

ADJUDICATION BY FIAT: THE NEED FOR PROCEDURAL SAFEGUARDS IN ATTORNEY GENERAL REVIEW OF BOARD OF IMMIGRATION APPEALS DECISIONS

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The Attorney General enjoys broad authority to certify to himself and review de novo decisions of the Board of Immigration Appeals (BIA). Though sparingly used, the certification power is controversial, in part because it permits the Attorney General to announce new rules and overturn longstanding precedent without meaningful process. Under current regulations, the Attorney General is not required to provide even basic procedural protections in certified cases, and he has issued decisions without giving the parties notice of the issues under review or an opportunity for briefing. This Note argues that review of BIA decisions without meaningful procedural safeguards implicates serious due process concerns, raises questions about the quality and accuracy of Attorney General decisions, and undermines the legitimacy and acceptability of immigration adjudication. To address these concerns, this Note proposes that the Attorney General promulgate regulations that require meaningful, adversarial participation by the parties and provide a transparent means of soliciting input from interested amici on issues of broad significance.

INTRODUCTION

On November 8, 2008, just a few months before he left office, Attorney General Michael Mukasey issued an opinion that reversed decades-old principles of immigration adjudication.¹ Exercising his power to review decisions of the Board of Immigration Appeals (BIA),² the Attorney General used a brief, unpublished BIA decision, *Silva-Trevino*, as a vehicle to completely rewrite longstanding precedent governing “crimes involving moral turpitude”³—a term of art

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¹ *Silva-Trevino*, 24 I. & N. Dec. 687 (AG 2008).

² 8 C.F.R. § 1003.1(h) (2009).

³ See *infra* Part I.D for a discussion of crimes involving moral turpitude and the precedent at issue in *Silva-Trevino*.

that plays a critical role in deportability determinations. The precedent at issue had not been questioned by either of the parties, and the Attorney General neither gave notice that he planned to reconsider it nor provided the parties an opportunity to brief or argue the issue, even though it had not been addressed below.⁴ Nonetheless, when Silva-Trevino moved for reconsideration in part on due process grounds, Mukasey responded with a one-paragraph denial that flatly rejected any due process concerns, stating only that “this matter was properly certified and decided in accordance with settled Department of Justice procedures,” and declaring that “there is no entitlement to briefing when a matter is certified for Attorney General review.”⁵

Of the more than 250,000 cases the immigration courts decide each year,⁶ between 30,000 and 46,000 are appealed to the BIA;⁷ of those, a mere handful are certified by the Attorney General for review.⁸ Certification is almost always controversial, in part because the Attorney General has used the certification power to announce new rules and overturn longstanding precedent, but also because he often does so in “a precipitous manner, without affording an adequate opportunity for parties and interested amici to provide full briefing of the serious issues involved.”⁹ The Attorney General’s authority on review is extraordinarily broad, and it is almost wholly unconstrained by procedural safeguards.¹⁰ The regulations governing certification require only that the Attorney General’s decision be stated in writing

⁴ See *infra* notes 67–79 and accompanying text for a complete discussion of the lack of procedural protections in *Silva-Trevino*.

⁵ Att’y Gen. Order No. 3034-2009 (Jan. 15, 2009) (on file with the *New York University Law Review*).

⁶ Between fiscal years 2004 and 2008, immigration courts completed between 259,963 and 324,044 cases annually. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at C3 (2009), available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

⁷ Since 2001, when the Board of Immigration Appeals’ caseload increased significantly, the BIA has resolved between 30,751 and 46,046 appeals per year. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK, at S2 (2004), available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf>; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, *supra* note 6, at S2.

⁸ Between 1999 and 2009, the Attorney General reviewed approximately seventeen BIA decisions and issued nineteen decisions, including three decisions regarding the BIA’s opinion in *R-A-*, 22 I. & N. Dec. 906 (BIA 1999), ranging from a low of zero in 2000 to a high of four per year in 2005 and 2008. See Attorney General and BIA Precedent Decisions, EOIR Virtual Law Library, http://www.usdoj.gov/eoir/vll/intdec/lib_indicetnet.html (last visited June 19, 2010) (archiving cases).

⁹ Letter from Lee Gelernt et al., ACLU Immigrants’ Rights Project, to Att’y Gen. Michael Mukasey (Oct. 6, 2008), available at http://www.aclu.org/pdfs/immigrants/mukasey_letter.pdf.

¹⁰ See *infra* Part I.C (discussing lack of constraints on this power).

and transmitted to the BIA or the Department of Homeland Security (DHS) for service upon the party affected.¹¹ They impose no requirement that the Attorney General give notice of the issues to be considered on review, provide an opportunity for the parties to be heard, or solicit input from amici on issues of broad significance. Whether the Attorney General invites briefing or even provides notice of the issues under consideration appears to depend on little more than whim: In some cases, both the parties and amici are given an opportunity to participate, while in other cases of equal import, the parties are provided neither sufficient notice nor an opportunity to be heard.¹²

I argue in this Note that, contrary to the Attorney General's pronouncement, there should be an entitlement to briefing and other procedural protections when the Attorney General certifies a matter for review. Review of BIA decisions without meaningful procedural safeguards implicates serious due process concerns, raises questions about the quality and accuracy of Attorney General decisions, and undermines the legitimacy and acceptability of immigration adjudication. I do not argue that Attorney General review itself is unnecessary or unlawful: Agency head review is a well-accepted means of ensuring policy coherence and political accountability within an agency,¹³ and it may be appropriate in the context of administrative immigration adjudication. I argue, rather, that when Attorney General review is used, it must adhere to basic tenets of fairness and due process and must be constrained by procedural safeguards spelled out in binding regulations.

In Part I, I consider agency head review generally, provide an overview of the ways in which the Attorney General has used his certification power in practice, and discuss the lack of procedural safeguards in the certification process in general and in *Silva-Trevino* specifically. In Part II, I address the constitutional and policy concerns associated with this lack of procedural safeguards, exploring first the due process rights of the individual litigants, and then turning to broader issues of fairness, legitimacy, and sound policy development. In Part III, I propose procedural safeguards that should be adopted through regulation to address these concerns. Specifically, I argue that

¹¹ 8 C.F.R. § 1003.1(h)(2) (2009).

¹² See *infra* Part I.C for examples and further discussion.

¹³ See Stephen H. Legomsky, *Learning To Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 458 (2007) (noting general acceptance of agency head review); see also Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 260–65 (1996) (describing agencies with appellate review boards whose decisions are subject to discretionary review by agency head).

the Attorney General should promulgate regulations that require notice to the parties and the public of his intent to certify a decision and the issues to be reviewed, an opportunity to object to certification, and an opportunity for the parties and amici to fully brief the issues under review.

I

ATTORNEY GENERAL REVIEW OF BIA DECISIONS

A. *Agency Head Review and the Certification Power*

For the vast majority of noncitizens undergoing removal proceedings, the BIA represents the highest level of administrative appeals. After an initial decision by an immigration judge, either party—the respondent immigrant or DHS—may appeal the decision to the BIA, and an immigrant may seek review of an adverse decision in a federal court of appeals. However, federal regulations permit the Attorney General to intervene in the administrative appeals process by certifying a BIA decision to himself or accepting referral of a BIA decision by DHS or the Board itself.¹⁴ Once a case has been referred, the BIA decision is no longer final and cannot be reviewed by a federal court or relied on as precedent;¹⁵ the decision issued by the Attorney General becomes the final agency decision and serves as precedent binding on future cases.¹⁶

That the Attorney General should retain power to review BIA decisions is not unreasonable: The BIA is part of the Department of Justice and therefore is subject to oversight by the Attorney General. Moreover, the BIA is not independently authorized by statute, but is rather the creation of the agency head—the Attorney General—who established the BIA through regulations and appoints the fifteen-member Board.¹⁷ Thus, although it exercises independent judgment in resolving appeals within its jurisdiction,¹⁸ the power exercised by the BIA in reviewing administrative adjudications originates in the Attorney General and is subject to his oversight and control.¹⁹

¹⁴ 8 C.F.R. § 1003.1(h)(1).

¹⁵ See *id.*; Att’y Gen. Order No. 2380-2001 (Jan. 19, 2001) (attached to E-L-H-, 23 I. & N. Dec. 700, 701 (AG 2004)).

¹⁶ 8 C.F.R. 1003.1(g).

¹⁷ See *id.* § 1003.1(a)(1) (establishing BIA within Executive Office of Immigration Review (EOIR) and describing its powers and jurisdiction).

¹⁸ See *id.* § 1003.1(d)(1)(ii) (ordering BIA to use independent judgment).

¹⁹ Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 289 (2002) (“[I]t follows from its establishment via delegated powers that the Board is subject to the control of the Attorney General.”).

Nor is agency head review in itself a controversial practice. Agency head or secretarial review of administrative adjudication is an accepted and relatively common arrangement within the administrative state.²⁰ Generally, agency head review is seen as a means of maintaining agency control over policy and achieving consistency and coherence in agency adjudications.²¹

Agency head review also permits executive branch control and provides for oversight of adjudicative policy decisions by a politically accountable official. Although we expect the BIA itself to function as a neutral adjudicatory body, the Department of Justice should be able to respond to changes in the executive administration; agency head review is one means of facilitating responsive policy changes. With retroactive effect and without the cumbersome notice-and-comment process required for rulemaking, Attorney General review can be a particularly efficient means of reversing course and implementing a new administration's policies.²² However, it is this very efficiency—the Attorney General's ability to swiftly and unilaterally reverse precedent and impose new legal standards—that makes the certification power a potentially dangerous tool and counsels in favor of strong procedural safeguards.²³

²⁰ Legomsky, *supra* note 13, at 458. *See generally* Weaver, *supra* note 13 (describing review structures of various agencies).

²¹ *See* Legomsky, *supra* note 13, at 458 (noting general acceptance of agency head review); Weaver, *supra* note 13, at 287–90 (detailing advantages of agency head review); *see also* Paul R. Verkuil et al., *Report for Recommendation 92-7: The Federal Administrative Judiciary*, in 1992 ADMIN. CONF. OF THE U.S. RECOMMENDATIONS AND REPS. 777, 1004 (1992) (describing agency review of administrative judges' decisions as means of retaining control over policy components of adjudicative decisionmaking). As Legomsky points out, the need for policy coherence is not particularly compelling in the context of Attorney General review of BIA decisions because en banc review by the BIA, rulemaking, and other mechanisms seem sufficient to ensure coherent and consistent policies. Legomsky, *supra* note 13, at 458.

²² *See* Justin Chasco, Comment, *Judge Alberto Gonzales? The Attorney General's Power To Overturn Board of Immigration Appeals' Decisions*, 31 S. ILL. U. L.J. 363, 378–79 (2007) (discussing ability of certification to “speed up the recognition of policy changes”).

²³ *See* Legomsky, *supra* note 13, at 461 (asserting that agency head review “permits a dangerous concentration of power in the hands of the individual”). Legomsky has argued that, despite the potential costs of the certification power, the Attorney General should retain the power to review BIA decisions. Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1382 (1986). At least one commentator, however, has posited that its costs outweigh its benefits and that the need for policy control could just as easily be met through other means. Chasco, *supra* note 22, at 382.

