COMMITTEE ON IMMIGRATION & NATIONALITY LAW

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Via mail

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
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Re: Attorney General Opinions & Board of Immigration Appeals Decisions

Dear Attorney General Garland,

The New York City Bar Association's Immigration and Nationality Law Committee congratulates you on your confirmation as Attorney General of the United States. We look forward to your leadership of the Department of Justice as it charts a path towards repairing the immigration policies and norms that were degraded under the prior Administration, including the restoration of due process and fundamental fairness at the Executive Office for Immigration Review's ("EOIR") components, namely, the Immigration Courts and the Board of Immigration Appeals ("BIA").

Upon your return to the DOJ as Attorney General, you reiterated the Department's commitment to one rule for all regardless of party, influence, class, race, or ethnicity; and you quoted former Attorney General Levi: "[i]f we are to have a government of laws and not of men, then it takes dedicated men and women to accomplish this through their zeal and determination, and also through fairness and impartiality."[1] In furtherance of a xenophobic and unjust agenda,

[1] On February 7, 1975, Edward H. Levi made these remarks at his swearing-in ceremony as the 71st Attorney General of the United States, available at https://ourpresidents.tumblr.com/post/110342817686/on-february-7-1975-edward-h-levi-was-sworn-in. Attorney General Merrick Garland Addresses the 115,000 Employees of the Department of Justice on His First Day, Washington D.C. (Mar. 11, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-garland-addresses-115000-employees-department-justice-his-first. (All sites last visited May 18, 2021.)

your predecessors made extraordinary use of a regulatory "referral" mechanism[2] to reverse decades-old immigration precedents to deliberately disadvantage immigrants who are poor, powerless, non-white, and female. While zeal and determination are necessary to restore fairness and impartiality to EOIR, specific expertise will also be required.

Therefore, the members of the Immigration and Nationality Law Committee, which consists of immigration attorneys from the public, private, and government sectors, academics, coalition leaders, and adjudicators, write with a focus on the abuse of the "referral" power by Attorneys General Sessions and Barr, and to offer recommendations for redress. Our concern arises from firsthand knowledge of the ways in which due process has been undermined in our immigration system. It is a concern shared by Senators[3] and former Immigration Judges.[4] As you start your tenure as Attorney General, we urge you to rescind the decisions of Attorneys General Sessions and Barr, and transform the immigration courts into a truly independent system not vulnerable to abuse of power by future Attorneys General.

In the matters EOIR adjudicates, people face death, persecution, family separation, and lifetime banishment.[5] Removal proceedings are federal administrative proceedings that determine whether an individual will be expelled from, admitted to, or granted permission to remain in the United States. Yet the immigration court system lacks the basic structural and procedural safeguards that other adjudicatory systems take for granted. Former Immigration Judge Dana Leigh Marks described the current immigration court system as akin to "holding death penalty cases in traffic court."[6] When an Attorney General chooses to certify a case for their review, they do not need not provide any explanation for their actions.[7] Moreover, the Attorney General has unfettered control over how to handle each aspect of a self-certified case, such as whether administrative precedent will be followed.[8] The unchecked power of a prosecutor over an

[2] 8 CFR § 1003.1(h)(i).

[3] Letter addressed to Attorney General Garland from United States Senators Kirsten Gillibrand, Sheldon Whitehouse, Elizabeth Warren, Edward J. Markey, Tim Kaine, and Jack Reed (Mar. 23, 2021), https://www.aila.org/infonet/senators-urge-attorney-general-garland-to-make-key.

[4] Statement of the Round Table of Former Immigration Judges, Submitted to the House Judiciary Committee on Immigration and Citizenship's Hearing on "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts," January 29, 2020.

[5] Allison Crennen-Dunalp, A Constitution that Starves, Beats, and Lashes (or the Plenary Power Doctrine): Jennings v. Rodrigez and a Peek Into the Immigration Dissent History, Denver Law Review, (Mar. 25, 2018), https://www.denverlawreview.org/dlr-online-article/2018/3/25/a-constitution-that-starves-beats-and-lashes-or-the-plenary.html#_ftn22.

