Catholic University Law Review

Volume 55
Issue 4 *Summer 2006*

Article 6

2006

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TSUNAMI WATCH ON THE COAST OF BOHEMIA[1]: THE BIA STREAMLINING REFORMS AND JUDICIAL REVIEW OF EXPULSION ORDERS

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INTRODUCTION

Removal is the ultimate criterion for the viability of a national system of immigration law. All sovereign states establish rules as to who may be admitted into the national territory, and on what terms. These rules, in all cases, presume the ability of the sovereign state to expel persons—primarily aliens—who are unlawfully present within the state.

Most modern states have also developed a body of law providing relief from expulsion, typically on humanitarian or foreign policy grounds.[2] In conditions of mass immigration, the adjudication of this specialized and normally obscure body of law takes on broad national policy implications.

In the United States, a system of administrative Immigration Judges (IJs), under the U.S. Department of Justice (DOJ)'s Executive Office for

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1. The title refers to the classic article on this topic by David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990). Professor Martin uses Walter Lippmann's "coast of Bohemia" metaphor to highlight the difficulties of aligning public policy to a "real environment [that] is altogether too big, too complex, and too fleeting for direct acquaintance . . . . [A]lthough we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it." *Id.* at 1274 (quoting W. LIPPMAN, PUBLIC OPINION 16 (1980)). The "tsunami" metaphor evokes the Federation for American Immigration Reform (FAIR)'s characterization of mass immigration as a catastrophic environmental phenomenon. *See, e.g.*, Michael M. Hethmon, *Diversity, Mass Immigration, and National Security After 9/11—An Immigration Reform Movement Perspective*, 66 ALB. L. REV. 387, 398-405 (2003).

2. I find the term "expulsion," which is used extensively by John Palmer in his BIA study with Professors Stephen Yale-Loehr and Elizabeth Cronin, helpful in referring generally to common features of exclusion, deportation, and removal proceedings. *See generally* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005). The public health and immunological connotations of this term mesh well with FAIR's longstanding concerns about the demographic and environmental effects of modern mass immigration.

Immigration Review (EOIR), adjudicate expulsion at the primary level.[3] The Board of Immigration Appeals (BIA) hears appeals from the decisions of administrative IJs.[4]

This Article examines the widely reported surge in appeals of BIA decisions since the implementation between 1999 and 2002 of the so-called "streamlining reforms," and surveys the response of the federal circuit courts that were required to rule on constitutional challenges to streamlining. This analysis focuses on thirteen reported cases in which the federal circuit courts unanimously affirmed the BIA summary review procedures.[5] Then, this Article takes a critical look at these reforms within the broader substantive context of the law of relief from expulsion.

The BIA has stated that the ultimate fairness of its streamlining reforms must be assessed by looking at the entire immigration proceedings process, including the full hearing before the IJ, the initial appeal to the Board, the opportunity for reconsideration, and the appellate jurisdiction of the federal courts.[6] For the BIA, the unanimous upholding of the summary affirmance process by the courts must be given its proper weight.[7]

Writers representing the immigration bar and immigrant interests have used a four-part test for assessing administrative and judicial review procedure in expulsion cases: accuracy, efficiency, acceptability, and consistency.[8] With the recent surge in reported decisions,[9] it has not been

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3. Fact Sheet, Executive Office for Immigration Review, BIA Restructuring and Streamlining Procedures (Mar. 9, 2006), http://www.usdoj.gov/eoir/press/06/BIA StreamliningFactSheet030906.htm [hereinafter EOIR Fact Sheet].

4. Homeland Security Act (HSA) of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291(a)), amended the Immigration and Nationality Act (INA) to abolish the former Immigration and Naturalization Service (INS), effective March 2003. Responsibility for addressing asylum claims was transferred to the U.S. Citizenship and Immigration Service (USCIS) of the newly created Department of Homeland Security (DHS). HSA § 451, 6 U.S.C. § 271 (Supp. III 2003). However, EOIR, along with the cadre of immigration judges and the BIA, remained under the Department of Justice (DOJ). HSA § 1101(a), 6 U.S.C. § 521(a) (Supp. III 2003).

5. *See infra* Part IV.

6. Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,885 (Aug. 26, 2002) [hereinafter Procedural Reforms].

7. EOIR Fact Sheet, *supra* note 3.

8. Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y. L.J., Dec. 27, 2004, at 3 (citing Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986)).

9. *See* Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining To Blame?*, 82 INTERPRETER

hard for opponents of curtailment of opportunities for review of final removal orders to find "war stories" in the legal literature to support their views.[10]

I argue that the BIA has generally achieved its self-defined administrative reform objectives, but that the federal appeals courts are now, as a consequence, facing an administrative crisis. This crisis is partly of their own making, as the federal courts seek to protect their own review power. However, it has partly been imposed on the courts by Congress, in the form of a jury-rigged body of law—which I would label the law of relief from expulsion—that does not fit into either the criminal or civil models of adversarial procedure. This Article discusses a set of appellate cases reviewing challenges to BIA streamlining decisions to illustrate the argument that a majority of judicial appeals of expulsion orders turn on statutory and evidentiary standards that are dysfunctional in an era of mass immigration.

This is a dissident "outsider" perspective, critical of the perceived self-interest in much legal writing on expulsion by advocates for alien interests and to a lesser extent, the professional civil servants within DOJ. Historically, the development of legislation concerning administrative and judicial review in immigration matters has occurred almost entirely among specialists within the legal profession. The public, variously defined, has largely been excluded. Despite the important constitutional and practical consequences such legislation entails for the modern administrative state, these bills are rarely the subject of open debate accessible to the average educated citizen, even after their introduction in Congress. For example, commentators have pointed out that the REAL ID Act provisions were typically not examined in committee, "but were added through a floor amendment . . . and then tacked onto must-pass appropriations legislation."[11]

I. THE SURGE IN APPEALS OF BIA DECISIONS SINCE THE MARCH 2002 BIA REFORMS

The surge in petitions filed in the federal courts of appeal for judicial review of BIA decisions affirming final orders of "expulsion" has been widely noted.[12] Observers seem to be in general agreement that the surge began in March 2002, after the BIA issued its regulations, allowing

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RELEASES 2005, 2010 (Dec. 19, 2005) (citing Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005)).

10. *See, e.g., id.* (citing cases criticizing BIA and IJ decisions).

11. Professor Nancy Morawetz, Remarks at the New York University School of Law Symposium: Seeking Review: Immigration Law and Federal Court Jurisdiction 2 (May 26, 2005).

12. *See, e.g.*, Palmer, Yale-Loehr & Cronin, *supra* note 2, at 3.

the BIA to use streamlining procedures on cases including claims for asylum and suspension of deportation claims.[13] In 2001, appeals of BIA decisions were reported to have constituted 3% of all federal appeals filed.[14] In 2002, BIA appeals were reported to be 10.9% of all appeals filed, increasing to 14.4% in 2003.[15] By 2003, BIA appeals, in the twelve federal circuit courts that hear appeals of BIA decisions, had surged to an astonishing 87% of all administrative agency appeals.[16]

In 2005, the federal courts of appeal received about five times as many petitions for review as they did prior to 2002.[17] EOIR states that the actual appeal rate has increased from 5% to 30%.[18] A study conducted by John R.B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin (BIA Study) found that the volume of BIA decisions has increased, with "a well-documented increase in petitions for review of final orders of removal."[19] Both the rate at which final orders are appealed and the actual number of cases filed in the courts of appeal each month have surged and continue to grow.[20]

Federal circuit court judges around the country publicly expressed concern that cases rushed through the BIA administrative review process had "not only flooded some circuits with appeals but have also caused lives to get lost in the shuffle of streamlining."[21] The *National Law Journal* reported that the Second and Ninth Circuits "are drowning in immigration appeals."[22] The Ninth Circuit, which for some time had accounted for more than half of all immigration appeals, was reported to have experienced a 560% increase in immigration appeals since 2001, "from roughly 900 in 2001 to 6,000 in 2004."[23] Immigration cases in late 2005 represented 45% of the Ninth Circuit's entire annual docket.[24] The Second Circuit "has been buried" by an astounding 1,400% increase in appeals from 2001.[25] The situation in the Second Circuit had "grown so

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13. *Id.* at 3, 44, 60.

14. Mailman & Yale-Loehr, *supra* note 8.

15. Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. 243, 246 (2005), *available at* http://www.abcny.org/pdf/report/AppealSurgeReport.pdf.

16. *Id.* at 246 n.18.

17. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 4.

18. EOIR Fact Sheet, *supra* note 3.

19. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 5, 8.

20. *Id.* at 8.

21. Pamela A. MacLean, *Judges Blast Immigration Rulings*, NAT'L L.J., Oct. 24, 2005, at S1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

dire" that by September 2005, the court eliminated argument on asylum appeals.[26]

A. The BIA Backlog and Pressure for Reform

The immediate impetus for the BIA reforms came from the staggering backlog of pending administrative appeals on file with the Board in 1999, which at that time was expected to metastasize if no action was taken.[27] The backlog crisis of 1999 had its origins in the Refugee Act of 1980,[28] which had provoked an unprecedented and largely unforeseen rise in asylum claims.[29] In response, a number of streamlining reforms were debated in the late 1980s, with one important reform, the assignment of BIA cases to three-member panels instead of the full Board, actually implemented in 1988.[30]

Growth of the backlog was further fueled by federal legislation, which accelerated immigrant and nonimmigrant alien entries to record levels throughout the 1990s.[31]

Beginning in 1986, the pace and scope of amendments to the Immigration and Nationality Act (INA) increased.[32] The Immigration Reform and Control Act (IRCA) of 1986 introduced amnesties for certain types of illegal aliens, thereby intensifying and expanding illegal and derivative chain migration into this country, a result which was the opposite of what Congress had intended.[33] Expansion of the grounds for

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26. *Id.*

27. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135-36 (Oct. 18, 1999) [hereinafter Streamlining]; *see also* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 23.

28. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8, 42, and 50 U.S.C.).

29. *See* Martin, *supra* note 1, at 1250-52.

30. Executive Office for Immigration Review; Board of Immigration Appeals; Designation of Judges, 53 Fed. Reg. 15,659, 15,659 (May 3, 1988) (codified at 8 C.F.R. § 1003.1(a)(3)).

31. Streamlining, *supra* note 27, at 56,136; *see also* 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 13-14 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

32. This overhaul of the nation's immigration laws included the Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359; the Immigration Act (IMMACT) of 1990, Pub. L. No. 101-649, 104 Stat. 4978; the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214; and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

33. *See* INA § 245A, 8 U.S.C. § 1255a (2000) (providing amnesties for aliens that meet certain criteria). Congressional intent to enforce immigration laws strictly is articulated in section 115 of IRCA. IRCA § 115 (stating Congress' intent "that—(1) the

expulsion of criminal aliens and the implementation of the employer sanctions regime, while deliberate, provided additional mechanisms for administrative and judicial review of enforcement actions.

As a consequence, the number of appealable IJ decisions and the rates at which the decisions were appealed to the BIA rose sharply.[34] A study conducted for the American Bar Association (ABA) reported that the number of appeals filed annually with the BIA roughly doubled between 1992 and 2000, while the backlog of pending appeals tripled, reaching 63,763 in 2000.[35] Moreover, the BIA and circuit courts ruled on an increased number of new legal issues.[36]

B. Implementation of BIA Reform by the Attorney General

Faced with an overwhelming backlog of pending administrative cases, the BIA began in 1999 to issue regulations streamlining its quasi-judicial review procedures.[37] The 1999 streamlining regulations were implemented in phases.[38] DOJ published a proposed rule in September 1998 that included a new provision designed to allow selected single Board members to affirm an administrative order without an opinion where the member found that:

> [T]he result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.[39]

In the final rule issued in October 1999, the Board designated categories of cases suitable for single-member review, expanded the authority of single members to issue an affirmance without opinion

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immigration laws of the United States should be enforced vigorously and uniformly, and (2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens").

34. DORSEY & WHITNEY LLP, *supra* note 31, at app. 10.

35. *Id.* at 13, app. 8, app. 11 (stating that while the number of cases doubled, the number of appeals decided did not increase proportionately with the increase in appeals, thus resulting in a growing backlog).

36. *Cf. id.* at 33-35.

37. *See* 8 C.F.R. § 1003.1 (2006).

38. *See* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 34.

39. Board of Immigration Appeals: Streamlining, 63 Fed. Reg. 49,043, 49,044 (Sept. 14, 1998) (codified at 8 C.F.R. §1003.1(e)(4)).

(AWO), expanded the use of summary dismissal, and took action to remand cases with technical defects.[40] In 2000, EOIR commissioned an audit study report by the Arthur Andersen Consulting firm to evaluate the extent to which the Pilot Project (implementing single-member AWOs), which ended in August 2001, had "[i]ncrease[d] productivity of fair and legally correct decisions in a program that can be sustained over an extended period of time."[41] The report described the pilot reforms as "an unqualified success."[42]

Citing the success of the 1999 streamlining regulation, EOIR, in February 2002, proposed a more sweeping streamlining regulation further expanding the number of cases referred to a single Board member.[43] In May 2002, the BIA eliminated the restriction of the single-member AWO regime to specified categories of cases.[44] In August 2002, final regulations further expanding BIA reforms were issued, which remain in force today.[45]

Between 1998 and 2002, the BIA issued eighteen separate internal directives designating various categories of cases as appropriate for streamlined review.[46] The most important of the new reforms was the designation of single-member review as the default procedure.[47] Review by three-member panels was limited to "(1) settl[ing] inconsistencies

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40. *See* 8 C.F.R. § 1003.1(d)(2), (d)(3)(ii), (d)(3)(iv), (e)(4), (e)(5).

41. EXECUTIVE OFFICE OF IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS (BIA) STREAMLINING PILOT PROJECT ASSESSMENT REPORT 1, 4-5 (2001) (evaluating the pilot project on behalf of the United States Department of Justice).

42. *Id.* at 13.

43. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7309-10 (Feb. 19, 2002).

44. Memorandum from Lori L. Scialabba, Acting Chairman, Board of Immigration Appeals, to Board Members, Board of Immigration Appeals (May 3, 2002), *in* DORSEY & WHITNEY LLP, *supra* note 31, at 23 (designating the types of cases that can be affirmed without opinion); *see also* Palmer, Yale-Loehr & Cronin, *supra* note 2, at app. 27 (summarizing Acting Chairman Scialabba's memorandum and stating that the streamlining reform designated "[a]ll cases involving appeals of IJ or INS decisions, so long as the BIA had jurisdiction and so long as the cases met the regulatory requirement for streamlining (i.e. correct result, only harmless or nonmaterial errors, and issues either squarely controlled by existing precedent or insubstantial")).

45. 8 C.F.R. § 1003.1; Procedural Reforms, *supra* note 6, at 54,878.