B. *Use of Attorney General Review To Effect Far-Reaching Policy Changes*

It is difficult to overstate the sweeping impact of Attorney General decisions. Although the Attorney General rarely exercises his authority to review BIA decisions,²⁴ averaging only about 1.7 certified decisions annually between 1999 and 2009,²⁵ the majority of his decisions produce significant changes in the law that directly affect whole classes of immigrants in removal proceedings.²⁶ The certification process is quite different from the routine, case-by-case review conducted by the BIA; it is a selective policymaking device that allows the Attorney General to assert control over the BIA and effect profound changes in legal doctrine.

The regulation authorizing Attorney General review does not specify when or under what circumstances certification is appropriate.²⁷ In practice, however, the certification power is used most frequently to announce new or changed legal rules or to advance policy goals of the Attorney General.²⁸ The power has been used to reconsider and reverse longstanding BIA precedent;²⁹ to reverse new BIA precedent;³⁰ to reverse a nonprecedent BIA decision and set a prece-

²⁴ Taylor, *supra* note 19, at 290 & n.104 (2002) (estimating that Attorney General's review authority has been exercised few times each year).

²⁵ Attorney General (AG) decisions are not collected separately in any publicly available location. I located AG opinions by reviewing both BIA and AG opinions published at the Executive Office for Immigration Review (EOIR) Virtual Law Library at http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html (last visited June 19, 2010). Not all of the opinions listed are correctly labeled, however; a number are listed as BIA decisions but are actually Attorney General opinions. Thus, while I believe I have located all the AG decisions published between 1999 and 2009, it is possible that my list is not entirely complete.

²⁶ See *infra* notes 38–42 and accompanying text (discussing types of cases involved in Attorney General reviews). The majority of Attorney General decisions rendered in the past ten years have overruled new or existing BIA precedent, replaced a case-by-case approach with a uniform rule, or attempted to resolve a circuit split.

²⁷ 8 C.F.R. § 1003.1(h)(1) (2009); see Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 484 n.35 (2008) (“The regulation does not specify any substantive criteria for referral.”).

²⁸ See Kevin R. Johnson, *A “Hard Look” at the Executive Branch’s Asylum Decisions*, 1991 UTAH L. REV. 279, 301 n.91 (discussing AG discretionary review, which generally resolves legal questions but raises issues of politicization).

²⁹ See, e.g., *Compean*, 24 I. & N. Dec. 710, 712 (AG 2009) (overruling BIA precedent decisions governing reopening of removal proceedings on grounds of ineffective assistance of counsel), *vacated*, 25 I. & N. Dec. 1 (AG 2009); *J-S-*, 24 I. & N. Dec. 520, 520 (AG 2008) (overruling BIA precedent decisions that held that spouses of persons subjected to forced abortion or sterilization are per se entitled to refugee status).

³⁰ See, e.g., *A-T-*, 24 I. & N. Dec. 617, 617–18 (AG 2008) (reversing BIA precedent decision denying withholding of removal to woman previously subjected to female genital mutilation); *Soriano*, 21 I. & N. Dec. 533, 534 (AG 1997) (reversing BIA precedent decision on retroactivity of amendments to Immigration and Nationality Act).

dential standard for evaluating an issue;³¹ to vacate BIA precedent so that the issue may be resolved through another policy mechanism;³² and to articulate an agency position in response to a request for briefing by a federal court of appeals.³³ Most striking, perhaps, is the use of the certification power to articulate a uniform agency position in the face of a circuit split.³⁴ When confronted with a split in circuit precedent, the BIA defers to the federal courts of appeals and follows the law of a given circuit in cases arising within that circuit, even if the BIA disagrees with that particular court's precedent.³⁵ The Attorney General, in contrast, has actually reached out to *resolve* circuit splits from below,³⁶ operating as a kind of administrative Supreme Court and asserting that his position merits *Chevron* deference by federal courts.³⁷

³¹ See, e.g., D-J-, 23 I. & N. Dec. 572, 573–74 (AG 2003) (requiring consideration of broad national security interests in bond determinations); Y-L-, 23 I. & N. Dec. 270, 273–74 (AG 2002) (rejecting prior case-by-case approach to “particularly serious crime” determinations).

³² See, e.g., R-A-, 22 I. & N. Dec. 906, 906 (AG 2001) (vacating and staying BIA decision pending publication of final rule through notice-and-comment rulemaking process). It also appears that Attorney General Reno's vacatur of the BIA's decision in N-J-B-, 21 I. & N. Dec. 812 (AG 1997), was intended to permit resolution of the issue by Congress. See *INS Instructs on Handling Suspension Cases Following the Vacating of N-J-B-*, IMMIGRANT RIGHTS UPDATE (Nat'l Immigr. L. Ctr., Los Angeles, Cal.), Aug. 29, 1997, at 3, available at <http://www.nilc.org/pubs/iru/1997/iru6-97.pdf> (reporting Clinton administration's plan to introduce legislation on point following vacatur).

³³ In *J-S-*, the BIA's decision had been appealed to the Third Circuit, and the Third Circuit had requested briefing by the Attorney General regarding DOJ's position on prior BIA precedent that had been applied in *J-S-*. See *J-S-*, 24 I. & N. Dec. 520, 523 (AG 2008) (noting Third Circuit's request). Rather than briefing the issue, the Attorney General certified the case and overruled the BIA precedent. See *id.* (reporting Attorney General Gonzales's certification order).

³⁴ *Compean*, 24 I. & N. Dec. 710, 713 (AG 2009) (overruling BIA precedent and articulating uniform agency decision in face of circuit splits), *vacated*, 25 I. & N. Dec. 1 (AG 2009); *Silva-Trevino*, 24 I. & N. Dec. 687, 693–95 (AG 2008) (replacing former BIA approach with novel, uniform standard in face of circuit splits).

³⁵ See *Anselmo*, 20 I. & N. Dec. 25, 31–32 (1989) (discussing this practice and giving examples).

³⁶ In his now-vacated decision in *Compean*, for instance, Attorney General Mukasey asserted that circuit splits on the right to effective assistance of counsel in removal proceedings had forced the BIA to apply a patchwork of different rules to motions for reopening based on ineffective assistance claims. *Compean*, 24 I. & N. Dec. at 713. He then proceeded to both resolve the constitutional issue and articulate a uniform standard for discretionary reopening based on claims of deficient performance. *Id.* at 714. In a footnote, he instructed the BIA to apply this standard across the board, even in circuits that recognized a right to effective assistance in removal proceedings, so that those circuits could “reconsider the question (en banc if necessary).” *Id.* at 730 n.8.

³⁷ *Silva-Trevino* not only purported to resolve an existing circuit split, but also implied that the federal courts should defer to the standard articulated by the Attorney General upon review. *Silva-Trevino*, 24 I. & N. Dec. 687, 689 n.1, 695–96 (AG 2008).

Substantively, the Attorney General tends to use the certification power to articulate new legal rules that affect broad classes of noncitizens and directly impact their chances of remaining in the country or securing effective representation in immigration court. Attorney General decisions have determined critically important legal issues such as: the standard for determining whether a conviction constitutes a crime involving moral turpitude;³⁸ the retroactivity of amendments to the Immigration and Nationality Act (INA);³⁹ the right to effective assistance of counsel in removal proceedings;⁴⁰ whether an expunged state conviction constitutes a “conviction” for purposes of the INA;⁴¹ and the meaning of “particularly serious crime.”⁴² Given that the immigration courts decide more than 250,000 cases annually,⁴³ these categorical rulings by the Attorney General likely affect thousands of immigrants every year.

C. Lack of Prescribed Process

This Note does not argue that use of Attorney General certification in these contexts is necessarily inappropriate, but rather that, when it is used, the Attorney General’s power of review must be constrained by basic procedural safeguards. As should be apparent from the description of cases subject to Attorney General review, the certification power is extraordinarily broad. Not only does the Attorney General have discretion to review any of the 30,000 BIA cases decided annually, but, when he does so, he views his review power as plenary,⁴⁴ extending to *de novo* review of law and facts and unconstrained by regulations that bind the BIA. Attorney General Ashcroft’s statement in *D-J-* is illustrative: “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 [Immigration Judge] and BIA are superseded and I am authorized to make the determination based on my own conclusions on the facts and the law.”⁴⁵

As it stands now, this plenary review power is not limited by any requirement that a particular process be followed or that the parties or the public be given proper notice and an opportunity for meaningful participation in the review process. The unconstrained nature of

³⁸ Silva-Trevino, 24 I. & N. Dec. 687 (AG 2008).

³⁹ Soriano, 21 I. & N. Dec. 516 (AG 1997).

⁴⁰ Compean, 24 I. & N. Dec. 710 (AG 2009), *vacated*, 25 I. & N. Dec. 1 (AG 2009).

⁴¹ Luviano, 23 I. & N. Dec. 718 (AG 2005).

⁴² Y-L-, 23 I. & N. Dec. 270 (AG 2002).

⁴³ See *supra* note 6 (citing statistics on number of immigration cases processed annually).

⁴⁴ See J-S-, 24 I. & N. Dec. 520, 531 (AG 2008) (asserting plenary review).

⁴⁵ D-J-, 23 I. & N. Dec. 572, 575 (AG 2003).

Attorney General review is particularly troubling given that the issues considered upon certification are often politically charged, especially those involving asylum claims,⁴⁶ and thus potentially vulnerable to politically driven decisionmaking.⁴⁷ Attorneys General have been known to issue decisions just weeks or even days before the end of their terms, suggesting that at least some have used certification to cement policy goals before leaving office.⁴⁸ Advocates have also speculated that the Attorney General may receive inappropriate assistance from the Office of Immigration Litigation (OIL)⁴⁹ in cherry-picking cases for certification that present facts favorable to OIL's prosecutorial agenda or the Attorney General's political objectives.⁵⁰

⁴⁶ See Legomsky, *supra* note 13, at 462 (“[I]n the asylum context . . . the stakes are high and the potential for inappropriate political and ideological influence has been amply demonstrated.”). At least eight of the nineteen Attorney General decisions issued between 1999 and 2009 involved issues relating to forms of relief for citizens fleeing persecution in their home countries, such as asylum, withholding of removal, or relief under the Convention Against Torture. See R-A-, 24 I. & N. Dec. 629 (AG 2008) (asylum); A-T-, 24 I. & N. Dec. 617 (AG 2008) (withholding of removal); J-S-, 24 I. & N. Dec. 520 (AG 2008) (asylum); S-K-, 24 I. & N. Dec. 289 (AG 2007) (asylum); J-F-F-, 23 I. & N. Dec. 912 (AG 2006) (Convention Against Torture); A-H-, 23 I. & N. Dec. 774 (AG 2005) (asylum and withholding of removal); R-A-, 23 I. & N. Dec. 694 (AG 2005) (asylum); C-Y-Z-, 23 I. & N. Dec. 693 (AG 2004) (asylum).