[6] Judge Dorothy Harbeck, In Borrowed Robes: A Day in the Life of an Immigration Judge, 56 Judges J. No. 3 30, 32-34 (2017) (describing typical cases an immigration judge decides in one day).

[7] Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev 841, 852 (2016) ("The current regulations do not contain any criteria or standard that cases must meet in order to be referred for review, unlike prior versions of the regulation, but instead focus exclusively on who may refer cases for review.").

[8] Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev 841, 909, 913 (2016) ("Currently, the Attorney General enjoys maximum flexibility in determining how to review cases that are referred to him for review... This broad range of action is open to the Attorney General because of a lack of institutional strictures on the exercise of the referral authority. Without a regulatory requirement that briefing must be accepted, or that oral argument must be held, or

ostensibly neutral adjudicatory body is unheard of in other court systems. Yet again, this is how the fate of hundreds of people's lives are being decided daily.

The Trump Administration excessively relied on the Attorney General's self-certification power to the point of abuse. During the eight years of the Obama Administration, Attorneys General self-referred cases only four times, whereas in 2018 alone, former Attorney General Sessions invoked this power seven times.[9] Moreover, the procedures used and the resulting decisions were arbitrary and capricious.

Decisions by former Attorneys General during the Trump Administration altered well-settled precedents by eliminating bond for certain asylum-seekers,[10] limiting an immigration judge's ability to grant a motion for continuance,[11] curtailed immigration judges' power to dismiss or terminate cases,[12] and depriving both immigration judges and the Board of Immigration Appeals of the ability to administratively close cases.[13] Even more concerning are two decisions of former Attorney General Sessions that overturned long-standing precedents, in practice nearly eliminating potential eligibility for asylum and related forms of humanitarian relief based on domestic abuse,

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that any particular procedure must govern every case that is referred and accepted for review, the Attorney General can examine the contextual circumstances of each case, how it fits into the existing obligations of the Office, and what level of decision or involvement is necessary in order for the administration to advance its policy through his review, and thereby decide how to handle the specific case."). Many of these concerns are reflected in *Matter of A-B-*, 27 I&N Dec. 247, 249-50 (A.G. 2018).

[9] American Bar Association, *Resolution 121A*, (Aug. 12-13, 2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/121a-annual-2019.pdf.

[10] *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). William Barr ordered immigration judges not to release migrants on bond after an applicant successfully establishes "a credible fear of persecution or torture" in the country of origin, overruling 15 years of contrary BIA law. Plaintiffs successfully challenged the *Matter of M-S-* in *Padilla v. U.S. Immigration & Customs Enforcement*. No. 2:18-cv-00928-MJP (W.D. Wash.) (Jul. 2, 2019).

[11] *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018). In response to *Matter of L-A-B-R- et al.*, former Immigration Judges and Members of the BIA opined that: "Sessions' latest decision would force each judge to write lengthy, highly detailed decisions for each of these while still trying to complete three or more full hearings a day...Furthermore, the decision imposes no such requirements in instances where DHS seeks a continuance." Statement of Former Immigration Judges and BIA members in Response to *Matter of L-A-B-R-*(Aug. 17, 2018), https://www.jeffreyschase.com/blog/2018/8/17/statement-of-former-immigration-judges-and-bia-members-in-response-to-matter-of-l-a-b-r-?rq=l-a-b-r.

[12] *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018). This decision by Attorney General Sessions restricted Immigration Judges' discretion to take low-priority cases off their dockets, effectively imposing removal even where an individual has already qualified for immigrant status, received a hardship waiver, or is merely awaiting a consular interview. After *Matter of S-O-G- & F-D-B-*, Immigration Judges must check with the Department of Homeland Security and get their permission to terminate or dismiss any case for anything other than the DHS's failure to prove removability. Therefore, as Former Chairman of the BIA and retired Immigration Judge Paul Wickham Schmidt said: "[t]he DHS, not the Immigration Judge, controls the Immigration Court's docket." (Sep. 19, 2018), https://immigrationcourtside.com/category/department-of-justice/executive-office-for-immigration-review-eoir/board-of-immigration-appeals-bia/matter-of-s-o-g-f-d-b/.