46. *See, e.g.*, Memorandum from Paul W. Schmidt, Chairman, Board of Immigration Appeals, to Board Members, Board of Immigration Appeals (Nov. 1, 2000) *in* DORSEY & WHITNEY LLP, *supra* note 31, at app. 17; Memorandum from Lori L. Scialabba, Acting Chairman, Board of Immigration Appeals, to Board Members, Board of Immigration Appeals (May 23, 2001) (on file with *Catholic University Law Review*); Memorandum from Lori L. Scialabba, Acting Chairman, Board of Immigration Appeals, to Board Members, Board of Immigration Appeals (Apr. 10, 2001) *in* DORSEY & WHITNEY LLP, *supra* note 31, at app. 19.

47. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 28.

among IJ rulings; (2) establish[ing] precedent; (3) review[ing] a legal error; (4) resolv[ing] a case or controversy of national import[ance]; (5) review[ing] a clearly erroneous factual determination by an IJ; or (6) revers[ing] the decision of an IJ in cases other than where reversal is 'plainly inconsistent' with intervening law."[48] Summary dismissal was expanded to appeals filed in bad faith or to cause delay.[49] The standard of review of an IJ's factual findings was restricted from de novo to "clearly erroneous."[50] Regulations now state that the BIA "will not engage in factfinding in the course of deciding appeals," but does retain the right to "tak[e] administrative notice of commonly known facts such as current events or the contents of official documents."[51] The number of authorized Board members was slashed from twenty-three to eleven to improve "cohesiveness and collegiality."[52]

C. Debate Regarding the Practical Impacts of the BIA Workload Management Approach

The decision by EOIR to streamline the BIA administrative appeals procedure was driven more by managerial, rather than legal, concerns.[53] That approach is appropriately described as resource- or "case-management."[54] A common theme in government explanations of the BIA reforms has been that streamlining had no effect on the jurisprudence of removal whatsoever.[55]

By contrast, opponents of streamlining have claimed that the BIA reforms "simply dumped" the backlog of appeals onto a less efficient forum, the federal circuit courts, resulting in an overall decrease in efficiency.[56] Professor Yale-Loehr has been quoted as comparing BIA reform to "squeezing a balloon" because, like the BIA backlog, the air in

48. *Id.* (citing 8 C.F.R. § 1003.1(e) (2005)).

49. 8 C.F.R. § 1003.1(d)(2)(D) (2006).

50. *Id.* § 1003.1(d)(3)(i).

51. *Id.* § 1003.1(d)(3)(iv).

52. Procedural Reforms, *supra* note 6, at 54,893-94 (discussing the advantages of a smaller Board). The Dorsey & Whitney study pointed to comments by FAIR and former BIA members who argued that the increase in Board members actually added to the backlog. DORSEY & WHITNEY LLP, *supra* note 31, at 14-15. *See generally* Letter from Michael M. Hethmon, Staff Counsel, Fed'n for Am. Immigr. Reform, to Charles Adkins-Blanch, Gen. Counsel, Executive Office for Immigr. Review (Mar. 20, 2002) (on file with *Catholic University Law Review*) [hereinafter FAIR Public Comments].

53. *See* Procedural Reforms, *supra* note 6, at 54,885.

54. *Id.* at 54,878, 54,885.

55. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 5.

56. *See id.* at 4-5, 31.

the balloon "'just goes to a different part.'"[57] A Heritage Foundation analyst called it a "'transference of costs from the executive branch to the courts.'"[58]

The immigration bar, however, has also suggested that the reforms have changed substantive law to the detriment of the alien interests the immigration bar represents.[59] Critiques of the reforms continue to be publicized and published, notably from former BIA member Lory D. Rosenberg.[60] These critics argue "that the changes undermine the four basic goals of any administrative process: accuracy, efficiency, acceptability, and consistency."[61] They argue that single-member panels are more likely to make errors than three-member panels when deferring to the IJ's factual findings.[62] Furthermore, they contend that losing parties will not recognize single-member AWOs as legitimate.[63]

Debate has also focused on conflicting explanations offered by the government and the bar for the surge in petitions to the appellate courts.[64] These explanations focus on "change[s] in the composition of the pool of BIA decisions."[65] For the ABA and its allies among immigrant interest groups, a critical factor was the increase in summary decisions.[66] Since the surge in appeals came soon after the September 11, 2001 terrorist attacks, many people assumed the "surge in petitions for review was being driven by a government crackdown on undocumented aliens."[67] Some sources suggest that the proportion of BIA decisions rejecting IJ appeals and issuing final orders of removal greatly increased beginning in March 2002.[68] A study by the U.S. Commission on

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57. Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1, *available at* http://www.sacbee.com/content/news/courts_legal/story/10637877p-11556573c.html.

58. *Id.* (quoting Paul Rosenzweig, Senior Fellow, Heritage Foundation).

59. *See* ABA COMM'N ON IMMIGR. POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 1-2 (2003), *available at* http://www.abanet.org/immigration/bia.pdf.

60. *See* Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9 BENDER'S IMMIGR. BULL. 91, 91 (2004).

61. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 29-30.

62. *Id.* at 30.

63. *Id.* at 31.

64. *Id.* at 5.

65. *Id.* at 7.

66. *Id.* at 54.

67. *Id.* at 3.

68. *Id.* at 4.

International Religious Freedom (USCIRF) pointed to rejection rates in the high ninetieth percentiles.[69]

D. Error Rates

If poor quality BIA decisions were the result of the streamlining reforms, it would follow, as various critics have written, that producing more opinions in less time would "'only result in passing the buck to others with less expertise,'" in particular, "'the already overburdened court[].'"[70] Critics suggest that "the Board's abdication of quality review in the interests of expeditious decision making, is now exposing certain IJ's to probing review by Article III Judges."[71] The commentary has focused on anecdotal horror stories.[72]

The government has vigorously objected to the argument that the BIA reforms resulted in a higher rate of appeal because the reforms increased errors and inconsistency and undermined litigants' confidence in the BIA.[73] EOIR has taken the position that "there is no evidence that the Federal [sic] court's reversal/remand rates of BIA decisions have changed significantly since the [BIA reforms] were instituted."[74] The EOIR stated that "[t]he vast majority of BIA decisions—more than 90 percent—continue to be affirmed in federal court."[75] From the agency's perspective, the 2002 BIA reform regulations limited "the Board's scope of review of [f]acts determined by the immigration judge, including findings as to the credibility of testimony," to the clearly erroneous standard, the same standard used for appellate court review of findings of fact by a trial court.[76] This standard recognized the primary role of the IJ as the fact-finder and eliminated duplication of resources created by successive de novo review.[77]

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69. *Id.* at 56 (explaining that a USCIRF study "shows a substantial increase in the proportion of BIA decisions that reject aliens' appeals: from 87% in fiscal year 2001, to 98% in fiscal year 2002, 97% in fiscal year 2003, and 96% in fiscal year 2004").

70. *Id.* at 32 (quoting Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Approach*, 15 SAN DIEGO L. REV. 29 (1977).

71. *See* Seipp & Feal, *supra* note 9, at 2012.

72. *See id.* at 2007-12 (discussing cases).

73. E-mail from Larry Levine, Counsel for Legislative Pub. Affairs, U.S. Dep't of Justice, to Stuart Drown, City Editor, Sacramento Bee (Sept. 21, 2004), http://www.usdoj.gov/eoir/press/LtrtoEditorSacBee.pdf.

74. *Id.*

75. EOIR Fact Sheet, *supra* note 3.

76. John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 614 (2004) (quoting 8 C.F.R. § 1003.1(d)(3)(i) (2003).

77. *Id.*

The BIA Study found that the data collected to date was too limited to confirm a trend, but concluded that the data did not appear to document "an increase in [the] error rate at the BIA level."[78] The BIA Study "detected no statistically significant differences between the appeal rates of single-member decisions and three-member decisions or between the appeal rates of [AWOs] and decisions with opinions."[79] The authors were also "confident" that summary dismissals under the new reforms were being challenged at a lower rate than other BIA decisions.[80] This was "most likely due to the underlying nature of the cases," rather than the procedure or form of the decision as a separate factor.[81] The authors "did not detect a higher appeal rate . . . for either summary decisions or prompt decisions."[82] In their view, the increase in final expulsion orders and the proportion of non-detained alien appeals did not indicate a change in the behavior of litigants, but only indicated the changed composition of the BIA decision pool used to measure appeal rates.[83]

E. Delay

As Professor David Martin noted in 1990, the speed or rate at which petitions for relief from expulsion are administratively adjudicated is a much more significant factor in immigration law than in other bodies of administrative law.[84]

EOIR asserts that aliens began to appeal BIA decisions at a higher rate after implementation of streamlining simply to delay their expulsion.[85] The BIA Study acknowledged that perception of delay may encourage aliens to file petitions, and thus may actually operate in a

78. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 59.

79. *Id.* at 61.

80. *Id.*

81. *Id.* at 63.

82. *Id.* at 6.

83. *Id.* at 6-7.

84. Martin, *supra* note 1, at 1288-89. Martin explained that:

> [T]he need for expeditious finality is more intense here. In other adjudication processes, such as those governing disability claims or public welfare or licensing, the applicant ordinarily does not enjoy the benefit sought until there has been a determination on the merits that he fully qualifies. Nothing in the application and waiting process itself tempts the unqualified to clog the system. With political asylum, in contrast, the simple act of applying has usually brought important benefits that magnify the attractions, whatever the ultimate determination on the merits.

Id. at 1288.

85. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 5; EOIR Fact Sheet, *supra* note 3; Letter from Kevin D. Rooney, Executive Office of Immigr. Review, U.S. Dep't of Justice, to John S. Carroll, Editor, L.A. Times (May 3, 2005), http://www.usdoj.gov/eoir/press/05/lettertoEditorLAT.pdf.

"vicious cycle" to create added delay.[86] The study cautioned that the causation of delay that a litigant can achieve is difficult to demonstrate.[87] The authors agreed that it is possible to achieve a considerable delay in the Second and Ninth Circuits, but argued that this is not significant because similar delays could be achieved prior to 2002.[88]

F. Detention

The BIA Study also found that the detention status of the alien in question may be an important variable.[89] Beginning in 2002, the percentage of BIA decisions involving detained aliens dropped by more than half (from 19-38% to 12-14%), presumably because the BIA increased output for non-detainee cases.[90] Detained aliens are less likely to appeal because they are more likely to face jurisdictional bars due to criminal convictions, and because filing a petition for review is likely to prolong their detention.[91] The New York City Bar Association's Committee on Federal Courts noted that the fact that "most of the petitioners in the Second Circuit are not in detention" accounts for the lack of complaints about the reforms in that jurisdiction.[92] The Bar Association also suggested that the policy of the U.S. Attorney's Office in that circuit, of routinely deferring deportation after an appeal is filed in order to avoid litigating a motion to stay deportation, may have actually made the new procedures even more advantageous to non-detained appellants.[93]

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86. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 81.

87. *Id.*

88. *Id.* at 82. The difference in direct and indirect costs to aliens of different origins from being expelled from the United States may be significant. *Id.* at 69-70. Aliens with higher 'costs' are more likely to challenge BIA review. *See id.* at 71. An example are the Fujianese asylum claims in the Second Circuit, where aliens are indentured by enormous illegal debt paid in smuggling fees, but are making significantly more money than they would in China, and face a return to an authoritarian state with weak judicial protections. *Id.* at 70—71. The authors of the BIA Study note that a critical problem with delay theory is that it is unlikely that an alien will actually be physically expelled, regardless of whether a petition was filed. *Id.* at 84 n.316. Even where the risk of expulsion is very low, the potential cost is often "enormous." *Id.* The difference in earning potential even over one year makes it financially rational to file a petition. *See id.* Though the data is not available, there are reasons to believe a correlation exists between case age and appeal rate: administrative delay in older cases may reflect "aggressive litigation," or an alien with a "genuinely difficult case." *Id.* at 66-68. More importantly, the longer the administrative level delay, the more ties the alien is likely to have formed with the United States, creating a greater incentive to invest in finding a way to stay. *Id.* at 68.

89. *Id.* at 73.

90. *Id.* at 74-75.

91. *See id.* at 75.

92. Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., *supra* note 15, at 255.

93. *Id.* at 251, 255.

Although the authors of the BIA Study stated that the significant drop in appeals to the BIA by detainees "does not suggest that the solution to the immigration surge is to keep more aliens in detention," they did not provide any reasons why increased detention or a monitored release without work authorization program would not be feasible.[94]

G. Change in Immigration Bar Behavior

The BIA Study identified an increase in the number of trained immigration lawyers and the rise in the proportion of represented aliens at the BIA level as other significant factors that may have caused the increase in immigration cases.[95] The authors suggested that the combination of increased BIA output, the "rush" to file facial challenges to BIA reform regulations, and the increased BIA dissatisfaction may have created a "'critical mass' of people within certain communities who were all facing adverse BIA decisions at the same time," causing immigration lawyers to begin actively litigating in the courts of appeal.[96] Data indicated that after April 2002, the appeal rate of aliens represented by counsel was higher than the pro se appeal rate, and appeared to be increasing.[97] The City of New York Bar Association reported that in the Second Circuit, the BIA reforms have actually "had a positive result: appellate review at a favored venue, the circuit courts of appeals."[98] On the other hand, many aliens cannot afford the cost of an appeal and must accept the decision and be deported.[99]

Professor David Martin suggested that the prompt execution of expulsion orders is essential after an asylum claim is denied.[100] It is the only form of deterrent that does not rely on "indiscriminate harshness" toward all asylum applicants, and "[a]sylum seekers occupy a low priority for use of scarce investigation and enforcement resources in the district offices."[101]

H. The Increased BIA Caseload

The most important reason for the surge of immigration appeals was the increased BIA caseload. It is generally agreed that the BIA reforms have nearly eliminated the backlog of cases for the time being.[102] One

94. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 74-76.
95. *Id.* at 85-87, 89.
96. *Id.* at 87-88.
97. *Id.* at 89-91.
98. Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., *supra* note 15, at 254.
99. *Id.* at 254 n.39.
100. Martin, *supra* note 1, at 1365.
101. *Id.* at 1365-66.
102. Guendelsberger, *supra* note 76, at 615.

BIA Member has pointed out that by reducing the time delays, the BIA reforms have also largely eliminated the need for remand to update the record due to the passage of time.[103]

Professor Yale-Loehr, one of the authors of the BIA Study, suggested in 2004 that increased enforcement, the statutory restrictions on discretionary relief, and expanded liability of criminal aliens for deportation were "other factors" to consider.[104] These factors could all be characterized as tending to increase the number of new expulsion proceedings at the IJ level, thus producing a related increase in appeals to the BIA.

This technical debate among government and private practitioners has not produced any consensus on the cumulative benefits of the streamlining reforms. Maintaining high efficiency in the process and wide acceptability in the results may be inherently contradictory jurisprudential objectives. The perspectives of the public and their representatives, and of the litigants and their counsel, are conceptually antagonistic, and in recent history, have become more so in practice.[105]

II. FAIR SUPPORT FOR BIA STREAMLINING

In public comments submitted on March 20, 2002, the Federation for American Immigration Reform (FAIR) made one of the few independent statements of support for the proposed reform regulation, commenting in favor of all of the proposed changes.[106] FAIR agreed with EOIR that only fundamental changes in the structure and procedures of the Board would reduce the backlog of cases.[107] The public comments pointed to strong indications that the existing system encouraged fraud and abuse.[108]

FAIR predicted that wider use of case screening procedures would improve the summary dismissal procedures.[109] Moreover, FAIR strongly endorsed the proposed "clearly erroneous" threshold for review of an IJ's factual determinations as a replacement for de novo factual review.[110]

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103. *Id.*

104. Mailman & Yale-Loehr, *supra* note 8.

105. *See* Marcia Coyle, *Immigration Appeals Surge: A Backlog Shifts from One Level to the Circuit Courts*, NAT'L L.J., Oct. 27, 2003, at 1.