⁴⁷ See Legomsky, *supra* note 13, at 462 (“[A]gency head review poses inherent dangers to the dispensation of justice, including especially the substitution of a political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law.”).

⁴⁸ For instance, Attorney General Mukasey issued his decision in *Compean*—a decision that arguably reflected the Bush administration's view on the right to effective assistance of counsel in removal proceedings—less than two weeks before the Obama administration took office. *Compean*, 24 I. & N. Dec. 710 (AG 2009), *vacated*, 25 I. & N. Dec. 1 (AG 2009). Attorney General Holder vacated this decision less than six months later. *Compean*, 25 I. & N. Dec. 1 (AG June 3, 2009). Even more strikingly, Attorney General Ashcroft issued a total of *six* decisions in the two months before he left office, including a number of cases that had been referred for review years earlier. A-H-, 23 I. & N. Dec. 774 (AG 2005) (referred by Immigration and Naturalization Service (INS) in 2001 and decided one month before Ashcroft left office); Luviano, 23 I. & N. Dec. 718 (AG 2005) (referred by INS in 1996 and decided less than one month before Ashcroft left office); Marroquin, 23 I. & N. Dec. 705 (AG 2005) (referred by BIA in 1997 and decided less than one month before Ashcroft left office); E-L-H-, 23 I. & N. Dec. 700 (AG 2004) (referred by INS after 1998 BIA decision and decided about two months before Ashcroft left office); R-A-, 23 I. & N. Dec. 694 (AG 2005) (initially decided and remanded to BIA by Attorney General Reno in 2001; reconsidered and remanded back to BIA by Ashcroft several weeks before he left office); C-Y-Z-, 23 I. & N. Dec. 693 (AG 2004) (referred by INS after 1997 BIA decision and review declined by Attorney General Ashcroft about two months before he left office).

⁴⁹ OIL, which is part of the U.S. Department of Justice, represents the government in immigration proceedings on review before the courts of appeals. For a more detailed discussion of OIL's participation in Attorney General decisions, see *infra* notes 135–44 and accompanying text.

⁵⁰ Amici urging reconsideration of *Silva-Trevino* noted the unlikelihood that the Attorney General would have identified this particular unpublished BIA decision (along

In this context, the lack of procedural requirements for Attorney General certification results in haphazard, secretive, and sometimes politicized review, with process determined by the Attorney General in an ad hoc, case-by-case manner. In some cases, the Attorney General has provided a more transparent, participatory process by setting a briefing schedule and inviting supplemental briefing by the parties and amici following certification.⁵¹ In other instances, the Attorney General has used the certification power to vacate a decision of the BIA, and then proceeded through the rulemaking process to propose new regulations, thereby providing for notice and comment on the issue.⁵² In other cases, however, the Attorney General has failed to provide adequate opportunities for interested parties to brief or argue the issues under consideration⁵³ and at times has failed even to inform the parties to the case of the issues to be considered upon review.⁵⁴

with the conveniently unsympathetic facts of Mr. Silva-Trevino's criminal conviction), among the 30,000 decided each year, without some assistance, particularly given that the case did not raise the issues considered by the Attorney General and had been remanded to the immigration court long before it was certified. Memorandum of Law of Amici Curiae American Immigration Lawyers Ass'n et al. in Support of Reconsideration at 9–10, Silva-Trevino, 24 I. & N. Dec. 687 (AG 2008) (No. A013 014 303), available at <http://www.aila.org/content/default.aspx?docid=27391> [hereinafter Memorandum in Support of Reconsideration]. They speculate that OIL may have recommended certification of the case in order to shore up its own litigation position and may have presented its views to the Attorney General.

⁵¹ See, e.g., *Compean*, 24 I. & N. Dec. 710, 712–13, 714 n.1 (AG 2009) (noting invitation for briefing by parties and interested amici), *vacated*, *Compean*, 25 I. & N. Dec. 1 (AG 2009); *J-S-*, 24 I. & N. Dec. at 523 (noting that certification order directed parties to submit briefs and that Attorney General also received briefs from two amici). However, even when the parties and interested amici are given some opportunity to be heard, the process provided has not always been open or transparent. For instance, the Attorney General's order certifying *Compean* requested amicus briefing but was provided only to the petitioner and was not made publicly available. Only after the Executive Office for Immigration Review contacted a limited number of organizations did the certification and request for briefing become more widely known. See Letter from Lee Gelernt et al., *supra* note 9 (objecting to lack of transparency and inadequate opportunity for amicus briefing in certification process). Notably, on June 3, 2009, Attorney General Holder vacated Mukasey's decision in *Compean*, stating that he did "not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice." *Compean*, 25 I. & N. Dec. at 2.

⁵² E.g., *R-A-*, I. & N. Dec. 906, 906 (AG 2001); see also *Compean*, 25 I. & N. Dec. at 2–3 (vacating Mukasey's prior decision and ordering rulemaking).

⁵³ The majority of Attorney General opinions give no indication that the parties or amici had an opportunity for briefing or argument.

⁵⁴ This was the case in *Silva-Trevino*. See Memorandum in Support of Reconsideration, *supra* note 50, at 8 (discussing failure of Attorney General to notify respondent of issues to be considered upon review).

D. *The Silva-Trevino Decision*

Silva-Trevino illustrates the extent to which Attorney General review, unconstrained by basic procedural requirements, can interfere with the due process rights of litigants and bypass the participatory, adversarial process we normally demand for decisions of significant import. The case involved Mr. Cristoval Silva-Trevino, a Mexican citizen and father to six U.S. citizen children who had resided in the United States as a lawful permanent resident since 1962.⁵⁵ In 2004, Silva-Trevino entered a plea of no contest to “indecentcy with a child” under Texas state law and was fined \$250, placed under community supervision for five years, and ordered to attend sex offender counseling.⁵⁶ More serious consequences followed a year later, when DHS initiated removal proceedings against Mr. Silva-Trevino based on his Texas conviction.⁵⁷

Silva-Trevino’s immigration case turned largely on the standard for determining whether a state criminal conviction constitutes a “crime involving moral turpitude”⁵⁸ (CIMT). For Silva-Trevino, this determination was critical, for conviction of a CIMT can bar removable immigrants from seeking certain forms of discretionary relief from deportation.⁵⁹ In his case, if the Texas crime properly constituted a CIMT, deportation was a certainty. If it were not a CIMT, Silva-Trevino could present evidence of his ties to the community and ask the judge to exercise discretion in his favor.

The federal definition of a CIMT is “nebulous,” but generally refers to conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality.”⁶⁰ CIMT determinations present a recurring difficulty in immigration law: A CIMT is defined by *federal* law, but immigration judges must ultimately determine whether a conviction under *state* criminal law, which usually makes no reference to the term “moral turpitude,” fits within the federal definition. For instance, Silva-Trevino was convicted under a Texas statute that defines “sexual contact” and sets out the circumstances under which such contact is criminal, but does not require proof of “moral turpitude” or otherwise define the crime as one “involving moral tur-

⁵⁵ Brief for Respondent at 1, *Silva-Trevino*, No. A 013 014 303 (BIA May 3, 2006) (unpublished opinion) (on file with the *New York University Law Review*).

⁵⁶ See *Silva-Trevino*, 24 I. & N. Dec. 687, 690–91 (AG 2008) (describing relevant facts).

⁵⁷ *Id.* at 691.

⁵⁸ 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006).

⁵⁹ In *Silva-Trevino*’s case, conviction of a CIMT rendered him “inadmissible,” *id.* § 1182(a)(2)(A), which in turn made him ineligible for discretionary relief from removal through adjustment of status under 8 U.S.C. § 1255(a). See *Silva-Trevino*, 24 I. & N. Dec. at 691 (explaining legal framework).

⁶⁰ Lopez-Meza, 22 I. & N. Dec. 1188, 1191–92 (BIA 1999).

pitude.”⁶¹ Thus, a court must engage in some sort of analysis to determine whether the state conviction can be considered a CIMT. In doing so, the BIA and courts of appeals have long held that they should “refer *only* to the statutory definition of the crime for which the alien was convicted (rather than attempt to reconstruct the concrete facts of the actual criminal offense) and ask whether that legislatively-defined offense necessarily fits within the INA definition.”⁶² This “categorical approach” protects both immigrants and immigration courts from the “practical difficulties and fairness problems” that would arise if immigrants were required to relitigate the facts underlying their state convictions in removal proceedings.⁶³

Mr. Silva-Trevino’s case came before the BIA in 2006, after an Immigration Judge (IJ) found Silva-Trevino removable and ruled further that his Texas conviction for “indecency with a child” constituted a CIMT.⁶⁴ At the time, longstanding Fifth Circuit precedent took a categorical approach to CIMT determinations and required the IJ to determine whether the minimum conduct necessary to sustain a conviction under the Texas statute would constitute a CIMT.⁶⁵ If even the least culpable conduct criminalized under the Texas statute constituted a CIMT, then presumably *all* conduct resulting in conviction would also be a CIMT, including Silva-Trevino’s. Therefore, any conviction under the statute could categorically be deemed a CIMT. If, on the other hand, the statute covered some less culpable conduct that would not qualify as a CIMT, then it would not be possible to find Silva-Trevino’s conviction a CIMT without looking beyond the legislatively defined crime to the facts underlying his conviction, an inquiry prohibited under the Fifth Circuit’s categorical approach.⁶⁶

⁶¹ *Silva-Trevino*, 24 I. & N. Dec. at 690.

⁶² *Patel v. Mukasey*, 526 F.3d 800, 802 (5th Cir. 2008) (quoting *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 463 (5th Cir. 2006)).

⁶³ *Id.*

⁶⁴ *Silva-Trevino*, 24 I. & N. Dec. at 691.

⁶⁵ *See, e.g., Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 320 (5th Cir. 2005) (citing *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982)); *Hamdan v. INS*, 98 F.3d 183, 189 (5th Cir. 1996)).

⁶⁶ Under then-existing Fifth Circuit precedent, if the statute of conviction explicitly defined multiple offenses (for instance, through subsections of the statute) that could be divided into CIMT and non-CIMT conduct, the court applied a “modified” categorical approach. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir. 2006). Under the modified categorical approach, the court could look to the record of conviction (a limited range of official documents) to determine whether the immigrant was convicted under a subsection of the statute that encompassed only CIMT conduct. *Id.* The modified approach was not relevant in Silva-Trevino’s case. Prior to *Silva-Trevino*, the circuits applied slight variations of both the categorical approach and the modified categorical approach. *See, e.g., Silva-Trevino*, 24 I. & N. Dec. 687, 688 (AG 2008) (noting that each federal court of appeals applies categorical and modified categorical approaches, but that they do not apply them

In their briefs before the BIA, neither Silva-Trevino nor DHS contested the Fifth Circuit CIMT standard. In its three-paragraph memorandum, DHS put forth no arguments at all,⁶⁷ and Silva-Trevino argued simply that the IJ had incorrectly applied Fifth Circuit law by failing to consider whether the least culpable conduct covered by the Texas statute qualified as a CIMT.⁶⁸ The BIA agreed with Silva-Trevino, finding that the Texas conviction did not constitute a CIMT under existing Fifth Circuit law because the statute covered a broad range of both CIMT and non-CIMT conduct.⁶⁹ Accordingly, on August 8, 2006, the Board reversed the IJ in an unpublished, non-precedent opinion⁷⁰ and remanded the case to allow the IJ to consider Silva-Trevino's claim for discretionary relief from deportation.⁷¹

Then, on August 8, 2007, a full year after the BIA remanded his case and while Silva-Trevino was still seeking adjudication of his claim for relief, his counsel received notice from the BIA that the Attorney General had certified the BIA's decision.⁷² The notice stated only that the Attorney General had referred the decision to himself a month earlier, on July 7, 2007, and provided a copy of the Attorney General's one-paragraph order.⁷³ The accompanying letter gave no indication of the reasons for the referral, the issues to be considered on review, or

uniformly); Velazquez-Herrera, 24 I. & N. Dec. 503, 515 (BIA 2008) (“[By 1996,] different variations of the ‘categorical’ approach had been applied in immigration proceedings for more than 80 years . . .”).

