RESOLVED, That the American Bar Association urges the Department of Justice to amend 8 C.F.R. §1003.1(h) to include, following formal rulemaking, standards and procedures governing the process by which the Attorney General may certify cases to himself or herself.

FURTHER RESOLVED, That the applicable standards should include procedures for (a) notice to the public of the Attorney General’s intent to certify a case to himself or herself; (b) identification of the specific legal questions the Attorney General intends to review; (c) an opportunity for public comment and briefing prior to issuance of any final decision, and (d) release of underlying decision(s) in the case; and

FURTHER RESOLVED, That the American Bar Association urges the Attorney General to exercise such certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process rather than as a mechanism to pre-empt full administrative agency review or to address questions not at issue in the case prior to certification.
The American Bar Association’s Commission on Immigration expressed renewed concern over the lack of independence in the nation’s immigration court system in its recent Reformsing the Immigration System Update Report. Other major stakeholders including the National Association of Immigration Judges and the Federal Bar Association have also raised serious concerns over the lack of immigration court independence. The immigration court system is part of the Executive Office for Immigration Review, an administrative agency within the Department of Justice. The U.S. Attorney General is responsible for overseeing the immigration court system including the 63 immigration courts and two adjudication centers as well as the Board of Immigration Appeals (“BIA” or “Board”). Due to the Attorney General’s broad duties within the Department of Justice, he or she serves as both immigration adjudicator and immigration prosecutor at the federal level. This dual function has been cited as a major conflict of interest and a primary reason why the immigration court system should be removed from the Department of Justice and placed in an independent, Article I court.

The BIA is the highest administrative body to interpret and apply the immigration laws throughout the nation. The BIA has appellate jurisdiction and reviews cases on appeal from the immigration courts. BIA review is generally completed on the written record although oral argument may be permitted. BIA precedential decisions are binding on the immigration courts and provide guidance on the proper interpretation of the Immigration and Nationality Act and its implementing regulations. Where jurisdiction exists, BIA decisions may be appealed to the U.S. Circuit Courts of Appeals.

Pursuant to existing federal regulations, the Attorney General is authorized to refer BIA decisions to himself or herself for adjudication. The regulations governing certification for review by the Attorney General currently permit referral where: (1) the Chairman of the BIA, a majority of the BIA, the Secretary of Homeland Security, or specifically designated Department of Homeland Security (“DHS”) officials refer a matter;

3 AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Policy Brief, Restoring Integrity and Independence to America’s Immigration Courts, September 28, 2018.
5 8 C.F.R. § 1003.1(d)(1).
6 Id. § 1003.1(h)(1)(i), “[t]he Attorney General directs the Board to refer to him.” (direct quote)
or (2) “[t]he Attorney General directs the Board to refer the matter to him.” The procedures governing self-referral require only that the Attorney General’s decision be in writing and transmitted to the BIA or DHS for service upon the party affected. The regulations do not establish criteria or specify categories of cases appropriate for the exercise of the certification authority, which would permit more predictability for stakeholders and increase the integrity of and public confidence in the process.

From January 1, 2018 through October 18, 2018 — less than three weeks before he left office — former Attorney General Jeff Sessions certified seven and made final decisions in five BIA cases, a rate significantly higher than his predecessor Attorneys General. Recently the certification process has been used, as opposed to rulemaking (or legislative recommendations), to establish not only procedural and docket management policies, but also substantive questions of law governing immigration proceedings that have resulted in reversing longstanding precedential decisions and limiting relief available under the asylum laws. In keeping with this practice, in December 2018, then Acting Attorney General Matthew Whitaker referred two additional cases to

7 Id. § 1003.1(h)(1).
8 Id. § 1003.1(h)(2).
10 Attorneys General in the Obama administration used the certification authority more sparingly, approximately once every two years. See Matter of Chairez-Castrejon, 26 I&N Dec. 796 (A.G. 2016); Matter of Silva-Trevino, 26 I&N Dec. 550 (A.G. 2015); Matter of Dorman, 25 I&N Dec. 485 (A.G. 2011); Matter of Compean, 25 I&N Dec. 1 (A.G. 2009). Bush administration Attorneys General issued 16 decisions, an average of two per year, more frequently than the Obama administration but far less frequently than the Trump administration to date. See Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, 101 IOWA L. REV. 841, 857-58 (2016), https://ilr.law.uiowa.edu/assets/Uploads/ILR-101-3-Gonzales.pdf (hereinafter “Advancing Executive Branch Immigration Policy”) (chronicling the use of the certification authority and noting that “from a peak of 37 cases a year through 1952, the authority was exercised on average, only twice per year during the Bush administration, and only 4 times during the 8 years of the Obama administration”).
himself for review, both of which raise substantive immigration law questions.\textsuperscript{13} Finally, in April 2019, Attorney General Barr decided a case that overturned long-standing BIA precedent making asylum-seekers who pass a credible fear interview ineligible for a custody redetermination hearing before an Immigration Judge.\textsuperscript{14}

The Department of Justice further indicated in Spring 2018 that it is considering a rule broadly expanding the circumstances under which the Attorney General may refer cases to himself or herself. The proposed new scope of referral would include matters the Board has not yet decided, and even matters decided by immigration judges “regardless of whether those decisions have been appealed to the BIA.”\textsuperscript{15} Under such a rule, the scope of the Attorney General’s referral authority would go beyond establishing law governing BIA adjudications, and could extend into who is perceived as eligible for protection by Customs and Border Patrol and who receives and passes an initial screening interview for protection from persecution or torture. These developments have highlighted the need for standards and procedures to govern the certification process and allow for adequate notice and input from the parties and the public.

