APPELLATE EXCEPTIONALISM? THE TROUBLING CASE OF IMMIGRATION DECISIONS' CONTINUED PRECEDENTIAL EFFECT EVEN AFTER CIRCUIT COURT VACATUR

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In federal litigation, generally, an appellate court's act of vacating a decision issued by a lower court serves to end its precedential effect.[1] An appellate vacatur should mean the impugned decision is no longer binding. In other words, a vacated decision is considered dead law.

Immigration law, however, is "exceptional" as noted by many jurists and commentators.[2] Within the immigration context, vacated decisions are strangely permitted to live beyond their vacatur.[3] Through the vehicle of a petition for review, an immigrant is able to challenge a decision by the Board of Immigration Appeals (BIA), the appellate body within the immigration court system, in the appropriate Article III circuit court of appeals.[4] But the precedential force of a published BIA decision does not die with its vacatur in the event a federal circuit

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1. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."); *In re* Bernard Madoff Inv. Securities LLC, 721 F.3d 54, 68 (2d. Cir. 2013) ("[V]acatur dissipates precedential force."); Asgeirsson v. Abbott, 696 F.3d. 454, 459 (5th Cir. 2012) ("[V]acated opinions are not precedent . . . ."); Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("[A] decision that has been vacated has no precedential effect whatsoever.").

2. We are thinking here of the many decisions where immigration law has been described as "Byzantine," complex, or contradictory. *See, e.g.,* Mezo v. Holder, 615 F.3d 616, 621 (6th Cir. 2010); Padilla v. Kentucky, 559 U.S. 356 (2010) ("Immigration law can be complex, and it is a legal specialty of its own."); Scialabba v. Cuellar de Osorio, 573 U.S. 41, 75 (2014) ("Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme . . . ."). In addition, the executive branch is provided extreme "deference" in certain circumstances as noted recently by the Supreme Court in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

3. *See infra* Part I.

4. 8 U.S.C. § 1252 (2018) ("The petition for review shall be filed with the *court of appeals* for the judicial circuit in which the immigration judge completed the proceedings.") (emphasis added). *See generally* 8 U.S.C. § 1252 (2018) (governing judicial review of orders of removal and other immigration-based matters).

court of appeals abrogates the decision. Rather, the vacated decision continues to be relied upon by immigration judges, and also by other federal courts, as the law in every other federal circuit.

This practice of vacated decisions continuing to serve as the law of the land in all but the "vacating circuit" is the BIA's long-held position.[5] A vacated BIA precedential decision is thus only partially dead: defunct within the vacating circuit, while at the same time able to continue affecting courts and litigants within the remaining eleven circuits. Such a result is damaging as it appears to contradict long-held notions of fairness, consistency, *stare decisis*, and the very meaning under the common law of "precedential effect."[6]

Why is this practice of continuing the precedential effect of vacated BIA decisions so problematic? Because it implicates a variety of concerns, including *Chevron* deference, separation of powers, the horizontal relationship between various circuit courts, and the uniformity of immigration law, among others. Additionally, this practice provides an implicit rationale for legitimizing partisan Attorney General (AG) decisions, which may be poorly reasoned, politically motivated, or lead to absurd results with disastrous and unintended consequences.[7]

This Article is organized into three parts. Part I analyzes the decision *Matter of Jasso Arangure*, which exemplifies how published BIA decisions are relied upon by other circuits post vacatur. Part II analyzes concerns raised by this practice, specifically (1) the failure at *Chevron* deference first step; (2) the failure at

5. *See, e.g.*, Matter of Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("[The Board] [is] not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States.").

6. The court, for example, in Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000), held that even unpublished opinions have precedential effect, finding the portion of the 8th Circuit Rule 28A(i) that declares unpublished opinions are not precedent is unconstitutional under Article III of the United States Constitution. The court pointed out that the portion of Rule 28A(i) "purports to confer on the federal courts a power that goes beyond the 'judicial,' and "inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law." *Id.* at 900, citing Marbury v. Madison, 5 U.S. 137, 177–78 (1803); *see also* cases cited *supra* note 1.

