigration duties are only a small part of a cabinet portfolio that encompasses every major legal issue in the United States."[214] When the Attorney General certifies a case for review, he receives advice from the OLC.[215] Yet, "the attorneys that staff OLC are charged with providing advice on a dizzying array of issues, and have no pretensions to expertise on immigration law or the specific

[213] *See* Barron & Kagan, *supra* note 105, at 248 (noting the view "that high-level supervision inappropriately suppresses professionalism and expertise[,]" though ultimately disagreeing with it); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2375 (2001) (explaining that the Clinton White House was advised to have the President distance himself from agency action because political involvement could "undermine the expertise rationale for *Chevron* deference"); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2029-30 (2015) (describing how political interference with agency expertise and political influence over knowledge-based decisions is generally seen as illegitimate).

[214] Gonzales & Glen, *supra* note 13, at 910; *see also* Riedel, *supra* note 24, at 301 ("[T]he Attorney General has virtually no expertise in the administration of immigration law.").

[215] Gonzales & Glen, *supra* note 13, at 917 (citing 28 C.F.R. § 0.25(f) (2015) (defining the OLC's duties to include "advising the Attorney General in connection with his review of decisions of the Board of Immigration Appeals and other organizational units of the Department")).

legal and policy issues that most frequently arise in immigration litigation."[216]

Furthermore, the Attorney General's proposed rule expanding his authority to certify cases at an earlier stage of proceedings will further reduce the opportunity for immigration judges and Board members to offer their input and expertise.[217] If anything, the proposed regulation is just a naked power-grab by the Attorney General, one that is designed to shut agency experts out of the process rather than to foster agency expertise.

To be sure, one could argue that immigration judge and BIA decisions also do not embody agency expertise. A number of commentators and courts have persuasively criticized the immigration adjudication system as broken, suffering from undue political influence, arbitrary decision-making, crushing volume, and inadequate support such that the agency decisions do not reflect reasoned decision-making or expert judgment.[218] That all may be true. But that is simply a reason not to give deference to any immigration adjudication decision, including precedential BIA decisions. Identifying massive structural flaws in the adjudication bureaucracy is hardly a reason to grant *additional* deference to another aspect of that adjudicatory structure. And even with those flaws, the Attorney General still has less comparative expertise than other agency officials. If the rest of the system is broken, that merely underscores how little expertise regarding substantive immigration law the Attorney General truly has.

Additionally, even if the Attorney General could be treated as bringing some form of expertise to his decisions, it is a one-sided type of expertise that raises questions about the fairness of the certification process. Because of the Attorney General's dual role as adjudicator at the agency and prosecutor in federal court, the agency's expertise necessarily encompasses the agency's charge to act as a prosecutor and to attempt to deport any non-citizen charged as removable. Indeed, other commentators have suggested that the Attorney General allegedly works with OIL to select cases for review that support OIL's prosecutorial interests and that favor the prosecutorial point of view.[219]

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[216] Gonzales & Glen, *supra* note 13, at 917; *see also* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 292 (1996) (suggesting that agency head review can create the perception that "[t]he person who actually decides may be relatively unfamiliar with the record and the arguments made in the case").

[217] *See supra* note 82 and accompanying text.

[218] *See supra* notes 61–64 and accompanying text.

[219] *See* Trice, *supra* note 13, at 1774.

In practice, referrals have overwhelmingly come from prosecutors or those with a prosecutorial slant rather than from more neutral decision-makers.[220] Notably, this is a deviation from the agency's early experience with referrals, as "[i]nitially, the Board was the driver behind referrals to the Attorney General" and prosecuting agencies referred only 25% of cases.[221]

Some Attorneys General have certified cases just weeks after assuming the job and have issued decisions that were certified by a different Attorney General. For example, in the recent cases of *Matter of L-E-A-* and *Matter of Castillo-Perez*, the referrals were made by Acting Attorney General Matthew Whitaker, who at that time had been in that role for less than four weeks.[222] And then both decisions were issued by a different Attorney General, William Barr, who was not part of the original decision to refer the case. Barr issued the *L-E-A-* decision on the merits less than six months after taking over as Attorney General.[223] The argument that the Attorney General is utilizing specialized expertise under these circumstances rings hollow.

Finally, although this Article argues that the Attorney General's decisions categorically are ineligible for *Chevron* deference rather than just select decisions based on their subject matter, it may be worth noting that — especially in the Attorney General's more recent decisions — one would be hard pressed to discern how the agency is demonstrating expertise, both with respect to the subject matter and with respect to the process of exercising the referral authority. Regarding the former, some decisions address issues — such as the standard for determining a government's ability to protect victims from persecution by private parties — that involve traditional statutory

220 *See* Gonzales & Glen, *supra* note 13, at 859 (stating that as of 2016, "in the most recent 26 decisions reviewed by the Attorney General, only one has been referred by the Board, while 14 have been self-certified by the Attorney General and 11 have been referred by either the INS or DHS").

221 *See id.*

222 Matthew Whitaker was appointed Acting Attorney General on November 7, 2018. He referred both *L-E-A-* and *Castillo-Perez* to himself on December 3, 2018. *See* L-E-A-, 27 I. & N. Dec. 494, 494 (Att'y Gen. 2018); Castillo-Perez, 27 I. & N. Dec. 495, 495 (Att'y Gen. 2018); Adam Goldman & Edward Wong, *Trump Installs a Critic of the Mueller Investigation to Oversee It*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/whitaker-mueller-trump.html [https://perma.cc/NX2N-VZRW].

223 William Barr became Attorney General on February 14, 2019. He decided *L-E-A-* on July 29, 2019 and *Castillo-Perez* on October 25, 2019. *See L-E-A-*, 27 I. & N. Dec. at 581; *Castillo-Perez*, 27 I. & N. Dec. at 664; Katie Benner & Nicholas Fandos, *Senate Confirms William Barr as Attorney General*, N.Y. TIMES (Feb. 14, 2019), https://www.nytimes.com/2019/02/14/us/politics/william-barr-confirmed.html [https://perma.cc/UV2H-4ANY].

analysis[224] or that have been addressed extensively in judicial decisions. Agencies have no expertise advantage to federal courts (and in fact are less expert) when it comes to interpreting judicial precedent.[225] Other recent cases have addressed whether nuclear families, victims of gang violence, or victims of certain forms of domestic violence would be viewed as "distinct" social groups in their home countries.[226] There is no reason to think that the Justice Department has specialized expertise in understanding the sociological conditions in foreign countries (if anything, it is the State Department that might have such expertise).[227] But, by the same token, other recent Attorney General decisions, such as those that address docket management practices, arguably involve a greater degree of agency expertise.[228] Even in those cases, though, the Attorney General has tended to use traditional tools and canons of statutory construction in reaching its decision, tools that courts have greater relative expertise in applying than do agencies.[229] However, as explained above, no matter what the subject matter is, the Attorney General is taking the case away from subject matter experts when referring the case to itself rather than allowing the case to be decided ultimately by an immigration judge or the BIA.