⁶⁷ On appeal, DHS filed a three-paragraph memorandum merely stating its view that the IJ's decision correctly set out the facts and applicable law in the case. U.S. Department of Homeland Security Bureau of Immigration and Customs Enforcement's Memorandum in Support of the Decision of the Immigration Judge, Silva-Trevino, No. A013 014 303 (BIA Apr. 26, 2006) (on file with the *New York University Law Review*).

⁶⁸ Brief for Respondent at 5, Silva-Trevino, No. A013 014 303 (BIA May 3, 2006) (on file with the *New York University Law Review*).

⁶⁹ Silva-Trevino, No. A013 014 303, at 4 (BIA Aug. 8, 2006).

⁷⁰ Regulations permit the BIA to select decisions to serve as precedents. 8 C.F.R. § 1003.1(g) (2009). In fiscal year 2006, the Board completed appeals of 36,350 IJ decisions. U.S. DEPT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2006 STATISTICAL YEAR BOOK, at S2 (2007), available at <http://www.justice.gov/eoir/statspub/fy06syb.pdf>. During the 2006 calendar year, the BIA selected only twenty-six decisions to serve as precedent. See Attorney General and BIA Precedent Decisions, EOIR Virtual Law Library, http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html (last visited July 3, 2010).

⁷¹ *Silva-Trevino*, 24 I. & N. Dec. at 692.

⁷² Memorandum in Support of Reconsideration, *supra* note 50, at 5.

⁷³ The Attorney General's order reads in full: “Pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2003), I direct the Board of Immigration Appeals to refer to me for review its decision in *Matter of Cristoval Silva-Trevino*, A13 014 303 (BIA 2006). The Board decision in this matter is automatically stayed pending my review. See *Matter of Haddam*, AG Order No. 2380-2001 (Jan. 19, 2001).” Silva-Trevino, AG Order No. 2889-2007 (July 10, 2007).

any briefing schedule or procedures to be followed.⁷⁴ Silva-Trevino's counsel sent inquiries to all of the addresses listed on the notice, requesting information about the reason for referral and the status of the order, but he received no response.⁷⁵

After three months of silence on the matter, the Attorney General issued a twenty-two page precedent opinion that reversed the BIA and completely rewrote the approach—never challenged below—used by the BIA and federal courts of appeals to determine whether a state criminal conviction constitutes a CIMT.⁷⁶ The Attorney General's sweeping opinion eviscerated the categorical approach that had been used for decades, in slightly varying forms, not only in the Fifth Circuit, but also throughout the federal courts of appeals.⁷⁷ In doing so, Mukasey rejected a time-tested standard that had protected immigrants by preventing relitigation of the facts underlying a conviction and permitting removal only where an immigrant has "actually or necessarily pleaded to the elements of a removable offense."⁷⁸ In its place, the Attorney General adopted a "realistic probability" inquiry, which places a greater burden of proof upon immigrants.⁷⁹ In addition, the opinion permitted immigration judges to inquire into evidence beyond the formal record of conviction, which would likely require relitigation of facts and increase the likelihood that a conviction will be deemed a CIMT.⁸⁰

The Attorney General articulated this new standard—binding on all future litigants and likely to result in increased removal of lawful permanent residents—without the benefit of briefing and without pro-

⁷⁴ Letter from Veronica Rubi, Senior Legal Advisor, Executive Office for Immigration Review, to Jaime M. Diez, Esq., Counsel for Cristoval Silva-Trevino (Aug. 8, 2007) (on file with the *New York University Law Review*).

⁷⁵ Memorandum in Support of Reconsideration, *supra* note 50, at 6.

⁷⁶ *Silva-Trevino*, 24 I. & N. Dec. at 688–90 (describing "new" approach for CIMT determinations).

⁷⁷ Memorandum in Support of Reconsideration, *supra* note 50, at 13–14; *see also* Jean-Louis v. Att'y Gen., 582 F.3d 462, 471 (3d Cir. 2009) ("*Silva-Trevino* eschews our approach of analyzing the least culpable conduct hypothetically sufficient to sustain conviction [and] renders the strict 'categorical' approach not 'categorical.'").

⁷⁸ *Dulal-Whiteway v. DHS*, 501 F.3d 116, 132–33 (2d Cir. 2007).

⁷⁹ *See Silva-Trevino*, 24 I. & N. Dec. at 689–90 (rejecting categorical approach in favor of novel realistic probability inquiry).

⁸⁰ The Attorney General's new approach first asks whether there is a "realistic probability" that a state statute would be applied to reach non-CIMT conduct. If that analysis fails to determine whether the statute in question is a CIMT, then the IJ may look at evidence beyond the formal record of conviction to "discern the nature of the underlying conviction," an examination not permitted under the modified categorical approach previously employed by the BIA and courts of appeals. *Id.* at 690. Furthermore, the immigrant would bear the burden of showing a "realistic probability" that the statute would be applied to non-CIMT conduct. *Id.* at 703 n.4.

viding even minimal notice and opportunity to be heard. In effect, he issued a rule by fiat, with no input from those directly affected or from those concerned with the broader effects on the thousands of immigrants likely to be bound by the decision.

It may be that *Silva-Trevino* represents an extreme instance of processless Attorney General review. Yet as long as Attorney General review remains unregulated and unconstrained by procedural requirements, cases like *Silva-Trevino* can, and likely will, occur. Part II considers the constitutional and policy-based concerns raised by such processless review and explains why the Attorney General should impose procedural constraints on the certification process.

II

CONSTITUTIONAL AND POLICY-BASED CONCERNS WITH AD HOC ATTORNEY GENERAL REVIEW

A. *Constitutional Requirements of Due Process in Removal Proceedings*

Noncitizens residing in the United States—and particularly lawful permanent residents like Mr. Silva-Trevino—are entitled to due process of law in any proceeding held to expel them from the country.⁸¹ The Supreme Court has long held that noncitizens in the United States—“lawful, unlawful, temporary, or permanent”—have due process rights in removal proceedings,⁸² and courts have repeatedly held that the immigrant’s private interest in the right “to stay and live and work in this land of freedom” is, “without question, a weighty one.”⁸³

⁸¹ Although it is true that the law envisions a spectrum of due process rights for noncitizens that vary depending on circumstances and status, *see, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001) (distinguishing rights of aliens in United States from those stopped at border); *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982) (distinguishing rights of those seeking first admission from those who have been admitted previously), I conduct the following due process analysis with reference to the most common cases reviewed—that is, those of resident noncitizens and lawful permanent residents, who are entitled to relatively strong due process protections. *See, e.g.*, *Compean*, 24 I. & N. Dec. 710, 714–15 (AG 2009) (involving noncitizens resident in United States for fifteen, five, and three years), *vacated*, *Compean*, 25 I. & N. Dec. 1 (AG 2009); *Silva-Trevino*, 24 I. & N. Dec. 687, 690 (AG 2008) (involving lawful permanent resident); *A-T-*, 24 I. & N. Dec. 296, 296 (BIA 2007) (involving noncitizen resident in United States for four years), *vacated*, 24 I. & N. Dec. 617 (AG 2008); *Marroquin*, 23 I. & N. Dec. 705, 706 (AG 2005) (involving lawful permanent resident). This is consistent with the general approach to the process due in a given proceeding, which must be evaluated “not merely with reference to a single case, but having in mind the type of case it is, with regard to the run of such cases.” *Rafeedie v. INS*, 880 F.2d 506, 524 (D.C. Cir. 1989) (citing *Santosky v. Kramer*, 455 U.S. 745, 761–68 (1982)).

⁸² *See Zadvydas*, 533 U.S. at 693 (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

⁸³ *Landon*, 459 U.S. at 34 (citation omitted).

For that reason, despite the government's strong interest in efficient administration of immigration laws and its "sovereign prerogative" in immigration matters,⁸⁴ the Supreme Court has ruled that the Constitution entitles noncitizens facing deportation to a hearing before an immigration judge that comports with traditional standards of fairness and due process.⁸⁵ These due process protections also extend to appeals of deportation orders before the BIA.⁸⁶

The Supreme Court has identified notice and an opportunity to be heard as "elementary and fundamental requirement[s]" of due process,⁸⁷ and, accordingly, the right to meaningful notice and opportunity to be heard in appeals before the BIA is generally quite robust.⁸⁸ Immigrants before the BIA must be given adequate notice of appeals procedures and sufficient information to allow them to prepare and present their arguments.⁸⁹ This means not only that they must be advised of general procedural requirements for filing an appeal and avoiding summary dismissal, but also that they must receive notice of a briefing schedule so that they are able to timely file written arguments.⁹⁰ If, after briefs have been filed, the BIA takes notice of new facts that could prove dispositive of the case, the immigrant must be afforded advance notice and an opportunity to be heard on the significance of the new facts asserted.⁹¹ Similarly, if the BIA seeks to affirm an IJ decision on grounds not relied upon below, the immigrant must be provided notice and an opportunity to address the reasons raised

⁸⁴ *Id.*

⁸⁵ See, e.g., *id.* at 32 (reviewing precedent suggesting that "continuously present resident alien is entitled to a fair hearing when threatened with deportation"); *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 212 (1953) ("[Individuals] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

⁸⁶ *Martinez-De Bojorquez v. Ashcroft*, 365 F.3d 800, 803–04 (9th Cir. 2004) ("The protections of the Due Process Clause extend to the ability of aliens to seek review of deportation orders entered by immigration judges with the BIA.").

⁸⁷ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁸⁸ BIA regulations do, however, permit summary dismissals of appeals and affirmance without opinion in certain circumstances. 8 C.F.R. § 1003.1(d)(2), (e)(4) (2009).

⁸⁹ *Padilla-Agustin v. INS*, 21 F.3d 970, 974–77 (9th Cir. 1994) (finding due process violation where BIA failed to provide adequate notice of potential for summary dismissal of appeal and procedures required to avoid dismissal), *overruled on other grounds by Stone v. INS*, 514 U.S. 386, 405 (1995).

⁹⁰ *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (finding due process violation where BIA failed to give petitioner notice of briefing schedule sufficient to enable him to present brief).

