

2006

Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation

Edward R. Grant

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 Cath. U. L. Rev. 923 (2006).

Available at: <https://scholarship.law.edu/lawreview/vol55/iss4/4>

This Symposium is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

LAWS OF INTENDED CONSEQUENCES: IIRIRA AND OTHER UNSUNG CONTRIBUTORS TO THE CURRENT STATE OF IMMIGRATION LITIGATION

*Edward R. Grant**

In the motion picture based on Christopher Buckley's satirical novel, *Thank You for Smoking*, protagonist and tobacco company flack Nick Naylor is asked by his son Joey, "what makes America the greatest country on Earth?" Naylor, exhaling irony, responds: "Our endless appeals process."¹

Whatever their view of the immigration appeals process, the participants in this Symposium (readers included), surely do not wish it to be endless.² Rather, they would likely concur that America's greatness is due in large part to its immigrant heritage, and that the present challenge is to enact policies that are fair, transparent, and enforced.³

* A.B. Georgetown University, J.D. Northwestern University, Affiliated Scholar, Center for Clinical Bioethics, Georgetown University School of Medicine. Member, Board of Immigration Appeals, Executive Office for Immigration Review, U.S. Department of Justice. The views and opinions stated herein are strictly those of the author, and do not represent the official position of the EOIR, or of the Department of Justice.

1. THANK YOU FOR SMOKING (Fox Searchlight Pictures 2006).

2. Addressing the related issue of motions, the Supreme Court spoke plainly to the incentives for delay in immigration proceedings.

Motions for reopening of immigration proceedings are disfavored [by the Attorney General and those enforcing the immigration laws on his behalf] for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. This is especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.

INS v. Doherty, 502 U.S. 314, 323 (1992) (citation omitted); see also INS v. Abudu, 485 U.S. 94, 110 (1988) ("[T]he Attorney General's regulations . . . plainly disfavor motions to reopen.").

3. See generally Michael M. Hethmon, *The Chimera and the Cop*, 8 UDC/DCSL L. REV. 83 (2004); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006); Lory Diana Rosenberg, *The Courts and Interception: The United States' Interdiction Experience and Its Impact on Refugees and Asylum Seekers*, 17 GEO. IMMIGR. L.J. 199 (2003). Few could doubt that despite its imperfections, U.S. policies toward immigrants and immigration have singular advantages over those in most Western European countries, where assimilation is less a part of the cultural heritage, and labor market barriers remain a genuine obstacle even for the native-born descendants of immigrants. See Marcelo M. Suarez-Orozco, *America's Immigration Advantage*, WASH. POST, Mar. 6, 2006, at A15 ("[I]n countries such as Denmark, Sweden and Germany, immigrants have no place in the cultural narrative of the nation. In the United States, immigration is at the center of the quasi-sacred narrative accounting for how we came to be the country we are

Some, though not all, would applaud the current generous policies that admit or adjust to permanent resident status close to one million newcomers each year.⁴ Others would argue not with the numbers, but with the manner in which new immigrants are selected for admission.⁵ Most would be troubled (despite significant disagreement on how to address the problem) by the phenomenon of illegal immigration that adds another approximately 500,000 new residents each year.⁶ All should be troubled by the fact that only a small fraction of final orders of deportation and removal—entered after a hearing before an immigration judge, with right of appeal to the Board of Immigration Appeals (BIA)—are actually executed.⁷ This fact would surely not be comforting to judges of the United States courts of appeals, who have strained in recent years to manage a burgeoning docket of immigration cases—a phenomenon that inspired the proceedings of the current Symposium.⁸

today.”). For a sharply contrasting view, see CHILTON WILLIAMSON, JR., *THE IMMIGRATION MYSTIQUE: AMERICA’S FALSE CONSCIENCE* 6 (1996).

4. OFFICE OF IMMIGR. STATS., U.S. DEP’T OF HOMELAND SEC. (DHS), 2004 YEARBOOK OF IMMIGRATION STATISTICS 5 (2006), available at <http://www.uscis.gov/graphics/shared/statistics/yearbook/yearbook2004.pdf>. According to DHS, 9,095,417 legal immigrants were admitted as, or adjusted to the status of, lawful permanent residents from 1991 to 2000, and 3,780,019 were admitted or adjusted from 2001 to 2004. *Id.* For analysis of the predictability of these figures, which signify the longest wave of high immigration to the United States in the nation’s history, see Lamar Smith & Edward R. Grant, *A Permanent Fixture? Analyzing Current Trends in Legal Immigration*, 74 INTERPRETER RELEASES 1065, 1065-66 (1997).

5. The Commission on Legal Reform, established by the Immigration Act of 1990, Pub. L. No. 101-649, § 141, 104 Stat. 4978, 5001-04 (codified in scattered sections of 8 U.S.C.), recommended “a significant redefinition of priorities and a reallocation of existing admission numbers to fulfill more effectively the objectives of our immigration policy.” U.S. COMM’N ON IMMIGR. REFORM, *LEGAL IMMIGRATION: SETTING PRIORITIES*, at v (1995), <http://www.utexas.edu/lbj/uscir/exesum95.pdf> (emphasis omitted). The Commission recommended a core legal immigration level of 550,000 per year, with an additional 150,000 visas per year allocated to clearance of backlogs for “spouses and minor children of legal permanent residents.” *Id.* at xi (emphasis omitted). Significantly in relation to the current immigration debate, the Commission recommended the elimination of the immigrant category for admitting unskilled workers, *id.* at xxiv, and strongly argued against creation of an agricultural guestworker program. *Id.* at xxx.

6. JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* 2 (2006), available at <http://www.pewhispanic.org/files/reports/61.pdf> (estimating a total unauthorized population of between 11.5 and 12 million, with an annual increase of 500,000, based on the U.S. Census Bureau’s March 2005 Current Population Survey).

7. The ratio of failed asylum-seekers removed from the United States is as low as 3%. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REPORT NO. I-2003-004, *THE IMMIGRATION AND NATURALIZATION SERVICE’S REMOVAL OF ALIENS ISSUED FINAL ORDERS 15-16* (2003); see also *id.* at 7 (noting recent statistics that allege more than 300,000 aliens with final orders).

8. Neither the problem of unenforced final orders of deportation, nor judicial impatience with the phenomenon, is limited to the United States. Mr. Justice Henry

Understanding how we reached this point—where the BIA decides more than 44,000 appeals annually,⁹ and more than 12,000 of these reach the federal courts of appeals¹⁰—is a multi-faceted task, but is critical to forming solutions that will ensure that immigration appeals are resolved correctly and without undue delay. This Article will demonstrate that the current immigration caseload is the logical consequence of a series of decisions, including congressional enactments, administrative regulations, and judicial opinions, which have given more authority to immigration judges, narrowed the issues for both administrative and judicial appeals, and streamlined a previously delay-ridden administrative appeals process.¹¹ To this list—critically—must be added the

Hodge, president of the Asylum and Immigration Tribunal, recently criticized the British government for failure to deport more illegal immigrants and failed asylum-seekers. Richard Ford, *Britain Must Deport More Failed Asylum-Seekers, Says Top Judge*, *TIMES* (London), Jan. 25, 2006, at 6.

9. In fiscal year (FY) 2005, the BIA received 42,734 cases and completed 46,355 cases. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK S2 (2006). Approximately 4000 of both the receipts and completions involved appeals from DHS decisions, chiefly family-based visa petition denials. *Id.* at T2. The remainder of the receipts involved appeals from final case decisions of immigration judges (24,349), appeals from immigration judge denials of motions to reopen final case decisions (1,859), motions to reopen decisions of the BIA itself (10,319), bond appeals (713), and remands from the circuit courts (1,308). *Id.*

10. *See Filings Climbed in Federal Courts in Fiscal Year 2004*, THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Mar. 2005, available at <http://www.uscourts.gov/ttb/mar05ttb/caseload/index.html>.

11. For a more critical view of these developments, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006) (“[T]he combined effect of the Attorney General’s reformation of the administrative adjudication process and Congress’s restrictions on judicial review is lethal to decisional independence.”). Professor Legomsky’s thesis begs this critical question: precisely *whose* “decisional independence” is to be most highly regarded in the area of immigration law? *Cf. id.* at 369-71. It is difficult to claim that immigration judges and members of the BIA do not exercise their own independent judgment in the cases pending before them; otherwise, how could one account for the oft-noted fact that certain immigration judges have higher “grant rates” in particular classes of cases than other immigration judges? *See, e.g., Attorney General Outlines Reforms for Immigration Courts*, 83 INTERPRETER RELEASES 1725, 1727 (referencing a study highlighting asylum grant rate disparities). More to the point, the Supreme Court has been consistent and virtually unanimous in upholding Congress’ plenary power to establish immigration laws, as well as the authority of executive branch officers to carry out those laws. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). Given the traditional sources of the plenary power doctrine—the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power—it would be odd indeed for Congress or the executive branch to create a body of immigration adjudicators whose decisions were *not* ultimately susceptible to review by more politically accountable officials. It also is not remarkable that the role of courts in reviewing the factual determinations, and in particular the purely discretionary determinations, of such authorities would be limited. *See INS v. Ventura*, 537 U.S. 12, 16-17 (2002); *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-91 (1999); David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 GEO.

simple weight of demands on the system, measured both by the growth in illegal immigration and the availability of relief from deportation. The good news is that despite these demands, genuine “choke points,” where matters lay unresolved for inordinate lengths of time, do not exist.

The Article will focus on two major sets of developments. Part I will trace the emergence of a trial-level immigration court system independent of the former Immigration and Naturalization Service (INS). In 1983, immigration judges were removed from the supervision of the INS, and given independent status, along with the BIA in the newly-created Executive Office for Immigration Review (EOIR).¹² Since the formation of the INS as part of the Department of Justice (DOJ) in 1940, the BIA had existed as an independent entity within the DOJ to review certain administrative decisions of the INS.¹³ Since at least 1983, all relevant administrative and congressional decisions point in one direction: the establishment of a more independent, trial-level immigration court with greater authority and a greater expectation of deference to its decision-making. This should not be seen as odd. A system involving scores of thousands of cases in which the important, quotidian decisions are made chiefly at the trial level should be viewed as the norm; a system in which an appellate body (e.g., the BIA) would be expected to “do over” the work of trial-level judges in thousands of those cases should be seen as anomalous. When the anomaly was the norm, chiefly in the late 1990s, the result—appeals that took years to decide, and did little to improve the administration of justice—was unsatisfactory by any reckoning.

Part II will focus on legislative, administrative, and judicial decisions that have created a greater degree of certainty and finality in many areas of immigration law. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,¹⁴ while unsuccessful in its stated goal to reduce illegal migration to the United States,¹⁵ was more

IMMIGR. L.J. 313, 329-332 (2002) (arguing that immigration advocates should be more concerned about substantive restrictions on eligibility for discretionary relief as opposed to expanding judicial review of such decisions).

12. 8 C.F.R. § 1003.0(a) (2006) (discussing the Executive Office for Immigration Review).

13. Watson B. Miller, *Foreword to the First Volume of ADMINISTRATIVE DECISIONS UNDER THE IMMIGRATION AND NATIONALITY LAWS*, 1 I. & N. Dec., at iii (1943). “The Board of Immigration Appeals derives its authority from sections 90.2 through 90.12, title 8, Code of Federal Regulations.” *Id.* The BIA was formed in August 1940 and issued its first decision on August 29, 1940. *See In re L-*, 1 I. & N. Dec. 1 (B.I.A. 1940).

14. Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 U.S.C.).

15. *See* H.R. REP. NO. 104-863, at 566 (1996) (Conf. Rep.); H.R. REP. NO. 104-828, at 1 (1996) (Conf. Rep.); S. REP. NO. 104-249, at 2-3 (1996); 142 CONG. REC. H2378 (daily ed. Mar. 19, 1996).

successful in streamlining the system of immigration adjudication through the following measures: (1) merging the former exclusion and deportation proceedings into a single form of “removal” proceedings;¹⁶ (2) expanding the authority to remove criminal aliens without hearings before immigration judges;¹⁷ (3) curtailing eligibility for waivers and certain forms of discretionary relief from removal;¹⁸ and (4) curtailing the jurisdiction of the courts of appeals to review decisions made on discretionary waivers and relief.¹⁹ The net effect of these changes was to narrow the litigable issues before immigration courts, the BIA, and courts of appeals, enabling more cases to be initiated and completed at the first level of adjudication, and thus more cases to be appealed.

Subsequent enactment of the Nicaraguan and Central American Relief Act (NACARA)²⁰ and the Haitian Refugee and Immigration Fairness Act (HRIFA) of 1998²¹ was also significant. NACARA granted an effective amnesty to tens of thousands of Cubans and Nicaraguans present in the United States without the need for them to apply for “defensive” relief in deportation proceedings;²² this removed thousands of otherwise contentious asylum cases from that system. Less generously, NACARA also granted to certain nationals of El Salvador and Guatemala the right to apply for suspension of deportation under the prior provisions repealed by IIRIRA.²³ Subsequent regulations, which granted these NACARA beneficiaries a presumption of “extreme hardship,” and allowed such cases to be adjudicated by INS (now USCIS) asylum officers, further streamlined (or terminated) the pending deportation proceedings for these aliens.²⁴ Finally, HRIFA granted a path to lawful permanent resident status for thousands of Haitian migrants who had been paroled into the United States for determination of their refugee claims.²⁵

16. IIRIRA § 304, 8 U.S.C. § 1229a (2000).

17. IIRIRA § 308, 8 U.S.C. § 1228(a) (2000); *see also* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 931-32 (1997).

18. IIRIRA § 304 (creating section 240A of the INA), 8 U.S.C. § 1229b (2000); *see also* Smith & Grant, *supra* note 17, at 917-18.

19. IIRIRA § 306(a)(2) (revising section 242 of the INA), 8 U.S.C. § 1252(a)(2)(B) (2000); *see also* Smith & Grant, *supra* note 17, at 918-19.