Thus, *Chevron*'s comparative expertise rationale does not support affording deference to Attorney General decisions.

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[224] *See, e.g.*, Da Silva v. Att'y Gen. of U.S., 948 F.3d 629, 635 (3d Cir. 2020) (suggesting that the court would not defer to the BIA's interpretation of the phrase "connected to" in an immigration statute "because interpreting 'connected to' does not implicate the BIA's 'expertise in a meaningful way'" (citation omitted)).

[225] *See, e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) ("There is therefore no reason for courts — the supposed experts in analyzing judicial decisions — to defer to agency interpretations of the Court's opinions." (internal quotes and citation omitted)).

[226] *See L-E-A-*, 27 I. & N. Dec. at 581 (concluding that "most nuclear families are not inherently socially distinct and therefore do not qualify as 'particular social groups'"); A-B-, 27 I. & N. Dec. 316, 325-36 (Att'y Gen. 2018) (suggesting that victims of domestic violence and gang violence may not qualify as particular social groups).

[227] *See* James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT'L J. REFUGEE L. 477, 482-84 (2003) (criticizing the ability of governmental policymakers to assess societal conventions in foreign countries).

[228] *See, e.g.*, S-O-G-, 27 I. & N. Dec. 462 (Att'y Gen. 2018) (addressing the authority of immigration judges to dismiss or terminate removal proceedings); L-A-B-R-, 27 I. & N. Dec. 405 (Att'y Gen. 2018) (addressing when immigration judges can grant continuances); Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018) (holding that immigration judges lack authority to place a case in "administrative closure").

[229] *See, e.g.*, *Castro-Tum*, 27 I. & N. Dec. at 286-88 (applying traditional statutory construction principles including the rule against superfluity to conclude that the Attorney General did not delegate authority to immigration judges to order administrative closure).

C. Democratic Accountability

As for the final *Chevron* factor, the Attorney General's authority to interpret statutes and make precedential legal decisions through the certification power likely undermines political accountability rather than promotes it. The concept of political accountability naturally encompasses how accountable the agency's lawmaking action is to the public at large. The *Chevron* court assumed that agencies would have accountability because the President is "directly accountable to the people."[230] Yet, in reality, the President is not especially responsive to any particular agency decision. As others have recognized, the President is in charge of the entire Executive bureaucracy, and does not have the time or the capability to rigorously supervise all agency action and hold agency decisionmakers accountable.[231] "Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence."[232] Similarly, while voters can send a President (or a candidate from the same party) out of office in response to unpopular agency actions, voters at the Presidential level necessarily must weight a number of factors in deciding how to vote (or not vote), and a voter may choose to support or oppose a Presidential candidate for reasons that have little to do with specific agency legal interpretations.[233] As a result, "highly contested elections are simply very poor devices for holding a person accountable[,]" because "even perfectly informed voters must make their choice on the basis of the few issues they regard

[230] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

[231] *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 110 (2010) ("[T]he president may not have the time or willingness to review [agency] decisions . . . ."); Kagan, *supra* note 213, at 2250 ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.").

[232] City of Arlington v. F.C.C., 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).

[233] *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 450 (2010) (finding little evidence to support the contention that voters respond to agency rulemaking); Kim, *supra* note 43, at 35-36 (asserting that it is questionable whether "presidential control actually renders agency decisions more responsive to the electorate"); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1744 (2009) (arguing that presidential control over an agency does not result in increased political accountability or responsiveness and suggesting that there may actually be a "negative relationship between a unitary executive and accountability"); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079-80 (2005).

as most important and then accept their representative's decisions on the other issues, whether they approve of her decision or not."[234]

Because of the difficulties the public faces in holding agencies accountable through the political process, any analysis of democratic accountability should take into account other opportunities for public participation and input regarding the agency action in question. In other words, "an agency's choice of democratic procedures — such as those that evidence 'fairness and deliberation' or extra opportunities for participation — could be viewed as more specific reasons to give deference on the basis of political accountability."[235]

When analyzed under this lens of accountability, the Attorney General's certification power scores poorly, for several reasons. First, the concept of political accountability sits in tension with the notion of agency adjudicators as impartial decision-makers, and the Attorney General has expressly disclaimed political motivations for his decisions. Second, Attorney General certification offers limited avenues for public participation relative to other forms of agency lawmaking. Third, agency specialists may actually be more responsive to public opinion than the Attorney General.

1. Tensions Between Political Accountability and Impartial Decision-Making

First, there is some tension in the idea that an agency may issue politically-driven decisions and legal interpretations under the guise of impartially adjudicating a specific dispute between two parties.[236] We generally like to think of adjudicators, even agency adjudicators, as being impartial and free from political bias in one direction or another.[237] As other scholars have addressed, there are unstated norms

[234] Rubin, *supra* note 233, at 2079.

[235] Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771 n.31 (2012) (citing United States v. Mead Corp., 533 U.S. 218, 229-30 (2001)).

[236] *See, e.g.*, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) (arguing that there are strong norms and conventions "that protect the independence of even executive agencies when engaged in adjudication"); *see also* Kim, *supra* note 43, at 11-14 (describing both legal and cultural constraints on political control over adjudication).

[237] Many immigration judges view their role to be impartial and independent decision-makers who should not be influenced by shifting political winds. For example, the National Association of Immigration Judges recently protested a new rule transferring some adjudicative authority from judges to an EOIR director as a move that would "end . . . independent decision-making over individual cases" and will

that adjudications should not be influenced by politics.[238] This is reflected in federal law enshrining a civil service process for hiring Administrative Law Judges and provides that they can only be fired for cause, rather than for political reasons.[239] EOIR's regulations state that the Board of Immigration Appeals should exercise "independent judgment" in deciding appeals, meaning that the Attorney General is not supposed to interfere with the Board's decision-making.[240] EOIR touts that its mission is to provide "fair treatment for all parties involved."[241] If administrative adjudicators expressed openly political rationales for their decisions, it would raise serious questions as to whether the parties received a fundamentally fair hearing that comports with constitutional due process requirements.

Importantly, the political accountability rationale for *Chevron* would suggest that the Attorney General should openly state that his interpretations of ambiguous statutory provisions are driven by politics or a desire to advance the President's immigration policy agenda. However, the Attorney General has expressly disclaimed any political bias or motivation in its decisions. In *Matter of A-B-*, the Attorney General stated that his "policy views on immigration matters . . . have no bearing" on how he made his decision.[242] In another decision, the Attorney General responded to allegations of bias based on his public statements on immigration by asserting that he had "no personal interest in the outcome of the proceedings."[243]

If the Attorney General is going to disclaim political motivation in decision-making, then he should not be able to rely on the concept of political accountability to claim *Chevron* deference. If the Attorney

undermine the authority of "non-political, independent" immigration judges. Tabaddor, *supra* note 203.

238 *See, e.g.*, Legomsky, *supra* note 13, at 461 ("[T]he essence of the adjudicative function is to find facts and interpret law, not to please the public.").

239 *See, e.g.*, 5 C.F.R. §§ 930.201-.211 (2020) (establishing rules for hiring and firing of Administrative Law Judges). Because immigration judges are not Administrative Law Judges, they are not subject to these protections and may be fired for any reasons. *See supra* note 56 and accompanying text.