⁹¹ See, e.g., *De la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994) (finding due process violation where BIA took notice of changed country conditions without providing "advance notice and an opportunity to be heard").

by the BIA.⁹² These requirements ensure that noncitizens have a meaningful opportunity to present their case and to address all potentially dispositive issues, whether raised before the IJ or by the BIA sua sponte.

The process afforded by the Attorney General upon certification has at times departed significantly from the “elementary and fundamental” requirements of due process described above. Silva-Trevino, for instance, may have received some minimal notice of the pendency of the certified action,⁹³ but he never received notice of the issues to be considered on review and had no reason to anticipate that the Attorney General would undertake a wholesale reconsideration of the standard governing CIMTs. He was given no indication of the procedures to be followed in presenting his argument, nor was he advised of any briefing schedule. Although the Attorney General raised issues never considered before either the IJ or the BIA and reversed the BIA based not only on different grounds, but also on a wholly new legal standard, Silva-Trevino had no opportunity to be heard on these issues. Under the due process standards for appeals before the BIA, therefore, the Attorney General’s actions clearly fall short of providing adequate procedural protections.

It is not entirely clear, however, that Attorney General review demands the same level of procedural protections guaranteed to immigrants before the BIA. There is very little authority on the process required when an agency head reviews the decision of an intermediate appellate review board. Because “[d]ue process is flexible and calls for such procedural protections as the particular situation demands,”⁹⁴ the process due is likely to vary depending on the particular agency arrangement.⁹⁵ In the immigration context, few federal court decisions do more than merely cite the certification regulation in passing, simply noting the Attorney General’s review authority.⁹⁶ The

⁹² See, e.g., *Pierre v. Holder*, 588 F.3d 767, 776–77 (2d Cir. 2009) (finding due process violation where BIA affirmed on grounds raised sua sponte without affording notice and opportunity to be heard); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) (finding due process violation where BIA denied appeal based solely on adverse credibility determination not raised before IJ and petitioner was given no opportunity to contest determination).

⁹³ See *supra* notes 73–74 and accompanying text (describing Attorney General’s single paragraph order giving notice of certification).

⁹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

⁹⁵ The constitutional analysis that follows is specific to the particular interests and risks involved in Attorney General review of BIA decisions and is not intended to apply to agency head review outside of this context.

⁹⁶ See, e.g., *Yusupov v. Att’y Gen.*, 518 F.3d 185, 199 n.22 (3d Cir. 2008) (noting that Attorney General overruled BIA decision); *Wood v. Mukasey*, 516 F.3d 564, 569 (7th Cir.

Supreme Court appears to have considered the certification power only once, in *INS v. Doherty*,⁹⁷ but its opinion focused on the scope of the Attorney General's discretionary authority to deny motions to reopen and does not address procedural concerns.⁹⁸ Nor do federal courts actually reviewing decisions issued by the Attorney General provide guidance. In *Jean v. Gonzalez*, for instance, the Fifth Circuit considered a case not unlike *Silva-Trevino*, in which the Attorney General unilaterally "create[d] and impose[d] a heightened standard in Jean's case by adding a factor to be considered" in deciding a claim for discretionary relief.⁹⁹ Yet the Fifth Circuit opinion, like other appellate decisions, simply does not touch on procedural issues.

B. *Mathews Analysis of Process Due*

How, then, should we evaluate the Attorney General's claim that "there is no entitlement to briefing when a matter is certified for Attorney General review"?¹⁰⁰ In immigration proceedings, courts evaluating the constitutional sufficiency of procedural protections turn to the three-part balancing test developed by the Supreme Court in *Mathews v. Eldridge*¹⁰¹:

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.¹⁰²

The Court initially developed the *Mathews* test to determine whether due process requires an evidentiary hearing prior to termination of public benefits. The test is most often used to evaluate procedures required to ensure accurate factfinding.¹⁰³ It may seem odd, therefore, to apply *Mathews* to the certification context, where legal and policy issues are most often at stake. The Court, however, has

2008) (noting that BIA has "last word on issues of discretion," assuming no intervention by Attorney General).

⁹⁷ 502 U.S. 314 (1992).

⁹⁸ The Second Circuit decision had in fact alluded to procedural concerns, *see Doherty v. U.S. Dep't of Justice*, 908 F.2d 1108, 1116–17 (2d Cir. 1990), *rev'd sub nom. INS v. Doherty*, 502 U.S. 314 (1992), but the Supreme Court did not address these concerns on review.

⁹⁹ *Jean v. Gonzales*, 452 F.3d 392, 396 (5th Cir. 2006).

¹⁰⁰ Att'y Gen. Order No. 3034-2009 (Jan. 15, 2009) (on file with the *New York University Law Review*).

¹⁰¹ 424 U.S. 319 (1976).

¹⁰² *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

¹⁰³ *See infra* notes 115–16 and accompanying text.

“not confined the *Mathews* approach to . . . situations where simple factfinding is the sole determinant of governmental action”¹⁰⁴ and has acknowledged that purely legal issues, such as matters of statutory interpretation, may also be a source of error evaluated under *Mathews*.¹⁰⁵ Thus, although the *Mathews* test is perhaps not a perfect fit for determining the process required when the Attorney General considers broad legal questions upon review, I apply it here because it is the standard used to determine the process due in administrative appeals before the BIA¹⁰⁶ and because it is “[t]he ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not ‘deprived of life, liberty, or property, without due process of law.’”¹⁰⁷

In the case of Attorney General review, two of the *Mathews* factors—the significant individual interests at stake and the weak government interest in conducting certification without binding procedural protections—weigh strongly in favor of providing procedural safeguards upon certification. Evaluation of the third factor—the risk of erroneous deprivation and the probable value of additional procedures—is much less straightforward. In the following section, I briefly address the individual and government interests at stake and then focus my analysis on the risk of erroneous deprivation.

1. *Individual Interests at Stake*

We have already seen that “deportation is a penalty—at times a most serious one,” and “[m]eticulous care must be exercised lest the

¹⁰⁴ *Burns v. United States*, 501 U.S. 129, 147 (1991) (Souter, J., dissenting). In *Burns*, Justice Souter describes the Court’s broad use of *Mathews* to evaluate due process in proceedings involving discretionary and legal issues—not merely factual issues. *Id.* at 147–48 (citing *Parham v. J. R.*, 442 U.S. 584, 599–600, 609 (1979); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11, 13 (1979); *Ingraham v. Wright*, 430 U.S. 651, 678 (1977)). The majority in this case did not reach the due process analysis because they construed the sentencing rules at issue to require notice before an upward departure, thereby avoiding the constitutional issue. *Id.* at 138. Justice Souter would have reached the constitutional analysis, *id.* at 145–46, and applied *Mathews* to determine the process due. *Id.* at 148.

¹⁰⁵ *Id.* at 150 (noting that, under *Mathews* analysis, one “source of possible sentencing error inheres in the interpretation and application of congressional sentencing authorization”); see also *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1148–49 (9th Cir. 1987) (noting that although *Mathews* does not require evidentiary hearing for purely legal issues, “a predeprivation opportunity to submit written objections . . . would assure that the City adequately and fairly considered Knudson’s legal objections” and finding such opportunity constitutionally required).

¹⁰⁶ See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 299 (5th Cir. 2009) (applying *Mathews* to determine whether BIA violated due process in denying motion to reopen); *Shao v. Mukasey*, 546 F.3d 138, 166–67 (2d Cir. 2008) (applying *Mathews* to determine whether lack of notice by BIA violated due process).

¹⁰⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (quoting U.S. CONST. amend. V).

procedure by which [an immigrant] is deprived of that liberty not meet the essential standards of fairness.”¹⁰⁸ An immigrant’s interest in remaining in the United States with his family “ranks high among the interests of the individual,”¹⁰⁹ and the issues considered by the Attorney General upon review are often dispositive of the immigrant’s right to remain in the country or to seek discretionary relief from removal. For instance, under the existing Fifth Circuit standard applied by the IJ and the BIA in *Silva-Trevino’s* proceedings, *Silva-Trevino* was entitled to a hearing for discretionary relief from removal. Although his continued residence in the United States was not guaranteed, deportation was not automatic, and he had a right to make a case for relief before an IJ. The Attorney General’s new legal standard, however, is likely to render his deportation mandatory and to foreclose any opportunity to argue before an immigration judge that his strong ties to his community and to his six U.S. citizen children weigh in favor of granting relief from the serious hardship of deportation. The individual’s interest may be even stronger in other cases where the BIA has actually granted relief, and the issues resolved by the Attorney General upon review result in reversal of that grant and removal of the immigrant from this country.¹¹⁰ In either case, because the issues under consideration are dispositive of the immigrant’s ability to apply for or obtain relief from removal, the individual interests at stake in the Attorney General’s decision are without question extremely weighty.

2. *Government Interests in Using Current Procedures*

It is true, of course, that the government generally has an interest in the efficient administration of immigration law and that “it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative.”¹¹¹ In the context of administrative appeals before the BIA, however, these government interests have not proven sufficiently significant to overcome the immigrant’s strong interest in remaining in the country: The BIA provides a meaningful opportunity to be heard in thousands of cases each year, including precedential decisions that significantly affect immigration policy. It is possible, of course, that the “sovereign prerogative” of the Executive and Congress weighs more heavily in decisions made by the Attorney

¹⁰⁸ *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

¹⁰⁹ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

¹¹⁰ *See, e.g., Jean*, 23 I. & N. Dec. 373, 374 (AG 2002) (reversing BIA decision granting lawful permanent resident status and finding respondent ineligible for any other relief from deportation).

¹¹¹ *Landon*, 459 U.S. at 34.

General, who is, after all, the appointed official to whom Congress directly delegated authority to rule on legal questions under the Immigration and Nationality Act (INA).¹¹² Even if this is the case, however, the argument that this interest supports an ad hoc, unregulated certification process is weak. In past decisions, the Attorney General has expressly invited briefing by both respondents and amici to “aid [his] review,”¹¹³ and there is no reason to believe that merely providing an opportunity to present arguments that the Attorney General is free to reject interferes with executive control of immigration policy.

Efficiency concerns carry even less weight in the certification context, where the Attorney General decides only a handful of cases each year and is not tasked with dispatching thousands of routine cases in a timely manner. Indeed, to ask the Attorney General to provide basic procedural protections upon review is to ask no more than many agencies provide as standard practice under the Administrative Procedure Act, which entitles parties to present arguments when the agency reviews a decision of its subordinates.¹¹⁴ Thus, it is difficult to argue that there is anything to be gained by shutting the parties out of the process, and the government’s interest in not providing fundamental due process protections is minimal.

3. *Risk of Erroneous Deprivation and Probable Value of Additional Procedural Safeguards*

As indicated above, the most difficult *Mathews* factor to balance is the risk of an erroneous deprivation and the probable value of additional or different procedural safeguards. Traditionally, procedural due process in administrative proceedings is viewed as a means of ensuring accurate decisionmaking that “finds the facts as they actually are and applies the law to those facts in accordance with prevailing doctrine.”¹¹⁵ Thus, the erroneous deprivation factor is most often used to evaluate accuracy in the determination of contested facts or the

¹¹² See 8 U.S.C. § 1103(a)(1) (2006) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”).