7. Consider the Attorney General's central role in the Trump Administration's press to roll back immigration and impose additional hurdles on legitimate asylum seekers and other seeking relief from removal. President Trump has kept immigration issues central to his Presidency, taking particular issue with asylum, a form of humanitarian immigration protection for individuals who meet the definition of a "refugee" and are outside of their country of origin. In support of his objection to asylum, President Trump offered the following argument: "[The United States] is full. Our area's full. The sector is full – can't take you anymore. I'm sorry – can't happen, so turn around." The Attorney General ("AG") has issued several decisions in line with the President's objection to asylum. Specifically, the Attorney General has "referred" to himself precedential BIA decisions which provide protection for certain groups of individuals based upon several decades of settled law. The consequence of the AG's referring cases to himself has been to limit the ability of asylum seekers to obtain protection. In June 2018, U.S. Attorney General Jeff Sessions issued Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018), which attempts to severely limit the viability of asylum claims by domestic violence survivors and others who have faced persecution by private actors based upon their membership in a particular social group. The decision includes sweeping language that is formally dicta, as the relevant issues were not before the Immigration Court or the Attorney General; however, this otherwise non-binding language has been incorporated into policy memoranda by both USCIS and ICE, agencies within the Department of Justice, to inform the adjudication of asylum requests. In July 2019, the Attorney General issued Matter of L-E-A, 27 I&N Dec. 581 (A.G. 2019), which intends to restrict asylum protection for individuals who have been persecuted or fear persecution in connection with family membership. Similar to *Matter of A-B-*, *Matter of L-E-A-* is formally a narrow decision, but includes sweeping language which creates the opportunity of impacting future asylum claims.

Chevron deference second step; and (3) negative implications of separation of powers. Part III concludes with recommendations for how circuit courts should address this issue moving forward.

I. VACATED BIA DECISIONS ARE RELIED UPON BY OTHER CIRCUIT COURTS AFTER VACATUR: *MATTER OF JASSO ARANGURE*, A CASE STUDY

We begin our discussion with the Sixth Circuit's vacatur of the BIA's published decision in *Matter of Jasso Arangure* involving the issue of res judicata.[8] Ramon Jasso Arangure, a lawful permanent resident, was convicted of first-degree home invasion under Michigan law. The federal agency, Immigration and Customs Enforcement ("ICE") referred Mr. Jasso Arangure for removal proceedings, claiming his home invasion conviction constituted an aggravated felony as a "crime of violence" under the Immigration and Nationality Act ("INA" or "Act").[9] ICE has broad discretion to add additional charges at any time throughout the pendency of removal proceedings; however, ICE declined to do so in connection with Mr. Jasso Arangure's case. The Immigration Judge entered judgment in favor of ICE.[10] Mr. Jasso Arangure was ordered removed.

While Mr. Jasso Arangure's case was on appeal, the Sixth Circuit Court of Appeals, in an unrelated case, held the applicable portion of the INA defining a "crime of violence" was unconstitutional.[11] The court ruled the statute was void for vagueness because it could encompass situations that may or may not be violent. Following the Sixth Circuit's decision, the BIA remanded Mr. Jasso Arangure's case to the immigration judge. Because ICE initially decided to bring only the single charge for the unconstitutionally vague "crime of violence," the immigration judge terminated Mr. Jasso Arangure's removal proceedings.[12]

Two days later, ICE initiated a second round of removal proceedings against Mr. Jasso Arangure. This time, ICE charged Mr. Jasso as removable for being an "aggravated felon"—on the basis of the exact same home invasion conviction—by arguing the charge constituted a different crime which also triggered removal.[13] Specifically, ICE re-classified the home-invasion conviction as a "burglary offense," rather than as a "crime of violence."[14] Arguing these second proceedings were barred by the doctrine of *res judicata*, Mr. Jasso Arangure moved the immigration judge to terminate the proceedings. The immigration judge declined and denied the motion. Mr. Jasso Arangure was ordered removed for the second time.[15]

On appeal to the BIA, Mr. Jasso Arangure again argued ICE was barred from bringing the second removal proceeding against him under the widely