106. FAIR Public Comments, *supra* note 52, at 1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 2. The clearly erroneous rule is established in 8 C.F.R. § 1003.1(d)(3) (2006). IJ adverse credibility decisions "supported by specific and cogent reasons," with respect to inconsistencies and omissions in a respondent's claim, observations of the respondent's demeanor, and reasonable inferences from those indicia, will not be

FAIR also noted "the deterrent effect of guidance to the immigration bar and the non-professional advocacy representatives as to what constitutes a frivolous appeal" meriting summary dismissal.[111] In addition, FAIR endorsed the shortened filing deadlines.[112]

FAIR predicted that the rule would have "no adverse effect on the quality of the decisions rendered."[113] FAIR noted the Andersen Consulting audit's findings that selection for streamlining had not increased the percentage of adverse decisions, and that the ratio of pro se cases assigned for streamlining had not increased.[114] FAIR opined that remand for fact-finding would pressure the IJs to improve consistency in their investigations.[115]

FAIR vigorously attacked the immigration bar and immigrant interest organizations for their predictions that the streamlining reforms would "compromise . . . due process."[116] In particular, FAIR called the continued comparisons by the American Immigration Lawyers Association (AILA) of immigration procedure to criminal procedure "a cynical demonstration of bad faith."[117] In addition, FAIR dismissed the claims made by Professor Yale-Loehr and others "that 'Board Members often make decisions that will determine whether someone who has been persecuted or tortured will live or die'" as "essentially demagogic" and "self-interest[ed]."[118] FAIR pointed to the required priority that is given to cases brought by detained aliens, and underlined the essential fact that removability was almost never at issue, and thus due process claims were arising only within the narrow context of claims by an admitted immigration law violator for eligibility for asylum, a waiver or other administrative relief.[119] FAIR characterized applicants for relief as "resourceful" and informed parties who had no qualms with "gaming the system" to delay removal for months or even years.[120]

FAIR commented that the primary justification for the existence of the BIA was the promotion of consistency and predictability in first-instance adjudications through the publication of administrative precedent.[121] The

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disturbed by the Board. *In re* A-S-, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998); *see also* Procedural Reforms, *supra* note 6, at 54,889 (citing *In re A-S-*).

111. FAIR Public Comments, *supra* note 52, at 3.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 3-4.
119. *Id.* at 4.
120. *Id.*
121. *Id.* at 4-5.

BIA is not an "independent court of claims for aliens."[122] FAIR predicted that reform was necessary to reduce conflicting opinions, reduce delays needed to resolve disputes between individual members, cut down the numbers of "'dissenting' opinions," which FAIR characterized as "often political attacks on Congress," and reduce the "prolixity of decisions actually issued."[123]

Despite FAIR's established stance as a critic of both the procedural and substantive aspects of the law concerning relief from expulsion, the preliminary findings of academic observers surveyed above and the holdings of the federal appellate courts in subsequent challenges to the BIA reforms discussed below generally confirm FAIR's predictions as to the constitutionality and the operational feasibility of the streamlining reforms.

III. BIA REFORMS UPHELD BY THE COURTS

Surprisingly, there has been relatively little focus in the legal literature on the judicial review of the streamlining reforms themselves, and how appellate review may have changed the substantive law of relief.[124] Nearly every aspect of the reforms was subjected to coordinated challenges brought by the immigration and refugee law bars, which are summarized in this section.[125]

These lawsuits were brought in the context of the vigorous attempts by the bar during the 1990s to counter repeated actions by Congress promoting jurisdiction-stripping as a primary tool to control illegal immigration.[126]

From 1961 to 1996, the most common procedure for judicial review of expulsion cases was through Hobbs Act petitions for review under former INA section 106.[127] Congress enacted section 106 to limit the availability of judicial review that had been created by the Administrative Procedure Act (APA).[128] Petitions for review were filed directly with the courts of appeal, bypassing the district courts.[129]

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122. *Id.* (emphasis omitted).

123. *Id.*

124. *See, e.g.*, Palmer, Yale-Loehr & Cronin, *supra* note 2, at 19-22 (outlining the history of judicial review of immigration decisions).

125. *See* discussion *infra* Part IV.

126. *See* discussion *infra* text accompanying notes 127-41.

127. Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 395 (2000) (citing Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651-53).

128. *Id.* at 395; *see also* Foti v. INS, 375 U.S. 217, 226 (1963). *But see* Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955) (holding that the 1952 Immigration and Nationality Act allowed for full judicial review of deportation orders).

129. Motomura, *supra* note 127, at 395.

According to the BIA Study, petitions filed are almost always challenged BIA decisions.[130]

By enacting the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress sought to reform and restrict judicial review with the goal of increasing the number of illegal aliens removed from the United States.[131] According to the Senate Committee on the Judiciary, "[a]liens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General."[132] IIRIRA and AEDPA took away jurisdiction from the federal courts to review removal orders for most criminal aliens, as well as restricting their ability to review discretionary determinations regarding removal relief.[133] Under new INA section 242(b)(9), "[j]udicial review of all questions of law and fact, including constitutional and statutory claims, arising out of an action to remove an alien from the United States . . . [remained] available only as part of the judicial review of a final order of removal" in the court of appeals.[134]

AEDPA and IIRIRA sought generally to eliminate judicial review of removal orders for aliens convicted of serious crimes.[135] The circuit courts, with minor exceptions, upheld the AEDPA jurisdictional bars.[136]

IIRIRA section 306(a)(2), codified in new INA section 242, created a single removal order review procedure for both inadmissibility and deportability grounds, and also created a number of statutory bars to judicial review.[137]

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130. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 19.

131. *See* Guendelsberger, *supra* note 76, at 616 n.24.

132. S. REP. NO. 104-249, pt. 1, at 7 (1996); *see also* H.R. REP. NO. 104-469, pt. 1, at 139-40 (1996) (stating that "legislation is required to ensure that illegal aliens denied asylum are actually removed from the U.S.").

133. Guendelsberger, *supra* note 76, at 606.

134. H.R. REP. NO. 104-828, at 219-21 (1996) (Conf. Rep.); *see also* Castro-Cortez v. INS, 239 F.3d 1037, 1043 (9th Cir. 2001).

135. *See* Guendelsberger, *supra* note 76, at 606.

136. *See* LaFontant v. INS, 135 F.3d 158, 164-65 (D.C. Cir. 1998); Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997); Mendez-Morales v. INS, 119 F.3d 738, 739 (8th Cir. 1997); Fernandez v. INS, 113 F.3d 1151, 1155 (10th Cir. 1997); Boston-Bollers v. INS, 106 F.3d 352, 354-55 (11th Cir. 1997); Kolster v. INS, 101 F.3d 785, 791 (1st Cir. 1996); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27, 30-31 (2d Cir. 1996); Duldulao v. INS, 90 F.3d 396, 399-400 (9th Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672, 676 (5th Cir. 1996).

137. Section 306(a)(2) created bars to determinations other than asylum determinations as well as to review of expulsion orders based on certain criminal offenses. However, the IIRIRA permanent rule bar was successfully challenged in four circuits,

IIRIRA restricted venue to the circuit in which the IJ completed the proceedings.[138] The deadline for filing a petition was lowered to thirty days after the date of the final expulsion order.[139] Other amendments made the availability and scope of judicial review depend on the date when an order for removal, deportation, or exclusion was issued.[140]

After IIRIRA, what remained were two broad categories of restrictions: INA section 242 limitations on circuit court review through petitions for review, and restrictions on district or circuit court review of specific matters in other statutes.[141]

The effort by Congress to streamline or eliminate judicial review of removal orders, especially for criminal aliens, was not completely successful. The Supreme Court and the Article III courts refused to accept complete congressional jurisdiction-stripping of review of BIA

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which allowed criminal aliens habeas corpus review of removal orders on statutory or constitutional grounds. *See* Calcano-Martinez v. INS, 232 F.3d 328, 337-38; Mahadeo v. Reno, 226 F.3d 3, 10 (1st Cir. 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1138-41 (9th Cir. 2000). This view was ultimately upheld by the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289, 308-13 (2001).

138. *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000), *amended by* REAL ID Act of 2005, 8 U.S.C.A. § 1252(a), (b) (West Supp. 2006).

139. *See* INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

140. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 839 (9th ed. 2004).

141. *See* Guendelsberger, *supra* note 76, at 615-17. There are more narrowly focused provisions from IIRIRA that eliminated judicial review for specific actions. *See* INA § 236(e), 8 U.S.C. § 1226(e) (2000) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."); INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) ("[N]o court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under section 1182(h) [INA section 212(h)], 1182(i) [INA section 212(i)], 1229b [INA section 240A], 1229c [INA section 240B], or 1255 [INA section 245] of this title, or (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) [INA section 208(a)] of this title."); INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) ("[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) [INA section 212(a)(2)] or 1227(a)(2)(A)(iii) [INA section 237], (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title."); INA § 242(b)(7)(D), 8 U.S.C. § 1252(b)(7)(D) ("The defendant in a criminal proceeding under section 1253(a) [INA section 243(a)] of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding."); and INA § 242(g), 8 U.S.C. § 1252(g) ("Except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

removal orders on due process grounds.[142] In 1996, AILA succinctly predicted that:

> There will be due process constitutional litigation over the provisions of the 1996 Immigration Reform Act as it applies to aliens. This litigation will once again face the courts with the classic debate over Congress' "plenary power" to make rules for admission and exclusion of aliens and the rule that Congress must act in accordance with the Constitution. The focus will be particularly keen on areas such as restrictions of judicial review and mandatory detention.[143]

In *Reno v. American-Arab Anti-Discrimination Committee*[144] and other cases, the courts have read these preclusion statutes narrowly, and have preserved judicial review through other means, including habeas corpus under 28 U.S.C. § 2241, mandamus under 28 U.S.C. § 1361, review of agency action under the APA, 5 U.S.C. § 701 et seq., and review of federal questions of law raising constitutional issues under 28 U.S.C. § 1331.[145] The Article III courts have fiercely defended a strong legal presumption in favor of judicial review and construction of ambiguities in favor of aliens, particularly where constitutional claims were raised.[146]

The Court's decision in *INS v. St. Cyr*[147] allowed some issues to be appealed by petition for review, and other issues by habeas motions in district court.[148] The decision "'resulted in hundreds, if not thousands, of remands to the Board and Immigration Judges,'" and probably provoked executive agency pressure on Congress to attempt to move all appellate review back to the circuit courts by enacting the REAL ID Act.[149]

In enacting the REAL ID Act in 2005, Congress claimed that it did not intend to eliminate judicial review, but intended to return judicial review to its "settled forum prior to 1996"—to the circuit courts.[150] "Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, [REAL ID] section 106 would give every

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142. *See infra* text accompanying notes 145-49.

143. Howard S. (Sam) Myers, III, *Where Have We Come From, Where Are We and What's on the Horizon*, *in* INTRODUCING THE 1996 IMMIGRATION REFORM ACT, AILA'S NEW LAW HANDBOOK 1, 9 (R. Patrick Murphy et al. eds., 1996) (footnotes omitted).

144. 525 U.S. 471 (1999).

145. *See, e.g.*, *id.* at 486-87. *See generally* Kurzban, *supra* note 140, at 842-60.

146. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 700-01 (2001).

147. 533 U.S. 289 (2001).

148. *Id.* at 314, 326.

149. Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14, 17 n.2 (D.D.C. 2003) (citation omitted).

150. H.R. REP. NO. 109-72, at 174-75 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 299.

alien one day in the court of appeals, satisfying constitutional concerns."[151]

This summary shows that, by the time the immigration bar chose to mount a direct challenge to BIA streamlining reforms, Congress had been unhappy for more than forty years with the excessive availability of judicial review to aliens in expulsion cases.

IV. THE CIRCUIT COURTS REVIEW BIA STREAMLINING

The first counter-attack by immigrant interests against the validity of the BIA streamlining regulations came in a suit brought in the United States District Court for the District of Columbia by the Capital Area Immigrants' Rights Coalition (CAIR), a coalition of immigrant interest groups, which challenged the issuance of the reform regulations under the APA.[152] The AILA joined CAIR in arguing that the adoption of the streamlining provision, "as the dominant method of adjudication[,] reducing the size of the Board from 23 members to 11[,] and . . . the six-month transition period designed to reduce the Board's backlog" were arbitrary and capricious.[153] The district court rejected those claims, finding that EOIR had "articulated a satisfactory explanation for the decision to adopt streamlining" by relying on the favorable Arthur Andersen audit, "[c]ongressional testimony reflecting a continued need for Board reform," and internal DOJ statistics and assessments.[154]

Between 2002 and 2004, aliens sued to bring facial challenges to AWO in eleven federal circuit courts, based on denial of due process and violations of administrative procedure.[155] Again, the aliens lost every case.[156]

The first case, *Albathani v. INS*,[157] involved the appeal by a Lebanese Christian of the BIA's denial of asylum, withholding of removal, and United Nations Covenant Against Torture (CAT) relief based on his membership in a particular social group, the Lebanese Forces militia.[158] Denial was made in an IJ decision based on lack of credibility.[159] The

151. *Id.* at 175.

152. *Capital Area Immigrants' Rights Coal.*, 264 F. Supp. 2d at 16.

153. *Id.* at 16, 25.

154. *Id.* at 26; *see also* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 29-32. Significantly, the decision was not appealed. *See id.* at 29.

155. *See* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 29 & nn. 156-57. The D.C. Circuit Court of Appeals does not hear petitions for review because there are no immigration courts in its jurisdiction. *See id.* at 29 n.156.

156. *Id.* at 29 (citing cases).

157. 318 F.3d 365 (1st Cir. 2003).

158. *Id.* at 367-69.

159. *Id.* at 367.