240 8 C.F.R. § 1003.1(d)(1)(ii) (2020); *see* Gonzales & Glen, *supra* note 13, at 850 (explaining that "the Attorney General may not attempt to influence or dictate the decisions of the Board" (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954))).

241 *About the Office*, U.S. DEP'T JUST. EXEC. OFF. IMMIGR. REV., https://www.justice.gov/eoir/about-office (last updated Aug. 14, 2018) [https://perma.cc/K76B-FKVP].

242 A-B-, 27 I. & N. Dec. 316, 325 (Att'y Gen. 2018).

243 L-E-A-, 27 I. & N. Dec. 581, 585 (Att'y Gen. 2019) (citations and internal quotation marks omitted).

General believes that he should receive *Chevron* deference, then he should have to assert that his decisions are politically motivated and biased in favor of the administration's policy priorities in order to justify it. This would be more honest and would allow reviewing courts to more accurately gauge whether the Attorney General was biased, or whether its decision is otherwise not compatible with due process protections against partiality in decision-making.

2. Limited Avenues for Public Participation

Second, the certification process is significantly less transparent than other rulemaking procedures and offers limited avenues for public participation. Initially, even the process of deciding which cases the Attorney General will hear is skewed against public participation and against the interest of the non-citizens and their families whom the Attorney General's decision will affect most strongly. Under the regulation, the only entities that can refer a case to the Attorney General are (1) the Attorney General himself, (2) the chair of the BIA or the BIA upon agreement of a majority of Board members, and (3) the Secretary or other designated officers of the DHS, the entity that prosecutes removal cases before the agency and that seeks to obtain final orders of removal.[244] Conversely, there is no mechanism for the non-citizen party to the case, private interest groups, non-governmental organizations, or any other interested member of the public to request that the Attorney General refer a decision to itself.[245] It may be no coincidence that over the last twenty-five years, virtually every Attorney General decision, regardless of political party, has favored the government and gone against the interests of non-citizens.[246]

Additionally, the process of certification is opaque and makes public involvement difficult. The government is uniquely aware of the corpus of agency adjudications that the Attorney General can review. Immigration judge rulings and unpublished BIA rulings are not publicly available, and at least one court has held that the public has no right to

[244] 8 C.F.R. § 1003.1(h)(1). In recent years, virtually all referrals have come from prosecutorial agencies, the Attorney General and DHS. *See* Gonzales & Glen, *supra* note 13, at 859.

[245] While there does not appear to be any specific prohibition on a private party requesting review, the regulation expressly favors governmental interests and any request from a private party, even if permitted to be made, "is not likely to be granted." *See* Gonzales & Glen, *supra* note 13, at 853.

[246] *See* Shah, *supra* note 8, at 138 & n.51 (suggesting that only a "minority" of Attorney General decisions have favored the interests of non-citizens).

see them.[247] Recently, the Attorney General has plucked obscure and unpublished agency decisions to review, leaving immigrants' rights organizations and other groups scrambling to figure out what the case is even about, whether the non-citizen involved had legal representation, and other critical facts that would allow those groups to meaningfully participate in the process before the Attorney General issues a decision.[248]

And while an agency is not restricted to one form of lawmaking over another, the notice-and-comment rulemaking process appears more transparent and open to participation than the certification process. For example, under the APA, any interested party can petition an agency to initiate the rulemaking process.[249] This allows those on all sides of an issue to express their views about when an agency should or should not take action.

Opportunities for public involvement and participation remain limited even after the Attorney General decides to accept a referral. When an agency is considering promulgating a new notice-and-comment rule, it must give the public advance notice of its intention to issue a rule and must describe what the proposed rule will do.[250] As a practical matter, the agency often provides a detailed explanation of the justifications and reasons for the rule.[251] By contrast, when the Attorney

[247] Not only has the BIA refused to make public its unpublished decisions, the government has actively tried to limit access by refusing to comply with Freedom of Information Act requests seeking their disclosure. *See* N.Y. Legal Assistance Grp. v. Bd. of Immigration Appeals, 401 F. Supp. 3d 445, 447, 450 (S.D.N.Y. 2019) (dismissing lawsuit seeking order requiring BIA to make all unpublished decisions publicly available).

[248] For example, in *Castro-Tum*, the Attorney General chose a case where the claimant was a child, and one who did not have any legal representation. Although the Attorney General allowed parties to appear as *amicus curiae*, those parties did not have familiarity with the facts of the case, and of course none of them would have standing to appeal the Attorney General's decision to federal court. *See, e.g.*, AM. IMMIGRATION COUNCIL, ADMINISTRATIVE CLOSURE POST-*CASTRO-TUM* PRACTICE ADVISORY 10 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf [https://perma.cc/FJ83-8JRX] (criticizing the Attorney General's decision to review the case "given that it was widely known that the respondent was unrepresented throughout his proceedings, had been unreachable for some time, and likely would be unable to appeal the decision to the circuit court").

[249] *See* 5 U.S.C. § 553(e) (2018) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

[250] *Id.* § 553(b).

[251] For example, the Consumer Financial Protection Bureau's Notice of Proposed Rulemaking to prohibit class action bans contained in arbitration clauses used by financial services ran more than 100 pages in the Federal Register and had nearly 700

General certifies a case for review, nothing in the regulations requires him to publish the underlying case or explain what the underlying case is about. Nor is it required to publish its notice in the Federal Register or identify the issues it intends to address.[252] Traditionally, the Attorney General has provided only a very brief, one-to-two sentence description of the legal issues it is intending to consider.[253] Even then, however, the Attorney General is not limited to the issues it identifies when accepting a case for referral. It can address any other issues or render any other legal interpretations that arise from the case.[254]

In the notice-and-comment framework, a final rule will violate the APA and be subject to vacatur if it is not a "logical outgrowth" of the proposed rule.[255] Thus, if an agency wants to change a rule in significant ways from how it was proposed and address issues not initially presented for public comment, the agency must submit a new proposed

footnotes. *See* Arbitration Agreements, 81 Fed. Reg. 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

[252] *See* Trice, *supra* note 13, at 1768, 1799. Typically, Attorney General referral decisions are published on the Department of Justice's website alongside the Department's publication of precedential BIA decisions, and members of the public can subscribe to receive electronic notification when published BIA and Attorney General decisions are issued. *See Agency Decisions*, U.S. DEP'T JUST. EXEC. OFF. IMMIGR. REV., https://www.justice.gov/eoir/ag-bia-decisions (last visited July 11, 2020) [https://perma.cc/7SZ5-J3DT] (displaying recent Attorney General decisions to accept referrals); *Keep Informed with Email Updates*, U.S. DEP'T JUST. EXEC. OFF. IMMIGR. REV., https://public.govdelivery.com/accounts/USDOJ/subscriber/new?topic_id=USDOJ_272 (last visited July 11, 2020) [https://perma.cc/5T9F-5ZD5].