¹¹³ *Compean*, 24 I. & N. Dec. 710, 713 (AG 2009), *vacated*, *Compean*, 25 I. & N. Dec. 1 (AG 2009); see also *J-S-*, 24 I. & N. Dec. 520, 523 (AG 2008) (recounting receipt of briefs from both parties and amicus briefs in support of respondent); *R-A-*, 24 I. & N. Dec. 629, 630 n.1 (AG 2008) (noting Attorney General’s provision of opportunity to submit additional briefing).

¹¹⁴ 5 U.S.C. § 557(c) (2006) (“Before . . . a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit” exceptions to decisions below and supporting reasons).

¹¹⁵ Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1102 (1984).

correct application of existing law to those facts, rather than accuracy in resolving purely legal questions or articulating legal standards.¹¹⁶ Some scholars view individual litigants as “not uniquely well-positioned to contribute to the resolution of a dispute” with respect to legal issues or “legislative fact[s],”¹¹⁷ and thus would consider the probable value of permitting participation by the parties to be minimal in cases where individualized facts are not contested.¹¹⁸

Under this view, the Attorney General might defend his position by arguing that he uses the certification power to decide pure issues of law;¹¹⁹ that the INA delegates to him authority to make controlling determinations of all questions of law;¹²⁰ and that he routinely remands his decisions to the BIA or the IJ, where application of the law articulated by the Attorney General to the facts of the case can be undertaken in proceedings that provide a full opportunity to be heard.¹²¹ While due process may require briefing or a hearing to resolve contested factual issues before the BIA or IJ on remand, there is no “risk of error,” as traditionally conceived, in the Attorney General’s resolution of legal issues and no probable value to briefing on questions of law that do not bear on the individualized circumstances of the immigrant’s case.¹²²

I contest this view and argue instead that, first, there is significant “probable value” in permitting individual litigants to contribute to the Attorney General’s resolution of important legal issues; second, the complex analysis of law and fact that underlies Attorney General decisions presents a serious risk of erroneous deprivation; third, this

¹¹⁶ See RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 9.5 (5th ed. 2010) (describing *Mathews* test’s focus on *factual* disputes and noting that “[i]f the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the factfinding process”).

¹¹⁷ *Id.* § 9.2.

¹¹⁸ RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.3, at 326 (5th ed. 2009) (explaining distinction between adjudicative and legislative facts and how adversary process enhances accuracy of former but not latter).

¹¹⁹ See Johnson, *supra* note 28, at 301–02 n.91 (1991) (“The Attorney General generally utilizes such review to resolve legal questions.”).

¹²⁰ See 8 U.S.C. § 1103(a)(1) (2006) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 685 n.1 (7th Cir. 2008) (holding that Attorney General had power under § 1103(a)(1) to decide legal questions under immigration laws).

¹²¹ In *Silva-Trevino*, the Attorney General remanded the case to the BIA to determine whether *Silva-Trevino*’s conviction constituted a CIMT under the newly articulated standard and noted that “[i]f the Board deems further inquiry appropriate, it may in turn remand the case to the Immigration Judge for additional proceedings.” *Silva-Trevino*, 24 I. & N. Dec. 687, 709 (AG 2008).

¹²² Of note, the Attorney General also claims the power to review factual determinations de novo. See *supra* note 44–45 and accompanying text.

risk is enhanced by the structural position occupied by the Attorney General as both adjudicator and litigator; and fourth, the length of the appeals process, coupled with the potential for *Chevron* deference to the Attorney General's position, counsel in favor of procedures to reduce error at the certification stage, despite the potential for error-correction at the federal courts of appeals.¹²³

a. Probable Value of Party Participation

First, in the particular context of Attorney General review, the parties to certified cases can add significant value to the review process and contribute to the resolution of important legal and policy issues. Although many immigrants appear pro se in the early stages of the administrative process and even before the BIA, most immigrants facing a decision before the Attorney General are represented by counsel.¹²⁴ Moreover, if the Attorney General publicly announced his decision to certify a case, as this Note argues he should, skilled counsel with expertise in immigration law and policy would likely be available to represent, co-counsel, or advise any immigrant whose case had been certified for review. Certification is not a mass adjudication of routine administrative claims, but a limited, high-stakes decision-making process in which the "fundamental premise of the adversary process" should hold—that is, "that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system."¹²⁵

This argument finds support in decisions of the courts of appeals. Although there is little case law dealing with the process required when agencies decide pure questions of law,¹²⁶ courts that address the

¹²³ My analysis of the erroneous deprivation factor may be aspirational: The *Mathews* analysis was designed to deal with individualized questions of contested fact, and the questions resolved on Attorney General review do not fit easily within this framework. Nonetheless, I seek to show that the Attorney General's striking failure to ensure the procedural protections we take for granted in other contexts—the basic right to notice and an opportunity to address the issues under review—does in fact undermine the accuracy of Attorney General decisions and raises serious due process concerns.

¹²⁴ Of the last twenty-four Attorney General decisions issued, nineteen involved immigrants represented by counsel, two involved pro se respondents, and three do not indicate whether the parties were represented. See Attorney General and BIA Precedent Decisions, *supra* note 8 (archiving cases). Of the two decisions involving pro se respondents, one made no substantive determination but simply vacated the BIA decision and remanded for reconsideration in light of another intervening Attorney General decision. E-L-H-, 23 I. & N. Dec. 700, 704 (AG 2004).

¹²⁵ Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 247 (2002).

¹²⁶ There are cases when appellate courts raise issues sua sponte and decide them without briefing by the parties. *Id.* at 253–54. However, the literature on sua sponte deci-

issue recognize the value of ensuring an opportunity for briefing. For instance, courts ruling on the opportunity to be heard on legal issues often deny the right to an evidentiary hearing or oral presentation, but they routinely justify denial of a full hearing on grounds that *written* argument satisfies the requirements of due process where only legal issues are at stake.¹²⁷ Thus, the Second Circuit has stated that where the “only issues at the hearing were ones of law . . . due process does not require a full evidentiary hearing but *only adequate opportunity for argument.*”¹²⁸

Such cases accord with the Supreme Court’s reasoning in *NLRB v. Bell Aerospace*, a critical case that reaffirmed agencies’ authority to make broad policy decisions through adjudication.¹²⁹ Noting that the rulemaking process would have provided the National Labor Relations Board with the informed views of a broader class of affected individuals, the Court nonetheless concluded that the adjudicative procedures used by the agency provided an adequate substitute since “[t]hose most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination.”¹³⁰ Thus, when an agency decides significant questions of law through adjudication, allowing the parties an opportunity to be heard is essential to “mature and fair consideration”¹³¹ and is of high value to the agency decisionmaker.

sions suggests that such decisions raise serious due process concerns and continue to trouble both justices and scholars. *See, e.g., id.* at 252 (“[I]t is both illegal and imprudent for appellate courts to ‘play God’ and decide such issues without input from the parties.”); Barry A. Miller, *Sua sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity To Be Heard*, 39 *SAN DIEGO L. REV.* 1253, 1260 (2002) (“[S]ua sponte decisions trouble judges because due process interests are implicated”); *see also* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”).

¹²⁷ *See, e.g.,* Knudson v. City of Ellensburg, 832 F.2d 1142, 1148 (9th Cir. 1987) (citing *Mathews* and requiring opportunity for written argument on legal issues where “[a]n evidentiary hearing would be of little value . . . to resolve this statutory interpretation issue. But some prior opportunity to object in writing to the City’s proposed action would have reduced the risk of legal error”); *Mothers’ & Children’s Rights Org. v. Sterrett*, 467 F.2d 797, 800 (7th Cir. 1972) (“[W]here pure questions of law are concerned the Supreme Court’s insistence upon confrontation of witnesses and cross-examination are [sic] not applicable. . . . However, we think that nevertheless an ‘adequate opportunity for argument’ ought to be afforded.”).

¹²⁸ *Conn. Dep’t of Pub. Welfare v. Dep’t of Health, Educ., & Welfare*, 448 F.2d 209, 212 (2d Cir. 1971) (emphasis added).

¹²⁹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

¹³⁰ *Id.* at 295.

¹³¹ *Id.*

b. Reducing the Risk of Legal Error

Second, in the context of Attorney General review, participation by the parties has the probable value of reducing the risk of error arising from the complex nature of the legal issues considered upon certification. Admittedly, the kinds of determinations made upon Attorney General review do not necessarily seem amenable to the erroneous deprivation analysis. Though he reserves the power to make *de novo* determinations of fact, the Attorney General rarely engages in the kind of individualized factual determinations that are easily characterized as either accurate or erroneous. Yet the legal issues resolved by the Attorney General frequently rest on factual assumptions, characterizations of the state of the law, and statutory construction. When these underlying factual and legal determinations are inaccurate, the law developed from them is in some sense erroneous or unsound.

In *Silva-Trevino*, for instance, the Attorney General based his decision to implement a new legal standard on claims that the existing approaches did not effectively identify immigrants who committed CIMTs, the courts of appeals were applying widely divergent standards, and the statutory language did not compel the basic approach used by virtually every circuit.¹³² The Third Circuit recently refused to apply *Silva-Trevino* in the case of a similarly situated immigrant, rejecting the Attorney General's approach as "premised on a fundamental misreading of the relevant language," "wrong-headed," and "contrary to Congress's intent."¹³³ Amici seeking reconsideration in *Silva-Trevino* also disputed a wide range of factual and legal claims underlying the decision, arguing that it "contains prejudicial errors of fact and law."¹³⁴ If this is correct—and if *Silva-Trevino* is found ineligible for relief under the new standard—then he may face erroneous deprivation of his right to remain in the United States. In cases like *Silva-Trevino*, skilled counsel could help clarify technical legal issues, bring greater transparency and accountability to the process, and lower the risk of an unsound decision.

c. Reducing Risks Associated with the Attorney General's Structural Position

Third, the risk of erroneous deprivation under current procedures is heightened by the Attorney General's position as both adjudicator and litigator. Although the enforcement functions previously held by

¹³² *Silva-Trevino*, 24 I. & N. Dec. 687, 688, 693 (AG 2008).

¹³³ *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 477, 481, 482 (3d Cir. 2009).

¹³⁴ Memorandum in Support of Reconsideration, *supra* note 50, at 3.

the INS have been transferred to DHS,¹³⁵ the Office of Immigration Litigation (OIL), part of the Department of Justice, remains responsible for litigation of immigration matters in the federal courts.¹³⁶ Professor Margaret Taylor has written extensively about the ways in which DOJ's litigation position can influence both rulemaking and review of BIA decisions by the Attorney General.¹³⁷ She notes in particular Attorney General Janet Reno's 1997 decision in *Soriano*, which reversed the BIA's determination that amendments to the INA could be given only limited retroactive effect.¹³⁸ She argues that the decision was motivated by a need to shore up the DOJ's litigation position on issues of retroactivity, including in an immigration case pending before the Supreme Court.¹³⁹ *Soriano* provoked hundreds of legal challenges,¹⁴⁰ and Attorney General Reno ultimately reversed the decision in 2001 after eight federal courts of appeals disagreed with her analysis.¹⁴¹ If accuracy can be defined as the development of rules that accord with the intent of Congress and survive challenge in federal court, the Attorney General's record is certainly not error free.