BIA summarily affirmed pursuant to 8 C.F.R. § 3.1(a)(7).[160] The appeal to the circuit court claimed denial of due process, including the operation of the new BIA summary AWO procedure.[161] The American Immigration Law Foundation (AILF) submitted an amicus brief arguing that summary AWO violated rules of administrative law.[162]

Albathani was required to provide conclusive evidence that he was the target of persecution on any of the five grounds, providing an account with a requisite specificity to "'establish a sufficient nexus between the events that he described and any ground enumerated'" for relief.[163] Applying this test, the First Circuit found that the record adequately supported the IJ's finding that Albathani lacked credibility.[164] "Albathani's inconsistency problems go well beyond mere fluctuations. He showed a pattern of embellishing his story. In each context, [he] added a new incident."[165]

Albathani claimed a due process violation based on the IJ's sharp demeanor during the conduct of his hearing.[166] The court reviewed these claims, but found them "meritless."[167] Because Albathani was an unadmitted alien, his due process rights were "limited."[168] Even if he had been admitted, the IJ's curt demeanor did not raise due process issues because "attempts to expedite proceedings are 'not the stuff of which a due process violation can be fashioned.'"[169] As for the AWO due process, the court emphasized that "[t]he context of the claim is important. An alien has no constitutional right to any administrative appeal at all."[170]

The Attorney General adopted the AWO procedure in 1999, and then proposed rules to expand its scope in February 2002.[171] The court

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 373 (quoting Aguilar-Solis v. INS, 168 F.3d 565, 571 (1st Cir. 1999)). The five grounds of persecution are "'race, religion, nationality, membership in a particular social group or political opinion.'" *Id.* (citing 8 C.F.R. § 208.13(b)(1)).

164. *Id.* at 373-74.

165. *Id.* at 374.

166. *Id.* at 374-75.

167. *Id.* at 375.

168. *Id.* (citing Kaplan v. Tod, 267 U.S. 228, 230 (1925)) (finding that mere physical presence on U.S. territory is immaterial because unadmitted aliens are "still in theory of law at the boundary line and [have] gained no foothold in the United States").

169. *Id.* (quoting Aguilar-Solis v. INS, 168 F.3d 565, 569 (1st Cir. 1999)).

170. *Id.* at 375-76 (citing Guentchev v. INS, 77 F.3d 1036, 1037 (7th Cir. 1996)).

171. *Id.* at 376 & n.8.

predicted that the outcome would be to shift the backlog to the appeals courts.[172]

Albathani and AILF argued that summary affirmance did "not provide a reasoned basis for review."[173] The court rejected this view, holding that no due process violation occurred because "[p]romulgation of the AWO regulations is within the power of the INS."[174] It did not matter whether the Board itself provided a reasoned opinion or whether it merely relied on the reasoning of the IJ, because administrative law only required the agency under which the Board was established to do so—in this case, the former Immigration and Naturalization Service (INS).[175] The court stated, "[t]he BIA can adopt, without further explication, the IJ's opinion."[176] Because summary AWO is "only of the 'result' and not the reasoning," an appeals court reviewing a decision might not know the basis on which the BIA rendered its decision.[177] However, no statutory or due process violation occurs if the court can review the IJ's decision and the record upon which it was based.[178] The court found that "if the BIA identifies an alternative satisfactory ground for upholding denial" of relief where the decision of an IJ was "unsatisfactory," it "must state it or risk remand."[179]

The court found the argument that a one-line affirmance may mean that Board members were not "engaged in the review required by regulation" to be "more serious," because "[i]mmigration decisions, especially in asylum cases, may have life or death consequences, and so the costs of error are very high."[180] While strongly suggesting the Board did not really review the record before the IJ, since "the record of the hearing itself could not be reviewed in ten minutes," the court nonetheless concluded that such an error was harmless in this case.[181] The First Circuit declined to infer just from the BIA's rate of decisions under the AWO procedure that "evidence of systemic violation by the BIA of its regulations" existed, because courts themselves used such

172. *Id.* at 377 n.9.

173. *Id.* at 377.

174. *Id.*; *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (noting that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties" (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965))).

175. *Albathani*, 318 F.3d at 377 (finding that Supreme Court precedent did not "require that this statement come from the BIA rather than the IJ").

176. *Id.* (citing Chen v. INS, 87 F.3d 5, 8 (1st Cir. 1996)).

177. *Id.*

178. *Id.* at 377-78 (citing 8 U.S.C. § 1252(b)(4)(A) (2000)).

179. *Id.* at 378.

180. *Id.*

181. *Id.*

procedures to manage their dockets.[182] The court found that the procedures employed by the BIA "are workload management devices that acknowledge the reality of high caseloads. They do not, either alone or in combination with caseload statistics, establish that the required review is not taking place."[183]

Weeks later, in March 2003, the Fifth Circuit, writing per curiam in *Soadjede v. Ashcroft*,[184] rejected a challenge—as statutorily ineligible—to BIA streamlining in the appeal of a denial of an asylum application filed more than one year after the alien's arrival in the United States.[185] The decision did not disclose the petitioner's nationality, and noted that Soadjede "d[id] not argue that the decision in his case [was] not supported by substantial evidence."[186] The court construed the appeal as a claim that the AWO procedure violated due process.[187]

The Fifth Circuit had "previously joined the majority of circuits in approving the authority of the BIA to affirm the immigration judge's decision without giving additional reasons."[188] The court "agree[d] with the reasoning set forth . . . in *Albathani* [that] in adopting the regulation, the Department of Justice . . . specifically considered the potential due process concerns about summary affirmance."[189] The court quoted with approval the DOJ's statement in the Federal Register that "'an endorsement of the result reached by the decision-maker below satisfies any conceivable due process requirement concerning justifications for the decisions made in any appellate process that the government decides to provide.'"[190]

In April 2003, the Eleventh Circuit referred to the *Albathani* decision in *Mendoza v. U.S. Attorney General*[191] when it denied asylum to a Guatemalan applicant who had illegally entered the United States nine

182. *Id.* at 378-79.

183. *Id.* at 379.

184. 324 F.3d 830 (5th Cir. 2003) (per curiam).

185. *Id.* at 831-32.

186. *Id.*

187. *Id.* at 831.

188. *Id.* at 832 (citing Abdulai v. Ashcroft, 239 F.3d 542, 549 n.2 (3d Cir. 2001); Mikhael v. INS, 115 F.3d 299, 302 (5th Cir. 1997); Giday v. INS, 113 F.3d 230, 234 (D.C. Cir. 1997); Chen v. INS, 87 F.3d 5, 7 (1st Cir. 1996); Prado-Gonzalez v. INS, 75 F.3d 631, 632 (11th Cir. 1996); Urukov v. INS, 55 F.3d 222, 227-28 (7th Cir. 1995); Alaelua v. INS, 45 F.3d 1379, 1382-83 (9th Cir. 1995); Maashio v. INS, 45 F.3d 1235, 1238 (8th Cir. 1995); Gandarillas-Zambrana v. BIA, 44 F.3d 1251, 1255 (4th Cir. 1995); Arango-Aradondo v. INS, 13 F.3d 610, 613 (2d Cir. 1994)).

189. *Id.* (citing Streamlining, *supra* note 27, at 56,139).

190. *Id.* (quoting Streamlining, *supra* note 27, at 56,139); *see also* Moin v. Ashcroft, 335 F.3d 415, 418 (5th Cir. 2003).

191. 327 F.3d 1283 (11th Cir. 2003).

years before the case, but failed to file an asylum application until August 1998, more than one year after his illegal entry.[192] The IJ found "conclusory" the applicant's testimony that guerillas were persecuting his family because of his father's prior military service, and held that the applicant had failed to rebut evidence of changed country conditions.[193]

The petitioner, Mendoza, also raised a due process objection to the BIA's single-sentence affirmance of the IJ's decision.[194] Because Mendoza did not challenge the discretion of the INS to streamline his appeal, the Eleventh Circuit did not address the First Circuit's holding that adoption of summary affirmance procedures was a decision committed to agency discretion under the *Vermont Yankee* doctrine.[195] Instead, the court considered the more limited claim that the "BIA deviated from its own regulations by failing to review the facts of his case."[196] Affirmance of an IJ's decision by a single BIA member in a single sentence without an opinion was permitted by regulation if "'the result was correct and . . . any errors were harmless or immaterial,'" and "the issue on appeal is squarely controlled by existing . . . precedent."[197] As in *Albathani*, the Eleventh Circuit noted that there was "no evidence that the BIA member who reviewed Mendoza's removal deviated from the requirements of the regulations" in deciding to streamline his appeal, and that the IJ's decision and the record "reveals that there is a basis for affirmance and for summary affirmance of Mendoza's removal."[198]

In May 2003, the Seventh Circuit addressed the issue in *Georgis v. Ashcroft*,[199] in the context of a denial of asylum to an Ethiopian claiming racial and political opinion persecution.[200] The BIA affirmed without opinion the IJ's determination that the applicant's claims "were not 'internally consistent' and 'inherently persuasive.'"[201] Georgis had entered and overstayed a tourist visa in 1995, but did not apply for asylum until after a "Notice to Appear" was issued in July 1997.[202]

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192. *Id.* at 1286, 1288. Since the enactment of IIRIRA in 1996, the one-year period is calculated from April 1, 1997 or the "date of the alien's last arrival in the United States," whichever is later. 8 C.F.R. § 208.4(a)(2)(B)(ii) (2006).

193. *Mendoza*, 327 F.3d at 1285-86.

194. *Id.* at 1288.

195. *Id.* at 1288 n.7.

196. *Id.*

197. *Id.* at 1288-89 (second omission in original) (quoting Gonzalez-Oropeza v. U.S. Att'y Gen., 321 F.3d 1331, 1332 (11th Cir. 2003)).

198. *Id.* at 1289; *see supra* note 182 and accompanying text.

199. 328 F.3d 962 (7th Cir. 2003).

200. *Id.* at 963-64.

201. *Id.*

202. *Id.* at 964.

The immigration court's decision to deny the asylum application was reviewed under the substantial evidence test.[203] Under the substantial evidence test, the court has noted that "[o]nly where the evidence in support of the application is 'so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution' will we reverse the Board's decision for lack of evidence."[204] Review of the IJ's credibility determination was "highly deferential," except where conclusions were "drawn from insufficient or incomplete evidence."[205] In this case, the court found its own explanation for four of the six inconsistencies resulting from the applicant's testimony cited by the IJ, and disparaged the remaining two inconsistencies in testimony identified by the IJ as insufficient to constitute substantial evidence of a lack of credibility.[206] The court found Georgis' explanations "plausible," but deferred to the role of the IJ as fact-finder, and remanded the case to the BIA for review.[207]

Like the First and Eleventh Circuits, the court in *Georgis* declined to rule on whether the agency's authority to implement streamlining was reviewable under the APA, as "it makes no practical difference whether the BIA properly or improperly streamlined review of Georgis' case."[208] If the case came to the circuit court on a petition for review, the substance of the review would have been the same in either scenario.[209] The decision noted that in *Albathani*, the First Circuit "held that the streamlining procedure on its face neither violates due process, renders judicial review impossible, nor runs afoul of any statute."[210] Direct review of the IJ's decision in cases appealed from the BIA under 8 C.F.R. § 1003.1(a)(7) did not compromise the courts' "ability to conduct a full and fair appraisal of the petitioner's case."[211]

The influential Ninth Circuit also adopted the reasoning of the *Albathani* decision in *Falcon Carriche v. Ashcroft*,[212] a November 2003 decision dismissing the appeal by a Mexican family of denial of its application for cancellation of removal.[213]

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203. *Id.* at 967 (citing Ambati v. Reno, 233 F.3d 1054, 1059 (7th Cir. 2000)).
204. *Id.* at 967-68 (quoting INS v. Elias-Zacarias, 502 U.S. 478, 484 (1992)).
205. *Id.* at 968 (citing Nasir v. INS, 122 F.3d 484, 486 (7th Cir. 1997)).
206. *Id.* at 968-70.
207. *Id.* at 970.
208. *Id.* at 967.
209. *Id.* (citing ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 279 (1987)).
210. *Id.* (citing Albathani v. INS, 318 F.3d 365, 377 (1st Cir. 2003)).
211. *Id.*
212. 350 F.3d 845 (9th Cir. 2003).
213. *Id.* at 848-50.

The Carriche family appealed a BIA summary AWO denying their request for cancellation of removal.[214] The IJ found that the hardship their youngest daughter, a U.S. citizen, would suffer if the family were removed—"difficulty adapting to the Mexican educational system and . . . economic conditions in Mexico, [and that] the family would be hard-pressed to provide for her basic care"—was "neither exceptional nor unusual."[215] Supported by amicus AILF, the Carriches claimed that "the discretionary nature of the hardship inquiry preclude[d] streamlining in cancellation of removal cases."[216] Citing all four precedents from its sister circuits, the court held that "streamlining does not violate an alien's due process rights" and that the appeals court "lack[ed] jurisdiction to review the specific decision to streamline," because the claim was "based on an alleged error in a discretionary hardship determination that [it] lack[ed] jurisdiction to review in the first instance."[217]

"A dramatic increase in caseload," coupled with "'frequent and significant changes in the complex immigration laws,'" prompted the BIA to implement streamlining procedures in 1999.[218] The procedure was designed "to meet four goals: (1) to promote uniformity by providing better quality BIA decisions in the cases that three-member panels decide; (2) to improve timeliness and fairness of decisions; (3) to assure correct results; and, (4) to eliminate the BIA's backlog."[219] The court also predicted that "the practical result may be to shift the backlog directly to the courts of appeal."[220]

The Ninth Circuit found that *Albathani*'s "careful reasoning is persuasive."[221] The requirement that the court review a BIA AWO decision "'without knowing its basis' does 'not render the scheme a violation of due process or render judicial review impossible.'"[222] The appellant's arguments that "'it takes at least three board members to identify, shape and determine important issues' in every appeal" or that "a single board member will not conduct the required review" were held to have "no support in the law."[223] The argument made in the *Mendoza*

214. *Id.* at 848.
215. *Id.*
216. *Id.* at 847-48, 850 n.4.
217. *Id.* at 848-49.
218. *Id.* at 849 (quoting Streamlining, *supra* note 27, at 56,136).
219. *Id.* at 849 n.3 (citing Streamlining, *supra* note 27, at 56,136).
220. *Id.* (citing Albathani v. INS, 318 F.3d 365, 377 n.9 (1st Cir. 2003)).
221. *Id.* at 850.
222. *Id.* (quoting *Albathani*, 318 F.3d at 377).
223. *Id.* at 850.

case that the BIA was not complying with its own regulations was not raised by the Carriches.[224]

The petitioners "received all of the administrative appeals to which they were entitled by statute, and the Constitution does not require that the BIA do more."[225] The Ninth Circuit expressly acknowledged the *Vermont Yankee* doctrine of deference to agency discretion in fashioning its own rules and methods of procedure.[226] Where jurisdiction exists, the court could still review the agency decision as embodied in the IJ's decision.[227] BIA streamlining was "similar to the BIA's already-familiar practice of adopting the IJ's opinion without issuing a separate opinion where the IJ's reasoning is sufficient."[228]

The Ninth Circuit also found no due process violations, using the *Mathews v. Eldridge* three-part test.[229] Although the alien petitioners had "a substantial interest in remaining in the United States," the balancing test's other two factors "favor[ed] the government."[230] There was no "substantial risk of erroneous deprivation" of due process, nor were additional safeguards required, because the alleged risks were "mitigated through the regulatory structure itself."[231] Finally, the court held that "the streamlining regulations have proven effective at reducing the BIA's backlog and the cost of administrative appeals," and thus furthered the government's goals."[232]

The court also rejected the argument that hardship claims are inherently so fact-oriented that each case is necessarily novel, making summary adjudication "arbitrary and a denial of due process."[233] The court explained that "'legally significant facts often fall into recognizable patterns' [and] [i]t is neither arbitrary nor a violation of due process for the BIA to decide that a particular case clearly falls within, or outside, those boundaries" of the hardship standard.[234]

Next, the court discussed at length the claim that every decision to deny a cancellation of removal (COR) hardship claim on the merits involves an assessment of a "'novel fact situation,' . . . a non-discretionary

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224. *Id.* at 850 n.5.