[253] *See, e.g.*, L-E-A-, 27 I. & N. Dec. 494, 494 (Att'y Gen. 2018) (referring the decision of the Board of Immigration Appeals to himself for review of issues relating to "[w]hether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group' under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit").

[254] For example, in *A-B-*, the Attorney General referred the case to himself for review of issues relating to whether "being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal." A-B-, 27 I. & N. Dec. 227, 227 (Att'y Gen. 2018). However, the ultimate decision went far beyond this specific question and addressed a total of nine issues — many of which deviated from the original question presented — including how to address the government's ability to protect victims of persecution, the proper standard for addressing the reasonableness of the possibility of internal relocation, and instructions for Credible Fear officers as to how they should conduct their screening interviews. *See* A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018).

[255] *See, e.g.*, Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996) (describing the logical outgrowth principle). For cases defining and applying this principle, see *Nat'l Black Media Coal. v. F.C.C.,* 791 F.2d 1016, 1022 (2d Cir. 1986); *United Steelworkers of America, AFL-CIO-CLC v. Marshall,* 647 F.2d 1189, 1221 (D.C. Cir. 1980); *South Terminal Corp. v. E.P.A.,* 504 F.2d 646, 659 (1st Cir. 1974).

rule — with a new opportunity for public comment — rather than issue a final rule that is not a logical outgrowth of the proposed rule.[256] No such constraint applies to Attorney General certification. In short, the public may receive very little, if any, advance notice of potentially sweeping changes to immigration law before the Attorney General imposes those changes in his decision.

The level of public input in the decision-making process also pales in comparison to the notice-and-comment process. Once the Attorney General accepts a case for certification, he is not required to offer the parties or interested groups the opportunity to submit briefs or other information that would aid the decision-making process.[257] That said, the Attorney General often permits parties and interested *amici curiae* to submit briefs or other information, though it has not done so in every case.[258] But even when participation is allowed, participation in an adjudicatory process is necessarily limited to members of the bar or other individuals authorized to practice before the EOIR.[259] By contrast, any member of the public can submit comments on a rulemaking.[260]

Attorney General adjudication decisions also are more insulated from congressional oversight than are notice-and-comment rules. The Congressional Review Act requires that all new legislative rules be presented to Congress.[261] It also allows Congress to overturn a new regulation by passing a joint resolution disapproving it within sixty days of the regulation's promulgation.[262] This power is significant, because if Congress overturns a rule, the agency may not issue a new rule that is "substantially the same" as the old one unless Congress passes a new

[256] The Department of Agriculture's final rule relaxing sodium restrictions and reducing whole grain requirements for school lunches recently was invalidated on this ground. *See* Ctr. for Sci. in the Pub. Interest v. Perdue, No. GJH-19-1004, 2020 WL 1849695, at *5, *7 (D. Md. Apr. 13, 2020).

[257] The Attorney General takes the position that "there is no entitlement to briefing when a matter is certified for Attorney General review." A-B-, 27 I. & N. Dec. 247, 249 (Att'y Gen. 2018) (quoting *Silva-Trevino*, Att'y Gen. Order No. 3034-2009 (Jan. 15, 2009)); *see also* Gonzales & Glen, *supra* note 13, at 906 ("[T]here is no legal or regulatory right to briefing or argument on referral."); Trice, *supra* note 13, at 1767.

[258] For example, in one recent case, the Attorney General noted that "[a]fter certifying this case, I received a party submission from DHS and fourteen amicus briefs spanning over five hundred pages." Castro-Tum, 27 I. & N. Dec. 271, 281 (Att'y Gen. 2018). *But see* E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018) (referring case and issuing decision without inviting interested persons to submit briefs).

[259] 8 C.F.R. § 1292.1 (2020) (defining who can appear before EOIR).

[260] 5 U.S.C. § 553(c) (2018).

[261] *See* 5 U.S.C. § 801(a)(1).

[262] *See id.* § 801(b)(1).

statute authorizing it.[263] However, the Act applies only to rules and not to adjudications.[264] Thus, adjudications can more easily fly under the congressional radar.

Of course, notice-and-comment rulemaking also has been criticized, and some have suggested that in reality it is no more participatory than any other process.[265] Moreover, just as it is easier for an Attorney General to issue an adjudication than to issue a notice-and-comment rule, it also is easier for Attorney General decisions to be reversed or undone.[266] However, most commentators claim that notice-and-comment is superior to adjudication for making policy and also more

[263] *See id.* § 801(b)(2). Although the law was until recently used only sparingly, Congress has wielded this power numerous times in the last three years to overturn Obama-era regulations or regulations issued by independent agencies. *See, e.g.*, Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), https://prospect.org/health/congressional-review-act-damage-assessment [https://perma.cc/55BZ-6W2E] (noting that Congress has overturned at least fifteen regulations under the CRA since President Trump's inauguration). For a list of congressional actions overturning regulations under this Act, see GW REG. STUD. CTR., CONGRESSIONAL REVIEW ACT TRACKER, https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/CRA/GW%20Reg%20Studies_CRATracker_03.12.20.pdf (last updated March 12, 2020) [https://perma.cc/5KEE-P29P].

[264] By its terms, the CRA applies only to the enactment of a "rule." 5 U.S.C. § 801. The Act defines "rule" by incorporating the APA's definition of "rule," with some minor adjustments. *See id.* § 804(3). The APA generally distinguishes a "rule" from an "order" issued pursuant to an adjudication. *See* 5 U.S.C. § 551 (defining "rule," "rulemaking," and "order"). "Accordingly, if an agency acts through an order or investigatory act, rather than a rule, the requirements of the CRA [Congressional Review Act] likely will not apply." CONG. RESEARCH SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS 11 (2019), https://fas.org/sgp/crs/misc/R45248.pdf [https://perma.cc/L8X2-A8EW]; *see also* Memorandum from Jacob J. Lew, Director, Office of Management and Budget, to the Heads of Departments, Agencies, and Independent Establishments (Mar. 30, 1999), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1999/m99-13.pdf [https://perma.cc/8ZCM-67N6] (determining that agency "orders" are not subject to the Congressional Review Act).

[265] *See, e.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492-93 (1992) ("No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions — a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.").

[266] *See, e.g.*, Silva-Trevino, 26 I. & N. Dec. 550, 550, 553 (Att'y Gen. 2015) (vacating prior Attorney General decision and restoring the pre-existing standard for evaluating whether a criminal conviction qualifies as a crime involving moral turpitude); Compean, 25 I. & N. Dec. 1, 2-3 (Att'y Gen. 2010) (vacating prior Attorney General decision regarding the standard for ineffective assistance of counsel).

democratically engaging.[267] Even if notice-and-comment is imperfect, it likely allows for greater engagement with the public than does adjudication, in which there is no obligation to engage the public at all prior to when the Attorney General issues its legally-binding decision.