8. Matter of Ramon Jasso Arangure, 27 I&N Dec. 178 (B.I.A. 2017).
9. 8 U.S.C. §§1101(a)(43)(F).
10. *Matter of Jasso Arangure*, 27 I&N Dec. at 179.
11. Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016).
12. *Matter of Jasso Arangure*, 27 I&N Dec. at 179.
13. *Id.*
14. 8 U.S.C. § 1101(a)(43)(G).
15. *Matter of Jasso Arangure*, 27 I&N Dec. at 180.

known and long-standing doctrine of *res judicata,* a doctrine that precludes parties from contesting matters which they have already had a full and fair opportunity to litigate.[16] While there are two types of *res judicata*, issue preclusion and claim preclusion, only claim preclusion was relevant to Mr. Jasso Arangure's claim. Claim preclusion prevents a party from litigating matters which should have been raised in an earlier case, but were not.[17] The BIA rejected Mr. Jasso Arangure's argument, concluding *res judicata* does not apply in removal proceedings.[18] In support of this conclusion, the BIA stated "Congress's clear intent to remove criminal aliens" overrides the "public policy" of *res judicata*.[19] The Sixth Circuit, employing important, detailed analysis, discussed in detail below, vacated the BIA's decision and remanded for further proceedings.

The Sixth Circuit's vacatur of the BIA's precedential *Matter of Jasso Arangure* decision affirms *res judicata* is still alive and well in removal proceedings occurring within in the Sixth Circuit. But the policy of *Matter of Jasso Arangure* generally, that *res judicata* does not apply within removal proceedings, at least as it pertains to claim preclusion in the aggravated felony context, survives *in every other circuit.*

The BIA continues relying on *Matter of Jasso Arangure* outside of the Sixth Circuit where the impugned decision apparently retains the force of law.[20] The result is a radical policy which received what amounts to a death blow in federal litigation generally survives its death. For individuals subject to removal proceedings, the *ex ante* consequences are extraordinary. ICE continues its practice of commencing multiple, successive removal proceedings against individuals—for the same underlying conviction—in the event its initially selected charge of removability fails.[21] A vacated immigration precedential decision is allowed to negatively affect litigants and impact courts throughout the remaining eleven circuits. This is tantamount to allowing the government as many chances as it wants to remove someone – no matter how many times it initiates proceedings, and no matter how inept it was at bringing charges in the previous instances.

It is important to note further *Matter of Jasso Arangure* is not an isolated event. There have been many cases that were vacated in the circuit courts only to continue with unimpeded precedential force in other circuits. Consider *Matter of Castro-Tum*, curtailing immigration judges' ability to grant continuances and administratively close cases.[22] Despite the Fourth Circuit's rejection of that decision, *Matter of Castro-Tum* lives on for immigration practitioners, and others,

16. Montana v. United States, 440 U.S. 147, 153 (1979).

17. Taylor v. Sturgell, 553 U.S. 880, 892 (2008).

18. *Matter of Jasso Arangure*, 27 I&N Dec. at 183.

19. *Id*.

20. *See, e.g.*, *In re* Eduardo Javier Franco-Aguirre, No. AXXX-XX1-747, 2019 WL 3857831 (B.I.A. June 18, 2019) (defining the basic elements of generic burglary).

21. *See, e.g.*, *In re* Michael David Sebba A.K.A. Michael Sebba A.K.A. Michael D. Sebba, No. AXXX-XX7-916 - ELO, 2019 WL 7168745, at *1 (B.I.A. Sept. 27, 2019) (ICE charged a respondent as removable for the same underlying conviction pursuant to a different section of the Act following the BIA's termination of removal proceedings without prejudice).

22. Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018)

outside the Fourth Circuit.[23] In addition, we note that *Matter of A-B-,* which eroded protections for immigrants seeking asylum suffering from domestic violence, has been "abrogated" according to the Sixth Circuit.[24] Nevertheless, the *Matter of A-B-* decision continues to be applied by immigration judges and the BIA.

II. BESTOWING DEFERENCE TO VACATED DECISIONS RAISES CONCERNS

1. Previously Vacated BIA Decisions Fail Chevron Step 1

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the BIA, as a federal agency, may warrant deference when it interprets the INA.[25] But eligibility is not entitlement.[26] Courts must assess whether an agency is actually entitled to *Chevron* deference through a two-part test.[27] This determination is particularly important when a vacated decision continues to live beyond its death and appears before other circuit courts of appeal.