225. *Id.* at 850 (internal citations omitted).

226. *Id.* (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978)).

227. *Id.* at 851 (citing Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003)).

228. *Id.*

229. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

230. *Id.*

231. *Id.*

232. *Id.* at 851-52.

233. *Id.* at 852.

234. *Id.* (quoting Streamlining, *supra* note 27, at 56,140).

factor that is reviewable."[235] The court found that it was "without jurisdiction to review whether the BIA improperly streamlined [an] appeal of a cancellation of removal decision in which only the discretionary 'exceptional and extremely unusual hardship' factor was in dispute."[236] Although the decision to streamline the case was not "inherently discretional," IIRIRA section 306 had expressly stripped appellate court jurisdiction to review discretionary decisions in the COR context, "including the ultimate discretionary decision to deny relief."[237] Saved from the section 306 scalpel were objective factual inquiries (e.g., whether the alien met the ten-year continuous presence requirement) and questions of law (e.g., whether an adult daughter was a child for COR purposes).[238] However, "whether an alien has demonstrated 'exceptional and extremely unusual hardship'" was a clearly discretionary issue, and thus protected from judicial review by statute.[239] The alien's claim that COR hardship determinations could not be streamlined because they were factually unique was dismissed as "circular logic."[240]

The court held that, in theory, it retained jurisdiction under the consolidation of review provision (8 U.S.C. § 1252(b)(9)) to review the BIA's decision to streamline asylum and COR cases where "the IJ's decision is not based on a discretionary factor.[241] But that exercise would be "unnecessary and duplicative," since the petitioner's concern for not knowing "the 'real' reasons for the BIA's decision falls by the wayside when we review the merits of the case."[242] "[W]here we can reach the merits of the decision by the IJ or the BIA, an additional review of the streamlining decision itself would be superfluous."[243]

The court noted that other circuits, besides the Eleventh Circuit, had "considered streamlining regulations only in the context of asylum and withholding of deportation petitions for which judicial review is still permitted under IIRIRA."[244]

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235. *Id.*

236. *Id.* at 855.

237. *Id.* at 852-53 (quoting Romero-Torres v. Ashcroft, 327 F.3d 887, 890 (9th Cir. 2003)).

238. *Id.* at 853; *see also* Montero-Martinez v. Ashcroft, 227 F.3d 1137, 1144 (9th Cir. 2002) (finding that judicial review is available for legal questions); Kalaw v. INS, 133 F.3d 1147, 1150-51 (9th Cir. 1997) (finding that judicial review is available for factual inquiries).

239. *Falcon Carriche*, 350 F.3d at 853.

240. *Id.* at 854.

241. *Id.* at 855 (citing 8 U.S.C. § 1252(b)(9) (2000)).

242. *Id.*

243. *Id.*

244. *Id.* at 853 n.7.

In *Denko v. INS*,[245] the Sixth Circuit rejected a due process challenge to AWO procedures in the context of a petition for review brought by a Ukranian Jewish applicant for asylum based on religious persecution, where the BIA summarily affirmed the IJ's denial of a motion to rescind an order of removal issued *in absentia*.[246] Supported by amicus AILF, Denko argued that it was "an abuse of discretion for the IJ not to reopen [her] removal proceedings" after she presented evidence of: ineffective assistance of counsel; conflict between the AWO regulation (8 C.F.R. §1003.1(a)(7)) and the statutory language of the INA; and a violation of due process, "because [the AWO regulation] fail[ed] to produce a separate BIA decision for the court of appeals to review."[247] Denko had entered as a visitor in April 1993 and overstayed her authorization, but did not file an asylum application until nearly five years later, in March 1998.[248] The court first considered "whether it was an abuse of discretion for the IJ to determine that Denko's claims of ineffective assistance of counsel were insufficient to constitute an exceptional circumstance," as required by 8 U.S.C. § 1229a(b)(5)(C).[249] The court applied a fundamental unfairness test to determine whether Denko was "prevented from reasonably presenting [her] case."[250] The court found it important to point out that Denko "neither contest[ed] the illegal nature of her presence in the U.S. nor her deportability," and thus could not show fundamental unfairness amounting to ineffective assistance of counsel.[251]

In her AWO challenge, Denko argued that "congressional intent embodied in the INA" showed that aliens were meant to have "two de novo reviews of their claims within the administrative system," which the AWO regulations had made impossible; and that without an independent BIA opinion, the agency had failed to prepare the required final order of removal for the court's review.[252]

The Sixth Circuit stated its rule of minimum due process in expulsion cases: "aliens who have entered the United States, both lawfully and unlawfully, cannot be 'expelled' without the government following established procedures consistent with the requirement of due process."[253] However, Denko's characterization of congressional intent

245. 351 F.3d 717 (6th Cir. 2003).
246. *Id.* at 720.
247. *Id.*
248. *Id.*
249. *Id.* at 723.
250. *Id.* (quoting Ramirez-Durazo v. INS, 794 F.2d 491, 499-500 (9th Cir. 1986)).
251. *Id.* at 724.
252. *Id.* at 725-26.
253. *Id.* at 726 (citing Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 212 (1953)).

was rejected, on the basis that "the BIA has the power to conduct reviews de novo, not that it is required to do so."[254] The court found that it was permissible to adopt the IJ's decision as the final agency determination where the BIA either "adopted the IJ's findings or has deferred to the IJ's decision."[255] The court agreed with the First Circuit in *Albathani* that a petitioner challenging summary affirmance regulations "must show more [than] the nature of the procedure itself combined with statistics indicating that thorough review would be difficult."[256]

The Sixth Circuit referred to the *Albathani* line of cases to hold that no due process violation had occurred.[257] Administrative appeal is not constitutionally compelled. When a court could review the IJ's decision in the absence of a BIA opinion, the AWO rule provided a "full and fair" review.[258] Citing the *Vermont Yankee* doctrine of deference to agencies' use of procedure, the court concluded that the *Mathews v. Eldridge* three-part test for due process tilted in favor of the government's "strong interest in its procedures for accurate, efficient, and economical adjudication of immigration matters."[259]

However, the Sixth Circuit declined to endorse the agency's claim that single-member summary affirmance was excepted from APA review as an action "committed to agency discretion by law."[260] The court found that "judicially manageable standards [are] available to a reviewing court," and that the size of the BIA caseload was *not* a factor to be considered, since the regulations themselves preclude streamlining for cases where the issues are not controlled by precedent and the facts are novel.[261] "Assuming without deciding that judicial review" could determine whether a case was properly designated for AWO under the streamlining regulations, the court concluded that it was proper under the facts in the *Denko* case.[262]

The Third Circuit's review of the BIA streamlining regulations in *Dia v. Ashcroft*[263] in December 2003 was notable because it affirmed the procedure but remanded the case on the merits, provoking a dissent by

254. *Id.* at 728 (emphasis omitted).
255. *Id.*
256. *Id.* (citing Albathani v. INS, 318 F.3d 365, 378-79 (1st Cir. 2003)).
257. *See id.* at 729-30.
258. *Id.* at 730 (quoting Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001)).
259. *Id.* at 730-31 n.10.
260. *Id.* at 731 (quoting Heckler v. Chaney, 470 U.S. 821, 828 (1985)).
261. *Id.* at 731-32.
262. *Id.* at 732.
263. 353 F.3d 228 (3d Cir. 2003) (en banc).

Judge Samuel Alito.[264] In *Dia*, an unadmitted Guinean asylum applicant appealed summary affirmance of an IJ decision denying asylum after determining that Dia's testimony was not credible.[265]

The Third Circuit characterized the BIA caseload in 1999 as "crushing[,] . . . the number of cases having increased exponentially in a little over a decade."[266] The court applied *Chevron* principles to analyze the BIA's "'construction of the statute which it administers,'" recognizing that deference to the executive branch was "'especially appropriate in the immigration context.'"[267] The INA was "'silent with respect to' *streamlined* administrative appeals," but did not contain anything that was "inconsistent" with the streamlining regulations.[268] In particular, it "would require a sizable leap that [the court could not] make" to claim that the definition of a final "order of deportation" at 8 U.S.C. § 1101(a)(47)(A)-(B) prohibits streamlining.[269] Referring to the *Vermont Yankee* doctrine, the court held that "the Attorney General did not run afoul of the INA" when he promulgated the streamlining regulations.[270]

The court also "agree[d] with [its] sister courts of appeals . . . that the streamlining regulations do not violate the Due Process Clause of the Constitution."[271] The due process to which aliens are entitled in deportation proceedings "stems from those statutory rights granted by Congress and the principle that '[m]inimum due process rights attach to statutory rights.'"[272] Therefore, "an unadmitted alien present in the United States has only 'limited' due process rights."[273]

When analyzing a due process argument, the court noted that, "in the context of the adjudication of claims for relief from removal," due process requires only that "[a]n alien: (1) is entitled to factfinding based on a record produced before the decisionmaker and disclosed to him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to an individualized determination of his [or her]

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264. *Id.* at 234, 261.

265. *Id.* at 233-34.

266. *Id.* at 235.

267. *Id.* at 236 (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999)).

268. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

269. *Id.* at 237-38 (citing 8 U.S.C. § 1101(a)(47)(B) (2002)).

270. *Id.* at 238.

271. *Id.*

272. *Id.* at 239 (alteration in original) (quoting Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996)).

273. *Id.* (quoting Albathani v. INS, 318 F.3d 365, 375 (1st Cir. 2003)).

interests."[274] Rejecting Dia's claim that these requirements could not be met by a single-member BIA summary adjudication of his asylum claim, the court found that the individualized determination was provided by the IJ.[275] The BIA was not required by the Constitution to articulate its reasons for affirmance.[276] The court adopted the *Albathani* holding and rejected an administrative law-based due process challenge argued by amici AILF.[277] Neither the "brevity" of the AWO decision, nor the broader requirement for fundamental fairness, showed a lack of due process.[278] "An applicant retains a full and fair opportunity to make his case to the IJ, and has a right to review of that decision by the BIA, and then by a court of appeals."[279]

The court then engaged in a lengthy interpretation of the application of the substantial evidence test, which is used in asylum credibility determinations, to the factual record in the *Dia* case.[280] After Dia was detained at a U.S. airport while claiming to be in transit from Italy to Honduras to work on a ship, the IJ found he was not credible, based on "inconsistencies in Dia's testimony and its overall implausibility."[281]

Scrutinizing the IJ's adverse credibility finding, the court identified IIRIRA section 306 as the codification of the substantial evidence test from *INS v. Elias-Zacharias*.[282] The section 306 test is the standard for review of agency fact-finding, and even though Congress omitted the explicit reference to substantial evidence, it states that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[283]

To determine whether the IJ's adverse credibility determination satisfied the substantial evidence test, the court explained that it would review the determination "to ensure that it was 'appropriately based on inconsistent statements, contradictory evidences, and inherently improbable testimony . . . in view of the background evidence on country

274. *Id.* (second alteration in original) (internal quotation marks omitted) (quoting Abdulai v. Ashcroft, 239 F.3d 542, 555 (3d Cir. 2001)).

275. *Id.* at 239-40.

276. *Id.* at 240.

277. *Id.* at 233, 241 (citing *Albathani*, 318 F.3d at 377).

278. *Id.* at 242-44.

279. *Id.* at 243.

280. *See generally id.* at 245, 247, 249-60.

281. *Id.* at 246-47.

282. *Id.* at 247 (citing INS v. Elias-Zacarias, 502 U.S. 478, 481-84 (1992)); *see also* IIRIRA § 306(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (2000), *amended by* REAL ID Act of 2005, 8 U.S.C.A. § 1252(a), (b) (West 2006).

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

conditions.'"[284] Any deference by the court was to be "'expressly conditioned on support in the record.'"[285] If the conclusion was "not based on a specific, cogent reason, but, instead, [was] based on speculation, conjecture, or an otherwise unsupported personal opinion, [it will not be upheld] because it will not have been supported by such relevant evidence as a reasonable mind would find adequate."[286]

In a lengthy dissent, Judge Alito strenuously criticized this interpretation, labeling part of his dissent, "Reversing the Standard of Proof."[287] Alito claimed that the Third Circuit "turns this standard on its head and finds that aspects of Dia's testimony should have been found to be credible because a reasonable person might have found them believable."[288] The court responded that Alito had applied "the no reasonable adjudicator standard" so as to deliberately do away with the need for substantial evidence.[289]

The Third Circuit conducted a detailed assessment of the IJ's determination of adverse credibility, finding that each point discussed was not supported by substantial evidence.[290] The court cited the "difficult nature of these types of cases, and the critical importance of resolving them properly—for the stakes are very high indeed."[291] This required that any "inferences" drawn from the record "must withstand scrutiny."[292] Such an approach "breathes life into" the substantial evidence standard.[293] The court vacated the BIA's order of affirmance of the IJ's decision and remanded the case.[294]

In his dissent, Judge Alito called the majority's analysis of adverse credibility decisions "seriously flawed" and focused on the difficulties in detecting false testimony in asylum hearings.[295] Initially, Alito conceded that asylum cases "are among the most difficult that we face. Much is obviously at stake, but the evidentiary record is very often meager . . .

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284. *Dia*, 353 F.3d at 249 (quoting *In re* S-M-J- (Interim Decision), 21 I. & N. Dec. 722 (B.I.A. 1997)).

285. *Id.* at 249 (quoting Nagi El Moraghy v. Ashcroft, 331 F.3d 195, 205 (1st Cir. 2003)).

286. *Id.*; *see also Nagi El Moraghy*, 331 F.3d at 205 (stating that the deference given to the IJ is reliant on express support in the record for the IJ's findings).

287. *Dia*, 353 F.3d at 264 (Alito, J., dissenting).

288. *Id.*

289. *Id.* at 251 n.22 (majority opinion).

290. *Id.* at 250-51.

291. *Id.* at 250.

292. *Id.*

293. *Id.* at 251.

294. *Id.* at 260-61.

295. *Id.* at 261 (Alito, J., dissenting).