20. Pub. L. No. 105-100, 111 Stat. 2160, 2193-2201 (1997) (codified as amended in scattered sections of 8 U.S.C.).

21. Pub. L. No. 105-277, 112 Stat. 2681-538 (1998) (codified as amended in scattered sections of 8 U.S.C.).

22. *See* NACARA § 202(a).

23. *See* NACARA § 203(c).

24. *See* 8 C.F.R. § 240.64(d) (2006).

25. *See* HRIFA § 902.

The next and most frequently cited cause for the rapid growth in immigration appeals is the BIA “streamlining” regulation—actually, a series of regulations—promulgated by Attorneys General Janet Reno and John Ashcroft in 1999 and 2002.²⁶ What is often not recognized is that the success of this *procedural* regulation—enabling the BIA to more than halve its pending caseload, and more than double its production of cases—was a direct result of IIRIRA’s aforementioned streamlining of the *substantive* issues to be adjudicated before immigration courts and the BIA. The existence of that cohort of cases resulted directly from the changes enacted in IIRIRA that eliminated certain forms of relief, created new forms with more circumscribed eligibility criteria, and restricted appellate review, thus creating a “closed system” of administrative adjudication on discretionary matters previously subject to circuit court review.

Key judicial decisions have validated this streamlined approach: uniform rejection by the circuits of challenges to the streamlining regulations;²⁷ concomitant rejection of challenges to jurisdictional limitations on review of discretionary decisions to grant waivers and relief from removal,²⁸ and an overall high affirmance rate of BIA decisions.²⁹ More recently, some circuit judges have called for greater

26. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878-905 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1 (2006)) [hereinafter Procedural Reforms].

27. See *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (concluding that BIA streamlining procedures allowing affirmance of immigration judges’ decisions without opinion represented a permissible construction of the Immigration and Nationality Act (INA)); *Yu Sheng Zhang v. U.S. Dep’t of Justice*, 362 F.3d 155, 157 (2d Cir. 2004) (holding that BIA streamlining regulations allowing a single board member to summarily affirm the decision of an immigration judge denying asylum did not deprive asylum applicant of due process); *Dia v. Ashcroft*, 353 F.3d 228, 236-44 (3d Cir. 2003) (en banc) (holding that the Attorney General permissibly construed INA in promulgating streamlining regulations, and finding that streamlining regulations did not violate alien’s due process rights); *Denko v. INS*, 351 F.3d 717, 729-30 (6th Cir. 2003) (deciding that the regulation allowing a single member of BIA to issue summary affirmance of an immigration judge’s order did not violate the due process rights of aliens); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (finding that BIA streamlining procedures allowing bypass of traditional three-judge review did not violate an alien’s due process rights under the Fifth Amendment); *Capital Area Immigrants’ Rights Coal. v. U.S. Dep’t of Justice*, 264 F. Supp. 2d 14, 34 (D.D.C. 2003) (holding that the regulation streamlining BIA appellate review procedures was not arbitrary or capricious).

28. See *Jean v. Gonzales*, 435 F.3d 475, 484 (4th Cir. 2006); *Alvarez-Delmuro v. Ashcroft*, 360 F.3d 1254, 1257 (10th Cir. 2004); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003); *Bravo v. Ashcroft*, 341 F.3d 590, 593 (5th Cir. 2003); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003); *Kharkhan v. Ashcroft*, 336 F.3d 601, 604 (7th Cir. 2003); *Montero-Martinez v. Ashcroft*, 249 F.3d 1156, 1160 (9th Cir. 2001).

29. See *infra* note 199 and accompanying text.

oversight of the conduct of proceedings in immigration court.³⁰ This does not change the fact that, overall, the circuit courts are comfortable with a system that, since the mid-1990s, has been prodded to be less “endless” and more decisive.³¹

Despite the tension that such a system entails, a regime of independent adjudicators subject to the ultimate authority of the executive branch has served the nation’s interests and immigration system well. Given the close connection of many immigration issues to matters of national security, public safety, and foreign relations, proposals to jettison the immigration adjudication function entirely from the political branches of the government are unwise and unlikely to be enacted. Similarly, despite the undesirable conflict among the circuits on questions of law and functional standards of review in immigration matters, proposals to move the entire immigration docket to a single circuit court deserve the uniform criticism directed at them by circuit judges in recent testimony before Congress.³²

I. BIA “STREAMLINING” AS A CULMINATION, NOT A BEGINNING

A. *The Emergence of a Trial-Centered Adjudication System*

1. *Ferment in the 1990s*

When the author entered the government as a “general attorney” with the INS in 1992, there were approximately eighty immigration judges and three full-time members of the BIA. Immigration judges had been independent of the INS for less than ten years, and were dealing, to a mixed degree of success, with a large influx of claims for asylum under section 208 of the Immigration and Nationality Act (INA). Certain nationalities, particularly Nicaraguans and Chinese, benefitted from special “administrative review” programs overseeing the work of immigration judges and the BIA,³³ while other nationalities, chiefly

30. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

31. See, e.g., *Morgan v. Gonzales*, 445 F.3d 549, 552-53 (2d Cir. 2006) (“We have recently commented that immigration cases are not ‘games.’ Indeed, they are not, and we will not, nor should an immigration judge be required to, indulge Morgan’s attempts to introduce needless delay into what are meant to be ‘streamlined’ proceedings.”) (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 113 (2d Cir. 2006)); see also *Wei Guang Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (“Th[e] apparent gaming of the system in an effort to avoid deportation is not tolerated by the existing regulatory scheme.”).

32. See, e.g., Editorial, *Don’t Tamper With the Courts*, N.Y. TIMES, Apr. 7, 2006, at A24.

33. See, e.g., *Attorney General Announces New Asylum Policy Unit*, 64 INTERPRETER RELEASES 472 (1987); *New Office Set Up to Review Eligibility for Asylum in U.S.*, N.Y. TIMES, Apr. 9, 1987, at A18. DOJ’s Asylum Policy and Review Unit (APRU) is described on a current government website as “a watchdog unit set up by the Reagan

Salvadorans and Guatemalans, benefitted from relief in class action lawsuits.³⁴ Meanwhile, a parallel system of internal INS adjudication of asylum claims seemed to be a project permanently under construction; the promised “final regulations” of 1990³⁵ were buried under an avalanche of new claims in the early years of that decade, resulting in a six-figure backlog of unadjudicated cases.³⁶ Aliens denied in that system were entitled to de novo consideration of their application in deportation proceedings before an immigration judge. During that period, circuit courts certainly had their say in some important matters, particularly the development of asylum law,³⁷ but the difficulties of an over-burdened system were borne primarily by the INS and EOIR judges.

The Clinton administration undertook several objectives to address the issue, which can be divided into policy-based and resource-based initiatives.³⁸ The chief policy initiative was new asylum regulations, effective January 1995, which centered on three major changes.³⁹ First,

Administration to ensure that the INS did not improperly deny asylum applicants.” U.S. Citizenship and Immigration Services, *This Month in Immigration History: January 1995*, <http://uscis.gov/graphics/aboutus/history/jan95.htm> (last visited July 28, 2006) [hereinafter *Immigration History*]. Within the government, its creation caused consternation within both the State Department and the INS. See Arthur C. Helton, *Final Asylum Rules: Finally*, 67 INTERPRETER RELEASES 789, 792-93 (1990) (describing INS acquiescence, and State Department criticism of APRU’s competence in the task of reporting country conditions); *INS Pushes Major Changes to Proposed Asylum Rule*, 66 INTERPRETER RELEASES 3, 13 (1989) (reporting that INS Commissioner Nelson asked Attorney General Thornburgh to disband APRU). The Nicaraguan Review Program, operated in the DOJ from 1985 to 1995, protected approximately 40,000 Nicaraguan nationals from deportation. Stanley Mailman & Stephen Yale-Loehr, *Amnesty for Central Americans?*, N.Y.L.J., Sept. 5, 1997, at 3. The program required review by the DOJ of the cases of all Nicaraguans ordered deported, even those who had presented asylum claims in the course of their proceedings. *INS Discontinues Nicaraguan Review Process*, 72 INTERPRETER RELEASES 83, 839 (1995) (citing country condition changes in Nicaragua and improvements in the U.S. asylum system, as grounds for termination).

34. See *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

35. *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674, 30,674-75 (July 27, 1990) (codified in 8 C.F.R. pts. 3, 103, 208, 236, 242, 253); see also Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 262-63 (1992); Helton, *supra* note 33, at 789-90.

36. See Smith & Grant, *supra* note 17, at 897-98 & n. 51 (citing INS data documenting the number of new asylum claims filed from FY 1994 to FY 1996).

37. The bulk of the significant circuit court law during this period emanated from the Ninth Circuit. See generally *Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), *vacated*, 502 U.S. 1086 (1992), *aff’d on remand*, 970 F.2d 599 (9th Cir. 1992); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989); *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *aff’d*, 480 U.S. 421 (1987).

38. See Smith & Grant, *supra* note 17, at 895-96.

39. See *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 62,284, 62,284 (Dec. 5, 1994) (codified at 8 C.F.R. pts. 208, 236, 242, 274a, 299).

applicants would no longer receive automatic work authorization, thus reducing a perceived incentive for filing non-meritorious claims.⁴⁰ Second, applicants denied asylum by the INS would no longer receive a detailed notice of intent to deny and final decision of denial, but rather would have their claims “referred” to an immigration judge for a de novo hearing of their claim.⁴¹ Third, immigration judges would “strive to complete the adjudication asylum application” within 150 days of the application being filed.⁴² To deal with these changes, resources altered greatly: the ranks of INS asylum officers doubled,⁴³ new hiring of immigration judges increased their number to over 200, and eight new members (plus dozens of staff attorneys) were appointed to the BIA in 1995.⁴⁴

There was plenty of work, and then some, to occupy the new hires at all levels. Asylum officers had an accumulated backlog to clear, although incoming cases, as anticipated, decreased.⁴⁵ Immigration judges, many of them new to the job, had to deal with a rapid influx of “referred” asylum claims, many of them quite dated, under a new system of deadlines.⁴⁶ The Board, with a backlog steadily built during the years when it

40. *Id.* at 62,284, 62,290-91.

41. *Id.* at 62,284, 62,293-94.

42. *Id.* at 62,284. For a comprehensive analysis of the issues and process resulting in the reform of asylum regulations effective January 4, 1995, see generally David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995).

43. The original cohort of 82 INS asylum officers hired in 1990 was roughly doubled to 150 in 1992, and doubled again to over 300 after promulgation of the 1995 regulations. Immigration History, *supra* note 33.

44. Executive Office for Immigration Review; Board of Immigration Appeals; Expansion of the Board, 59 Fed. Reg. 47,231, 47,231 (Sept. 15, 1994) (codified at 8 C.F.R. § 3.1(a)(1)) (expanding the BIA to 12 members); *New BIA Members Selected, Board Expands to 12 Members*, 72 INTERPRETER RELEASES 772 (1995); see also Michael John Creppy, *The Quest for Enhanced Efficiency in Immigration Courts*, 72 INTERPRETER RELEASES 193, 194 (1995) (describing increased hiring of immigration judges).

45. Smith & Grant, *supra* note 17, at 897 n. 51 (citing INS data). Numbers of applications to INS' successor, the United States Bureau of Citizenship and Immigration Services (USCIS) in the Department of Homeland Security, are also low when compared with numbers in the early 1990s. See CONG. RESEARCH SERV., NO. RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 13 (2006) [hereinafter POLICY ON ASYLUM SEEKERS]. After a peak of more than 150,000 new applications filed with the INS in FY 1994, applications fell to under 40,000 in FY 1999. *Id.* at 12-13. After an upturn in FY 2001 and FY 2002, applications to USCIS fell to 27,551 in FY 2004. *Id.* at 12.

46. At the time of the 1995 regulations, there were 425,000 asylum applications pending adjudication by INS asylum officers. Immigration History, *supra* note 33. As these claims could now be adjudicated by the asylum officers under the “grant” or “refer” options created by the regulations, and all referred applicants would be issued a charging document placing them in deportation proceedings, there was a significant increase in asylum cases before the immigration judges. POLICY ON ASYLUM SEEKERS, *supra* note 45, at 8.

functioned with three permanent members and minimal staff, had to adjust to the twin challenges of maintaining an increased caseload and attempting to synthesize the views of new members with varied opinions.⁴⁷ Then came IIRIRA.

2. IIRIRA: Enhancing the Authority of Immigration Judges

The impact of IIRIRA on the benefits available to those aliens who are illegally present in the United States, or to those legally present and charged (usually for a crime) with having forfeited the privilege of that status, has been thoroughly examined, including by the author,⁴⁸ and will not be repeated here. Rather, the purpose here is to highlight the legislation's overall intent to narrow the scope of issues (and relief) that can be litigated before immigration judges, to give those judges enhanced status, and to limit Article III review of their decisions in areas committed by statute to the discretion of the Attorney General. These changes (particularly in the area of asylum)⁴⁹ codified much of what the Clinton administration had undertaken in increasing the size and responsibility of the immigration judge corps. While IIRIRA was criticized for truncating the discretion of immigration judges to award certain relief,⁵⁰ its consequences, a decade after enactment, have given immigration judges more authority, as defined by the deference their decisions are now accorded.

a. Limiting Issues to be Litigated

IIRIRA narrowed the issues to be litigated by immigration judges in four principal ways, and expanded it in one—a development with profound impact chiefly in the Second Circuit.

First, IIRIRA consolidated the formerly bifurcated exclusion and deportation proceedings into a single form of “removal” proceeding,⁵¹ and concomitantly, eliminated the former “entry”⁵² and *Fleuti*⁵³ doctrines.

47. See, e.g., *In re Tijam*, 22 I. & N. Dec. 408 (B.I.A. 1998); *In re Hernandez*, 21 I. & N. Dec. 224 (B.I.A. 1996); *In re B-*, 21 I. & N. Dec. 66 (B.I.A. 1995).