3. Responsiveness to Public Opinion

Third, as counterintuitive as it may sound, the Attorney General's decisions may be less reflective of public opinion than the decisions of agency adjudicators. The Justice Department has a diverse portfolio of issues falling within its jurisdiction. Thus, even when the President attempts to hold the Attorney General accountable, the President's actions may be based on other issues entirely and may have nothing to do with immigration. For example, President Trump appears to have been very supportive of Jeff Sessions' immigration policy decisions, but nonetheless fired him for an unrelated reason — Sessions' refusal to interfere with Special Prosecutor Robert Mueller's Russia investigation.[268]

Consequently, specialist agency adjudicators may actually be more responsive to the public than the Attorney General on immigration-specific topics. BIA members and immigration judges, unlike the Attorney General, focus exclusively on immigration, and more specifically on the deportation and removal aspects of immigration. Moreover, unlike agency heads who serve for a short duration and who may know little about public attitudes toward deportation, immigration judges and BIA members may stay in their job for many years, and in the process develop a more nuanced understanding of public attitudes on immigration and how they have shifted over time.[269] They then can

[267] *See, e.g.*, RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, ADMINISTRATIVE LAW & PROCESS 299 (5th ed. 2009) (stating that there has been "near universal judicial and scholarly criticism of agency use of adjudication as a vehicle for formulating policy rules"); Legomsky, *supra* note 13, at 459 (arguing that "rulemaking has tremendous advantages over adjudication as a vehicle for policy formation"); Weaver, *supra* note 216, at 294 ("The preference for legislative rulemaking is unquestioned. For decades, commentators have complained about the tendency of some agencies to create new rules adjudicatively rather than legislatively. These commentators argue that Congress established informal procedures to [e]nsure that those affected by proposed rules are given a voice in the legislative process. They also argue that legislative procedures are preferable to adjudicative procedures, and that agencies should generally be forced to use those procedures." (footnotes omitted)).

[268] *See* Baker et al., *supra* note 171.

[269] Of course, immigration judges and BIA members are subject to political pressures and influence because they can be hired and fired by the Attorney General, and an Attorney General may appoint immigration judges based on their political beliefs rather

account for those attitudes, either explicitly or implicitly, when rendering decisions or issuing precedent.

One example of how agency officials with a specialized portfolio may better accommodate public opinion than an elected or appointed official with a broad portfolio involves the recent issue decided by the Supreme Court over whether Title VII of the Civil Rights Act prohibits sexual-orientation discrimination in the workplace.[270] Since 2015, the Equal Employment Opportunity Commission ("EEOC"), the agency charged with overseeing certain aspects of Title VII, has taken the position that Title VII prohibits sexual-orientation discrimination in the workplace, a view the Supreme Court recently adopted.[271] The current presidential administration, however, took the opposite view in front of the Supreme Court.[272] If an individual voted for Trump in 2016, or does so in 2020, does that mean that voter necessarily believes that sexual orientation discrimination should be allowed? Of course not. That voter may oppose sexual orientation discrimination but may choose to vote for Trump based on other issues more important to that voter, be it tax cuts, tariffs, or health care, or anything else. The President may adopt his position on sexual orientation discrimination without regard to public opinion — or even with knowledge that the public disagrees — if he feels he is likely to get voter support on other issues.

But the EEOC, whose central focus is employment discrimination, cannot make that same tradeoff. Accordingly, it may think more prominently about public opinion on the issue than would the

than their expertise. *See supra* notes 56–61 and accompanying text. Additionally, it is possible that adjudicators will enter their jobs with already-developed views of the law based on their prior experience. One study found statistically significant correlations between prior work experience and asylum grant rates, finding that judges with prior government experience granted asylum at lower rates than those with prior private practice or non-profit experience. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 345-48 (2007). But that also suggests that just as prior experience can influence one's views, an individual's experience as an Immigration Judge or BIA member can also influence that person's views over time. *See id.*

[270] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (finding that Title VII prohibits discrimination in employment against gay and transgender employees).

[271] *See* Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641, *4-10 (Equal Emp't Opportunity Comm'n, July 15, 2015); *see also Bostock*, 140 S. Ct. at 1757 n.7 (Alito, J., dissenting) (describing when the EEOC first concluded that Title VII prohibited discrimination against gay and transgender individuals).

[272] Brief for the United States as Amici Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 9, Altitude Express, Inc. v. Zarda, No. 17-1623 (Aug. 23, 2019) (arguing that "Title VII's prohibition on discrimination because of sex does not bar discrimination because of sexual orientation").

President, even though the EEOC's Commissioners are not directly elected.[273] And in fact, the EEOC's view is consistent with virtually all polling showing that a significant majority of Americans support legislation outlawing workplace discrimination against LGBTQ individuals.[274] Thus, it may not be fair to blindly assume that higher-level agency officials are more politically accountable than career agency employees just because they are closer to the President. This means that when the Attorney General refers a case to himself and takes it away from an agency specialist, he may actually be reducing accountability rather than fostering it.

Finally, the whole concept of political accountability is ill-fitting for immigration. Non-citizens, the group most directly affected by immigration regulation, cannot vote. Thus, the Executive Branch is not directly accountable to the group it is regulating, and therefore may have greater incentive to interpret ambiguities unevenly and against the interest of non-citizens.[275]

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[273] It also may be relevant that the EEOC has a political parity requirement, in that no more than three of its five commissioners can be from the same party, and the Commissioners serve staggered five-year terms and therefore are somewhat more insulated from the will of the President. *See* 42 U.S.C. § 2000e-4(a) (2018).

[274] Recent polling shows strong support for outlawing sexual-orientation-based discrimination, though some polls have been commissioned or conducted by advocacy groups. *See, e.g.*, REUTERS/IPSOS POLL DATA, STONEWALL ANNIVERSARY POLL 9 (2019), https://www.ipsos.com/sites/default/files/ct/news/documents/2019-06/2019_reuters_tracking_-_stonewall_anniversary_poll_06_07_2019.pdf [https://perma.cc/TBE2-7RSZ] (finding that 65% of respondents supported federal legislation outlawing sexual orientation discrimination in the workplace and only 11% opposed); Chad Livengood, *Poll: 4 in 5 Voters Want Ban on Firing for Sexual Orientation, Gender Identity*, CRAIN'S DETROIT BUS. (June 9, 2019, 12:04 AM), https://www.crainsdetroit.com/crains-forum/poll-4-5-voters-want-ban-firing-sexual-orientation-gender-identity [https://perma.cc/4J4F-WEPX] (finding that 80% of likely Michigan voters think it should be illegal to fire someone based on sexual orientation); Alex Vandermaas-Peeler, Daniel Cox, Maxine Najle, PhD, Molly Fisch-Friedman, *Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America*, PUB. RELIGION RES. INST. (Aug. 2, 2018), https://www.prri.org/research/wedding-cakes-same-sex-lgbt-marriage [https://perma.cc/7PDY-9BB8] (finding that 71% of respondents support laws that protect LGBTQ persons from workplace discrimination and 22% opposed).

[275] *See* Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 560 (2013) ("Political accountability is particularly problematic as a basis for *Chevron* deference in the immigration context because noncitizens cannot vote and are therefore not represented in the political process."); *see also* Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 315 n.39 (2001) (noting that because "noncitizens cannot vote, they are particularly vulnerable to adverse legislation" (quoting Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000))).