[and] it is often not reasonable to demand corroboration."[296] However, a decision based only on the applicant's testimony presented "obvious and serious problems."[297] Judge Alito stated that "testimony by asylum-seekers cannot simply be accepted without question."[298] "Persons wishing to escape deplorable conditions that fall short of persecution have a strong motive to fabricate tales of persecution, and it must be recognized that such stories are not hard to construct."[299] Alito noted Professor David Martin's observation that the government was "rarely able" to investigate the applicant's claims in the field.[300] Because the applicant "'will usually be the only available witness to the critical adjudicative facts of the case . . . [the applicant] has substantial incentives to lie or to embroider the truth (and few disincentives), [which] makes for a system vulnerable to manipulation.'"[301]

Alito characterized the intent of Congress as one of choosing to entrust

> the responsibility for making these important [credibility] determinations to the Attorney General, with very limited judicial participation. Specifically, we must accept a credibility determination made by those to whom the Attorney General's authority has been delegated "unless any reasonable adjudicator would be compelled to conclude to the contrary." This limited role sometimes puts us in the uncomfortable position of deferring to a credibility determination about which we are skeptical. But the statute leaves us no alternative.[302]

Judge Alito then engaged in an extended application of principles of impeachment in domestic cases to buttress his argument that the court made three fundamental errors: failure to approve of plausibility determinations that take into account "'background knowledge' about human behavior"; inversion of the statutory standard of review by failing to defer to agency fact-finding where a reasonable adjudicator "could make a contrary finding"; and failure to consider the totality of the circumstances "in reviewing the IJ's credibility determination," but instead focusing "one by one on specific statements . . . and ask[ing] whether each of those statements is plausible."[303]

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296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.* at 261-62 (citing Martin, *supra* note 1, at 1280).
301. *Id.* at 262 (quoting Martin, *supra* note 1, at 1280).
302. *Id.* (quoting 8 U.S.C. § 1252(b)(4)(b)).
303. *Id.* at 262; *see also id.* at 262-66 (explaining the detailed nature of each legal error).

The Eighth Circuit joined the other circuits in a much shorter December 2003 decision, *Loulou v. Ashcroft*.[304] An Ethiopian asylum applicant claimed political opinion and ethnic group persecution, and appealed the BIA's affirmance of the IJ's denial of relief, which was based on lack of credibility and failure by the alien to produce easily obtainable documentation to corroborate her claims.[305]

The Eighth Circuit quickly dismissed the claim that the "BIA's summary affirmance violated her due process rights because the summary affirmance fails to give individualized attention to her case and frustrates our review. We join our sister circuits in concluding the streamlined review procedure does not violate an alien's due process rights."[306]

Next, the court delved into her claim that substantial evidence demonstrated either past family persecution or a well-founded fear of future persecution.[307] In sustaining the IJ's adverse finding, the court essentially found the petitioner to be not credible, based on the fact that she did not provide obtainable evidence to corroborate her story.[308] "The IJ had specific, cogent reasons for disbelieving Loulou . . . . Under the circumstances, substantial evidence supports the IJ's decision that Loulou's failure to call her mother as a witness had a major adverse impact on her credibility."[309]

In *Yuk v. Ashcroft*,[310] the precedent case in the Tenth Circuit issued in January 2004, the petitioners were Cambodian members of the same extended family.[311] All the petitioners were found to be derivative beneficiaries of a single claim filed by a former police official appealing summary BIA affirmance of the denial of their applications for asylum.[312] The petitioners had entered the United States separately between March and June 1997, and overstayed their tourist visas, applying for asylum in March 1998.[313] The IJ denied asylum and found that the petitioners were unable to show past persecution or a well-founded fear of future persecution.[314] The appeal, supported by amicus AILF, argued three claims: first, that the BIA AWO violated their due process rights and

304. 354 F.3d 706, 708 (8th Cir. 2003), *cert. denied*, 543 U.S. 987 (2004).
305. *Id.*
306. *Id.* at 708-09.
307. *Id.* at 709.
308. *Id.*
309. *Id.* at 709-10.
310. 355 F.3d 1222 (10th Cir. 2004).
311. *Id.* at 1224.
312. *Id.* at 1224-25.
313. *Id.* at 1224.
314. *Id.* at 1225.

administrative law; second, that the IJ and BIA acted in error by not finding past persecution; and third, that the IJ and BIA erred in finding changed conditions in Cambodia to the extent that the petitioners no longer had a well-founded fear of future persecution.[315]

The court stated that "*Albathani* was the first decision to address this issue, and its analysis has been widely followed . . . . We generally follow it as well."[316]

The Tenth Circuit reviewed the IJ's determination of the petitioner's refugee status issue using the substantial evidence standard.[317] The court noted that the BIA's adverse determination of eligibility for asylum "'must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.' It can be reversed only if the evidence presented by [the applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed.'"[318] The court noted that it does not "'weigh the evidence or . . . evaluate the witnesses' credibility.'"[319]

Substantial evidence supported the IJ's conclusion that persecution had not occurred in the past, and that State Department country reports relied on by the IJ constituted substantial evidence of changed conditions, thus barring a finding of a well-founded fear of future persecution.[320] It was also "not [the court's] prerogative to reweigh the evidence, but only to decide if substantial evidence supports the IJ's decision."[321]

The final two of the eleven federal circuits issued decisions in March 2004 that adhered closely to the nine earlier precedents. In *Zhang v. U.S. Dep't of Justice*,[322] the Second Circuit upheld a BIA AWO of an IJ decision to deny a Chinese male asylum on the ground of persecution for violating China's birth control policy.[323] The IJ found him not to be a credible applicant because "his testimony was 'neither consistent nor plausible.'"[324] The Second Circuit summarily dismissed claims that "the IJ's credibility findings were not grounded in the record," and that the

315. *Id.* at 1228 & n.6.

316. *Id.* at 1229 (internal citations omitted).

317. *Id.* at 1233.

318. *Id.* (alteration in original) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)).

319. *Id.* (omission in original) (quoting Woldemeskel v. INS, 257 F.3d 1185, 1189 (10th Cir. 2001)).

320. *Id.* at 1234-36.

321. *Id.* at 1236.

322. 362 F.3d 155 (2d Cir. 2004) (per curiam).

323. *Id.* at 156.

324. *Id.*

applicant was a victim of persecution.[325] The court then focused its entire opinion on Zhang's due process challenge to the BIA streamlined review procedures.[326]

Citing the ten precedents from other circuits, the Second Circuit held that "the streamlining regulations' provision for summary affirmance of IJ decisions by a single Board member does not deprive an asylum applicant of due process."[327] An alien's right to appeal derives only from statute.[328] "'The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review.'"[329] Even criminal defendants lack any constitutional right to an appeal.[330] The court noted, "'[t]he existence of his right to appeal and the parameters of that right find their roots in statutes and rules.'"[331]

Echoing the reasoning in *Dia v. Ashcroft*, the Second Circuit reiterated that although "[v]arious sections of the Immigration and Nationality Act indicate that Congress did contemplate some form of appellate review," it was "silent as to the manner and extent of any administrative appeal, leaving that determination to the Attorney General, who, in turn, has delegated this responsibility to the BIA."[332] In that circumstance, *Vermont Yankee* deference to the administrative agency was appropriate.[333] The availability of "judicial review pursuant to 8 § U.S.C. 1252" supported a conclusion that streamlining did not violate due process.[334]

The Court cited the *Denko* and *Falcon Carriche* cases to hold that streamlining regulations met the *Matthews v. Eldridge* test.[335] The court stated that:

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325. *Id.*

326. *Id.* at 156-59.

327. *Id.* at 157; *see also id.* (citing Khattak v. Ashcroft, 332 F.3d 250, 252-53 (4th Cir. 2003)) (rejecting the idea that the streamlining regulations were "impermissibly retroactive").

328. *Id.*

329. *Id.* (quoting Guentchev v. INS, 77 F.3d 1036, 1037 (7th Cir. 1996)).

330. *Id.*

331. *Id.* (alteration in original) (quoting Furman v. United States, 720 F.2d 263, 264 (2d Cir. 1983) (per curiam)).

332. *Id.*; *see also supra* notes 272-73.

333. *Zhang*, 362 F.3d at 157 (citing 8 U.S.C. § 1101(a)(47) (2000) (providing that "an order of deportation is not 'final' until . . . the BIA has passed on it"); 8 U.S.C. § 1158(d)(5)(A)(iii)-(iv) (2000) (providing "time limits for filing and resolving administrative appeals"); 8 U.S.C. § 1229a(c)(4) (2000) (providing for an alien's right to be informed of the right to appeal a removal order)).

334. *Id.* at 158.

335. *Id.* at 159 (citing Denko v. INS, 351 F.3d 717, 730 n.10 (6th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 851-52 (9th Cir. 2003)).

> Whether the streamlining regulations will or will not add to our burden, however, is not the issue before us. Our concern is whether streamlining deprives an alien of the process that he is due by law. Under applicable laws and regulations, even after streamlining, an applicant for asylum or withholding of removal remains entitled to a full hearing on his asylum claims, a reasoned opinion from the IJ, the opportunity for BIA review, and the right to seek relief from the courts. This is the process Zhang received.[336]

In the final case of this series, *Blanco de Belbruno v. Ashcroft*,[337] the Fourth Circuit upheld a denial of asylum to a Guatemalan citizen and her five derivative family members who had originally entered the United States fourteen years previously and had overstayed their tourist visas by eighteen months.[338] The court denied Belbruno's claims that the streamlining regulations are inconsistent with the INA, that application of the regulations to her case violated her due process rights, and that the regulations were impermissibly retroactive.[339] Application of the *Chevron* doctrine to the Attorney General's interpretation of the INA was significantly influenced by the government's plenary powers.[340] The court stated that it was "mindful of the fact that 'the power to expel or include aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[341]

Dismissing Belbruno's claim that the AWO had deprived her of due process, the Fourth Circuit noted that "[j]udicial review, not judicial micromanagement of BIA procedures, is the proper response."[342] BIA summary affirmance procedures were "not unlike summary disposition procedures routinely used by appellate courts."[343] Streamlining "reserve[d] appellate explication for issues that require it."[344] It also was

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336. *Id.*

337. 362 F.3d 272 (4th Cir. 2004).

338. *Id.* at 275-76. The petitioner's husband, a citizen of Argentina, had filed the original family political asylum application claiming a fear of persecution from that country in 1992. *Id.* at 276. The family was charged in 1998 with violation of INA section 237(a)(1)(B) (failure to possess valid immigration documents at time of application for admission). *Id.* The husband then withdrew his asylum petition, and the Guatemalan wife then filed for political asylum in her own name, with her Argentine husband as a derivative applicant. *Id.*

339. *Id.* at 275-76, 278.

340. *Id.* at 278.

341. *Id.* (alteration in original) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

342. *Id.* at 280-81.

343. *Id.* at 281.

344. *Id.*

not significant that the AWO was issued by a single BIA member.[345] "[T]here is no magic—and certainly no due process implications—in any given number of reviewing judges. What matters is that Belbruno was able to take the decision of the Immigration Judge to an authority with the responsibility to overturn an erroneous decision."[346] Finally, the court held that streamlining was not impermissibly retroactive because it did not attach "'new legal consequences to events completed before its enactment,'" but only affected "'the body that adjudicates the claims.'"[347]

V. SIGNIFICANCE OF THE APPELLATE DECISIONS FOR THE LAW OF RELIEF FROM REMOVAL

The twelve streamlining decisions following *Albathani* are instructive as to the state of the law of relief on three levels. First, they provide a clear articulation of the minimum due process now available to aliens in the United States facing expulsion. Second, they provide a better understanding of the outer limits of jurisdiction-stripping. Finally, and most significant for critics of U.S. expulsion policy like FAIR, the holdings in these cases on the substantive law of relief highlight pervasive, systemic problems within the substantive law itself.

As an advocacy organization opposed to mass immigration, both illegal and legal, FAIR has been less constrained in its scrutiny of the expulsion appeals system than other institutional stakeholders in the status quo, in particular the immigration bar and federal bureaucracy.[348] The remainder of this article attempts to frame a policy argument that these systemic issues must be acknowledged and addressed by the professional constituencies in the federal agencies, academia, and other legal policy institutions before the division of labor between EOIR and the federal courts in the disposition of alien claims for relief can be stabilized.

A. The Minimum Requirements of Due Process at the Agency and Appellate Court Levels

After the *Albathani* line of cases, it seems clear that recent attempts to create or expand rights of aliens to administrative review of expulsion decisions have not succeeded. The appellate courts emphasized again

345. *Id.* at 282-83.

346. *Id.* at 282.

347. *Id.* at 283 (quoting INS v. St. Cyr, 533 U.S. 289, 321 (2001); Khattack v. Ashcroft, 332 F.3d 250, 253 (4th Cir. 2003)).

348. *See, e.g.*, FAIR Public Comments, *supra* note 52, at 1, 3-4.

and again that "[a]n alien has no constitutional right to any administrative appeal at all."[349]

Even after the creation of the Department of Homeland Security (DHS), the BIA remains an administrative agency created and operated under the executive authority of the Attorney General. DOJ regulations require that "there shall be . . . a Board of Immigration Appeals."[350] The BIA must adjudicate immigration appeals so as to provide precedential guidance to DHS, IJs, immigrants, and immigration attorneys.[351] BIA regulations also require that appeals be adjudicated in a manner that is legally correct, impartial, independent, and timely.[352] In theory, the Attorney General can reform, reorganize, or even eliminate the BIA.[353] The list of an alien's minimum statutorily created rights is neither long nor complex.[354] Compliance with these procedural entitlements could be delegated to DHS personnel, if EOIR was ever abolished.

Of course, agency authority remains limited in practice by the existence of due process protections for aliens that the government seeks to expel.[355] The Fifth Amendment entitles aliens to due process of law in deportation proceedings, and the right of aliens in immigration proceedings to challenge detention orders via writ of habeas corpus has been recognized for more than a century.[356] But there is no constitutional requirement for IJ or BIA review of expulsion orders, should Congress delegate authority to issue such orders to immigration officers or other DHS officials.[357]

The *Albathani* line of cases emphasized that streamlined BIA review procedures raised no due process issues, either in the way they were implemented or in the scope of review actually provided. The affirmance by a single BIA member of an IJ's decision without giving additional

349. Albathani v. INS, 318 F.3d 365, 375 (1st Cir. 2003); *see also* Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 157 (2d Cir. 2004); Dia v. Ashcroft, 353 F.3d 228, 242 (3d Cir. 2003); Denko v. INS, 351 F.3d 717, 729 (6th Cir. 2003).

350. 8 C.F.R. § 1003.1(a)(1) (2006).

351. *Id.* § 1003.1(d)(1), (g).

352. *Id.* § 1003.1(d)(1).

353. *See id.* § 1003.1(a)(1).

354. *See, e.g.*, INA § 238(b)(4)(A)-(F), 8 U.S.C. § 1228(b)(4)(A)-(F) (2000).

355. *See* Reno v. Flores, 507 U.S. 292, 306 (1993); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

356. *Reno*, 507 U.S. at 306; *Nishimura Ekiu*, 142 U.S. at 660.

357. *See* Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003).

reasons or a separate opinion does not violate BIA regulations[358] or due process.[359]

BIA streamlining regulations met the *Mathews v. Eldridge* three-part due process test.[360] Streamlining procedures are workload management devices that do not establish that review did not take place.[361] Similarly, hardship claims in COR cases are not so inherently fact-based as to make single-member affirmance a violation of due process.[362]

The immigration bar has not ceased to express concerns that recent congressional attempts to simplify expulsion proceedings risks renewed constitutional litigation arising from suspension of habeas challenges to its jurisdiction-stripping provisions.[363] In particular, the 2005 expansion of circuit court jurisdiction by the REAL ID Act to include any "question of law" is expected to provoke renewed litigation, in particular over mixed questions of law and fact.[364] The prospect of renewed litigation has not, however, seemed to deter Congress from continuing the trend of streamlining procedures and limiting immigration litigation, appeals to the Board of Immigration Appeals, and judicial review.[365]

B. Deference to Agency Fact-Finding

While the appellate courts fought after 1996 to retain jurisdiction over statutory interpretation and constitutional review of expulsion cases, the Supreme Court admonished the appellate courts in a countervailing line of cases to give more deference to the determinations of the immigration adjudicators; particularly when the IJ decision was upheld by the BIA, both in reviewing findings of fact and statutory interpretations within the BIA's area of expertise.[366]

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358. Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 279-80 (4th Cir. 2004); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1288-89 (11th Cir. 2003).