48. See generally Smith & Grant, *supra* note 17.

49. IIRIRA § 604, 8 U.S.C. § 1158 (2000).

50. See, e.g., Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief? – The 1996 IIRIRA Amendment: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1, 37-38 (2000).

51. H.R. REP. NO. 104-469, pt. 1, at 230 (1996) (Conf. Rep.).

52. *Id.* at 225.

53. See *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963) (holding that a lawful permanent resident returning from abroad is not considered to have made a new entry if the trip was “innocent, casual, and brief”); see also H.R. REP. NO. 104-469, pt. 1, at 225-26 (noting that the drafters of IIRIRA intended “to overturn certain interpretations of *Fleuti*”).

Gone would be disputes about whether an alien had gained sufficient foothold to claim an entry into the United States,⁵⁴ about whether a departure was “brief, casual, and innocent,”⁵⁵ and about which form of proceeding was correct⁵⁶—a determination that could significantly impact an alien’s eligibility for relief. Instead, such eligibility would be determined by whether the alien had previously been admitted to the United States after a lawful inspection for that purpose, or had come into the country illegally, without being admitted.⁵⁷

Second, IIRIRA established a system for “expedited removal” of aliens inadmissible due to fraud or failure to possess valid permission to be in the country.⁵⁸ Unless such aliens had a “credible fear” of returning to their homelands and sought to apply for asylum, they could be ordered removed without a hearing before an immigration judge,⁵⁹ thus clearing judges’ dockets of numerous and essentially uncontested matters.⁶⁰

Third, IIRIRA narrowed the forms of relief and waivers that may be applied for as a defense to removal in immigration court.⁶¹ Most significant for illegal aliens—both illegal entrants and legal entrants who have overstayed—was the repeal of “suspension of deportation,” with its standard of extreme hardship, including to the alien himself, and the seven-year period of physical presence, with “cancellation of removal for non-permanent residents,” which requires ten years of continuous presence, and a showing of “exceptional and extremely unusual hardship” to an immediate family member (not including a sibling) who is also a United States citizen or lawful permanent resident.⁶² Most significant for permanent residents was the elimination of INA section

by stating that a returning lawful permanent resident is seeking admission if the alien is attempting to enter or has entered the United States without inspection”).

54. See, e.g., *You Yi Yang v. Maugans*, 68 F.3d 1540, 1550 (3d Cir. 1995); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 756 (2d Cir. 1995); *In re Z-*, 20 I. & N. Dec. 707, 708 (B.I.A. 1993); *In re Patel*, 20 I. & N. Dec. 368, 371-72 (B.I.A. 1991); *In re Ching & Chen*, 19 I. & N. Dec. 203, 204-05 (B.I.A. 1984).

55. See, e.g., *Carbajal-Gonzalez v. INS*, 78 F.3d 194, 201 (5th Cir. 1996); *Biggs v. INS*, 55 F.3d 1398, 1401 (9th Cir. 1995).

56. *Xin-Chang Zhang*, 55 F.3d at 736.

57. *Smith & Grant*, *supra* note 17, at 916.

58. IIRIRA § 302(a), 8 U.S.C. § 1225(b) (2000).

59. IIRIRA § 302(a), 8 U.S.C. § 1225(b)(1)(B)(iii).

60. See U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 1 (2005), available at <http://www.uscirf.gov/countries/global/asylum%5refugees/2005/February/execsum.pdf>.

61. IIRIRA § 304(a)(3) (creating INA section 240A(b)), 8 U.S.C. § 1229b (2000).

62. IIRIRA § 304(a)(3), 8 U.S.C. § 1229b(a)-(b); see also *Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 874 (9th Cir. 2003); *In re Monreal*, 23 I. & N. Dec. 56, 64-65 (B.I.A. 2001); *In re Nolasco*, 22 I. & N. Dec. 632, 641 (B.I.A. 1999).

212(c) relief—albeit a repeal with many footnotes due to *INS v. St. Cyr*⁶³ and subsequent regulations.⁶⁴ In its place is another form of cancellation of removal with tighter residency requirements and a long list of offenses—known as “aggravated felonies”—which render a potential applicant ineligible.⁶⁵ Just as the exceptional and extremely unusual hardship standard for the first form of cancellation presents far fewer “close cases” than did the extreme hardship standard, so too the aggravated felony bar in criminal cases reduces the litigable issues greatly, often to the point of zero.⁶⁶ Like reforms to provisions such as the INA section 212(h) waiver have had a similar impact.⁶⁷

Fourth, IIRIRA imposed limitations on “humanitarian” relief— asylum and withholding of removal⁶⁸—in the form of a one-year time deadline for applying for asylum in the United States,⁶⁹ a bar to asylum for any alien convicted of an aggravated felony,⁷⁰ and a more expansive definition of a “particularly serious crime” that will bar an alien from withholding of removal.⁷¹ The time deadline, in particular, can significantly narrow the

63. *INS v. St. Cyr*, 533 U.S. 289 (2001).

64. See 8 C.F.R. § 1003.44 (2006).

65. IIRIRA § 304(a)(3), 8 U.S.C. § 1229b; see also 8 U.S.C. § 1101(a)(43) (defining the term “aggravated felony”).

66. One immigration law expert describes the provision as: a substantial regression from the law prior to [the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)], because the law prior to AEDPA allowed aggravated felons to apply for INA section 212(c) relief if they were not incarcerated for 5 years or more. In addition, the aggravated felony bar in cancellation is applicable to all persons in removal proceedings, including those who are inadmissible. Given the drastic redefinition of aggravated felonies to include virtually every felony and some misdemeanors, the cancellation provision will be useless in the vast majority of cases.

IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 769-70 (9th ed. 2004).

67. Section 348 of IIRIRA amended section 212(h) of the INA, which permits a discretionary waiver to be granted to aliens inadmissible to the United States on specified grounds relating to criminal conduct (the waiver, however, is not available for most drug offenses) by prohibiting aliens previously admitted for lawful permanent residence from obtaining the waiver if they have been convicted of an aggravated felony, or if they have not resided lawfully in the United States for at least seven years prior to the commencement of removal proceedings. IIRIRA § 348, 8 U.S.C. § 1182(h) (2000).

68. IIRIRA § 604(a), 8 U.S.C. § 1158 (2000).

69. IIRIRA § 604(a), 8 U.S.C. § 1158(a)(2)(B).

70. IIRIRA § 604(a), 8 U.S.C. § 1158(b)(2)(B)(i). Under this provision, an alien is considered to have been convicted of a particularly serious crime, and thus barred from asylum, if convicted of any aggravated felony. *Id.*

71. IIRIRA § 305(a)(3), 8 U.S.C. § 1231(b)(3)(B) (2000). Under this provision, an alien is considered to have been convicted of a particularly serious crime, and thus barred from relief, if convicted of an aggravated felony or felonies to which he has been sentenced to an aggregate term of imprisonment of 5 years or more; however, the Attorney General is not barred from finding a particularly serious crime to exist in the case of a lesser sentence. *Id. Compare In re Y-L-*, 23 I. & N. Dec. 270, 270 (B.I.A. 2002)

issues in cases where it is applied, because the standard of probability of persecution that must be established for withholding of removal is more difficult to reach than the “well-founded fear” standard applicable in asylum cases.⁷²

Still on the subject of asylum, the one area where IIRIRA significantly *expanded* the range of litigable issues in immigration court should be mentioned. Section 601 of IIRIRA, amending the definition of refugee in INA section 101(a)(42),⁷³ resolved a long-simmering political battle, defining persecution on account of political opinion to include victimization, through forced abortion or sterilization, under a regime of coercive family planning.⁷⁴ Relying on BIA precedent that was relatively undisturbed in the federal courts, immigration judges routinely dismissed such claims, which almost exclusively came from China.⁷⁵ Now, such claims represent a formidable block of the caseload in certain

(trafficking in controlled substance presumptively a particularly serious crime, regardless of the sentence), *with In re L-S-*, 22 I. & N. Dec. 645 (B.I.A. 1999) (alien smuggling not a particularly serious crime).

72. *Compare* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987) (asylum standard), *with* *INS v. Stevic*, 467 U.S. 407, 429-30 (1984) (“withholding” standard under former INA section 243(h), replaced by section 241(b)(3)).

73. IIRIRA § 601(a), 8 U.S.C. § 1101(a)(42) (2000); *see also In re X-P-T-*, 21 I. & N. Dec. 634, 636 (B.I.A. 1996).

74. For a pre-IIRIRA discussion of the legal theory supporting such claims, see Memorandum from Grover Joseph Rees, III, Gen. Counsel, Immigr. & Naturalization Serv., to Jan Ting, Acting Dir., Office of Int’l Affairs, Immigr. & Naturalization Serv., et al. (Jan. 19, 1993), *in* 70 INTERPRETER RELEASES 485, 498-509 (1993); Memorandum from Grover Joseph Rees, III, Gen. Counsel, Immigr. & Naturalization Serv., to John Cummings, Acting Dir., Office of Int’l Affairs, Immigr. & Naturalization Serv., et al. (Mar. 4, 1993), *in* 70 INTERPRETER RELEASES 485, 510-12 (1993). This position was consistent with the following executive branch determinations:

(1) an August 5, 1988, memorandum of the Attorney General to the Commissioner of the Service directing all “INS asylum adjudicators” to give “careful consideration” to applications from Chinese nationals who refused to abort a pregnancy or resisted sterilization as an “act of conscience”; (2) interim regulations that were promulgated by the Attorney General on January 29, 1990 [superceded without explanation by the “final” asylum regulations of September 1990]; (3) Executive Order No. 12,711, 55 Fed. Reg. 13,897-98 (1990) [requiring “enhanced consideration” be given to such claims]; and (4) a November 7, 1991, memorandum of the General Counsel of the Service subscribing to the view that China’s coercive family planning policies constitute persecution on account of political opinion.

In re G-, 20 I. & N. Dec. 764, 775 (B.I.A. 1993). The General Counsel’s position, however, was not followed by the BIA or circuit courts. *See De You Chen v. INS*, 95 F.3d 801, 805-06 (9th Cir. 1996); *Xin-Chang Zhang v. Slatery*, 55 F.3d 732, 744 (2d Cir. 1995); *In re G-*, 20 I. & N. Dec. at 776-77 (pending further direction from Attorney General, BIA will continue to follow its ruling in *In re Chang*, 20 I. & N. Dec. 38 (B.I.A. 1989)).

75. *De You Chen*, 95 F.3d at 806-07; *Xin-Chang Zhang*, 55 F.3d at 752, 756; *In re Chang*, 20 I. & N. Dec. at 47.

immigration courts, chiefly in the New York metropolitan areas, and present some of the most vexing issues of fact-finding and credibility determinations faced by immigration judges in any jurisdiction.⁷⁶

b. Enhancing the Status of Immigration Judges

While significantly altering—and narrowing—the issues to be addressed by immigration judges, IIRIRA also enhanced their status by making them among the very few immigration officials designated by statute (the sole others being the Attorney General and the now-defunct INS Commissioner and Deputy Commissioner) and specifying that they shall not be employed by the INS.⁷⁷ A brief history illustrates the significance of this development.

The function of immigration judge was first carried out by supervisory inspections officers whose hearing room has been restored to original appearance on Ellis Island;⁷⁸ as immigration policies changed and the need for adjudication of deportation cases increased, this function came to be carried out by officials defined by statute as “special inquiry officers” (SIOs).⁷⁹ The role of the SIO was not originally limited to adjudication functions.⁸⁰ Internal INS reforms resulted in the designation, by regulation issued in 1973, of such officers as “immigration judges.”⁸¹ Yet, these immigration judges remained within the INS, and

76. See, e.g., *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 143 (2d Cir. 2003); *Jia-Ging Dong v. Slattery* 84 F.3d 82, 83-84 (2d Cir. 1996); *Xin-Chang Zhang*, 55 F.3d at 736-37.

77. IIRIRA § 371(a), 8 U.S.C. § 1101(b)(4) (2000).

78. See Paul Goldberger, *Gateway to America Is Once Again Ready to Greet the Masses*, N.Y. TIMES, Aug. 14, 1990, at C13.

79. See Immigration and Nationality Act (INA), Pub. L. No. 414, § 101(b)(4), 66 Stat. 163, 171 (1952) (codified as amended at 8 U.S.C. § 1101(b)(4)). For a thorough account of the struggle to establish a body of immigration adjudicators “independent” from the prosecutorial functions of the former INS, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 453-54 (1988) (“Few will dispute that immigration judges wield great power in making decisions that profoundly affect individual lives. Their judicial attire lending verisimilitude, they bring dignity and authority to the hearings over which they preside. But it was not always thus. Their predecessors as INS hearing officers labored in an uncertain and unrewarding environment. They possessed none of the independence guaranteed today’s immigration judges; by and large, they did not command respect; and they were poorly compensated for their efforts. The bureaucratic metamorphosis from a lowly group of INS hearing officers to a fledgling immigration-judge organization took place within the comparatively brief span of six years.”).

80. SIOs “might have inspected noncitizens at the border on one day, on another investigated violations, on yet another marshaled the case against a deportable noncitizen, and on still another served as a [SIO] to adjudicate the deportation of someone who had been investigated by their colleagues.” THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 249 (5th ed. 2003).