But structural concerns extend beyond the misguided decision in *Soriano*. OIL is frequently consulted regarding the consequences of policy decisions on federal immigration litigation,¹⁴² and advocates have speculated that communications by OIL may guide the Attorney General's decision to certify a case and inform his resolution of the issues.¹⁴³ As a litigating arm, OIL may not fully and fairly present the

¹³⁵ On March 1, 2003, the enforcement functions of the Immigration and Naturalization Service were transferred from the Department of Justice to the Department of Homeland Security pursuant to the Homeland Security Act of 2002 § 402, Pub. L. No. 107-296, 116 Stat. 2135, 2177-78 (2002) (codified at 6 U.S.C. § 202 (2006)).

¹³⁶ See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 405 n.207 (2007) ("In most circuits, the Office of Immigration Litigation (OIL) of the Department of Justice represents the government in immigration appeals."); Office of Immigration Litigation, OIL-1, <http://www.usdoj.gov/civil/oil/> (last visited June 17, 2010).

¹³⁷ See generally Taylor, *supra* note 19 (analyzing relationship between DOJ's litigation and policy functions in immigration context).

¹³⁸ See *Soriano*, 21 I. & N. Dec. 516, 519 (AG 1997).

¹³⁹ Taylor, *supra* note 19, at 284-86.

¹⁴⁰ See *Theodoropoulos v. INS*, 358 F.3d 162, 173 (2d Cir. 2002) (describing "hundreds of challenges to *Soriano* . . . filed by aliens in federal courts").

¹⁴¹ Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436, 6438 (Jan. 22, 2001). The Attorney General explained the reversal as "acquiesce[nce] in the courts' conclusion, as a matter of statutory construction, that Congress intended" its amendments to be applied as the BIA had initially applied them. *Id.* at 6438.

¹⁴² Taylor, *supra* note 19, at 293.

¹⁴³ Amici urging reconsideration of *Silva-Trevino* have pointed to circumstantial evidence of potentially impermissible communications between the Attorney General and OIL regarding certified cases. See *supra* note 50.

arguments against its own views, and in the absence of briefing by the immigrant, opposing views may never be aired. Allowing the parties to present arguments would ensure that the Attorney General comes to a well-reasoned, error-free decision that is based on arguments presented by both sides and not merely a means of shoring up DOJ's litigation positions in federal court.¹⁴⁴

d. The Limits of Judicial Review

Finally, some scholars have identified the availability of judicial review as the ultimate safeguard against error and abuse in certification.¹⁴⁵ While most immigrants will eventually have an opportunity to seek review of the Attorney General's decision on issues of law in the courts of appeals,¹⁴⁶ two considerations should limit reliance on judicial review as the sole safeguard against erroneous deprivation. First, because certified cases are frequently remanded to the trial level for further factual development, "effectively plac[ing] Petitioner's removal proceedings back at square one,"¹⁴⁷ the process of arguing yet again before the IJ, appealing to the BIA, and then seeking review in federal court can take years.¹⁴⁸ During this lengthy appeals process, immigrants may be subject to prolonged mandatory detention (as was Mr. Silva-Trevino) or restrictive monitoring.¹⁴⁹ In the public benefits

¹⁴⁴ I assume that the Attorney General is an unbiased adjudicator capable of "reach[ing] a different conclusion in the event he deems it necessary to do so after consideration of the record." *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970). While some may be skeptical that briefing by the immigrant's counsel will change the Attorney General's mind on a question of law or policy, the notion that adversarial proceedings improve outcomes, even at the appellate level and on issues of law, is a fundamental premise of our legal system. See Milani & Smith, *supra* note 125, at 273–79 (arguing against sua sponte decisions in appellate courts and discussing adversarial proceedings' importance in maintaining integrity of legal system). At the very least, party participation in the certification process would introduce greater accountability and transparency into the process and make it harder for the Attorney General to ignore arguments against his (or OIL's) initial policy position.

¹⁴⁵ See, e.g., Legomsky, *supra* note 23, at 1383 (noting that safeguards against potential abuse of review power by Attorney General include good faith of Attorney General and availability of judicial review).

¹⁴⁶ See 8 U.S.C. 1252(a)(2)(D) (2006) (providing for judicial review of "questions of law" presented in petition for review, notwithstanding other jurisdictional bars to judicial review in INA).

¹⁴⁷ *Silva-Trevino v. Watkins (Silva-Trevino I)*, No. B-09-001, 2009 U.S. Dist. LEXIS 8423, at *1 (S.D. Tex. Feb. 5, 2009).

¹⁴⁸ As of December 10, 2009, Mr. Silva-Trevino, now seventy years old, still did not have a final administrative decision from the BIA, and the district court considering his habeas petition stated that it had not "been given any reason to believe that a final ruling will ever be reached in this matter." *Silva-Trevino v. Watkins (Silva-Trevino II)*, No. B-09-001, at 5 (S.D. Tex. Dec. 10, 2009), available at <http://drop.io/vvwjpm>.

¹⁴⁹ Mr. Silva-Trevino, for instance, was held in DHS custody for more than four years under the mandatory detention statute, 8 U.S.C. § 1226(c) (2006), as he awaited a final

context, the availability of a postdeprivation hearing is considered inadequate to mitigate the risk of erroneous deprivation when “the degree of potential deprivation that may be created by a particular decision” and “the possible length of wrongful deprivation” are high.¹⁵⁰ The same reasoning should apply here: Because an erroneous decision by the Attorney General is likely to result in serious and prolonged deprivations of liberty, the prospect of judicial review years down the road cannot justify denying basic procedural rights upon certification.

Moreover, as the Attorney General has noted, *Chevron* deference can severely restrict federal courts’ ability to reconsider interpretations that are flawed but not “‘unambiguously foreclosed’ by the statutory text.”¹⁵¹ The courts of appeals routinely grant *Chevron* deference to interpretations of the INA by the BIA and Attorney General,¹⁵² and in the context of CIMT determinations, the Attorney General has explicitly sought deference to the approach he articulated in *Silva-Trevino*.¹⁵³ To the extent that *Chevron* deference weakens review by the courts of appeals, it is particularly important to provide the parties a full opportunity to make legal arguments before the Attorney General.

In sum, then, although the risk of erroneous deprivation is somewhat different from that traditionally considered in the *Mathews* anal-

decision in his immigration case. *Silva-Trevino II*, No. B-09-001, at 1–2. Although immigrants subject to mandatory detention normally are not entitled to an individualized bond hearing, in December 2009, the Southern District of Texas found that Silva-Trevino’s continued detention was unconstitutional and ordered his release. *Id.* at 10. However, the terms of his release are extremely confining. He must: reside at his family home and not change his residence without permission of the court; report in person once a week between 9 A.M. and 11 A.M. to the Detention and Removal Operations office in Harlingen (approximately an hour and twenty minute drive from Silva-Trevino’s home); remain within the limits of Hidalgo and Cameron counties; avoid bars, taverns, cantinas, pools halls, and all establishments whose primary business is the sale of alcohol; and observe a 10 P.M. to 6 A.M. curfew, among other restrictions. *Id.* at 10–14.

¹⁵⁰ *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) (quoting *Fusari v. Steinberg*, 419 U.S. 319, 341 (1976)).

¹⁵¹ In *J-S-*, the Attorney General reconsidered a BIA decision upheld by the federal courts of appeals. 24 I. & N. Dec. 520, 531 (AG 2008). He found the BIA’s decision flawed, but noted that appellate courts “were bound to accept the Board’s interpretation . . . if they concluded that that interpretation was not ‘unambiguously foreclosed’ by the statutory text” *Id.* at 531 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

¹⁵² See, e.g., *Kellermann v. Holder*, 592 F.3d 700, 702 (6th Cir. 2010) (“We generally accord *Chevron* deference to the BIA’s decisions construing ambiguous statutory terms in the INA.”).

¹⁵³ *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 472 (3d Cir. 2009) (“The Attorney General urges that deference is owed to his interpretation of these [CIMT] provisions, and that the methodology that he espouses is obligatory, notwithstanding our contrary precedents.”).

ysis, additional procedural safeguards could reduce this risk. Such safeguards would allow the parties to contribute to the Attorney General's understanding of underlying factual and legal claims and to assist him in reaching a sound, error-free decision. Coupled with the immigrant's significant and weighty interest in remaining in the U.S. and the government's minimal interest in not providing notice and an opportunity for briefing, this analysis suggests that additional safeguards are warranted. Ultimately, it is not clear whether a court would agree that the Constitution demands notice and opportunity to be heard on the legal issues raised upon Attorney General review. But there is a strong case to be made that preventing meaningful participation by the parties upon certification raises serious due process concerns.

C. Nonconstitutional Concerns: Policy Reasons for Procedural Safeguards

However a court might decide the issue of individual due process rights, broader considerations of fairness, accuracy, and legitimacy counsel in favor of procedural requirements that ensure meaningful participation by both the individual parties and interested amici. The Attorney General may use his review power sparingly, but, when he does, he uses it in ways that profoundly change the law and affect thousands of immigrants facing removal. When the Attorney General uses the certification power to announce binding rules of general applicability without providing for meaningful participation by the parties or soliciting input from expert amici, he runs the risk of issuing decisions of lesser quality and undermining public confidence in immigration law. In this section, I argue that Attorney General review undertaken without a robust participation process risks appearing as an end-run around rulemaking, undermines the legitimacy and acceptability of immigration adjudication, and may ultimately result in less-informed, lower-quality decisions.

1. Certification as an End-Run Around Rulemaking

The Attorney General has other tools available for issuing rules of general applicability that allow for a more transparent public process, such as notice-and-comment rulemaking.¹⁵⁴ Given the broad impact of the rules articulated through certification, it is legitimate to ask why the Attorney General chooses to use adjudication to issue

¹⁵⁴ 8 U.S.C. § 1103(g) (2006); *see also* Legomsky, *supra* note 13, at 458 (“The agency head will be just as capable of asserting agency policy primacy via rulemaking as he or she would be via review of adjudication.”).

rules that might otherwise be promulgated through notice-and-comment rulemaking. Were the Attorney General to issue rules like those articulated in *Silva-Trevino* through the rulemaking process, he would be required to provide public notice and a comment period that would allow experts, advocates, and affected individuals to make their views and arguments known.¹⁵⁵ The Attorney General's decision to issue such rules instead through the secretive certification process has been perceived as an end-run around the rulemaking process, allowing the Attorney General to "accomplish indirectly what [he is] prohibited from doing directly—impos[ing] binding substantive rules of general applicability, with the force of law, without the procedural safeguards that the law would otherwise require."¹⁵⁶

Of course, it is well settled that agencies have broad discretion to choose between rulemaking and adjudication as a means of establishing agency policy and articulating binding legal rules.¹⁵⁷ Particularly where the Attorney General is reviewing new BIA precedent or considering narrower, more fact-bound issues, adjudication may be the most appropriate means for the Attorney General to announce a legal rule.¹⁵⁸ Nonetheless, courts and commentators have repeatedly emphasized the advantages of rulemaking as a vehicle for articulating

¹⁵⁵ See 5 U.S.C. § 553 (2006) (laying out Administrative Procedure Act's requirements for notice and comment prior to rulemaking).