359. Loulou v. Ashcroft, 354 F.3d 706, 7-8 (8th Cir. 2003), *cert. denied*, 543 U.S. 987 (2004); Dia v. Ashcroft, 353 F.3d 228, 238 (3d Cir. 2003) (en banc); Denko v. INS, 351 F.3d 717, 728, 730 (6th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 850-51 (9th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003) (per curiam); *Albathani*, 318 F.3d at 874-75.

360. Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 159 (2d Cir. 2004); *Falcon Carriche*, 350 F.3d at 851-52.

361. *Albathani*, 318 F.3d at 378-79.

362. *Falcon Carriche*, 350 F.3d at 852.

363. *See* Morawetz, *supra* note 11, at 8.

364. *See* Gerald L. Neuman, *The REAL ID Act and the Suspension Clause*, 9 BENDER'S IMMIGR. BULL. 1555, 1557, 1562 (2005).

365. *See generally* MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., NO. RL33410, IMMIGRATION LITIGATION REFORM (2006) (discussing jurisdiction-stripping proposals in H.R. 4437, S. 2454, S. Amdt. 3192, S.2611/S.2612, and other 2006 bills).

366. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (noting the failure of the Ninth Circuit to defer to BIA statutory interpretation of the serious nonpolitical crime

In 1992, the most important of these landmark cases, *INS v. Elias-Zacarias*, articulated the substantial evidence test in the immigration context.[367] Four years later, Congress codified the formula as part of IIRIRA, providing that for judicial review of BIA determinations, "administrative findings of fact are conclusive unless any *reasonable adjudicator* would be compelled to conclude to the contrary."[368] IIRIRA also expressly stripped the Article III courts of authority to consider additional evidence, even material evidence.[369] *Elias-Zacharias* remains the standard of review used by the federal courts to define the scope of their review of fact-finding by DHS officials, IJs, and the BIA.[370]

BIA Member John Guendelsberger has pointed out that "[a]fter *Elias-Zacarias*, some circuit courts described their review of Board decisions on questions of fact as 'highly deferential,' 'extraordinarily deferential,' 'extremely deferential,' or 'exceedingly narrow.'"[371] While this language may suggest a more heightened degree of deference to findings in immigration proceedings, Guendelsberger emphasized that, doctrinally at least, "the degree of deference accorded immigration fact-finding [has not differed significantly from the kinds of] deference afforded in . . . administrative determinations" by other agencies.[372]

The decisions favoring judicial deference to agency fact-finding appeared to have culminated in 2002, some months before the *Albathani* decision, when the Supreme Court held "that the Ninth Circuit overstepped the bounds of its authority in deciding an issue of asylum eligibility" not decided by the BIA.[373] In *INS v. Ventura*, the Supreme Court held that the Ninth Circuit should have remanded the question of

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exception). The agency had expertise over a statute it administered, and *Chevron* deference thus should have applied. *Id*; INS v. Yueh-Shaio Yang, 519 U.S. 26, 27, 30-32 (1996) (giving deference to agency decisions regarding denials of discretionary waivers); INS v. Elias-Zacharias, 502 U.S. 478, 481 (1992) (giving deference to agency findings of fact). *See generally* Guendelsberger, *supra* note 76, at 617-34 (providing an overview of judicial deference to agency decisions).

367. *Elias-Zacarias*, 502 U.S. at 483-84 (finding that the substantial evidence test in the asylum context allows reversal only where the reviewing court not only supports a contrary conclusion, but compels it); Georgis v. Ashcroft, 328 F.3d 962, 967-68 (7th Cir. 2003).

368. IIRIRA, Pub. L. No. 104-208, § 306(b)(4)(B), 110 Stat. 3009, 3009-608 (codified at 8 U.S.C. § 1252(b)(4)(B) (2000)) (emphasis added), *amended by* REAL ID Act of 2005, 8 U.S.C.A. § 1252(a), (b) (West Supp. 2006).

369. *See* IIRIRA § 306(a), 8 U.S.C. § 1252(a)(1) ("[T]he court may not order the taking of additional evidence under [28 U.S.C. §] 2347(c) . . . .").

370. *See, e.g.*, Moin v. Ashcroft, 335 F.3d 415, 418 (5th Cir. 2003) (noting that the Administrative Procedure Act "mandates substantial evidence review of administrative agency fact findings," the standard applied to BIA streamlining procedures in *Albathani*).

371. Guendelsberger, *supra* note 76, at 628 & n.136 (citations omitted).

372. *Id.* at 628.

373. *Id.* at 606 (citing INS v. Ventura, 537 U.S. 12 (2002) (per curiam)).

changed country conditions to the BIA, rather than issue a decision on its own.[374] "A court of appeals is 'not generally empowered to conduct a *de novo* review into the matter being reviewed . . .'"[375] Instead, the court noted that "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'"[376]

In the BIA streamlining cases, the appellate courts also have seemed to acknowledge, at the doctrinal level, the deference owed to agency interpretations.[377] For example, an agency decision to streamline was non-reviewable where it was based on a discretionary determination and appellate court jurisdiction had been removed by statute.[378] There is agreement among several circuits that the *Vermont Yankee* doctrine requires the courts to give great deference to the BIA developing its own procedures.[379] However, at least two courts felt the need to state that judicial review of certain BIA decisions is not barred by the APA because "judicially manageable standards [are] available to a reviewing court."[380] In *Dia v. Ashcroft*, the Third Circuit held that even the IIRIRA statutory reformulation has not significantly modified the traditional substantial evidence test.[381]

In practice, the clear difference between circuits in the rate of reversal of BIA decisions suggests that appellate non-acquiesence to administrative factual findings remains a significant problem.[382] The Ninth Circuit was referenced by EOIR for its failure to defer to administrative fact-finding.[383] The BIA Study confirmed what it called

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374. *Id.* at 609.

375. *Id.* at 610 (quoting *Ventura*, 537 U.S. at 16).

376. *Id.* (quoting *Ventura*, 537 U.S. at 16); *see also* Ezeagwuna v. Ashcroft, 325 F.3d 396, 398 (3d Cir. 2003).

377. *See* Hamdan v. Gonzales, 425 F.3d 1051, 1058 (7th Cir. 2005); *see also* Heckler v. Chaney, 470 U.S. 821, 837-38 (1985).

378. Falcon Carriche v. Ashcroft, 350 F.3d 845, 853-54 (9th Cir. 2003).

379. Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 280 (4th Cir. 2004); Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 157 (2d Cir. 2004) (per curiam); Dia v. Ashcroft, 353 F.3d 228, 238 (3d Cir. 2003) (en banc); Denko v. INS, 351 F.3d 717, 730-31 n.10 (6th Cir. 2003); *Falcon Carriche*, 350 F.3d at 850.

380. *Denko*, 351 F.3d at 731-32; *see also* Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003).

381. *Dia*, 353 F.3d at 247-48 (defining substantial evidence as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury" (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939))).

382. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 77-78; *see also id.* at 54, 55, tbl.1 (indicating that appeal rates during summer 2004 ranged from 9% in the Eleventh Circuit to 60% in the Eighth Circuit).

383. Procedural Reforms, *supra* note 6, at 54,891.

"the 'conventional wisdom' that the Ninth Circuit is more sympathetic to alien's claims—particularly asylum claims—than any of the other circuits."[384] One line of attack on deference doctrine attempts to work around the statutory and Supreme Court mandate by claiming an exception still exists for review of factual determinations made by an IJ if a non-discretionary ground for relief was also a factor.[385] Opponents of streamlining have seized upon this disparity to insist that the BIA reforms amount to an "abdication of quality review in the interests of expeditious decision-making."[386]

VI. UNADDRESSED STRUCTURAL PROBLEMS IN THE LAW OF RELIEF

The substantive law of relief from expulsion poses many well-known conceptual and evidentiary difficulties.[387] A "value-neutral" approach to judicial review in expulsion cases may be the rhetorical ideal, but few, if any, stakeholders argue for such an approach in practice.[388] The BIA streamlining cases highlighted the dilemmas facing the judicial review process, as the twelve challenges were brought in a variety of factual and statutory scenarios.[389] Most commentators find these difficulties reason to tolerate a systemic bias in favor of the alien petitioner.[390] I would suggest that this approach has become dysfunctional.

Entitlement to relief is almost always the determinative issue in both administrative and judicial appeals. The three major types of relief from expulsion are persecution-based relief, cancellation of removal and related relief, and waivers of inadmissibility or excludability.[391] Some types of relief are mandatory if eligibility standards are met, but most forms of relief require the government to determine whether the alien merits a favorable exercise of discretion.[392] Whatever doctrine INA

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384. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 77 n.303; *see, e.g.*, Wang v. Ashcroft, 341 F.3d 1015, 1023 (9th Cir. 2003) (finding an exception to *Ventura* based on "rare circumstances").

385. *Cf.* He v. Ashcroft, 328 F.3d 593, 595-96 (9th Cir. 2003); Begzatowski v. INS, 278 F.3d 665, 668 (7th Cir. 2002).

386. *See* Seipp & Feal, *supra* note 9, at 2012.

387. *See infra* notes 388-97 and accompanying text.

388. Motomura, *supra* note 127, at 451-52.

389. *See, e.g.*, Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 276-78 (4th Cir. 2004); Dia v. Ashcroft, 353 F.3d 228, 233-34 (3d Cir. 2003) (en banc); Falcon Carriche v. Ashcroft, 350 F.3d 845, 848 (9th Cir. 2003).

390. *Cf.* Matthew H. Joseph, Note, Immigration and Naturalization Service v. Elias Zacarias*: Partially Closing the Door on Political Asylum*, 52 MD. L. REV. 478, 500 (1993).

391. *See* ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 20 (2001).

392. *Id.*; *see also* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 12 (discussing the expulsion process).

section 242(a)(2)(B) may embody, the immigration interests, the immigration bar, and the DHS administrators will continue to take advantage of the expanded doctrine of prosecutorial discretion. Both the BIA and the Article III courts fully understand that prosecutorial discretion currently plays a very large role, even if it is difficult to measure.[393] Aliens must generally concede deportability as a condition to requesting relief.[394] Although the formal burden of proof remains on the alien applicant to establish that he or she meets the elements of eligibility for relief from expulsion,[395] in practice there is a strong and pervasive bias among the regulatory and stakeholder institutions to give the applicant what Professor Martin called "the benefit of the doubt."[396]

Administrative and judicial assessments of applicant credibility, the legislative facts of international conditions and changed country conditions, and the legal recognition of novel particular social groups are examples of core areas of the law of relief where the utility of general legal principles has been preempted by structural pro-applicant bias. For example, Professor Martin has pointed out that the basic tools of confrontation and cross-examination rarely play a role in expulsion proceedings, since it is unusual for any witness other than the applicant and possibly a family member to testify.[397] Other core adjudications with inherent bias problems would include hardship determinations in COR cases, and the still-ubiquitous waiver and reconsideration provisions.

A. Asylum

Critics in the immigration bar have noted that post-streamlining criticism of BIA and IJ decisions appearing in circuit court decisions have arisen largely in asylum cases "where a claimant's credibility is always of

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393. Michael M. Hethmon, *The Chimera and the Cop*, 8 UDC/DCSL L. REV. 83, 138-39 (2004) (discussing the 2000 Meissner memorandum). The authors of the BIA Study note:

> The process by which the government expels someone from the United States can be broken down into three basic stages: identifying the person as potentially subject to expulsion, deciding to expel the person, and ensuring that the person actually leaves the country. At each step along the way, the government may exercise prosecutorial discretion not to proceed further, thereby allowing the person to remain in the country, at least temporarily.

Palmer, Yale-Loehr & Cronin, *supra* note 2, at 12.

394. *See, e.g.*, Begzatowski v. INS, 278 F.3d 665, 668 (7th Cir. 2002).

395. *See, e.g.*, Palmer, Yale-Loehr & Cronin, *supra* note 2, at 13-14.

396. Martin, *supra* note 1, at 1283; *see, e.g.*, *In re* Pula, 19 I. & N. Dec. 467, 476 (B.I.A. 1987) (Heilman, Bd. Member, concurring in part, dissenting in part) (finding that asylum laws are humanitarian).

397. Martin, *supra* note 1, at 1349.

great concern."[398] Professor Martin described the adjudication of asylum applications as a three-part process, combining:

> retrospective factfinding about past events specific to the [alien applicant], . . . broader determinations about the practices of the government or other alleged persecutors in the home country . . . [and] an informed prediction (not truly a finding) about the degree and type of danger the particular applicant is likely to face upon return [to their home country] . . . .[399]

The Supreme Court has held that asylum requires demonstration by the applicant that a "reasonable possibility" exists that the alien will be persecuted in his or her home country.[400]

In theory, DOJ could expel aliens "already judged to be 'refugees' under the *Cardoza-Fonseca* standard, if they fall short of the showing required to claim the mandatory *nonrefoulement* protection."[401] In practice, the view of advocates for asylum applicants, that the utility of general legal principles are limited by the intensely factual nature of asylum claims, has prevailed.[402] Professor Martin has written that all asylum decisions are made in a "highly charged policy context."[403] More recently, immigration lawyer Mark Van Der Hout has suggested that the results in asylum cases in the Ninth Circuit can be shown to depend on the political views of the three judges composing the review panel.[404]

Given the vagueness of the underlying standards, this is not surprising. Past persecution does not require corroboration, and may be established solely through the applicant's credible testimony,[405] but an applicant need not have suffered persecution in the past to qualify for asylum.[406] A "well-founded fear" of persecution can certainly exist where there is less than a fifty percent chance that persecution will occur, and might even exist when there is only a ten percent chance of suffering persecution.[407]

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398. *See* Seipp & Feal, *supra* note 9, at 2005-06.

399. Martin, *supra* note 1, at 1280 (footnotes omitted).

400. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

401. Martin, *supra* note 1, at 1265.

402. *See* Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., *supra* note 15, at 257; *see, e.g.*, Poradisova v. Gonzales, 420 F.3d 70, 82 (2d Cir. 2005) (noting that the "asylum application process requires a good faith inquiry into whether an applicant is entitled to this country's protection, and should never resemble 'a search for justification to deport'" (quoting Senathirajah v. INS, 157 F.3d 210, 221 (3d Cir. 1998))).

403. Martin, *supra* note 1, at 1253.

404. Cooper & Bazar, *supra* note 57.

405. Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).