81. 8 C.F.R. § 1.1(1) (1974).

fought a gradual bureaucratic war for trappings such as adequate courtrooms.⁸² In the meantime, the BIA had more independent status—and, notably, the authority to act in the name of the Attorney General in deciding individual cases and to issue legal rulings binding on the INS and other immigration agencies—since the congressional transfer of most immigration functions to the Department of Justice in 1940.⁸³ For over 40 years—until the creation of EOIR in 1983—the BIA reviewed the decisions of the SIOs, who had an undefined degree of independence from INS district authorities prosecuting the cases before them, and who were also responsible for many of the SIOs' conditions of work.⁸⁴ While the 1973 change in title to immigration judge signified greater independence for the SIOs, this was an independence that evolved over time, particularly since the change did not involve any change in personnel. In this context, the existence of a *de novo* standard of review for the BIA's review of SIO decisions made sense as a matter of administrative law, especially since there was no statutory requirement that SIOs be lawyers.⁸⁵

This dynamic changed—significantly—with the creation of EOIR in January 1983, and further with the end, a decade later, of the practice of the chief immigration judge reporting to the chairman of the BIA on administrative matters.⁸⁶ As immigration judges emerged from the INS culture in the period from 1983 to 1993, and saw their ranks swell through the mid-1990s, their self-identity, and function, as quasi-

82. See Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 8 (1980).

83. U.S. Immigration and Naturalization Service—Populating a Nation: A History of Immigration and Naturalization, http://www.cbp.gov/xp/cgov/toolbox/about/history/ins_history.xml. Enactment of restrictive immigration laws in the 1920s, and increased efforts to deport unauthorized immigrants, led to the creation of the Immigration Board of Review within the Department of Labor in the mid-1920s, to provide an intermediate tier of review between decisions of immigration inspectors and the Commissioner of Immigration. See *id.* Executive reorganization in 1940 brought the Bureau of Immigration, including the Immigration Board of Review, renamed the Board of Immigration Appeals, into the Department of Justice. *Id.*

84. See Rawitz, *supra* note 79, at 454, 457-59.

85. See, e.g., *Woodby v. INS*, 385 U.S. 276, 278 n.2, 279 (1966); INA § 101(b)(4) (codified as amended at 8 U.S.C. § 1101(b)(4)). However, in 1956, the INS mandated that all SIOs have law degrees. See ALENIKOFF, MARTIN & MOTOMURA, *supra* note 80, at 250.

86. *Reno Names New EOIR Chief*, 71 INTERPRETER RELEASES 790, 791 (1994). The newly appointed director of EOIR, Anthony Moscato, was limited to that position, whereas his predecessor, David Milhollan, had held the positions both of director of EOIR and chairman of the BIA. See *David L. Milhollan Announces Retirement from EOIR*, 70 INTERPRETER RELEASES 1371, 1371 (1993).

independent adjudicators also evolved.⁸⁷ The institutional memory of having been “housed” in INS with an uncertain degree of independence faded, and a new identity emerged. Not surprisingly, some judges began to question the need for de novo review of their decisions, particularly regarding findings of fact and related determinations such as the credibility of witnesses.⁸⁸

While not addressing the issue of de novo review, section 371 of IIRIRA sent a clear signal that the status of immigration judges should be independent in function as well as in compensation structure. The new definition of “immigration judge,” replacing that for “special inquiry officer,” specified the following: that judges be attorneys; that they be appointed and under the supervision of the Attorney General; and that they work in EOIR, not in the INS.⁸⁹ While none of this altered the de facto status of immigration judges, it insulated the judges from regulatory demotions of that status. Just as important, IIRIRA created a new compensation scheme for the judges, removing them from the general schedule and basing their pay on a percentage (increasing with seniority) of the highest pay for the Senior Executive Service.⁹⁰ These provisions truly made immigration judges *sui generis* among the thousands of DOJ employees then charged with enforcement of the INA: they became the only non-management officials whose status, independence, and compensation was fixed by statute. The congressional intent was further highlighted by the fact that no similar codification of status was accorded those on the *appellate* level, i.e., members of the BIA.

c. Insulation from Review

IIRIRA’s third enhancement of the authority of immigration judges was its three-fold limitation on the jurisdiction of the federal courts in immigration matters: first, by removing jurisdiction to review discretionary decisions to deny relief, including both types of cancellation of removal and waivers such as section 212(h),⁹¹ as well as decisions to deny asylum applications as untimely;⁹² second, by removing jurisdiction to review orders of removal against criminal aliens;⁹³ and third, by

87. Another part of the “cultural” change in the immigration judge corps was a conscious effort for diversity in hiring. See Creppy, *supra* note 44, at 196.

88. This observation is based on almost countless personal conversations with immigration judges, as well as comments presented during professional gatherings of immigration judges and members of the BIA.

89. IIRIRA § 371(a), 8 U.S.C. § 1101(b)(4).

90. IIRIRA § 371(c), 8 U.S.C. § 1103 note (2000) (Compensation for Immigration Judges).

91. IIRIRA § 306(a), 8 U.S.C. § 1252(a)(2) (2000).

92. IIRIRA § 303, 8 U.S.C. § 1158(a)(2)(B) (2000).

93. IIRIRA § 306(a), 8 U.S.C. § 1252(a)(2)(C).

mandating a highly deferential standard of review for administrative findings of fact, as well as discretionary judgments whether to grant asylum under section 208 of the INA.⁹⁴ Specifically, findings of fact were to be considered “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,”⁹⁵ and asylum decisions “conclusive unless manifestly contrary to the law and an abuse of discretion.”⁹⁶ While these provisions did not single out the decisions of immigration judges, they covered decisions made by the Attorney General, and therefore by the Attorney General’s delegates in EOIR. Thus, the focus on fact-finding—typically a function of trial-level judges—is consistent with the overall direction of enhancing the status and authority of immigration judges.

The impact of these provisions has been examined at length elsewhere,⁹⁷ and their interpretation is a topic for debate within the circuit courts themselves.⁹⁸ The focus here is on two questions: what did Congress intend? And did this intent presage a more limited role for administrative appellate review? Whatever their views on the wisdom of Congress’ actions in section 306 of IIRIRA, the authorities agree that Congress intended to sharply curtail the role of federal courts in immigration adjudication.⁹⁹

94. IIRIRA § 306(a), 8 U.S.C. § 1252(b)(4)(B), (D).

95. IIRIRA § 306(a), 8 U.S.C. § 1252(b)(4)(B).

96. IIRIRA § 306(a), 8 U.S.C. § 1252(b)(4)(D).

97. Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1447-55 (2005). See generally Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000).

98. See *Kumar v. Gonzales*, 444 F.3d 1043, 1056 (9th Cir. 2005) (Kozinski, J., dissenting in part) (“My colleagues grumble that an immigration judge shouldn’t pretend to be a ‘handwriting expert’ or a ‘forensic laboratory.’ But a circuit judge shouldn’t pretend to be an immigration judge. This is yet another tiresome ‘example of the nitpicking we engage in as part of a systematic effort to dismantle the reasons immigration judges give for their decisions.’” (citation omitted)). Judge Kozinski quoted from his earlier dissent in *Abovian v. INS*, 257 F.3d 971, 980 (9th Cir. 2001) (Kozinski, J., dissenting from denial of petition for rehearing en banc), in which he listed other examples. Plainly, the scope of review actually permitted under the deferential IIRIRA is not, even at this date, a settled matter. See also *Alexandrov v. Gonzales*, 442 F.3d 395, 407-09 (6th Cir. 2006) (reversing an immigration judge’s adverse credibility determination based on applicant’s submission of two documents found by State Department investigators to be fraudulent; the court found the State reports to be unreliable).

99. The chief House sponsor of IIRIRA made plain that:

Appeals to the federal courts . . . should be extraordinary and limited to situations in which there is a likelihood of a contested issue of law or fact relating to an alien’s right to remain in the United States In contrast, issues pertaining to purely discretionary relief . . . should remain within the sole discretion of the Attorney General and, thus, are no longer appealable to the federal courts.

Smith & Grant, *supra* note 17, at 918-19.

Three related concerns likely impelled this move: that appellate courts had over-stepped their bounds in second-guessing the decisions of EOIR adjudicators;¹⁰⁰ that three, and sometimes four, “bites of the apple” was more process than was due in most immigration cases;¹⁰¹ and that immigration judges and the BIA, while not perfect, usually “got it right.”¹⁰² Whatever specific motivations were most prominent, Congress’ actions in narrowing the issues before immigration courts, enhancing the bureaucratic status of immigration judges, and imposing limitations on federal court review of factual and discretionary determinations made by those judges had the cumulative effect of enhancing the importance of a decision made by an immigration judge in any given case, and increasing the likelihood that such a decision would be the final one in that case.

B. The Move from Strict De Novo Review: BIA Decisions Post-IIRIRA Grant Greater Deference to Immigration Judges

The period following IIRIRA, as could be anticipated, saw increased activities at all levels of immigration decision-making, including remedial legislation from Congress,¹⁰³ implementing regulations from the Attorney General,¹⁰⁴ interpretive guidance from the BIA,¹⁰⁵ and federal court

100. See *Jahed v. INS*, 356 F.3d 991, 1001-08 (9th Cir. 2004) (Kozinski, J., dissenting); *Abovian*, 257 F.3d at 973-74 (Kozinski, J., dissenting from denial of petition for rehearing en banc); *Kumar v. Gonzales*, 435 F.3d 1019, 1031, 1038 (9th Cir. 2006) (Kozinski, J., dissenting).

101. “Three bites” would be available in proceedings commenced entirely with the filing of a Notice to Appear (or its predecessor, the Order to Show Cause) in immigration court: first bite, immigration judge; second bite, BIA; third bite, federal court of appeals. See, e.g., *Jahed*, 356 F.3d at 1002 (Kozinski, J., dissenting). A “fourth bite” could be availed by those aliens, including those who filed an affirmative asylum claim or other petition for benefits with the INS, who were denied or referred, and then issued an Notice to Appear or Order to Show Cause.

102. See *Bing Feng Chen v. INS*, 87 F.3d 5, 7 (1st Cir. 1996).

103. See, e.g., Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997) (codified as amended in scattered sections of 8 U.S.C.).

104. See *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens*, 62 Fed. Reg. 10,312 (1997) (codified in scattered parts of 8 C.F.R.).

105. *In re Perez*, 22 I. & N. Dec. 689, 690-94 (B.I.A. 1999) (interpreting continuous residence requirement for relief under new section 240A(a) of the INA regarding cancellation of removal); *In re C-V-T-*, 22 I. & N. Dec. 7, 8-9, 10-14 (B.I.A. 1998) (interpreting new section 240A(a) of the INA); *In re Pineda*, 21 I. & N. Dec. 1017, 1018-20 (B.I.A. 1997) (interpreting IIRIRA section 348(a)’s revisions to section 212(h) of the INA); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917-18 (B.I.A. 1997) (interpreting section 601 of IIRIRA); *In re S-S-*, 21 I. & N. Dec. 900, 901-02 (B.I.A. 1997) (interpreting revised definition of “conviction” in section 322(a)(1) of IIRIRA); *In re Noble*, 21 I. & N. Dec. 672, 674-79 (B.I.A. 1997) (interpreting Transition Period Custody Rules enacted by section 303(b)(3) of IIRIRA).

litigation.¹⁰⁶ The focus here is on those developments, particularly BIA decisions that: (1) established binding precedents that facilitated a more rapid adjudication of cases; (2) lent further deference to decisions of immigration judges; and (3) by doing so, further laid the groundwork for a streamlining of the administrative appeals process.

Measured by the number of cases affected, the post-IIRIRA precedents with the greatest impact on immigration judge decisions were those pertaining to cancellation of removal under INA sections 240A(a) (cancellation for lawful permanent residents (LPR)) and 240A(b) (cancellation for lawful non-permanent residents).¹⁰⁷ The first form of relief is a defense to loss of LPR status by those aliens who have placed that status at risk, usually by conviction for a crime that renders them deportable from the United States. The latter form of relief is a defense to removal for those aliens unlawfully present in the United States and, like “suspension of deportation” under former INA section 244(a)(1)-(2), results in an automatic grant of LPR status. BIA decisions pertaining to this form of relief will be discussed first.

The dispositive issue in most non-LPR cancellation cases is whether the alien respondent can establish exceptional and extremely unusual hardship to a “qualifying relative”: a United States citizen or lawful resident spouse, parent, or child (under twenty-one years of age).¹⁰⁸ Hardship to the alien himself or herself is not sufficient under the statute; this is one major change from the former suspension of deportation.¹⁰⁹ In a series of three decisions, *In re Montreal*,¹¹⁰ *In re Andazola*,¹¹¹ and *In re*

106. See, e.g., *Stewart v. INS*, 181 F.3d 587, 592 (4th Cir. 1999); *Berehe v. INS*, 114 F.3d 159, 161 (10th Cir. 1997).

107. INA § 240A(a), 8 U.S.C. § 1229b(a) (2000).

108. INA § 240A(b), 8 U.S.C. § 1229b(b).

109. See, e.g., *In re O-J-O-*, 21 I. & N. Dec. 381, 382-83 (B.I.A. 1996); see also H.R. REP. NO. 104-828, at 213 (1996) (Conf. Rep.) (criticizing *In re O-J-O-* and stating: “The managers have deliberately changed the required showing of hardship from ‘extreme hardship’ to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm to his spouse, parent, or child *substantially beyond that which ordinarily would be expected to result from the alien’s deportation*”) (emphasis added).

110. 23 I. & N. Dec. 56, 64 (B.I.A. 2001) (finding high exceptional and extremely unusual hardship threshold was not met because respondent was in good health and able to support U.S. citizen family in Mexico).

111. 23 I. & N. Dec. 319, 323 (B.I.A. 2002) (finding that the exceptional and extremely unusual hardship standard was not met by single mother of two young children who would be denied comparable educational benefits, but not all schooling, in Mexico). The court was not persuaded by the extended family’s illegal presence in the United States, and found that the mother’s accumulated savings and sale of assets could ease the transition. *Id.* at 323-24.