The use of the Attorney General’s certification authority has been the subject of considerable debate for years. Former Attorney General Alberto Gonzales and DOJ Senior Litigation Counsel Patrick Glen have argued that the mechanism is preferable to an administration using executive orders and memoranda to advance immigration policy.\textsuperscript{16} Others have raised concerns that the exercise of the authority has disrupted the development of immigration law and policy and altered longstanding practices for partisan purposes;\textsuperscript{17} that the Attorney General “is removed from the agency’s expertise in immigration,”\textsuperscript{18} and that the Attorney General’s role as the nation’s chief law enforcement

\textsuperscript{13} See Matter of L-E-A-, 27 I&N Dec. 494 (A.G. 2018) (relating to whether, and under what circumstances, an alien may establish persecution on account of membership in a “particular social group” based on the alien’s membership in a family unit); Matter of Castillo-Perez, 27 I&N Dec. 495 (A.G. 2018) (relating to the appropriate legal standard for determining when an individual lacks “good moral character” under 8 U.S.C. § 1101(f) and the impact of multiple convictions in determining whether to grant discretionary relief in the form of cancellation of removal under 8 U.S.C. § 1229b(b)).

\textsuperscript{14} See Matter of M-S-, 27 I&N Dec. 509 (A.G. 2019) (holding that individuals transferred from expedited removal proceedings to full removal proceedings after passing a credible fear interview are ineligible for release on bond). Pursuant to the decision, implementation of this case has been delayed until July 15, 2019. This case overturned long-standing precedent in Matter of X-K-, 23 I&N Dec. 731 (BIA 2005).


\textsuperscript{16} Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, supra note 10.

\textsuperscript{17} See, e.g., Maureen A. Sweeney, Enforcing/Protection: The Danger of Chevron in Refugee Act Cases, FACULTY SCHOLARSHIP 1599 (2018), https://digitalcommons.law.umaryland.edu/fac_pubs/1599.

\textsuperscript{18} See, e.g., Bijal Shah, The Attorney General’s Disruptive Immigration Power, 102 IOWA L. REV. 129, 141 (2017) (noting that “because the Attorney General is removed from the agency’s expertise in immigration, scholars might also debate the proper level of judicial deference to administrative decision-making in
officer prevents him or her from bringing the necessary balance and objectivity to immigration “lawmaking” through the adjudication process.\textsuperscript{19} Immigration advocates have also argued that there are significant procedural shortcomings in the Attorney General’s certification process, such as short briefing timelines, lack of alignment between the factual and legal issues presented in the underlying decisions and the question addressed by the Attorney General on certification, certification of issues not on appeal to the BIA, and certification of cases where the respondent is not represented by counsel.\textsuperscript{20}

While the BIA’s authority to adjudicate removals is delegated from the Attorney General and subject to Attorney General review under the current framework, and agency head review of administrative proceedings is not unusual, as the chief law enforcement officer of the United States, the Attorney General serves as both the prosecutor and the adjudicator in referred cases. As such, the Attorney General has an inherent conflict between his or her enforcement and adjudicator roles.

The Attorney General’s exercise of the certification authority without more transparency and due process safeguards can undermine the legitimacy and acceptability of the immigration adjudication process. For these reasons, the Department of Justice should use the rulemaking process to establish standards and procedures for Attorney General certification, including procedures providing notice and an opportunity for the parties and the public to brief the specific legal questions the Attorney General intends to consider, and for \textit{amici} to weigh in\textsuperscript{21} before a decision is rendered. EOIR also should provide access to the underlying decisions in redacted form if necessary, in cases

\textsuperscript{19} See, e.g., Stephen H. Legomsky, \textit{Restructuring Immigration Adjudication}, 59 DUKE L.J. 1635, 1672 (2010), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1468&context=dlj (“In theory, empowering Attorneys General to review and reverse BIA decisions makes them more politically accountable for the BIA’s shortcomings. In practice, that benefit is of small consolation. As the nation’s chief law enforcement officer, the Attorney General has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of the decision making, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and the fairness of procedures.”).


\textsuperscript{21} See Laura S. Trice, Note, \textit{Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions}, 85 N.Y.U. L. REV. 1766, 1876 (2010) (recommending 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, arguing that “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 [5 U.S.C. § 557(c)], which entitles parties to present arguments when the agency reviews a decision of its subordinates.”). In his 2018 decisions, former Attorney General Sessions invited amicus briefing in some cases, but not in others. For example, the former Attorney General certified \textit{Matter of E-F-H-L-}, 27 I & N. Dec. 226 (A.G. 2018), to himself and decided the case on March 5, 2018, without providing the parties or amici the opportunity to brief any of the issues involved.
referred to the Attorney General, to provide adequate context and specification regarding the issues presented and more meaningful participation by *amici*.