In conducting *Chevron* analysis, courts must first determine whether the statute is ambiguous, "applying the ordinary tools of statutory construction."[28] If the statute is unambiguous, that is the end of the matter – the court applies the statute as written. If, however, the statute is ambiguous, the court continues to step two: requiring deference to the agency's interpretation so long as it is permissible, *i.e.*, reasonable.[29] A vacated BIA decision fails both steps.

Chevron's first step is informed by the recognition that the "judiciary is the final authority on statutory construction."[30] But based on a sample of 1,000 cases, circuit courts find ambiguity at *Chevron*'s first step 70% of the time.[31] This leniency in statutory review invites criticism of circuit courts as abdicating their judicial duty, criticism that is particularly appropriate when appellate courts defer to BIA decisions which have been previously vacated. When faced with a vacated BIA published decision, circuit courts must be extra vigilant and adhere to their foundational judicial duty as extolled by *Marbury v. Madison* – to "say what the law is."[32]

Mr. Jasso Arangure's case provides an illustrative example of how circuit courts can apply appropriate judicial vigilance. The Sixth Circuit, utilizing "traditional tools of statutory construction" found the Act unambiguous–despite the

23. Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).

24. *See* Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018), *abrogated by* Juan Antonio v. Barr, 959 F.3d 778 (6th Cir. 2020).

25. Negusie v. Holder, 555 U.S. 511, 516–17 (2009).

26. Arangure v. Whitaker, 911 F.3d 333, 337 (6th Cir. 2018).

27. City of Arlington v. F.C.C., 569 U.S. 290, 296 (2013).

28. *Id*.

29. *Id.*

30. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

31. *Cf.* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 33–34 (2017).

32. 5 U.S. 137, 177 (1803).

fact the Act was completely silent regarding *res judicata*.[33] In light of the Act's silence, the court turned to canons of construction, those background principles courts have developed over time to guide statutory interpretation, in order to review the Act for ambiguity.[34]

The court applied the common-law presumption canon, which presumes general statutory language incorporates established common-law principles, such as *res judicata*, unless a contrary statutory purpose is evidenced.[35] Applying this exacting review to the Immigration and Nationality Act, the court found the statute unambiguous.[36] No deference was accorded to the BIA's decision.

Circuit courts should apply a similar standard of review to BIA decisions vacated by sister circuits when determining whether *Chevron* deference is due. This review simultaneously respects precedent while anticipating the evolution of the law in this area: the Supreme Court has consistently applied canons at *Chevron* step one, and an exacting standard is consistent with the Supreme Court's evolving jurisprudence on the issue.[37]

In its recent *Pereira v. Sessions* decision, the Supreme Court admonished circuit courts for being too quick in finding statutes ambiguous.[38] In his concurring opinion, Justice Kennedy highlighted the fact that several current members of the Supreme Court, including Justices Gorsuch and Thomas, as well as Chief Justice Roberts, have called into question the premises of *Chevron*, in part due to the frequency with which circuit courts find statutes ambiguous.[39] Of particular concern to the Justices are instances where agencies are interpreting statutory provisions concerning their *own* scope of authority.[40]

The determination about when deference is owed is the court's, and the court's alone.[41] The Supreme Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), however, affirms an administrative agency is not necessarily without recourse in certain situations. Administrative agencies have the ability not to follow certain federal court decisions if *Chevron* deference is indeed owed. Specifically, court opinions published before an agency issues an opinion on a matter which the agency is otherwise owed deference may not be followed–unless the court has stated, or will state, that it does not owe the agency *Chevron* deference to the matter at issue.

33. Arangure v. Whitaker, 911 F.3d 333, 338 (6th Cir. 2018).

34. *Id*.

35. *Id.* (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).

36. *Id.*

37. *See, e.g.*, Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007*)*; I.N.S. v. St. Cyr, 533 U.S. 289, 319 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988).

38. 138 S. Ct. 2105, 2121 (2018).

39. *Id*.

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

41. *See, e.g.*, Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 849 (1984).