Recinas,¹¹² the BIA hewed to the clearly expressed congressional intent that the hardship standard for cancellation should be significantly higher than that for suspension of deportation.¹¹³ While rejecting the notion that the hardship resulting from deportation must be “unconscionable” to meet the standard,¹¹⁴ the BIA adopted a more stringent set of criteria than those it had applied in cases of a prior generation (pre-1962), where an alien was obliged to show exceptional and extremely unusual hardship to himself or a qualifying family member.¹¹⁵

IIRIRA required the BIA to interpret myriad other provisions. Among its decisions that had the greatest impact on adjudications at the trial level were: (1) defining standards for the exercise of discretion in granting cancellation of removal to permanent residents convicted of crimes;¹¹⁶ (2) determining that spouses of persons persecuted under the Chinese coercive family planning program could benefit from IIRIRA’s amendment to the “refugee” definition;¹¹⁷ (3) determining standards for when an alien is disqualified from asylum or withholding of removal due to criminal conduct;¹¹⁸ (4) construing IIRIRA’s definition of “conviction”;¹¹⁹ (5) defining the scope of certain “aggravated felonies”;¹²⁰ and (6) construing the scope of mandatory detention for aliens in removal proceedings who have been convicted of crimes.¹²¹ These decisions were intended to create transparent standards for immigration judges, whose decisions would be reviewed for compliance by the BIA.¹²²

112. 23 I. & N. Dec. 467, 470-72 (B.I.A. 2002) (holding that a single mother of six children, four of whom were U.S. citizens, met hardship standard where she was sole support for children and entire family legally resided in the United States). The BIA noted that “[w]e consider this case to be on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met.” *Id.* at 470.

113. *In re Montreal*, 23 I. & N. Dec. at 59.

114. *Id.* at 61.

115. *Id.* at 61-62.

116. *In re C-V-T*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998).

117. *In re C-Y-Z*, 21 I. & N. Dec. 915, 917-19 (B.I.A. 1997).

118. *In re L-S*, 22 I. & N. Dec. 645, 653-54 (B.I.A. 1999); *In re S-S*, 22 I. & N. Dec. 458, 463-65 (B.I.A. 1999); see also *In re L-S-J*, 21 I. & N. Dec. 973, 974-75 (B.I.A. 1997); *In re Q-T-M-T*, 21 I. & N. Dec. 639, 653-54 (B.I.A. 1996).

119. *In re Roldan*, 22 I. & N. Dec. 512, 517-18 (B.I.A. 1999), *vacated sub nom.* Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000); *In re Punu*, 22 I. & N. Dec. 224, 227 (B.I.A. 1998).

120. *In re Ruiz-Romero*, 22 I. & N. Dec. 486, 488-92 (B.I.A. 1999).

121. *In re Joseph*, 22 I. & N. Dec. 799, 803-05 (B.I.A. 1999) (clarifying its earlier opinion in *In re Joseph*, 22 I. & N. Dec. 387 (B.I.A. 1999)).

122. This is not to deny that, especially in fact-bound circumstances, disagreement on application of the principles can remain. Compare, e.g., *In re Romalez-Alcaide*, 23 I. & N. Dec. 423, 426-27 (B.I.A. 2002), with *id.* at 437-39 (Pauley, Bd. Member, concurring) (disagreeing over the application of the cancellation of removal provisions in INA section 240A(b)); see also *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (finding

As significant as these developments were in creating a body of precedent that could be readily applied in review of immigration judge and INS decisions, equally important was the BIA's perceptible move to a more deferential standard of review, chiefly toward immigration judge fact-finding in asylum cases. The primary example, *In re A-S*,¹²³ sustained the adverse credibility finding made in the case of a Bangladeshi national alleging persecution on account of his membership in the Jatiyo party, supporting ex-president Ershad.¹²⁴ The BIA's decision branded as "axiomatic" its "authority to employ a de novo standard of appellate review in deciding the ultimate disposition of a case."¹²⁵ However, citing prior cases, which provided that the BIA gives "great weight" to immigration judge findings regarding the credibility of witnesses, the BIA stated that it now would "accord deference" to adverse credibility determinations under the following conditions: "(1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the [alien] provided incredible testimony; and (3) the [alien] has not provided a convincing explanation for the discrepancies and omissions."¹²⁶

What the ten-member BIA majority might have viewed as a modest extension of prior precedent, the three dissenters, with varying degrees of urgency, considered an improper abandonment of the BIA's de novo review authority. One dissenter, while noting the virtues of transparency and uniformity in the majority's standard, nevertheless concluded:

[I]t is not clear . . . why our vantage point is necessarily less revealing than that of the Immigration Judge and why we want to give such great deference to the Immigration Judge, rather than relying on our own expertise and sound, independent judgment after review of the written record on appeal.¹²⁷

A second dissenter was more pointed, disagreeing that the majority's test was among "reasonable possibilities" available to the BIA for a standard of review, and suggesting to asylum applicants how they might "satisfy the asylum law as we apply it at the Board of Immigration

that an alien's absence from the United States under a grant of voluntary departure or acceptance of "voluntary return" interrupts the accrual of continuous physical presence required for cancellation of removal); *In re Avilez-Nava*, 23 I. & N. Dec. 799, 804 (B.I.A. 2005) (holding that an individual "turned back" at a port of entry is not interruptive of continuous physical presence).

123. 21 I. & N. Dec. 1106 (B.I.A. 1998).

124. *Id.* at 1107, 1112.

125. *Id.* at 1109.

126. *Id.*; see also *In re Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994); *In re Pula*, 19 I. & N. Dec. 467, 471-472 (B.I.A. 1987).

127. *In re A-S*, 21 I. & N. Dec. at 1114 (Schmidt, Chairman, dissenting).

Appeals, which, for most practical purposes, is how we apply it in this country.”¹²⁸

In re A-S- followed a series of decisions, all engendering vigorous dissents or “limiting” concurrences, in which the BIA had defined the standards for when asylum applicants have met their burden of proof. For example, in *In re S-M-J-*,¹²⁹ the BIA required an active role on the part of the applicant, the INS, and the immigration judge in bringing into the record evidence of conditions in the applicant’s native country.¹³⁰ *In re O-D-*¹³¹ held that the presentation of a fraudulent document in support of an asylum application could have a presumptive adverse effect on the applicant’s credibility.¹³² *In re Y-B-*,¹³³ issued simultaneously with *In re A-S-*, further defined the relationship between the applicant’s credibility and the applicant’s overall burden of proof, finding that “the weaker an [applicant’s] testimony, [even if the testimony is consistent,] the greater the need for corroborative evidence.”¹³⁴ In the same week, the BIA held that the reasonableness of an asylum applicant’s fear of persecution is undermined when his family remains in their native country unharmed for a long period of time after the applicant’s departure.¹³⁵

Collectively, these decisions announced a series of standards intended to be uniform and transparent, which, when complied with, would result in BIA deference to the decision of the immigration judge, including, manifestly, decisions in which individual BIA members would disagree with the result.¹³⁶ While not all aspects of these rulings have found favor in all federal courts of appeals,¹³⁷ most have been affirmed or cited with

128. *Id.* at 1122 (Rosenberg, Bd. Member, dissenting).

129. 21 I. & N. Dec. 722 (B.I.A. 1997).

130. *Id.* at 724, 726-27.

131. 21 I. & N. Dec. 1079 (B.I.A. 1998).

132. *Id.* at 1082-83.

133. 21 I. & N. Dec. 1136 (B.I.A. 1998).

134. *Id.* at 1139.

135. *In re A-E-M-*, 21 I. & N. Dec. 1157, 1160 (B.I.A. 1998).

136. *See id.* at 1163 (Schmidt, Chairman, dissenting); *In re Y-B-*, 21 I. & N. Dec. at 1143 (Rosenberg, Bd. Member, dissenting); *In re A-S-*, 21 I. & N. Dec. 1106, 1113 (B.I.A. 1998) (Schmidt, Chairman, dissenting); *In re O-D-*, 21 I. & N. Dec. at 1089 (Rosenberg, Bd. Member, dissenting).

137. *Miah v. Ashcroft*, 346 F.3d 434, 439 (3d Cir. 2003) (citing the corroboration regulations with approval); *Kayembe v. Ashcroft*, 334 F.3d 231, 238 (3d Cir. 2003) (upholding corroboration requirement, but noting a three-part inquiry necessary for corroboration); *Abdulai v. Ashcroft*, 239 F.3d 542, 545 (3d Cir. 2001) (remanding on the facts of the case, but noting that the corroboration requirement is not per se invalid); *Kataria v. INS*, 232 F.3d 1107, 1113 (9th Cir. 2000) (reiterating the court’s disapproval of the corroboration requirement); *Diallo v. INS*, 232 F.3d 279, 283 (2d Cir. 2000) (offering a favorable treatment of the corroboration requirement, but remanding the case on the facts); *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000) (disapproving of the corroboration requirement if testimony is consistent and credible); *see also Kheireddine v. Gonzales*, 427

approval.¹³⁸ The result—in which the de novo standard of review survived, but immigration judges also knew that the BIA would not necessarily substitute its judgment on matters within the ordinary purview of trial courts—was another effective step in enhancing the authority of immigration judges in individual cases.

C. The Streamlining Initiative

Congress, in enacting IIRIRA, deliberately intended to increase enforcement against both aliens unlawfully present in the United States and aliens who had committed crimes.¹³⁹ Not surprisingly, the number of enforcement actions increased almost immediately, with a sizable jump commencing in FY 1997 in cases brought before the immigration courts,¹⁴⁰ and a concomitant increase in the number of aliens removed from the United States.¹⁴¹ As a result, appeals to the BIA grew rapidly, doubling from 14,000 in 1994 to 28,000 in 1998.¹⁴²

Neither the rules nor the procedures of the BIA were suited for this onslaught of cases. Regulations governing the BIA required cases to be decided either by three-member panels or by the Board sitting en banc.¹⁴³ With the exception of cases where an appeal was withdrawn and thereby moot, virtually every other matter pending before the BIA—including late

F.3d 80, 88 (1st Cir. 2005) (citing the BIA regulations with approval, and finding that the Board properly applied them); *Dawoud v. Gonzales*, 424 F.3d 608, 612 (7th Cir. 2005) (cautioning that a credible asylum claim cannot be rejected solely for lack of corroborative evidence); *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004) (upholding the corroboration requirement); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004) (upholding the corroboration requirement, but emphasizing a three-part inquiry for requiring corroboration); *Gontcharova v. Ashcroft*, 384 F.3d 873, 876 (7th Cir. 2004) (upholding the regulations, but noting that the rule depends on reasonableness of expecting evidence); *Berishaj v. Ashcroft*, 378 F.3d 314, 326 (3d Cir. 2004) (citing BIA regulations with approval, but noting a three-part inquiry necessary for corroboration); *Balogun v. Ashcroft*, 374 F.3d 492, 503 (7th Cir. 2004) (citing corroboration requirement generally with approval, but noting also the BIA's holding that corroboration required only as to "material facts"); *Dia v. Ashcroft*, 353 F.3d 228, 253 (3d Cir. 2003) (citing corroboration requirement with approval).

138. *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005); *Hassan v. Gonzales*, 403 F.3d 429, 436 (6th Cir. 2005).

139. *Smith & Grant*, *supra* note 17, at 915, 933.

140. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK 2000 B2 & fig.2 (2001), available at <http://www.usdoj.gov/eoir/statspub/SYB2000Final.pdf>.

141. OFFICE OF IMMIGR. STATS., U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 148, 158 tbl.40 (2004), available at <http://www.uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>.

142. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 8, 1999) (codified at 8 C.F.R. pt. 1003 [hereinafter Streamlining Final Rule]).

143. 8 C.F.R. § 1003.1(a)(3), (5) (2006).

appeals, untimely motions, uncontested motions, summary dismissals for failure to allege error in the decision below, applications for relief or waivers of deportation where the alien was statutorily ineligible, and visa petitions with no statutory basis—was submitted to a three-member panel.¹⁴⁴ The regulations also set a standard of *de novo* review, creating the potential for re-litigation of all issues by the panel, including issues not specifically presented on appeal.¹⁴⁵ The Board's internal procedures were equally outdated: there were no deadlines for completion of cases (other than those involving detained aliens) and insufficient attention to moving cases that had been decided years earlier by immigration judges.¹⁴⁶ Significant changes in immigration law brought about by the Immigration Act of 1990,¹⁴⁷ a "technical corrections" act of 1994,¹⁴⁸ the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,¹⁴⁹ IIRIRA, and NACARA, all raising new and sometimes complex issues of statutory interpretation, added further pressure to the BIA's workload.

Two misconceptions in the current discussion are that the BIA took no initiative to address this challenge in the late 1990s, and that the streamlining regulations that emerged in final form in 2002 were the product of a single administration, spurred by the impact of the attacks of September 11, 2001. In fact, the BIA first proposed the adoption of single-member review of routine cases as early as 1996; after lengthy intra-agency and departmental review, proposed regulations to implement "streamlining" were published in September 1998,¹⁵⁰ and final regulations were published a year later.¹⁵¹ The philosophy behind the regulations was straightforwardly stated at the time of issuance:

The final rule responds to an enormous and unprecedented increase in the caseload of the Board. The rule recognizes that in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and

144. DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE ABA COMM'N ON IMMIGR. POLICY, PRACTICE & PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 9-10 (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

145. 8 C.F.R. § 1003.1(d)(3).

146. See Procedural Reforms, *supra* note 26, at 54,879.

147. Pub. L. No. 101-649, 104 Stat. 4978.

148. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305.

149. Pub. L. No. 104-132, 110 Stat. 1214.

150. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 63 Fed. Reg. 49,043 (proposed Sept. 14, 1998) (codified at 8 C.F.R. pt. 1003).