¹⁵⁶ Legomsky, *supra* note 13, at 460.

¹⁵⁷ See *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."). The *Bell Aerospace* Court indicated that there might be some situations in which reliance on adjudication would amount to an abuse of discretion, and a few lower courts have found abuse of discretion where an agency appears to use adjudication solely as a vehicle for announcing policy. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *First Bancorporation v. Bd. of Governors*, 728 F.2d 434, 438 (10th Cir. 1984) (finding abuse of discretion for "improperly attempting to propose legislative policy by an adjudicative order"); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981) ("[T]he F.T.C. has exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking."). However, these cases have been widely criticized. See, e.g., RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.9 (5th ed. 2010); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1408 (2004).

¹⁵⁸ The *Chenery* Court recognized that the rulemaking process might not be conducive to the resolution of all legal issues, such as issues not foreseen in advance of adjudication, issues with which the agency has not had sufficient experience to "warrant rigidifying its tentative judgment into a hard and fast rule," and issues so "specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 202–03. While this reasoning applies to certain Attorney General decisions, it is less applicable to decisions like *Silva-Trevino* in which review of the legal issue was not necessary to resolve the case, but the Attorney General nonetheless used the case as a vehicle for announcing a changed policy position.

general policies.¹⁵⁹ Thus, the fact that the Attorney General is able to circumvent this process by certifying cases for review—without being subject to other procedural constraints—raises concerns about the quality and legitimacy of his decisions.

2. *Legitimacy and Acceptability Concerns*

Furthermore, any process that is seen as a means of evading more transparent and participatory methods clearly presents concerns about the legitimacy and acceptability of that process. This is a particular concern in the case of Attorney General review, given the Attorney General's dual position as adjudicator and litigator and his interaction with OIL.¹⁶⁰ When the Attorney General forgoes the transparent rulemaking process and refuses to mandate a robust adversarial process in its place, advocates and affected immigrants may question the neutrality and fairness of the resulting decisions.¹⁶¹ Acceptability or legitimacy is usually cited as a goal of the administrative review process,¹⁶² and it is particularly important where adjudicative rules are likely to bind thousands of similarly situated individuals in the future. Yet as long as the certification process remains secretive and political, informed by the parties or amici only when the Attorney General invites their opinions, it is not likely to appear fair.

3. *Quality and Accuracy Concerns*

Beyond issues of fairness and legitimacy, however, the inadequacies in the certification process also raise serious concerns about the quality of rules developed through Attorney General review. Many scholars have argued that rulemaking results in higher quality rules “because it invites broad participation in the policymaking process by all affected entities and groups.”¹⁶³ Whereas adjudication permits consideration of only the data and arguments presented by the parties, rulemaking allows solicitation of input from the broader public and

¹⁵⁹ See, e.g., *id.* at 202 (“The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”); PIERCE, JR. ET AL., *supra* note 118, § 6.4.1, at 299 (“[There has been] near universal judicial and scholarly criticism of agency use of adjudication as a vehicle for formulating general rules”); Legomsky, *supra* note 13, at 459.

¹⁶⁰ See *supra* text accompanying notes 135–44 (discussing concerns over how DOJ and OIL litigation positions affect Attorney General's policy positions).

¹⁶¹ See Weaver, *supra* note 13, at 293 (discussing parties' perceptions of agency head decisionmaking).

¹⁶² See, e.g., Legomsky, *supra* note 23, at 1313 (identifying acceptability as one of four goals of administrative review).

¹⁶³ Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308.

forces the agency to consider the national effects of adopting a rule that will bind parties in a wide spectrum of cases.¹⁶⁴

This is not to say that the Attorney General should abstain from policymaking through certification altogether or that he should choose, whenever possible, to issue rules of general applicability through the rulemaking process.¹⁶⁵ Instead, the Attorney General should seek to increase the quality of his decisions by maximizing participation in the certification process—not, of course, by recasting the certification process as a mini-rulemaking, but by providing for meaningful, adversarial participation by the parties and solicitation of briefing by interested amici.

III

PROPOSED PROCEDURES

Allowing the Attorney General to determine the procedures provided upon certification in an ad hoc manner has resulted in a secretive and arbitrary process that interferes with immigrants' due process rights and undermines the quality and legitimacy of Attorney General decisions. To address these concerns, the Attorney General should promulgate binding regulations that lay out in detail the procedures that must be followed when a case is certified for review.

In formulating regulations, the Attorney General could follow the lead of the Environmental Protection Agency, whose regulations provide that when the Environmental Appeals Board refers an appeal to the Administrator, the rules governing Board procedures will be interpreted as referring to the Administrator.¹⁶⁶ Alternatively, the Attorney General could adopt regulations similar to 8 C.F.R. § 1003.7 (2009), which lays out the procedures governing certification of cases to the BIA and provides for notice to the parties and the right to request oral argument and submit a brief. While both of these options provide a good starting point, regulations designed to truly ensure the fairness and accuracy of Attorney General decisions should go further. Indeed, if the Attorney General wishes to function as a kind of “administrative Supreme Court,”¹⁶⁷ then he should draw upon the

¹⁶⁴ See, e.g., PIERCE, JR., *supra* note 157, § 6.8 (describing nine advantages of rulemaking over adjudication).

¹⁶⁵ Indeed, rulemaking has its own set of problems. In 2000, Attorney General Reno published a proposed rule to resolve the issue raised in *R-A-* and then vacated the BIA's decision pending publication of the final rule. *R-A-*, 23 I. & N. Dec. 694, 694 (AG 2005). In 2008, the rule still had not been published in final form, and Attorney General Mukasey remanded the original case to the BIA to resolve the issue. *R-A-*, 24 I. & N. Dec. 629, 629 (AG 2008).

¹⁶⁶ 40 C.F.R. § 22.4(a) (2009).

¹⁶⁷ See *supra* text accompanying notes 34–37.

model used by the Supreme Court itself and provide for public notice, an opportunity to object to certification, and solicitation of input by parties and interested amici, as described below.

First, Attorney General review of BIA decisions should begin with adequate notice to both the parties and the public. Ideally, notice should occur at the stage of referral or consideration for certification, rather than upon certification itself, and the parties and interested amici should be provided an opportunity to object to certification.¹⁶⁸ Under the current regulations, the government has absolute control of what cases are brought before the Attorney General for review. The BIA, DHS, or the Attorney General can pick and choose among the 30,000-plus cases decided by the BIA each year to find the case that presents the issues in the light most favorable to its own position. This is especially troubling when the Attorney General selects an unpublished decision for review, as there is no way of knowing who may have guided his hand and what motives informed the selection.¹⁶⁹ Granting the parties and amici the right to object to certification would permit them some minimal participation in the selection process, allowing them to argue either that a particular issue does not merit review at all or that the case selected does not present the issues fully.¹⁷⁰ Such opportunity to object would also allow the parties or amici to persuade the Attorney General that some other mechanism, such as notice-and-comment rulemaking, is a more appropriate means of resolving the issue.¹⁷¹

Moreover, because due process requires notice that is more than “mere gesture,”¹⁷² a one-paragraph order merely notifying the immigrant’s counsel that the case has been certified is not sufficient. Rather, as in an appeal before the BIA, the parties must be given notice of certification procedures and sufficient information to allow them to prepare and present arguments.¹⁷³ At the very least, this

¹⁶⁸ As a party to the case, DHS would, of course, also have an opportunity to advance arguments for or against certification.

¹⁶⁹ See *supra* note 50 and accompanying text (discussing possible improper communications in Attorney General review).

¹⁷⁰ The Attorney General has, on occasion, declined to review cases referred to him. *E.g.*, C-Y-Z-, 23 I. & N. Dec. 693, 693 (AG 2004); Cazares, 21 I. & N. Dec. 188, 200 (AG 1997); De Leon, 21 I. & N. Dec. 154, 184 (AG 1997).

¹⁷¹ Attorney General Reno occasionally vacated BIA decisions in order to permit resolution of the issues through another policy mechanism. See, *e.g.*, *supra* note 32.

¹⁷² *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (holding that for notice to be constitutional it must be given through means reasonably expected to reach absentee parties).

¹⁷³ See *supra* notes 85–90 and accompanying text (discussing due process violations in BIA adjudications).

means identifying the issues to be considered upon review and giving the parties notice of the briefing schedule and other procedures.

To address broader accuracy and fairness concerns, notice that a case has been certified to the Attorney General should also be accessible to the general public, through publication in the Federal Register or a public docket maintained online. Notice to the public should equip interested amici to participate meaningfully in the certification process. This requires notice of the issues under consideration and publication of procedural requirements for amicus briefing. Further, if the referred BIA decision is not publicly available, it should be published along with the notification of the certification. Quick and easy access to the BIA decision is essential for amici to meaningfully engage with the facts of the case and fully develop the legal issues.

Finally, to satisfy the basic requirements of due process, the Attorney General must, at a minimum, provide the parties an opportunity to fully brief the issues under review.¹⁷⁴ This should also include an opportunity for supplemental briefing in any case where the Attorney General identifies additional issues—such as the viability of existing precedent—after certification. Moreover, because the parties themselves may not be well positioned to address the broader implications of a generally applicable rule, the opportunity for briefing should be extended to interested amici. Providing amici a meaningful opportunity to be heard will both facilitate full and accurate development of the issues and help to legitimate a process that may otherwise appear to circumvent the participatory process required by rulemaking.

CONCLUSION

The certification power is unlikely ever to become a wholly uncontroversial device. Under any administration, the power is likely to be used to effect significant changes in immigration law, to the dissatisfaction of one party or another. But there is no reason for Attorney General review to take place under a veil of secrecy, without the relatively simple procedural safeguards that we take for granted in other contexts. The process followed (or rather, *not* followed) in *Silva-Trevino* does not benefit anyone: not the parties to the case, who have a right to be heard on critical and potentially dispositive issues; not the thousands of similarly situated immigrants who have an interest in ensuring that rules likely to affect them are fair and well reasoned;

¹⁷⁴ An opportunity for briefing should be required in all cases, even where the issues under consideration were briefed below. In these cases, supplemental briefing may be necessary to respond to reasoning in the BIA's decision or to clarify or expand upon arguments made below, where the issues considered by the Attorney General may not have been the sole or central focus of the case.

and not the Attorney General or DHS, whose jobs will always be easier if the public believes that they act in accordance with widely shared principles of fairness and due process. By promulgating regulations that bind himself and future Attorneys General to fair and clear procedures, the Attorney General could lift the veil of secrecy and restore transparency to the certification power, improving the legitimacy and perhaps the quality of immigration law in the process.