Such administrative decisions do not do more. Administrative agencies do not have the power to decide when deference is owed.[42]

In *Kisor v. Wilkie*, a case concerning the continued viability of the related concept of *Auer* deference, which requires courts to defer to agency interpretations of its own regulations, the Supreme Court dramatically limited the scope of judicial deference required, while otherwise upholding judicial deference to agencies' reasonable readings of genuinely ambiguous regulations as retaining an important role.[43]

Circuit courts are wise, therefore, to require a more exacting standard of review when engaged in *Chevron* analysis's first step, guarding against reflexively finding the statute underlying a vacated BIA precedential decision "ambiguous" when it may not be.

2. Previously Vacated BIA Decisions Fail Chevron Step 2

Assuming *arguendo* that the statute underlying a vacated BIA published decision survives *Chevron* step 1, *i.e.*, the statute is indeed ambiguous, an equally exacting standard of review should attach at *Chevron* step 2 for relevant, vacated BIA decisions. Chevron's second step requires courts to determine if the agency's interpretation is reasonable.[44] In making the reasonableness determination, courts determine whether the agency interpretation is arbitrary and capricious.[45]

At a minimum, the agency's decision must be supported by substantial evidence in order to survive arbitrary and capricious review.[46] Accordingly, decisions that fail to consider important issues of fact and law are likely arbitrary and capricious. Decisions which are not the result of agency expertise but are rather boldly and blatantly results-oriented are similarly likely arbitrary and capricious.[47] The Supreme Court's recent decision finding the government's attempted rescission of the DACA Program to be arbitrary and capricious is an excellent example.[48]

When a BIA precedential decision is vacated by a court of appeals, the BIA does not accept the adverse determination by one circuit court of appeals as binding throughout the United States.[49] No new BIA decision is issued. Rather, the BIA continues treating the decision as precedent, without change, throughout the remaining circuits. If the circuit courts allow the BIA to proceed in this fashion, those courts are likely improperly applying *Chevron's* second step.

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

43. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

44. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

45. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 30 (1983).

46. *Id.*

47. *See, e.g.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

48. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 207 L. Ed. 2d 353, 2020 U.S. LEXIS 3254, 140 S. Ct. 1891 (2020).

49. *See, e.g.*, Matter of Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989).

The underlying reason for vacatur of a decision includes important issues of fact and law. When a previously vacated BIA decision appears in another circuit—haunting beyond its death—it does so necessarily without consideration of the underlying reasons for its vacatur. Important issues of fact and law necessarily remain unconsidered. Failing to consider important aspects, it is unlikely the vacated decision, without change, is reasonable.[50]

Circuit courts should utilize a more exacting standard of review at *Chevron's* second step to ensure the BIA decision is not arbitrary and capricious. A more exacting standard of review at *Chevron* step two is similarly consistent with the Court's evolving jurisprudence.[51] Heightened scrutiny addresses, in part, the Justices' concerns discussed previously.

One possible solution is for circuit courts, as a matter of practice, to vacate and remand those BIA decisions which have been previously vacated by a sister circuit. Upon remand, the BIA should be instructed to issue a new decision, which at the very least accounts for the unaddressed issues of fact and law underlying the reason for vacatur.

The practice as it currently exists allows vacated BIA published decisions to continue to haunt litigants and courts in all but the vacating circuit. In addition to *Matter of Jasso Arangure*, other vacated BIA decisions continue to have consequences across disparate federal circuits.[52] By utilizing an exacting level of scrutiny at both steps of *Chevron* analysis, if necessary, circuit courts will provide clarity for both litigants and courts while more faithfully executing their constitutional duties.

3. According Vacated BIA Decisions Deference Negatively Implicates Constitutional Separation of Powers

Discussed above is the fact the BIA has a practice of continuing to accord its vacated precedential decisions with the force of law outside of the vacating circuit. Implicit to this practice is a determination by the BIA of its own scope of authority. And by extension, a determination by the BIA of the court's scope of authority, too—contrary to the Chief Justice's assertion, "[The Court does] not leave it to the agency to decide when it is in charge."[53]

The Immigration Court and Board of Immigration Appeals are agencies under the Department of Justice, Executive Office for Immigration Review.[54]

50. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

51. *See generally* Pereira v. Sessions, 138 S. Ct. 2105 (2018).