Finally, the American Bar Association has long worked toward ensuring fairness and due process rights for immigrants and asylum-seekers in the United States. Irrespective of specific policies implemented by the current administration, the precedential implications of using the Attorney General’s referral power to overturn long-standing precedent, diminish substantive relief, and eliminate traditional docket management tools is troubling from a due process and systemic standpoint. The Attorney General’s referral authority should return to being used sparingly, and only to clarify immigration law after a full administrative review process at the Board of Immigration Appeals. Such review should be narrowly tailored to address the issues on appeal. It should not be used to rewrite immigration law or promote broad-based policy objectives.

Respectfully submitted,

Wendy S. Wayne  
Chair, Commission on Immigration  
August 2019
1. **Summary of Resolution(s).** Amend 8 C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process. Include procedures for a) notice and intent of the Attorney General to certify a case, b) opportunity for public comment and briefing prior to issuance of the final decision, c) identification of the specific legal questions the Attorney General intends to review, and d) release of underlying decisions at issue. The Attorney General should exercise certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

2. **Approval by Submitting Entity.** The resolution content was discussed and approved by Commission Members between April 22nd and April 26th. Previously, Members were also active in preparing a Report from which the recommendations for the resolution originate, *2019 Update: Reforming the Immigration System.* The Update Report was released in March 2019 after 3 years of research and development.

3. **Has this or a similar resolution been submitted to the House or Board previously?** No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?** The proposed policy would support and complement existing policy.

    06M107C – policy recommending due process, independence, and neutrality in the adjudication of immigration cases, as well as full, fair and meaningful review in the federal courts. Proceedings should comply with procedures afforded in Administrative Procedure Act.

    06M107D – policy encouraging an immigration system that is transparent, user-friendly, accessible, and fair, with adequate resources to carry out its functions; development of efficient interagency procedures; enforcement against unauthorized practice of law and ineffective assistance of counsel; free availability of legal resources for participants in immigration matters; reasonable discovery procedures; efficient process for timely handling of FOIA requests.

    10M114D – policy urging restoration of federal judicial review of immigration decisions to U.S. Courts of Appeals.

5. **If this is a late report, what urgency exists which requires action at this meeting of the**
6. **Status of Legislation.** (If applicable) n/a

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Commission plans to coordinate with the ABA Governmental Affairs Office to advocate with relevant contacts within Congress, the Department of Homeland Security, the Department of Justice, and other stakeholders to bring awareness of this policy and effect legislative change or updated procedures that reflect due process and fairness in the immigration adjudication system.

8. **Cost to the Association.** (Both direct and indirect costs) Adoption of the resolution will not result in expenditures for the ABA.

9. **Disclosure of Interest.** (If applicable) No known conflict of interest exists.

10. **Referrals.**

    Center on Children and the Law  
    Commission on Hispanic Rights and Responsibilities  
    Section of Civil Rights and Social Justice  
    Section of Criminal Law  
    Section of International Law  
    Standing Committee on Pro Bono and Public Service  
    Working Group on Unaccompanied Minor Immigrants

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Meredith A. Linsky  
    Director, Commission on Immigration  
    1050 Connecticut Ave NW, Suite 400  
    Washington, DC 20036  
    Tel: 202-662-1006  
    E-mail: meredith.linsky@americanbar.org

12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)
Mary Ryan
Nutter McClennen & Fish LLP
155 Seaport Blvd.
Boston, MA 02210
Tel: 617-439-2212
E-mail: mryan@nutter.com
EXECUTIVE SUMMARY

1. Summary of the Resolution

Amend 8 C.F.R. §1003.1(h) and establish, through rulemaking, standards and procedures for the Attorney General certification process. Include procedures for a) notice and intent of the Attorney General to certify a case, b) opportunity for public comment and briefing prior to issuance of the final decision, c) identification of the specific legal questions the Attorney General intends to review, and d) release of underlying decisions at issue. The Attorney General should exercise certification authority sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

2. Summary of the Issue that the Resolution Addresses

The Attorney General is empowered to *sua sponte* refer Board of Immigration Appeals ("BIA") decisions to himself and independently re-adjudicate them. For the last half of a century Attorney Generals have traditionally used the referral power sparingly. However, Attorneys General in the current administration have referred several BIA decision for review, substantially rewriting immigration law in the process. These developments have highlighted the need for regulations delineating the standards and procedures for such referrals. Moreover, the referral power should be used sparingly, and only to review decisions issued by the Board of Immigration Appeals in the ordinary administrative appeal process.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Developing established standards and procedures for the Attorney General certification process will ensure predicability, allow for adequate input from the affected parties and the public, and enhance fairness and due process.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

There are no minority views of which we are aware.