For all these reasons, the political accountability justification for *Chevron* deference holds little weight in the context of Attorney General referral decisions.

D. Agency Head Review

One possible criticism of the argument for denying *Chevron* deference to Attorney General certification decisions is that Attorney General certification is a normal part of the administrative adjudication structure. Placing final adjudicative authority in the head of an agency, also known as "agency head review," is a common feature of federal administrative agencies.[276] The concept of agency head review, to some degree, also is recognized in the APA.[277]

Scholars have identified several policy justifications for agency head review. First, agency heads arguably "have a comparative advantage in policy expertise relative to agency adjudicators."[278] This is because the agency head has a greater opportunity for deliberation than overburdened agency adjudicators, thus leading to "better informed decisions."[279] Second, agency head review has the potential to promote consistency and uniformity in agency policy and to provide for some accountability for lower-level agency decision-makers.[280] One could argue that agency head review in the immigration context could be particularly helpful, where there is widespread disparity among immigration judges in how frequently they grant or deny relief to non-citizens.[281] Third, such review "helps the agency head gain greater

[276] *See, e.g.*, Legomsky, *supra* note 13, at 458 (noting that Attorney General review "is not an unusual arrangement," because "Congress often authorizes agency heads to review adjudicative decisions that fall within their domains"); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 175 (2019) (stating that "traditional [federal] administrative model vests final decision-making authority with the agency head"); Weaver, *supra* note 216, at 287-96 (listing various benefits and drawbacks of agency head rulemaking).

[277] *See* 5 U.S.C. § 557(b) (2018) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

[278] Walker & Wasserman, *supra* note 276, at 175.

[279] *Id.*

[280] *See* Legomsky, *supra* note 13, at 458; Walker & Wasserman, *supra* note 276, at 176 (stating that agency head review "help[s] ensure consistency in adjudicative outcomes").

[281] *See* Legomsky, *supra* note 13, at 458 (stating that "one might be tempted to urge more frequent Attorney General review of BIA decisions" to address the disparity in asylum approval rates).

awareness of how a regulatory system is functioning."[282] This allows the agency head to work with lower agency officials to make regulatory adjustments as necessary.

In other words, if agency head review is a part of the ordinary administrative process from which *Chevron* deference flows, then one might assume that agency head decisions like Attorney General certification decisions should receive *Chevron* treatment. That assumption is mistaken for several reasons.

First, the mere fact that agency heads can issue their own adjudicative decisions does not automatically justify applying the *Chevron* framework to those decisions.[283] That is particularly true where the agency head, like the Attorney General, uses certification to deliberately bypass more formal and rigorous decision-making procedures.[284] Whether or not agency head review is normal, it still must satisfy *Chevron*'s rationales in order to gain *Chevron* treatment. The fact that an agency head may review adjudication decisions is not a carte blanche to ignore the procedural protections and structures of the adjudication system that lie at the heart of the *Chevron* bargain. Specifically, the Attorney General should not be able to gain *Chevron* deference by taking what is essentially an interpretive ruling and dressing it up as an adjudication decision.

To the extent that other examples of agency head review approximate Attorney General review, the arguments in this Article may raise questions about whether *Chevron* should apply to those forms of agency

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[282] Weaver, *supra* note 216, at 289.

[283] For example, the Social Security Administration ("SSA") exercises top-level review by "issuing Social Security Rulings, which designate adjudications at any level as precedential and internally binding on all components of the SSA." Walker & Wasserman, *supra* note 276, at 193. However, while Social Security Rulings are internally binding on the agency, the SSA itself has emphasized that they "do not have the force or effect of the law or regulations." *Preface: Social Security and Acquiescence Rulings*, SOC. SECURITY ADMIN., https://www.ssa.gov/OP_Home/rulings/rulings-pref.html (last visited July 11, 2020) [https://perma.cc/Y3CG-959S]. Consequently, courts have not uniformly agreed that Social Security Rulings should receive *Chevron* deference rather than *Skidmore* deference. *See* Liskowitz v. Astrue, 559 F.3d 736, 744 n.8 (7th Cir. 2009) (stating that Social Security Rulings are entitled to *Skidmore* or *Seminole Rock* deference); *see also* Martin v. Soc. Sec. Admin., Comm'r, 903 F.3d 1154, 1161-62, 1162 n.51 (11th Cir. 2018) (suggesting reasons why Social Security Rulings should not receive *Chevron* deference and distinguishing contrary cases as pre-*Mead*); Hagans v. Comm'r Soc. Sec., 694 F.3d 287, 302-03, 303 n.19 (3d Cir. 2012) (finding *Chevron* inapplicable to Social Security Ruling but leaving open the possibility that it could apply *Chevron* to other Social Security Rulings).

[284] *See* Weaver, *supra* note 216, at 294 (noting that agency head review reduces incentives to issue legislative notice-and-comment rules and explaining that "[t]he preference for legislative rulemaking is unquestioned").

head review as well. However, the nature and form of other types of agency head review is beyond the scope of this Article, and it does not purport to address how all agency head decisions should be reviewed. In any event, there are reasons to believe that Attorney General review in particular fails to adequately further the goals of agency head review. This provides further reason to refuse to give the Attorney General *Chevron* deference, even if other agency head decisions might receive it.

First, as explained above, the Attorney General does not bring greater expertise or opportunity for deliberation than lower-level agency adjudicators.[285] As former Attorney General Alberto Gonzalez frankly admitted, the Attorney General (1) lacks immigration expertise, (2) has a busy portfolio that limits the time he can devote to any single issue, and (3) does not deliberate or consult with the various components of immigration agencies when making decisions.[286] If anything, Attorney General decisions reflect a contempt, or at least a disregard, for the agency and how it operates rather than an interest in becoming more aware of how the agency operates — which is the third justification for agency head review.

In reality, the Attorney General's decisions frequently undermine the goal of deliberation. In *Matter of A-B-*, the Attorney General reversed a published BIA decision providing a means for victims of domestic violence to seek asylum that represented a "culmination of a 15 year process" of consultation, decision-making and coordination between Immigration Judges, the BIA, various Attorneys General, the private immigration bar and enforcement agencies like DHS.[287] In *Matter of Thomas & Thompson*, the Attorney General rejected a series of three different BIA decisions issued over the course of fifteen years that developed the law around when state criminal convictions should or should not have immigration consequences.[288]

Second, the Attorney General's review decisions do not increase or promote consistency. The BIA already provides for consistency, because it issues nationally binding precedent, and can sit *en banc* as well as in three-judge panels.[289] In fact, it appears that one of the most common

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[285] *See supra* Part III.B.

[286] *See supra* text accompanying notes 214–216.

[287] *See* Jeffrey S. Chase, *Statement in Response to* Matter of A-B-, JEFFREY S. CHASE: OPINIONS/ANALYSIS ON IMMIGR. L. (June 11, 2018), https://www.jeffreyschase.com/blog/2018/6/11/statement-in-response-to-matter-of-a-b- [https://perma.cc/22Q9-EYH4] (providing a statement released by a group of former Immigration Judges and BIA Board Members).