[13] *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). However, the Executive Office for Immigration Review and Department of Justice themselves only a few years prior to this decision suggested that they use such administrative closures in order to combat the heavy and unmanageable caseloads that both immigration judges and the courts have. *See* Dept. of Justice and Exec. Office for Imm. Rev., *Legal Case Study, Summary Report* (Apr. 2017), https://www.aila.org/casestudy.

child abuse, gang violence, or family membership.[14] One decision in particular undermines protections for children, who may face persecution for no other reason than a family relationship that effectively makes the child a means to the end of punishing a family member, often based on events beyond the child's control; diminishing the cognizability of family-based social groups fuels such persecutors' power over their victims by signaling that a targeted child is highly unlikely to find safe haven after persecution based on kinship ties.[15]

Additional decisions by these prior Attorneys General further undermined asylum law and procedure by abrogating the right to full asylum hearings,[16] eliminating the duress exception to the persecutor bar to asylum,[17] eliminating the possibility of stating a claim for asylum based on mixed motives for persecution,[18] and even undermining the principle of *res judicata* by revoking a grant of asylum from fourteen years before.[19] For protection under the Convention Against Torture, the prior Attorneys General altered the "state actors" analysis to reduce eligibility for protection,[20] and heightened the standard for relief under the Convention Against Torture by requiring a finding that

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[14] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). Former Chairman of the BIA and retired Immigration Judge, Paul Wickham Schmidt explained: "Attorney General Sessions, unilaterally intervened and undid two decades of progress for women refugees of color with his grossly incorrect and disingenuous decision by overruling *Matter of A-R-C-G-* on completely specious grounds while intentionally misconstruing the facts of record. Significantly, Sessions' intervention was over the objection of DHS, which had expressed continuing agreement with the *A-R-C-G-* framework for deciding domestic violence cases." (Apr. 9, 2021) https://immigrationcourtside.com/2021/04/09/%E2%98%A0%EF%B8%8Fend-misogyny-%F0%9F%A4%AE-eoir-now-gorelick-miller-muro-are-right-but-abused-refugee-womens-lives%E2%9A%B0%EF%B8%8F-cant-wait-for-congress-judge/ In an op-ed, former Deputy Attorney General Jamie Gorelick and Tahirih Justice Center founder Layli Miller-Muro wrote, "[u]nder Attorney General Jeff Sessions, decades of progress were nearly wiped out by the stroke of a pen. Because the highest immigration court is part of the Justice Department, he was able to single handedly reverse key legal precedents favorable to women's claims and issue guidance to judges limiting gender-based asylum. As a result of these changes, the safety of many immigrant women hangs by a thread." Jamie Gorelick and Layli Miller-Muro, Wash. Post, *U.S. asylum law must protect women*, (Apr. 7, 2021), https://www.washingtonpost.com/opinions/2021/04/07/us-asylum-law-must-protect-women/.

[15] *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

[16] In *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018), Attorney General Sessions vacated the right of asylum applicants to a full hearing on their application without first having to establish prima facie eligibility for such relief.

[17] *Matter of Negusie*, 28 I&N Dec. 120 (A.G. 2020). Although the doctrine of duress is common to other bodies of law, Attorney General Sessions eliminated the duress exception to persecutor bar to asylum and withholding of removal.

[18] *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), introducing de novo review of asylum to second-guess IJ fact-finding; tightening Particular Social Group requirements by eliminating the possibility of a mixed motive for persecution, thus finding additional reasons to deny asylum.

[19] *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020). In the absence of any justifying change in fact or law, the Attorney General Mr. Chowdhury's case fourteen years after he received a final decision on the merits of his claim for asylum in violation of his due process rights and principles of res judicata.