52. *See, e.g.*, Matter of L-E-A-, 27 I. & N. Dec. 40, 40 (B.I.A. 2017) (concerning standards regarding particular social groups based upon familial relationships in connection with applications for asylum); *see also* Matter of Mendoza-Hernandez & Capula-Cortes, 27 I. & N. Dec. 520, 520 (B.I.A. 2019) (holding a subsequent Notice of Hearing perfects an otherwise deficient Notice to Appear for purposes of triggering the "stop-time" rule in connection with Cancellation of Removal).

53. *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (quoting City of Arlington v. F.C.C., 569 U.S. 290, 327 (2013)).

54. Homeland Security Act of 2002 § 1101.

The BIA acts as an appellate review tribunal, tasked with reviewing questions of law *de novo*. At the same time, the BIA is otherwise responsible for ensuring the development of the factual record while enforcing the nation's immigration laws.[55] The necessary determination of whether an issue confronting the BIA requires its immigration expertise or is rather more properly a question of law can be ambiguous—especially when circuit courts fail to sufficiently scrutinize the matter. When the BIA is considering questions of law, such as interpreting the statute to determine its scope of authority, the BIA is acting in a judicial function–encroaching on the power of the judiciary.

The BIA's encroachment on judicial powers is particularly problematic due to the relationship of the Attorney General to the BIA. As the head of the Department of Justice, the Attorney General has the power to regulate immigration judges and the BIA.[56] This power includes the authority to review, modify, and overturn individual decisions of the immigration courts and BIA, which are then binding on each.[57] Due to the BIA's practice of ignoring the effects of vacatur outside of the vacating circuit, in such a circumstance, there exists the risk that the Attorney General is substituting his opinion for that of the court's. The power of the executive branch, through the BIA, is aggrandized at the expense of the judiciary.

The Seventh Circuit recently stated, in *Baez-Sanchez v. Barr*, "it should not be necessary to remind the . . . [BIA], all of whose members are lawyers, that the 'judicial Power' under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government."[58] Once the circuit court reaches a conclusion, both the Constitution and the Immigration and Nationality Act require the Board of Immigration Appeals to implement it.[59] Accordingly, the circuit courts are the most appropriate venue in which to invalidate already vacated BIA decisions.

III. HOW OTHER CIRCUIT COURTS SHOULD VIEW VACATUR

The issues exemplified by *Matter of Jasso Arangure* beg the question: why should all other federal circuit courts feel bound to defer to a precedential decision issued by the BIA when that decision previously was vacated by its sister circuit court of appeals?

The answer is: they should not. No principle of civil procedure, appellate procedure, or administrative law should support such a conclusion. In fact, the history of jurisprudence militates toward the opposite conclusion.

Circuit courts should respect the death of a vacated BIA decision. Such respect includes according no deference to vacated BIA decisions. In the alternative, circuit courts should similarly vacate BIA decisions which have been

55. *Id.*
56. *See id.* at § 1101, 1102(3).
57. *See* 8 CFR § 10003.1(h) (2008).
58. Baez-Sanchez v. Barr, 947 F.3d 1033, 1036 (7th Cir. 2020).
59. *Id*.

vacated by sister circuits, and in appropriate cases remand for the BIA to issue a new decision which remedies or addresses the reasons for the vacatur in that circuit.

To be clear, the argument is not that circuit courts are bound by a decision of another sister circuit, among which there is parity and equality. Rather, the circuit courts should not provide deference specifically to the *vacated* decisions of the BIA, an administrative agency which the U.S. Constitution does not afford the status of an Article III court. The decisions of the BIA and AG are subject to the political influences (and whims) of the current administration and its appointees.[60] As mentioned previously, judicial deference to vacated BIA decisions, without exacting scrutiny, implicates a variety of concerns, including, *Chevron* deference, separation of powers, the horizontal relationship between various circuit courts, and the uniformity of immigration law, among others. This practice resulting in the longevity of vacated decisions proves the "exceptional" nature of immigration law. Such continued reliance upon otherwise vacated BIA decisions leads to unfairness and injustice, and flies in the face of our traditional expectations of the appellate process.

60. *See, e.g.*, Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018) (holding both Immigration Judges and BIA do not have the authority to administratively close proceedings), *abrogated by* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).