[288] *See* Thomas, 27 I. & N. Dec. 674, 674 (Att'y Gen. 2019).

[289] *See* 8 C.F.R. § 1003.1(g) (2020); Legomsky, *supra* note 13, at 458.

outcomes of Attorney General review is to reverse published BIA precedent, thus upending nationally consistent rules and injecting uncertainty into the law.[290] In some situations, the Attorney General has rejected a precedent without putting a new rule in place, thereby decreasing consistency and uniformity.[291] Attorneys General also have issued decisions in order to deviate from growing federal court consensus on the meaning of immigration statutes, or to disrupt settled norms and the agency's "longstanding practices."[292]

Third, further complicating the legitimacy of agency head review in immigration adjudication is the Attorney General's unusual dual role as adjudicator at the agency level, but prosecutor at the judicial level. Practically speaking, there is almost no difference between the Attorney General issuing an interpretation of an immigration statute in a brief to a federal court of appeals, and the Attorney General doing the same thing by selecting a BIA decision and certifying it for review as a vehicle for issuing its immigration law interpretation. Courts have been especially reluctant to grant *Chevron* deference, or even *Skidmore* deference, to agency litigating positions, and rightly so.[293] The Attorney General should not be able to gain extra deference simply by issuing its interpretation at the agency review level than at the litigation level.[294]

Finally, both the sheer volume of people who are affected by the Attorney General's decisions along with the significant liberty interests at stake in deportation matters should give one pause about granting

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290 *See supra* note 18 and accompanying text (describing how frequently the Attorney General overrules the BIA).

291 *See, e.g.*, E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018) (vacating published BIA decision holding that asylum and withholding of removal applicants are entitled to a full evidentiary hearing).

292 *See* Shah, *supra* note 8, at 143.

293 *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); William Brothers, Inc. v. Pate, 833 F.2d 261, 265 (11th Cir. 1987) ("Common sense tells us that if deference were always to be given to the [agency's] litigating position, then claimants would be effectively denied the right to appellate review."). *See generally* Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447 (2013) (canvassing various circuits' approaches to agency litigating positions and concluding that most circuits do not give them *Chevron* deference).

294 *But cf.* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 152-57 (1991) (stating that "the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a [rule]," because a litigation position before the agency constitutes agency action while a litigation position in court does not deserve deference because it is a *post hoc* justification for prior agency action).

deference to agency head decisions that bypass the traditional procedural protections and constraints of administrative decision-making. The immigration adjudication system is vast, handling hundreds of thousands of cases every year.[295] The rights at stake in deportation — which can literally be the difference between life and death — are enormous.[296] Attorney General decisions are thus enormously consequential in both scope and magnitude. Such high stakes should favor greater judicial review rather than lesser review.[297] Courts should not reflexively grant deference to the Attorney General simply because other agency heads can exercise review in cases with smaller stakes affecting a smaller number of people.

This is not to say that a decision by an agency head should never get deference, or that *Chevron* should be jettisoned entirely. If the Attorney General promulgates a rule that undergoes the notice-and-comment process, deference might be warranted. As others have argued, with specific reference to immigration decision-making, "rulemaking has tremendous advantages over adjudication as a vehicle for policy

[295] The scope of immigration adjudication is much greater than the adjudication systems of many other agencies utilizing agency head review. *See* Weaver, *supra* note 216, at 253-70 (giving examples of other agencies using agency head review).

[296] *See, e.g.*, Kim, *supra* note 43, at 43 (arguing that even if the Trump Administration's immigration actions "could be characterized as electorally responsive" one must also account for "the gravity of the individual interests at stake" in assessing the legitimacy of the executive behavior); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977) (stating that the BIA is "unique" among administrative tribunals because "our immigration laws directly and exclusively affect human beings"); *see also Padilla v. Kentucky*, 559 U.S. 356, 360, 364 (2010) (concluding that deportation may be "the most important" consequence of a non-citizen's criminal conviction, and that deportation is a "drastic measure"); Cerna, 20 I. & N. Dec. 399, 408 (BIA 1991) ("The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways.").

[297] There are other agencies that adjudicate a high volume of cases, but there also are notable differences between how those agencies conduct review and how the Attorney General conducts review. For example, the U.S. Patent and Trademark Office processes over 600,000 patent applications every year and employs more than 300 Administrative Patent Judges. Walker & Wasserman, *supra* note 276, at 177-78. However, while the agency has a Patent and Trademark Appeals Board, it does not have agency head review. *See id.* at 159-60. The SSA exercises top-level review by adopting lower agency officer rulings as precedent, thereby working with career agency officials and engaging in a deliberative process. *See supra* note 283. This contrasts sharply with the Attorney General's tendency to overturn agency decisions, and to do so without significant consultation with career agency officers. Additionally, the SSA has decided that its Rulings do not have the force of law, *supra* note 283, while the Attorney General has given his certification decisions the same force of law as notice-and-comment regulations. *See supra* note 265.

formation."[298] While notice-and-comment procedures make rulemaking slower and more costly, that is the price of being able to issue regulations with the force of law. Allowing the Attorney General to "impose binding substantive rules of general applicability, with the force of law, without the procedural safeguards that the law would otherwise require," disrupts that delicate balance.[299] If the Attorney General is going to take away these procedural protections, then the benefits of *Chevron* should be taken away as well.

For all these reasons, neither the justifications for *Chevron* deference nor those for agency head review support applying *Chevron* to Attorney General certification decisions.

IV. STANDARDS FOR REVIEWING ATTORNEY GENERAL DECISIONS

This Article has attempted to show that courts should not apply the *Chevron* framework when reviewing challenges to Attorney General certification decisions. Instead, courts should apply the less-deferential (but still somewhat deferential) *Skidmore* framework. One could go even further and argue that the Attorney General's decisions should be reviewed *de novo*, because the APA requires a court to "decide all relevant questions of law."[300] However, because that would eliminate *Chevron* entirely, and because this Article focuses on whether Attorney General decisions should be analyzed under *Chevron* even if it remains good law, this discussion focuses on *Skidmore* review rather than on *de novo* review.

Recall that under *Skidmore*, a court's decision whether or not to uphold an agency's interpretation depends on the persuasive power of the agency's reasoning, including such factors as the agency's expertise on the particular issue presented, its consistency or inconsistency over time, the political motivations underlying the decision, and other factors.[301] *Skidmore* generally is the appropriate framework for evaluating an agency's interpretive rules and other decisions that do not carry the force of law, as well as decisions by agencies that have not been delegated formal rulemaking authority.[302]

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298 Legomsky, *supra* note 13, at 459.

299 *Id.* at 460.

300 5 U.S.C. § 706 (2018).

301 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see also supra* notes 86–88 and accompanying text.