[20] In *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020), Attorney General Barr interpreted the provision in the Convention Against Torture regulations that require torture to be inflicted or approved by a public official or another person "acting in an official capacity" to mean that the official's actions must be performed "under color of law," making irrelevant the question of whether the actions were rogue.

the torturer specifically intended to inflict severe pain and suffering.[21] In subsequent decisions, the Attorneys General made it difficult to demonstrate rehabilitation and good moral character,[22] and raised the bar for proving the existence of extreme hardship from medical conditions to warrant cancellation of removal.[23] We urge you to rescind or otherwise overrule each of these decisions.

During the Obama Administration, Attorney General Holder found it necessary on two separate occasions to invoke the self-certification power to vacate and overrule two decisions made by prior Attorney General Mukasey. In one decision, Attorney General Holder took such action to resolve the inconsistency that was created when prior Attorney General Mukasey overruled two well-established BIA precedents on which various Federal Circuit Courts had relied.[24] In the other decision, Attorney General Holder entirely vacated one of former Attorney General Mukasey's opinions based on the fact that various Federal Circuit Courts had rejected the decision and because subsequent rulings by the U.S. Supreme Court had raised concerns about the opinion's rewriting of the "categorical approach" to determining if a crime constitutes an aggravated felony.[25] Fourteen years later, Attorney General Barr attempted to again change the categorical approach, allowing for a radical reinterpretation of statutory language to deem people deportable even if they did not commit all of the elements of an aggravated felony.[26]

The prior administration's incursions on due process in the immigration court system demands course correction. We provide the following suggestions that, individually or in concert, would prevent the abuse of the self-certification power:

- Rescind, re-issue, or render non-precedential each of the 2018-2020 decisions discussed above; where necessary, direct the Department to address the subject matter of those decisions through notice-and-comment rulemaking.

- Withdraw regulations regarding the administrative review procedures of the BIA so that individuals have a full and fair opportunity to pursue immigration applications for

[21] *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020). The Attorney General certified this case to warn the BIA against granting protection under the Convention Against Torture unless there is a strict interpretation that the torturer intended to inflict severe pain and suffering.

[22] *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) effectively precludes most individuals with two (or more) DUIs from getting cancellation of removal, unless there is sufficient evidence to overcome the rebuttable presumption that the person lacked good moral character.

[23] *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020). In a Non-LPR Cancellation case, it is not sufficient that a medical condition is present; the applicant must show why their qualifying relative's medical condition will cause hardship that is exceptional and extremely unusual if removed.

[24] *Matter of Compean, Matter of Bangaly, & Matter of J-E-C-*, 25 I&N Dec. 1, 1-2 (A.G. 2009). *See also* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 Iowa L.Rev. Online 18, 24-27 (2016).

[25] *Matter of Silva-Trevino*, Order No. *Matter of Silva-Trevino*, (Apr. 10, 2015), http://www.immigrantdefenseproject.org/wp-content/uploads/2011/03/AG-Order-Vacating-Silva-Trevino-2015.pdf

[26] *Matter of REYES*, 28 I&N Dec. 52 (A.G. 2020).

which they are statutorily eligible and to respond to arguments made on appeal by DHS.[27]

- On account of the complex nature of immigration law, in which Attorneys General typically lack expertise, provide the Attorney General with an advisor having specialized knowledge of the field.[28]

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Our committee welcomes your appointment as Attorney General. We are confident that you will further the goal of strengthening our nation's commitment to a just and humanitarian immigration system. Finally, we stand ready to assist in any way we can to bring about lasting and systemic change.

Respectfully,

Danny Alicea, Chair
Immigration & Nationality Law Committee

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[27] Final Rule: "Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents," (EOIR Docket No. 159; AG Order No. 4478-2019), 84 Fed. Reg. 31463.

[28] Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev 841, 917 (2016) ("Considering the complexity of immigration law, the Attorney General would be better served by relying on an advisor specifically versed in that area of law and with ongoing knowledge of how issues are being resolved by the agency and the federal courts.").