151. Streamlining Final Rule, *supra* note 142, at 56,135.

should not be changed on appeal This procedure will enable the Board to render decisions in a more timely manner, while concentrating its resources primarily on cases where there is a reasonable possibility that the result below was incorrect, or where a new and significant issue is presented.¹⁵²

The 1999 regulations permitted three categories of “summary” decisions that could be rendered by a single Board member: summary remands in purely administrative matters;¹⁵³ summary dismissals in cases where the appeal is late, where the right to appeals is waived, where the appeal fails to state specific reasons for reversing the decision below, and where the BIA lacks jurisdiction;¹⁵⁴ and summary affirmances where it is determined that the result reached below was correct, that

any errors in the decision under review [are] harmless or nonmaterial; and that (A) [t]he issues on appeal are squarely controlled by existing Board or federal court precedent . . . or (B) [t]he factual and legal issues raised on appeal are not so substantial that the case warrants issuance of a written opinion in the case.¹⁵⁵

Notably, the precise text of the order that may be issued in such cases was mandated by the regulation.¹⁵⁶

Patient implementation of the 1999 regulation meant that the BIA’s case backlog continued to grow, to a high water mark of 64,000 cases at the beginning of FY 2001.¹⁵⁷ The Board received appeals at the rate of 2,500 month, but generally completed less than 2,000 per month in the years prior to FY 2001, the first year that the new rules were fully implemented.¹⁵⁸ Also contributing to an initial lack of impact is that asylum cases were excluded, by internal BIA decision, from summary affirmance, requiring that this significant part of the caseload, including some of the oldest cases at the BIA, be adjudicated by three-member panels, regardless of the merits or lack thereof.¹⁵⁹ At the cusp of streamlining’s initial implementation, therefore, the BIA had an inventory of cases that, at its present pace, without any further receipts, would take approximately three years to complete. In fact, due to the dynamic nature of the growing backlog, this meant that far too many

152. *Id.* at 56,135-36.

153. 8 C.F.R. § 1003.1(e)(2) (2006).

154. *Id.* § 1003.1(d)(2).

155. *Id.* § 1003.1(e)(4).

156. *Id.* § 1003.1(e)(4)(ii).

157. *See* DORSEY & WHITNEY LLP, *supra* note 144, at app. 12-13.

158. *See id.* at app. 10.

159. *See* Memorandum from Paul W. Schmidt, Chairman, Bd. of Immigr. Appeals, to Bd. Members, Bd. of Immigr. Appeals (Aug. 28, 2000), *in* DORSEY & WHITNEY LLP, *supra* note 144, at app. 3.

cases adjudicated from 1998 to 2000 (the last “non-streamlining” years) were received at the Board in 1992, 1993, and 1994.

Such a backlog—remarkably no longer a factor, as the Board’s current inventory of 27,000 cases is far exceeded by its annual completion of more than 40,000 cases¹⁶⁰—had many pernicious effects. The ensuing delay, in the classic phrase, equated to justice denied. Decisions rendered after years on appeal either granted relief far too late or resulted in orders of deportation that were unenforceable due to aliens having moved or enforcement authorities having lost interest. The incentive to file non-meritorious appeals prospered, as those seeking delay from deportation could “park” their cases at the BIA and anticipate years of delay. Changes in law or personal status could require cases to start all over again, defeating the goal of finality. The craft of expert administrative appellate review continued, but it could not be applied to a sufficient number of cases to call the BIA’s work truly effective.

Had the BIA been given more time to implement the 1999 streamlining rules—including a move to permit at least some asylum cases to be amenable to summary affirmance—substantial progress would have been made. In FY 2001, the first full year of “pilot” implementation of streamlining, the BIA completed 3700 more cases than it received, the first such “profit” in institutional memory.¹⁶¹ The following year, still operating under the 1999 rules but with some internal policy changes, the BIA completed 47,000 cases against 35,000 receipts—the largest absolute or percentage “delta” in the history of keeping such statistics.¹⁶² This progress was being made, however, in a fast-paced environment altered by the attacks of September 11, 2001, and impatient with the notion of delay in removing from the United States those who had exhausted their legal appeals to stay. Reduction in the BIA’s backlog was a new phenomenon; the story fixed in many minds was the number of pending cases itself. In an ironic prequel to the current debate, dominated by repetitive reports of a handful of strongly critical circuit court decisions, debate about the BIA in 2001 and 2002 centered on publicity regarding a

160. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEPT’ OF JUSTICE, FY 2005 STATISTICAL YEAR BOOK S2 & fig.25, U1 fig.28 (2006), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf> [hereinafter EOIR 2005 STATISTICAL YEAR BOOK].

161. See *id.* at S2 fig.25.

162. See *id.*

handful of its own decisions,¹⁶³ as well as the fractious nature of some of the BIA's published decisions.¹⁶⁴

All of these factors—the success of streamlining in cutting into the BIA's backlog, the desire for more progress given the persistent size of the backlog, and a desire for a more “cohesive” BIA membership—led to adoption of the final streamlining regulations in August 2002. As noted, some of the most recognizable features of streamlining, including the authority to issue an order of summary affirmance in any case within the BIA's jurisdiction that met the necessary criteria, were already established. The 2002 regulation¹⁶⁵ added the following salient features:

- A case amenable to summary affirmance (“affirmance without opinion”) shall be so affirmed.¹⁶⁶
- De novo review by the BIA of factual determinations by immigration judges was eliminated; the BIA retained de novo review of questions of law, discretion, judgment, and all other issues on appeal.¹⁶⁷
- Factual determinations, including credibility findings, would be reviewed only to determine if the decision of the immigration judge was “clearly erroneous.”¹⁶⁸
- All BIA cases would first be screened and reviewed by a panel of members authorized to issue single-member decisions, including, but not limited to, orders of summary remand, affirmance, or dismissal. Orders with more explanatory reasoning could be issued by a single member.¹⁶⁹
- Cases could only be referred for adjudication by a three-member panel if necessary: “to settle inconsistencies among the rulings of different immigration judges”; “to establish a precedent”; “to review a decision . . . not in conformity with the law or with applicable precedents”; “to resolve a case . . . of major national import”; “to review a clearly erroneous factual determination by an immigration judge”; or “to reverse a decision of an immigration judge.”¹⁷⁰

163. For a particularly breathless and incomplete account of the BIA's work, see MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MEMBERS TO OUR SHORES* 214-20, 232-33 (2002).

164. See, e.g., *In re Tijam*, 22 I. & N. Dec. 408 (B.I.A. 1998); *In re N-J-B-*, 21 I. & N. Dec. 812 (B.I.A. 1997).

165. Procedural Reforms, *supra* note 26, at 54,878.

166. 8 C.F.R. § 1003.1(e)(4) (2006).

167. *Id.* § 1003.1(d)(3)(i)-(ii).

168. *Id.* § 1003.1(d)(3)(i).

169. *Id.* § 1003.1(e)(1)-(5).

170. *Id.* § 1003.1(e)(6).

- Unless “exigent circumstances” exist, all BIA appeals must be decided within a period of 90 days from completion of the record on appeal in the case of single-member decisions, and within an additional 180 days when referred to a three-member panel.¹⁷¹
- The number of Board members, authorized at twenty-three (but which had never exceeded twenty-one, and was at that number only for a brief period in Fall 2001) would be reduced to eleven.¹⁷²

These reforms have brought us to the current state of affairs. Some criticize the 2002 regulations, described as the “Ashcroft reforms” as qualitatively different from those that preceded them, and responsible for a mere shifting of the backlog from the BIA to the federal circuit courts.¹⁷³ However, a closer examination of the history of the streamlining regulations and statistics shows that the BIA had made substantial inroads by the time the new rules took effect in September 2002, and that this was already having an effect on circuit court dockets.¹⁷⁴ Another frequent criticism is that by requiring the entry of “affirmance without opinion” (AWO) orders in all cases meeting the regulatory criteria, the BIA was prevented from informing higher appellate courts of its genuine reasons for affirming a case, thus creating more work for those courts. This criticism is more telling perhaps, and cannot be refuted by mere statistics. Part of the “conversation” between

171. *Id.* § 1003.1(e)(8)(i).

172. *Id.* § 1003.1(a)(1). For discussion of the reasons for this change, see Procedural Reforms, *supra* note 26, at 54,893-94.

173. See Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1161 (2004). Levinson's argument, shared by others, is that the transfer of BIA members to other DOJ positions compromised the integrity of the Board by implicitly tying job tenure to agreement with the policies of the Attorney General. *Id.* at 1163. Upon receiving his own certificate of appointment from Attorney General Reno in 1998, the author noted that he was “to have and to hold the said Office, with all the powers, privileges, and emoluments to the same of right appertaining unto him . . . during the pleasure of the Attorney General.” As further evidence of the “subtle” change in the BIA's degree of independence, Levinson cites insertion of the following language into the regulations: “The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them.” 8 C.F.R. § 1003.1(a)(1) (2006). Levinson, *supra*, at 1161. This is hardly an innovation, as it has been the understood charter of the BIA and its members since its formation in 1940. See 8 C.F.R. § 90.2 (1940).

174. As discussed, the BIA issued more than 31,000 decisions in FY 2001, and more than 47,000 in FY 2002. EOIR 2005 STATISTICAL YEAR BOOK, *supra* note 160, at S2 fig.25. The aggregate total circuit court immigration caseload increased from 1760 cases to 4449 between these two years. See Administrative Office of the United States Courts, Rate of Appeal for BIA Decisions (last updated Dec. 7, 2005) (on file with *Catholic University Law Review*) [hereinafter BIA Appeal Data].

the BIA and the circuit courts, especially evident in unpublished remands to the BIA, is communication to the BIA of those areas in which the circuits require more clarification of issues. This can be as straightforward as the so-called *Lanza* remands in the Ninth Circuit, which prohibit use of AWO orders where the case involves issues over which the circuit court has jurisdiction, as well as those over which it does not,¹⁷⁵ or as complex as more recent Second Circuit decisions on credibility in asylum cases, which ask the Board to consider whether, even if some aspects of an immigration judge's factual findings cannot be squared with the record, other sustainable aspects make it "inevitable" that the immigration judge would reach the same conclusion.¹⁷⁶ However, based on the author's experience in regularly reviewing new circuit court decisions, there is no basis to conclude that the circuits are more likely to reverse or remand decisions issued with an AWO order than those with more full explanations.¹⁷⁷

175. *Lanza v. Ashcroft*, 389 F.3d 917, 924-26, 932 (9th Cir. 2004). In *Lanza*, the Ninth Circuit held that an AWO order is not appropriate in circumstances where the case involves an issue over which the circuit court has no appellate jurisdiction (such as the immigration judge or BIA determination that an applicant for cancellation of removal has not established "exceptional and extremely unusual hardship," or whether an asylum applicant has filed within one-year of his arrival into the United States) as well as an issue that the circuit court can review (such as whether the cancellation applicant has established 10-years continuous physical presence, or an asylum applicant is credible). *Id.* at 925-26. Based on the author's experience, it appears that other circuits have not shared this difficulty, and in the context of such "mixed" issues, they address the entirety of the immigration judge decision when an AWO is issued by the BIA. In Ninth Circuit cancellation cases, the author's experience is that upon remand, the BIA will likely issue an order specifically affirming the immigration judge's finding of no qualifying hardship.

176. *See, e.g., Ming Xia Chen v. BIA*, 435 F.3d 141, 144-45 (2d Cir. 2006).

177. This is admittedly a subjective, and limited, determination. But the issue of "how much to write" is not a new one. *See Ninth Circuit Tells BIA How to Write an Opinion*, 72 INTERPRETER RELEASES 1512, 1512-13 (1995) (summarizing *Tukhowinich v. INS*, 64 F.3d 460 (9th Cir. 1995), and noting, "[w]hen the [BIA] wishes to affirm an [immigration judge's] deportation order in a brief opinion, how much detail must the BIA include in its opinion before it can satisfy a reviewing court that its consideration of the case before it has been adequate? There is a conflict in the circuits on this issue").

The point here is simply that the dozens of unpublished reversals and remands to the BIA issued each month do not suggest that all would be well if the BIA would but write more in its decisions. The assigned error in most such cases is the BIA's substantive decision to affirm, for example, an immigration judge's adverse credibility determination. There is no evidence that more prolix BIA decisions defending such determinations would change the circuits' views; nor, it would seem, should that be the case. The administrative decision either is correct, or it is not. The argument that the BIA should return to a more "full" or *de novo* consideration of all asylum claims must assume that the BIA would reach different results; otherwise, the exercise would be pointless. However, given the fact that the affirmance rate for BIA decisions in the circuit courts has not declined since the advent of streamlining, there is no reason to conclude that streamlining has brought a higher incidence of error to BIA decisions.

There is a limit to the prudence¹⁷⁸—and relevance—of any further remarks I might make with regard to the wisdom of specific provisions of the 1999 and 2002 streamlining regulations. As the presiding member of the panel responsible for the initial screening function at the Board, however, I can attest that the regulations' contribution to the timely administration of justice, and to focusing scarce resources on cases that present more difficult issues, are both palpable. I also see daily demonstrations of how these reforms are part of a long process, commencing years before 1999, of giving greater quasi-judicial stature and authority to immigration judges, of moving toward a traditional standard of deference to factual determinations by these trial-level adjudicators, and of narrowing some of the issues to be decided by such adjudicators at both the trial and appellate level. Without these developments, which proceeded from many sources, streamlining, if not unworkable, would have been significantly less successful at rapidly drawing down the BIA's backlog of cases. Conversely, the success of streamlining in bringing timely and correct conclusions to matters that had previously languished for years indicates that it has brought a proper balance to the task of administrative appellate review. The myth persists that, as evidenced by the results of streamlining before the circuit courts, streamlining has had an opposite, destabilizing effect. That myth will be addressed in the following section.

II. JUDICIAL REVIEW: A CONVERSATION, NOT CONDEMNATION

A. *A Nod to the Circuits*

Lest the effort to put in perspective is misinterpreted as denial that a problem indeed exists, a few facts must be acknowledged. The immigration caseload of the United States courts of appeals has indeed skyrocketed, from 1757 in the year ending September 30, 2001, to 12,349 in the year ending September 30, 2005.¹⁷⁹ Most of that growth has occurred in the Second and Ninth Circuits, which together account for more than 75% of this caseload.¹⁸⁰ More telling, particularly for those

The preceding does not cover one significant area of error the BIA *should* address by writing more in its decisions: those instances where the BIA has neglected to resolve an issue unsettled by the decision below, or to consider a pending motion. This is not a matter of making the wrong decision, but of failing to make a decision at all.