302 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 227-28 (2001) (describing the *Skidmore* framework, and treating *Chevron* as an exception to the default framework described in *Skidmore*); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991)

Although *Skidmore* deference is still deference, courts play a much more robust role in reviewing agency action under *Skidmore* than they do under *Chevron*. While *Chevron* vests primary interpretive authority in the agency, *Skidmore* places the court in the driver's seat.[303] Under *Skidmore*, although courts must consider the agency's interpretation, they also must exercise their independent judgment in assessing whether the agency's interpretation carries persuasive force.[304] This requires courts to engage in meaningful review of the agency's interpretation rather than just looking to whether that interpretation is permissible.

Consequently, applying *Skidmore* rather than *Chevron* can significantly affect the agency's likelihood of success in court. One study found a more than twenty percentage-point difference in agency-win rates when courts applied *Chevron* (77.4%) versus when they applied *Skidmore* (56.0%).[305] Another study similarly found that courts applying *Skidmore* deferred to agencies 60.4% of the time.[306]

Applying *Skidmore* also offers the benefit of allowing courts to account for many of the most criticized aspects of the Attorney General review process, factors that are irrelevant under *Chevron*.[307] For example, a number of Attorney General decisions have overturned or reversed longstanding interpretations of immigration law developed through litigation over time.[308] *Skidmore* contemplates that courts will consider an agency's consistency, or deviation from a consistent position, in deciding whether to defer to the agency's decision.[309] If the

(finding that EEOC should receive *Skidmore* deference rather than *Chevron* deference because Congress did not grant the EEOC rulemaking authority over Title VII).

303 *See, e.g.*, Hickman & Krueger, *supra* note 89, at 1249 ("Unlike *Chevron*, *Skidmore* envisions the courts rather than the agencies as the primary interpreters of statutes.").

304 *See, e.g.*, *id.* at 1255-59 (describing the view that *Skidmore* gives courts a sliding scale of factors to consider and that lower courts, in practice, have given deference to agencies under this framework).

305 Barnett & Walker, *supra* note 23, at 6 (concluding that "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%)"). However, it also is important to keep in mind that courts deferred to immigration adjudications at a lower rate than adjudications more generally. *See supra* note 143 and accompanying text.

306 Hickman & Krueger, *supra* note 89, at 1275.

307 *See id.* at 1243 ("*Chevron* seemed to abandon many of the factors previously considered relevant in determining the court's proper level of deference. *Skidmore*'s focus on the context of the agency's interpretation seemed particularly out of place in *Chevron*'s regime.").

308 *See supra* notes 287–288 and accompanying text.

309 *See* United States v. Mead Corp., 533 U.S. 218, 228 & n.8 (2001) (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)) (explaining that the "consistency

Attorney General is seen as opining on issues outside his expertise, and bypassing the expertise of immigration specialists within the EOIR, that also is a reason for declining to defer under *Skidmore*.[310] A greater or lesser degree of formality and procedural regularity also is a relevant factor.[311] If the Attorney General fails to provide notice and an opportunity for briefing, or if its decision goes beyond the scope of the issues the Attorney General certified for review, then courts can consider those facts in assessing the persuasive value of the agency's position. Similarly, if the Attorney General chooses to bypass the procedural protections and greater inclusiveness of notice-and-comment rulemaking and instead use the certification power to make policy, the court can evaluate the agency's proffered justifications for providing less process in deciding how much weight to give to the agency's decision. Whereas *Chevron*'s rigid two-step test turns a blind eye to these concerns once the court decides that the agency is exercising delegated authority, the *Skidmore* framework allows courts to account for the arguments both for and against the use of the Attorney General's certification power in deciding whether to uphold interpretations made through the exercise of that power.

The *Skidmore* framework also is perfectly consistent with the practice of agency head review. The main purposes of agency head review — promoting consistency, deliberation, access to expertise and greater awareness of agency practices — are reflected in the *Skidmore* test, which focuses on an agency's "consistency," its "specialized experience," and the "thoroughness evident in [the agency's] consideration."[312] Thus, *Skidmore* review can account for the beneficial features of agency head review while also providing for more searching examination of agency policy when an agency head jettisons traditional agency procedures to make law on his own.

Furthermore, applying lesser deference (in the form of *Skidmore*) to the Attorney General's decisions creates incentives for reforming the immigration adjudication process. If agency decisions get the benefit of *Chevron* deference and are therefore likely to be upheld by courts, then

of an agency's position is a factor in assessing the weight that position is due" under *Skidmore*). Under this approach the Fourth Circuit recently held that the Attorney General's interpretation of regulations regarding the practice of "administrative closure" was not entitled to *Skidmore* deference because "it represents a stark departure, without notice, from long-used practice and thereby cannot be deemed consistent with earlier and later pronouncements." Romero v. Barr, 937 F.3d 282, 297 (4th Cir. 2019).

310 *See Mead*, 533 U.S. at 228 & n.10.

311 *See id.* at 228 & n.9 (citing Reno v. Koray, 515 U.S. 50, 61 (1995)).

312 *See* Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

the government has little reason to try and change that system. Indeed, if political accountability is a reason to provide *Chevron* deference, that may just incentivize the agency to exert greater political influence on the adjudication process. Yet, one of the most vocal, sustained and broad-based criticisms of the immigration adjudication system is that it is overly politicized, to the point that it does not fairly resolve cases. A number of scholars, advocacy groups, and apolitical organizations like the American Bar Association have repeatedly called for Congress to make immigration courts independent, to remove immigration adjudication from the Justice Department, and to create a separate and apolitical immigration court system.[313] But if keeping that adjudication system within the Justice Department will result in more deferential *Chevron* review, the agency has good reason to fight against any change. If the Attorney General's decisions are reviewed more skeptically, then that reduces the inertia in favor of the status quo.[314]

CONCLUSION

The Attorney General has asserted for itself sweeping authority to issue binding interpretations of immigration law without providing any formal process to interested parties. These interpretations have overturned longstanding precedent, disrupted well-established procedural protections for non-citizens, and carry enormous implications for the hundreds of thousands of non-citizens in removal proceedings and their loved ones. At the same time that the Attorney General has claimed this broad power, it also has argued that the power is subject to only limited review by the courts, because the Attorney General's legal interpretations are entitled to *Chevron* deference. The Attorney General's attempt to further influence an already politically-fraught adjudication process should not be so easily sanctioned by the courts. Because none of *Chevron's* underlying rationales apply to Attorney General certification and review, the Attorney General's immigration decisions should not be analyzed under the *Chevron*

313 *See supra* notes 63–64 and accompanying text.

314 The well-documented flaws and breakdowns of the entire immigration adjudication process raise the broader question of whether the system is so dysfunctional that no immigration decisions, whether from the Attorney General, the BIA or otherwise, should receive *Chevron* deference. The applicability of *Chevron* to various types of immigration law has been attacked on a number of fronts, including detention, asylum, cases involving interpretation of criminal law, and cases implicating personal liberty. *See supra* note 25 and accompanying text. This Article joins that chorus of voices and hopefully provides more fuel for considering whether immigration should simply be removed from the *Chevron* framework entirely.

framework, but under the less-deferential *Skidmore* framework. Doing so will help discourage the Attorney General from bypassing traditional rulemaking procedures and from injecting improper political pressure into an ostensibly impartial adjudication process.