178. See Procedural Reforms, *supra* note 26, at 54,893.

179. BIA Appeal Data, *supra* note 174.

180. *Id.* The Second Circuit received 2550 immigration-related appeals in FY 2005, and the Ninth Circuit received 6583 appeals. *Id.* By contrast, the Seventh Circuit, whose decisions are frequently cited in journalistic accounts of the current situation, received a relatively paltry 257 appeals in the same period, and its caseload has not altered significantly over the last three years. *Id.*

who have to decide these cases, is the outsized increase in immigration cases as a percentage of all cases received by the circuits. Here again, the Second and Ninth Circuits have seen the biggest change: from 4% in FY 2001 to 36% in FY 2005 in the Second Circuit, and from 9% to 41% in the Ninth Circuit.¹⁸¹ By contrast, the immigration caseload in the frequently cited Seventh Circuit was only 7% of its total in FY 2005.¹⁸² One may compare the understandable reaction to this sudden increase in caseload to that engendered by the substantial expansion, a generation ago, of federal drug crimes and prosecutions, a phenomenon that continues to place disproportionate burdens on the federal courts.¹⁸³ The difference here is the suddenness of the increase: immigration appeals more than doubled from FY 2001 to FY 2002, and doubled again in FY 2003.¹⁸⁴

Given these circumstances, the work of the circuits has been admirable. In virtually all circuits with significant immigration dockets, the median time between receipt of the appeal and the decision has increased, but nowhere near the level of case receipts themselves.¹⁸⁵ The median decision time in the Ninth Circuit, for example, reached a low of twelve months in 2003, and increased to approximately sixteen months in 2005.¹⁸⁶ One reason for this success, perhaps ironic, is that many circuits, led by the Ninth Circuit, have adopted the practice of summary or very brief orders in unpublished decisions affirming immigration judge and BIA decisions.¹⁸⁷

The ability of the circuits to keep up with this caseload does not, however, quell the agitation for changes that might relieve this burden. In addressing such proposals, it is useful to recall how the functions of those whose work is reviewed by the circuits has been altered over the

181. *Id.*

182. *Id.* This more than triples the percentage in FY 2001. *Id.* While their caseloads are lower, circuits such as the Third (15% in FY 2005) and the First (12%) have seen four-fold or more increases in the percentage of immigration cases as part of their overall incoming caseload. *Id.*

183. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 7-8 (2001), available at <http://www.uscourts.gov/recenttrends2001/20015yr.pdf> (“The complexity of drug cases places an additional burden on the federal courts. . . . Because drug cases usually involve multiple defendants, they often require nearly twice the amount of work for judges and more judicial resources than non-drug cases.”); Diana G. Culp, *Fixing the Federal Courts*, 76 A.B.A. J. 63, 63-65 (1990); *Report of the Federal Courts Study Committee*, 22 CONN L. REV. 733, 847-49 (1990).

184. BIA Appeal Data, *supra* note 174.

185. *Id.*

186. *Id.*

187. Richard C. Tallman, Judge, U.S. Court of Appeals for the Ninth Circuit, Remarks at the Immigration Judges’ Training Conference, Federal Judiciary Panel (Aug. 7, 2006) (written outline on file with *Catholic University Law Review*).

years, and why a system where appellate bodies need not invest undue resources on the vast majority of appeals they receive is a consummation to be wished, not frustrated.

B. Crisis: Perception or Reality?

The perception of crisis in the immigration adjudication system—a perception that led to the convening of the current Symposium—arises from several factors, some objectively verifiable in the strictest sense of the term, some subjective, and some that approach the realm of urban legend. As previously discussed, the federal courts of appeals have seen unprecedented growth in their immigration dockets, none of which can be attributed to their own actions, such as an unusual success rate granted to alien petitioners or undue delay that may encourage the “parking” of non-meritorious cases. These facts are verifiable: 12,000 new filings per year, an affirmance/dismissal rate of over 85%, and a median decision time that has not greatly increased.¹⁸⁸ Given that some unsuccessful applicants have lost their parking time before the BIA, and others feel unsatisfied with the brevity of some orders now issued by the BIA, it is understandable that they increasingly seek further review, and the delay it obtains for them, in the federal courts. But this is not the fault of those courts themselves.

More subjective, but to be taken seriously as well, are two perceptions: immigration judges sometimes fail in their duty to conduct fully impartial hearings or issue reasoned decisions in conformance with the standards set forth by the BIA and the circuit courts;¹⁸⁹ and the BIA, because of the volume of its caseload and the deferential standard of review it is obligated to apply, provides insufficient correction of such errors.¹⁹⁰ Reported instances of intemperate or biased behavior by immigration judges attract a great deal of publicity, but the few documented examples in the hundreds of thousands of full-merits decisions rendered in recent years by immigration judges tend to be recycled both in appellate opinions and in the popular press.¹⁹¹ Less “sexy,” but far more significant to the immigration system and, most critically, to the persons whose lives and fortunes are at stake in that system, is whether immigration judges

188. See BIA Appeal Data, *supra* note 174.

189. See, e.g., Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 496 (2005).

190. *Id.* at 499-500, 503-04.

191. See Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (discussing the low number of complaints in relation to the total number of cases reviewed).

uniformly “touch all the bases” in rendering a reasoned decision, and whether the BIA takes sufficient notice when they do not.¹⁹²

Approaching the realm of urban myth is the perception of the BIA as a rubber-stamp for the work of incompetently performing immigration judges, and that the work of the Board is (justly so) under an unrelenting assault from the federal appellate judiciary as a whole.¹⁹³ The reality of Board adjudication and its relations with the circuit courts, particularly those with the largest immigration case loads, is more complex, and reflects a relationship not altogether different from that between the federal courts and other administrative decision-makers.¹⁹⁴ The Board and circuit courts with heavy immigration dockets maintain cordial and productive contact on issues of mutual concern. This is exemplified in the concurring opinion of Judge Terence Evans of the United States Court of Appeals for the Seventh Circuit in *Guchshenkov v. Ashcroft*,¹⁹⁵ written following a personal visit to the Chicago immigration court:

Although I join the majority in voting to remand these two consolidated asylum petitions for further proceedings, I write separately to express my concern, and growing unease, with what I see as a recent trend by this court to be unnecessarily critical of the work product produced by immigration judges who have the unenviable duty of adjudicating these difficult cases in the first instance.

I wonder . . . if we have a fair appreciation of the work load and conditions under which immigration judges must work. For one thing, what we see is less than the tip of the iceberg of an immigration judge’s work load. In the Seventh Circuit, only 6 immigration judges hear roughly 1,000 contested asylum cases a year. That’s an average of 166 cases per judge per year. Some

192. *See id.*

193. Sylvia Hsieh, *Federal Dockets Swelling with Immigration Appeals*, DAILY REC. (Kansas City, Mo.), Feb. 7, 2006; Liptak, *supra* note 191; Howard Mintz, *Legal Fight for Refuge*, SAN JOSE MERCURY NEWS, Sept. 18, 2005, at A1; Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1.

194. *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 780 (1990) (describing tension between Supreme Court’s more expansive reading of “committed to agency discretion” clause in section 701(a)(2) of the Administrative Procedure Act and the “liberalizing tendency” of lower courts toward increased judicial review of agency action). A similar tension is evident in several Supreme Court decisions on asylum law that emphasize even more than the substantive result the obligation of the federal courts to give appropriate deference to agency fact-finding and discretion. *See, e.g.*, *Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006), *vacating* 409 F.3d 1177 (9th Cir. 2005); *INS v. Ventura*, 537 U.S. 12, 16-18 (2002), *rev’g in part* 264 F.3d 1150 (9th Cir. 2001); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992), *rev’g* 921 F.2d 844 (9th Cir. 1990).

195. 366 F.3d 554, 560-62 (7th Cir. 2004) (Evans, J., concurring).

of these cases moot out . . . and many end with a grant of relief. But we only see the cases where relief is denied which leaves, I suggest, the false impression that the immigration judges are simply denying asylum petitions willy-nilly.

....

Contested asylum hearings themselves are not the sedate, high-tech proceedings one often sees in the courtroom of a United States district judge. Immigration judges have no court reporters—they record the proceedings on 30-minute cassette tapes Much of the testimony they hear comes through interpreters. Imagine conducting hearings involving asylum applicants from Kazakhstan, Bangladesh, Sri Lanka, Yemen, and Mauritania over a 2-week period when none of the petitioners have a meaningful grasp of English.

....

Because 100 percent of asylum petitioners want to stay in this country, but less than 100 percent are entitled to asylum, an immigration judge must be alert to the fact that some petitioners will embellish their claims to increase their chances of success. On the other hand, an immigration judge must be sensitive to the suffering and fears of petitioners who are genuinely entitled to asylum in this country. A healthy balance of sympathy and skepticism is a job requirement for a good immigration judge. Attaining that balance is what makes the job of an immigration judge, in my view, excruciatingly difficult.

All in all, considering the difficult cases they hear day in and day out, I am of the view that immigration judges do a fairly good job. Are they perfect? No. Should we expect their decisions to be airtight? No. Perfection, I think, is simply impossible given their heavy work load, lack of resources, and the complexities involved in the cases they hear This court should not be so quick to criticize their efforts.¹⁹⁶

Statistical evidence rebuts the notion that the BIA and immigration judges are routinely reversed in the federal courts. For example, the Seventh Circuit reported in *Benslimane v. Gonzales* that it reversed or remanded BIA decisions in 40% of the last 136 cases it decided;¹⁹⁷ yet, a circuit-by-circuit review of a similar cohort of cases issued by nine of the circuits reveals a much higher rate of affirmance, averaging 89%.¹⁹⁸

196. *Id.*

197. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

198. This summary of the reversal and affirmance rates for nine circuits, prepared in December 2005, is based on the last 136 court decisions on the merits involving petitions for review of Board decisions. The percentages are based on the published and

unpublished court cases in Westlaw. The average rate for the eight circuits reviewed (not including the Seventh Circuit) is 89% of cases affirmed and 11% of cases reversed or remanded (123 of 1088 cases were reversed or remanded).

In the First Circuit, 90% of cases were affirmed, and 10% of cases were reversed or remanded (13 of 136 were reversed or remanded). This list covers from *Yongo v. INS*, 355 F.3d 27 (1st Cir. 2004), through *Belguendouz v. Gonzales*, 159 F. App'x 207 (1st Cir. 2005).

In the Second Circuit, 84% of cases were affirmed, and 16% of cases were reversed or remanded (22 of 136 were reversed or remanded). This search covered from *Yang Chu v. Gonzales*, 155 F. App'x 536 (2d Cir. 2005), through *Kamal v. U.S. Citizenship & Immigration Service*, 158 F. App'x 331 (2d Cir. 2005).

In the Third Circuit, 84% of cases were affirmed, while 16% of cases were reversed or remanded (22 of 136 cases were reversed or remanded). The list covers from *Liong v. Gonzales*, 140 F. App'x 342 (3d Cir. 2005), through *Szehinskyj v. Attorney General*, 432 F.3d 253 (3d Cir. 2005).

In the Fourth Circuit, 97% of cases were affirmed, while 3% of cases were reversed or remanded (4 of 136 cases were reversed or remanded). These figures span from *Basung v. Gonzales*, 124 F. App'x 815 (4th Cir. 2005), through *Owens v. Gonzales*, 155 F. App'x 720 (4th Cir. 2005). Eleven non-merits dismissals were not included in these figures.

In the Fifth Circuit, 93% of cases were affirmed, and 7% of cases were reversed or remanded (9 of 136 cases were reversed or remanded). This search covered from *Yanto v. Ashcroft*, 111 F. App'x 776 (5th Cir. 2004), through *Singh v. Gonzales*, 156 F. App'x 714 (5th Cir. 2005). The affirmed numbers did not include twenty-five arguably non-merits affirmances. In addition, the list does not include the Fifth Circuit's initial affirmance in *Xiaodong Li v. Gonzales*, 420 F.3d 500 (5th Cir. 2005), its subsequent decision in *Xiaodong Li v. Gonzales*, 429 F.3d 1153 (5th Cir. 2005) to vacate based on the Board's further order decision, or its reversal in *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) to conform the case to Board precedent.

In the Sixth Circuit, 82% of cases were affirmed, and 18% of cases were reversed or remanded (25 of 136 cases reversed or remanded). The list covers from *Csekinek v. INS*, 391 F.3d 819 (6th Cir. 2004), through *Hana v. Gonzales*, 157 F. App'x 880 (6th Cir. 2005).

In the Seventh Circuit, 63% of cases were affirmed, while 37% of cases were reversed or remanded (47 of 136 cases reversed or remanded). The search spanned from *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004), through *Hussain v. Gonzales*, 424 F.3d 622 (7th Cir. 2005).

In the Ninth Circuit, 80% of cases were affirmed, and 20% of cases were reversed or remanded (27 of 136 cases reversed or remanded). The list covers from *Singh v. Gonzales*, 147 F. App'x 700 (9th Cir. 2005), through *Hay v. Gonzales*, 156 F. App'x 42 (9th Cir. 2005). The figures do not include twenty-seven Ninth Circuit affirmances that resulted from procedural failures before the court or from cases in which the court lacked substantive review authority (e.g., petitions seeking to overturn exercises of discretion), and does not include cases that were dismissed based on a failure to exhaust administrative remedies. However, the list does include approximately twenty remands under *Lanza v. Ashcroft*, 389 F.3d 917 (9th Cir. 2004), in which the Board's sole error was using an AWO order in situations where the case involved a mix of issues, some of which were within the jurisdiction of the circuit court to review, and others not. The list also includes cases involving remands for consideration of intervening circuit law. These inclusions would act to increase the percentage of cases resulting in reversals or remands, and decrease the number of affirmances. However, particularly in those cases involving *Lanza* remands, they are less likely to involve substantive error on the part of the Board.

In the Eleventh Circuit, 99% of cases were affirmed, and 1% of cases were reversed or remanded (1 of 136 cases reversed or remanded). The figures cover from *Yi Zheng v. U.S.*

Recent statistics issued by the Administrative Office of the United States Courts, and summarized in detail below, demonstrate an effective nationwide affirmance rate of more than 85%.¹⁹⁹ Most importantly, there is no evidence that these numbers moved in any significant direction since the adoption of the BIA's "streamlined" adjudication system. In fact, the affirmance rate has, if anything, increased: after dipping to 71% in FY 2002 (down from 81% the prior year), the affirmance rate hit 83% in FY 2003, 89% in FY 2004, and 86% in FY 2005.²⁰⁰

These statistics do not measure those cases in which a court of appeals reached no decision on the merits but the parties consented to a remand to the Board. Such cases may involve perceived error on the part of the Board or the immigration judge, but may also involve errors in the execution of a decision, gaps in the record, or the alien's newly acquired eligibility for a form of relief such as adjustment of status. Statistics prepared by the EOIR, including all reversals and remands, including those by stipulation, account for 488 remands from the Second Circuit in FY 2004 and FY 2005, and 1328 from the Ninth Circuit.²⁰¹ Given the

Attorney General, 136 F. App'x 311 (11th Cir. 2005), through *Amaya La Puente v. U.S. Attorney General*, 162 F. App'x 835 (11th Cir. 2005).

199. BIA Appeal Data, *supra* note 174. The statistics establish that of cases "terminated on the merits" by the circuit courts of appeals in FY 2005, 86% resulted in affirmances of the BIA or denials of petitions for review, and 14% in reversals (6%) or remands (8%). The affirmance rate was 89% in the First Circuit, 94% in the Second Circuit, 81% in the Third Circuit, 95% in the Fourth Circuit, 87% in the Fifth Circuit, 90% in the Sixth Circuit, 61% in the Seventh Circuit, 88% in the Eighth Circuit, 83% in the Ninth Circuit, 94% in the Tenth Circuit, and 95% in the Eleventh Circuit.

200. *Id.*

201. Memorandum from author to *Catholic University Law Review* (Oct. 18, 2006) (data compiled by the Office of Planning, Analysis, and Technology, Executive Office for Immigration Review) [hereinafter EOIR Data]. EOIR figures for FY 2006 show a stable number of remands to the BIA from the Ninth Circuit (933 versus 923 in FY 2005), but a marked increase in the Second Circuit (842 in FY 2006, up from 378 the previous year). *Id.* Part of the explanation for this figure is the Second Circuit's success in FY 2006 in "streamlining" its own docket, including adoption of a non-argument calendar, in which four three-judge panels completed twelve petitions involving denial of an asylum claim each week. See *Ming Xia Chen v. BIA*, 435 F.3d 141, 145 & n.1 (2d Cir. 2006) (noting further the "inevitable" disparity in results that may occur in apparently similar cases, and explaining that "[p]anel will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our precedents"). Second Circuit judges attending an October 2006 conference at Georgetown University Law Center sponsored by the Federal Judicial Center, and attended by members of the BIA as well as immigration judges, stated that these procedures, among other measures, have succeeded in cutting significantly the average time for disposition of a petition for review in an asylum case. The judges also noted that a significant number of remands to the BIA occurred as the result of stipulations between the government and petitioner's counsel, a fact which is borne out by the author's experience in reviewing such remanded cases.

A total of 2239 cases were remanded to the BIA in FY 2006, up from 1638 in 2005 (80% of this increase being attributable to the Second Circuit) and 671 in 2004. EOIR Data, *supra*. According to the Administrative Office of the United States Courts, the circuit courts resolved

number of cases decided by those circuits during this period, these numbers do not alter significantly the statistical portrait painted here.

Finally, statistics gathered since the issuance of *Benslimane* show little change, notwithstanding the ensuing publicity of the Board's work. In the first two months of 2006, the circuit courts issued 894 decisions (available on Westlaw) involving petitions for review from decisions of the BIA.²⁰² A total of 148 were reversed or remanded, a rate of 16.5%.²⁰³ Two-thirds of these reversals, or ninety-nine cases, involved asylum appeals, and approximately two-thirds of that figure, or seventy cases, involved problems with adverse credibility determinations made by immigration judges and affirmed by the BIA.²⁰⁴ Of that figure, more than half came from the Second Circuit, which, perhaps not coincidentally, issued more decisions (366) than any other court during this period.²⁰⁵ In contrast, the Ninth Circuit, which issued 261 decisions, reversed credibility determinations in only eleven cases, and a third of the Ninth Circuit's total of forty-six reversals were for the BIA to consider the impact of new circuit precedent issued since the BIA had heard the case.²⁰⁶ The Seventh Circuit itself issued a relatively scant twenty-one decisions, of which it reversed the BIA decision in seven cases.²⁰⁷

If one considers, again, that the entire universe of circuit court immigration cases is but the tip of the iceberg—the Board alone completed approximately 45,000 decisions in FY 2005, and only 16% of immigration judge decisions are even appealed to the Board—it is difficult to square the statistical reality with the proposition that the BIA's orders are “routinely nullified” by the courts.²⁰⁸ Nor is there statistical evidence to back up the assertion that such decisions are riddled with error or that

7312 immigration matters in FY 2004, and 9782 in FY 2005. BIA Appeal Data, *supra* note 174. No similar figure for FY 2006 was available at time of publication, but it seems safe to assume, based on the Second Circuit's increased output alone, the circuit courts completed well over 10,000 immigration matters during that period. For further discussion of 2006 statistics, see *infra* note 207.

202. Memorandum from author to *Catholic University Law Review* (Apr. 21, 2006) (memorandum and list of cases on file with *Catholic University Law Review*).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. These statistics are drawn from daily tracking by the author and BIA colleagues of newly released circuit court decisions reviewing decisions of the BIA. Data made available just prior to publication shows that 3831 circuit court decisions involving petitions for review from the BIA were released on Westlaw between January 1 and August 31, 2006, and that 669 of these reversed the BIA decision and/or remanded for further proceedings, a rate of 17.5%. See EOIR Data, *supra* note 201. The effective remand rate is higher if remands by stipulation of the parties are taken into account. See *supra* text accompanying note 201.

208. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2004).

the rate of such error has increased since implementation of the streamlining regulations. What *does* appear true is that the circuit courts were not prepared for the changes resulting from the Board's doubling its annual output of cases, and reducing by years the time cases remained before it. While, as demonstrated here, this was a logical outcome of legislative and administrative changes in immigration law, the circuit courts are justifiably concerned at the impact this has had on their work.²⁰⁹

All appellate jurists, including members of the BIA, may consider an individual decision they are reviewing to be manifestly deficient in its reasoning or oversight of important evidence. Often, the bitterest of disagreements flow from one's *Sitz im Leben*. *Benslimane* provides a fine illustration.²¹⁰ There, the immigration judge, in conformance with regulation, required the alien to file a completed Form I-485 (application for adjustment of status) with the immigration court as a condition of being granted a further continuance of his case.²¹¹ The respondent declined to do so, arguing that since the application had already been with the adjudicating branch (Citizenship and Immigration Services) of the Department of Homeland Security, it was already in possession of the government.²¹² The request for continuance was denied.²¹³ The Seventh Circuit viewed the immigration judge's requirement of a new filing as an irrational and wholly procedural obstacle to relief that Congress intended aliens in this position to benefit from;²¹⁴ most practitioners in immigration courts and before the BIA would view the filing obligation as an ordinary course of business. This subtlety is lost on those outside commentators who have cited *Benslimane* as evidence of an immigration adjudication process that is seriously deficient.²¹⁵

Post-*Benslimane*, the Second Circuit presented a far different perspective on the need of the BIA and immigration judges to manage their respective caseloads.²¹⁶ The court noted:

The BIA's "streamlining" regulations were enacted in response to a crushing backlog of immigration appeals, the continuing existence of which prevents the speedy resolution of proceedings vitally important to thousands of aliens, and we will

209. *Don't Tamper With the Courts*, *supra* note 32.

210. *Benslimane*, 430 F.3d at 830-32.

211. *Id.* at 830.

212. *Id.* at 831.

213. *Id.*

214. *Id.* at 832.

215. See, e.g., *Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596, 2596-98 (2006).

216. See *Guyadin v. Gonzales*, 449 F.3d 465, 469-70 (2d Cir. 2006).

not cripple the BIA's procedures by subjecting to appellate review internal case-management decisions far removed from the actual substantive rights of aliens. The BIA's members and the dedicated corps of immigration judges under the Board's supervision should be applauded for their continuing diligence, their integrity, and and [sic]—as is shown in the records of nearly all immigration cases we encounter in this Court—their earnest desire to reach fair and equitable results under an almost overwhelmingly complex legal regime. Statutes, regulations, and case law regularly change, and the cases before immigration judges require subtle legal analysis as well as robust factfinding generally dependent on credibility assessments that a reviewing court cannot duplicate. IJs and the BIA are to be commended for their efforts, in which the “streamlining” policy plays an important role.²¹⁷

These remarks must be considered in perspective, of course, especially given the significant number of reversals by the Second Circuit of immigration judge and BIA decisions involving credibility determinations in asylum cases.²¹⁸ As noted by Ninth Circuit Judge Michael Hawkins in remarks to the annual conference of the BIA in October 2004, about 90% of the appeals from the BIA present few difficulties for him and his colleagues, but about 10% are more problematic.²¹⁹

Judge Hawkins' estimate, borne out by the overall circuit-by-circuit statistics, demonstrates that it is not sufficient that EOIR judges get the “easy” case right—even if they comprise a large portion of our docket, which they do. Our challenge is to get better and better at the more difficult cases: cases made difficult by the facts, by the legal issues presented, or by the fact that an apparently correct decision rendered at the trial level might not have touched all the bases, or even touched some wrong ones. I am confident, though, that a symposium meeting a year or two hence would demonstrate both that we are paying even closer attention to the more difficult cases, and that this effort is reflected in the opinions and results from the circuit courts.

In many respects, the “ball game” in examining issues such as we examine today is the standard of review. For example, the Board is compelled by regulation to affirm an immigration judges' finding that an asylum applicant is not credible unless that decision is “clearly

217. *Id.*

218. *See supra* text accompanying notes 204-05.

219. Michael Hawkins, Judge, U.S. Court of Appeals for the Ninth Circuit, Address at the Annual Conference of the Board of Immigration Appeals (Oct. 22, 2004).

erroneous.”²²⁰ The circuit courts operate under similar limitations: the administrative findings of fact are “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”²²¹

These are very deferential standards. It is clear that various circuit judges view the terms “reasonable adjudicator” and “compelled” through different lenses. It will always be thus. The BIA struggles to find the appropriate level of review given our mandates from the Attorney General and the variant degrees of deference afforded it by the circuits, and even by different panels on the same circuit. As Judge Evans noted in *Guchshenkov*, one should not expect perfection in this quest.²²²

When I arrived at the BIA in 1998, we were literally crushed by an ever-increasing caseload driven by recent immigrant surges from Asia and Latin America, and by reforms to the nation’s immigration laws and regulations enacted in the prior decade. Our backlog increased at a level of 700 cases per month, and most of the substantive cases I reviewed in 1998 had been with us at least since 1993 or 1994. There were no deadlines to speak of in non-detained cases, and our case management system merely kept track of what cases we had. The reality eight years later—that the BIA decides more cases each month than we take in, uses short orders (as do all appellate courts) to dispose of cases where no substantive issues are presented in the appellant’s brief, and enjoys a consistent high affirmance rate in the courts of appeals—has not come without cost, but is an achievement that should not be lightly regarded.

CONCLUSION

The current debate should be devoid of nostalgia. If there ever was a time when the BIA could provide truly *de novo* and *timely* review to each case before it, that time is long gone. There now are simply far too many immigrants, legal and illegal, generating far too many removal cases and far too many claims for relief, for such a system to work. The same is true for the federal courts of appeals, which were artificially protected from a post-IIRIRA spike in their immigration caseload by the BIA’s growing backlog of the late 1990s. Many of the most ardent critics of the EOIR adjudication system seek expansion of federal circuit court review in immigration matters, which could potentially add thousands of cases involving criminal aliens and claims for discretionary relief to the circuits’ immigration dockets. Whether these proposals pass or fail, there is no going back to a time when those dockets numbered in the hundreds

220. 8 C.F.R. § 1003.1(d)(3)(i) (2006).

221. 8 U.S.C. § 1252(b)(4)(B) (2000).

222. *Guchshenkov v. Ashcroft*, 366 F.3d 554, 562 (7th Cir. 2004) (Evans, J., concurring).

or, for some circuits, the dozens. Even if a large percentage of current unlawfully present aliens received “amnesty” of some form, history teaches that the flow of new illegal entrants, and new immigration enforcement matters, would not be significantly reduced. The answer to the current sense of unease about the immigration appeals system, therefore, does not lie in those bodies—either the BIA or the circuit courts—taking upon themselves functions customarily belonging to trial judges and which, over the years, have become the province of a quasi-independent immigration trial bench.

Like much else in the vast administrative and legal system governing immigration to the United States, the work of judges is dictated by the policy preferences of a nation that, for all its current ferment over the issue, accepts historically high annual levels of immigration from virtually all corners of the globe. At the same time, most recent immigration legislation has established tougher enforcement policies against potential terrorists and their supporters, against legal immigrants who have committed crimes, and illegal aliens, both those who gained entry by stealth or fraud, and those who entered legally, but who have overstayed their terms of entry. The renewed enforcement efforts implementing these policies simply put more cases into systems that were not, and in many cases still are not, capable of the strain. Given these factors, those systems have performed remarkably well, providing a level of independent adjudication and due process befitting our legal heritage and immigrant tradition. The premise that the current system does not meet “minimum standards of legal justice”²²³ is not borne out by the evidence; nor does it constitute a propitious starting point for a discussion of how those systems can meet the demands placed by public policies favoring high levels of immigration. It is the author’s hope that the tone of collegiality evident in this Symposium remains the leitmotif of those interactions between the judicial and administrative appellate bodies tasked with the growing burden of immigration case appeals.

223. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