406. *Poradisova*, 420 F.3d at 77-78 ("To establish eligibility for asylum, a petitioner must show that he has suffered past persecution . . . or that he has a well-founded fear of future persecution . . .").

407. INS v. Cardoza-Fonseca, 480 U.S. 421, 431, 440 (1987).

Professor Martin points out that the Supreme Court has declined to "'set forth a detailed description of how the well-founded fear test should be applied,' leaving that term to acquire 'concrete meaning through a process of case-by-case adjudication.'"[408]

Compounding this structural ambiguity is the problem of credibility determinations. Factual findings and credibility determinations are integral in the context of relief from expulsion, but are also fundamentally problematic.[409] Critics have identified "excessive reliance on plausibility determinations by the IJ's" as the basis for many circuit court reversals of expulsion orders.[410] At the same time, the appellate courts have emphasized the presumption of credibility in asylum proceedings.[411] Credibility determinations were also at issue in several of the BIA streamlining cases.[412] The judges in these cases debated how to handle the intensely factual nature of asylum claims, the weak evidentiary standards, and the fiction of the honest applicant, factors that limit the utility of general legal principles.[413] The circuit courts continue to base reversals of BIA decisions on excessive reliance on credibility determinations by IJs under a "benefit of the doubt" policy and practice.[414] This activist role of the circuit courts in reviewing credibility determinations seems to directly conflict with the doctrinal expressions of deference to IJ and agency fact-finding reflected in the *Albathani* line of cases. The most recent response of Congress to this conflict remains ambiguous, with statutory attempts to tinker with evidentiary standards in asylum cases raising in turn new questions of law that appear destined for the appellate courts.[415]

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408. Martin, *supra* note 1, at 1264 (quoting *Cardoza-Fonseca*, 480 U.S. at 448).

409. *See* Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 77-78, 78 n.215 (2004).

410. Seipp & Feal, *supra* note 9, at 2011 (citing cases).

411. *See* KURZBAN, *supra* note 140, at 819-21 (discussing BIA review of IJ credibility determinations).

412. Seipp & Feal, *supra* note 9, at 2011-12; *see, e.g.*, Dia v. Ashcroft, 353 F.3d 228, 234 (3d Cir. 2004) (en banc); Georgis v. Ashcroft, 328 F.3d 962, 968 (7th Cir. 2003).

413. *See, e.g.*, *Dia*, 353 F.3d at 248-50; Albathani v. INS, 318 F.3d 365, 373-74 (1st Cir. 2003).

414. *See* Martin, *supra* note 1, at 1283; Seipp & Feal, *supra* note 9, at 2011.

415. The REAL ID Act of 2005 introduced a new "central reason" standard of proof for the nexus between a ground for asylum and persecution on account of that ground, and restricted the circumstances when an applicant need not provide corroborative evidence in an asylum or withholding of removal case. *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 302, 303 (to be codified at 8 U.S.C. § 1158(b)(1)(B)(i)). At the DHS, the Office of the Ombudsman proposed a formal bifurcation of administrative adjudication of asylum and withholding or removal applications. Applications from illegal aliens would no longer be processed by USCIS, but would be referred directly to an immigration judge for adjudication in the context of a removal proceeding. *See* Letter

B. Country Conditions and Changed Conditions

The decisions in *Mendoza v. U.S. Attorney General*[416] (Eleventh Circuit), *Dia v. Ashcroft*[417] (Third Circuit), and *Yuk v. Ashcroft*[418] (Tenth Circuit) grappled with the evidentiary dilemma of alien country conditions and changed conditions, Professor Martin's classic "coast of Bohemia" problem.[419] The provision of background evidence on country conditions is intended to allow the trier of fact to determine whether a claim for relief is plausible.[420] However, the BIA has never issued a decision providing explicit guidance on how an IJ should weigh the relative probative value of documents assessing country conditions.[421] The inability of the BIA to articulate a functional nexus between publicly available background evidence and the particularized testimony of the applicant, or to assess how changes in overseas conditions may have affected that nexus, has left the appellate courts with the dubious task of assessing the plausibility of predictions made by an IJ or the BIA as to the probability that the alien applicant would experience future foreign persecution or hardship if expelled.

Professor Martin's 1990 critique of asylum adjudication was especially skeptical of the ability of a neutral judicial adjudicator to use country guidelines to make future persecution determinations, on three grounds.[422] Martin argued that official country reports "are useful only when they can be based on particularized characteristics that sharply distinguish a certain group from the rest of the population. Most persecution . . . does not follow such crisp patterns."[423] Martin concluded that "[g]uidelines that must use such vague terms are probably worse than no guidelines at all."[424]

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from Prakash Khatri, Ombudsman, U.S. Citizenship & Immigr. Servs., to Emilio Gonzalez, Dir., U.S. Citizenship & Immigr. Servs. (Mar. 20, 2006), *available at* http://www.dhs.gov/interweb/assetlibrary/CISOmbudsman_RR_24_Asylum_Status_03-20-06.pdf (recommending that USCIS "limit its adjudication of I-589 applications for asylum and withholding of removal to those submitted from individuals who are in valid non-immigrant status in the United States").

416. 327 F.3d 1283 (11th Cir. 2003).

417. 353 F.3d 228 (3d Cir. 2003) (en banc).

418. 355 F.3d 1222 (10th Cir. 2004).

419. *Yuk*, 355 F.3d at 1234-36; *Dia*, 353 F.3d at 249; *Mendoza*, 327 F.3d at 1288; Martin, *supra* note 1, at 1273-75.

420. Guan Shan Liao v. U.S. Dep't of Justice, 293 F.3d 61, 71 (2d Cir. 2002).

421. *See* Susan K. Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 205 (2000).

422. *See* Martin, *supra* note 1, at 1359-60.

423. *Id.*

424. *Id.* at 1360.

Martin also conceded that reliance on country guidelines creates a bias in favor of the applicant.[425] Individual applicants are encouraged to take affirmative reports of persecution or hardships and match their personal circumstances as closely as possible to a current "winning" profile, even at the risk of encouraging fraudulent testimony.[426] In contrast, any routine official use of negative reports to streamline the issuance of an expulsion order may come under attack for impermissibly restricting the ability of applicants to testify as to unique circumstances.[427]

A related area where significant problems exist for the appellate judge is the adjudication of the expanding universe of novel social groups, an area of the law of relief without theoretical limits. The granting of relief on the basis of membership in a novel social group reflects recognition by the court of both a new conclusory legal analogy and of country conditions that match the elements of the group.[428] Professor Martin observed in 1990 these novel cases constitute a "fairly small percentage of the caseload."[429] That context has changed by 2006, as novel social group claims continue to attract and consume significant judicial resources.[430]

C. Cancellation of Removal Based on Hardship

Hardship determinations in COR cases were another ambiguous substantive area of the law of relief from expulsion examined in the *Albathani* line of cases.[431] To receive cancellation of removal relief under INA section 240A, an alien, other than certain permanent legal residents, must "establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse parent, or child," and that the person is a United States citizen or a legal permanent resident.[432] The legislative history of the hardship provisions indicates that Congress has repeatedly expressed an intention that relief should only be granted where expulsion would cause extreme hardship.[433] Unlike asylum cases, the courts have upheld the elimination of judicial review of BIA

425. *See id.*

426. *See id.*

427. *See id.*

428. *See, e.g.*, Annette Lopez, Comment, *Creating Hope for Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 603, 604 (2004).

429. *See* Martin, *supra* note 1, at 1363.

430. *See* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 53 fig.5 (displaying rise in appeal rate).

431. *See, e.g.*, Falcon Carriche v. Ashcroft, 350 F.3d 845, 848 (9th Cir. 2003).

432. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2000), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, 8 U.S.C.A. § 1229b (West Supp. 2006).

433. H.R. REP. NO. 104-828, at 213-14 (1996) (Conf. Rep.).

discretionary hardship determinations under INS section 240A.[434] However, even in this restrictive doctrinal environment, the Ninth Circuit still found that it had the authority to review a claim that BIA application of the COR hardship standard violated due process.[435]

In COR cases, an IJ's factual determinations supporting hardship claims are reviewed by the BIA under the clearly erroneous standard.[436] But whether facts amount to "exceptional and extremely unusual hardship" is reviewed de novo.[437] This standard remains ambiguous, however, and "does not have to be literally interpreted or strictly construed, or at least not more strictly than 'extreme hardship,'" especially if the case "otherwise merits the favorable exercise of discretion."[438]

D. Waivers

The still-ubiquitous waivers and reconsideration provisions that encourage serial and piecemeal proceedings based on claims of changed factual or procedural circumstances appeared as a factor in at least one of the *Albathani* cases.[439] In addition to appeals of denial of asylum and cancellation of removal,[440] the BIA has jurisdiction, by regulation, to hear: appeals of denials of former INA section 212(c) waivers; discretionary decisions on all family preference petitions (except automatic revocations or appeals by beneficiaries), waivers of inadmissibility for nonimmigrants under 8 U.S.C. § 1182(d)(3); adjustment of status applications under 8 U.S.C. § 1255, or rescission of status under 8 U.S.C. § 1256;[441] and decisions relating to detention in removal, including IJ decisions for continuation of detention beyond the

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434. INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i), *amended by* REAL ID Act of 2005, 8 U.S.C.A. § 1252(a), (b) (West Supp. 2006); Alvarez-Delmuro v. Ashcroft, 360 F.3d 1254, 1256-57 (10th Cir. 2004); Romero-Torres v. Ashcroft, 327 F.3d 887, 888 (9th Cir. 2003).

435. Ramirez-Perez v. Ashcroft, 336 F.3d 1001, 1005 (9th Cir. 2003).

436. *See* 8 C.F.R. § 1003.1(d)(3) (2006).

437. *See id.*

438. Curtis Pierce, *The Benefits of "Hardship": Historical Analysis and Current Standards for Avoiding Removal*, 76 INTERPRETER RELEASES 405, 410 (1999).

439. *See, e.g.*, Denko v. INS, 351 F.3d 717, 721, 724 (6th Cir. 2003).

440. 8 C.F.R. § 1003.1(b)(3), (9). The former 10,000 annual cap on admissions was eliminated by the REAL ID Act. 8 U.S.C. § 1159(b)(2000), *amended by* REAL ID Act of 2005, 8 U.S.C.A. § 1159(b) (West Supp. 2006).

441. *See* 8 C.F.R. § 1003.1(b). Adjustment of status under INA section 245 allows an alien to gain legal permanent resident status without departing and being lawfully readmitted as an immigrant, and is available both prior to and during expulsion proceedings. INA § 245, 8 U.S.C. § 1255 (2000), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, 8 U.S.C.A. § 1255(i) (West Supp. 2006); *see also* MCWHIRTER, *supra* note 391, at 9.

statutory removal period.[442] However, the Board lacks the authority to enter a final order of removal because expulsion decisions may be subject to judicial review pursuant to INA section 241(a)(5).[443]

The widely acknowledged sympathy of the Ninth and Second Circuits to alien claims, in particular asylum claims, and their respective records of declining to defer to administrative fact-finding, seem to directly correlate with the high caseloads in these circuits. This judicial activism could be interpreted as evidence of resistance to the countervailing line of Supreme Court decisions,[444] culminating in *INS v. Ventura*, criticizing de novo appellate review and urging greater deference to EOIR's agency expertise.[445]

Critics of the BIA reforms characterize this tension as inherent in due process requirements.[446] The prevailing view of the immigrant interests and the judiciary seems to be that expulsion cases are not amenable to traditional criteria.[447] FAIR disagrees.[448] "[W]hen the record can reasonably be read in more than one way, [the rule from the *Ventura* line of cases is that] the court should not substitute its preference for what it considers the more reasonable view of the evidence."[449] The striking reported differences between the circuits in the rate of reversing BIA decisions, both before and after implementation of streamlining reforms, can credibly be explained by the personal opinions and worldviews of the judges who have been left by Congress to reduce these penumbras and emanations to predictions as to future events in foreign lands.[450] The judges in the activist circuits, if they felt it were necessary, could exercise a much greater level of restraint and even skepticism, by utilizing, for example, the substantial evidence test, in order to reduce their caseloads to levels comparable to those of the less sympathetic circuits.[451]

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442. 8 C.F.R. § 1003.1(b)(14).

443. *See* KURZBAN, *supra* note 140, at 805; *see also* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 19-20 (discussing judicial review of removal orders).

444. INS v. Aguirre-Aguirre, 526 U.S. 415, 418, 423, 431 (1999) (holding that the failure of the Ninth Circuit to defer to BIA statutory interpretation of the serious nonpolitical crime exception to deportation withholding was erroneous because the agency has expertise over a statute it administers, and *Chevron* deference thus should apply); INS v. Yueh-Shaio Yang, 519 U.S. 26, 27, 32 (1996) (giving deference when reviewing denials of discretionary waivers); INS v. Elias-Zacharias, 502 U.S. 478, 481 (1992) (giving deference when reviewing findings of fact).

445. INS v. Ventura, 537 U.S. 12, 16-18 (2002) (per curiam).

446. *See* FAIR Public Comments, *supra* note 52, at 3-4.

447. *Cf. id.* at 4-5.

448. *Id.* at 3-4.

449. Guendelsberger, *supra* note 76, at 629.

450. *See* MacLean, *supra* note 21; notes 21-25 and accompanying text.

451. For a discussion of the role of discretionary decisionmaking and due process rights, compare Benslimane v. Gonzales, 430 F.3d 828, 831-33 (7th Cir. 2005) (stating that

VII. ENVIRONMENTAL CONSTRAINTS ON ADMINISTRATIVE AND JUDICIAL REFORM

Finally, several broader concerns exist that have barely appeared in the legal literature, although the concerns are a longstanding focus of debate and controversy for immigration policymakers.[452]

A. Continued Massive Demand

According to FAIR, "[i]mmigration to the United States, one of the few countries in the world that admits immigrants [in significant number], cannot provide relief from poverty or oppression [or even persecution] to more than a tiny fraction of the world's rapidly growing population."[453] Developing nations account for ninety percent of the world's population growth.[454] Large-scale migrations no longer provide "a viable solution to economic and social problems."[455]

The number of aliens seeking to immigrate to the United States is unlimited, with the only practical restraints being the ability to physically reach U.S. territory.[456] The unlimited demand and increasing availability of international travel have produced, and will continue to produce, enormous and growing numbers of inadmissible aliens.[457] Looking just at appeals of denial of asylum, the largest category of relief cases, Professor Martin noted years ago that "[t]here are millions of people around the world, however, who face no substantial threat of persecution but who would value such a chance at permanent residence in a stable and wealthy nation."[458] Affluent Western nations are like "élite universities, besieged by applicants."[459] The penalties for an inadmissible alien to lie so as to qualify for relief from removal are slight and insignificant compared to the potential benefits of such lawless action. Thus, the incentive to try the U.S. immigration system is great.

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the court has the jurisdiction to review the denial of a motion for continuance leading to removal because it is discretionary), with Hamdan v. Gonzales, 425 F.3d 1051, 1060-61 (7th Cir. 2005) (finding no due process violation since discretionary decision was involved).

452. *See* Martin, *supra* note 1, at 1267-70.

453. Brief for Federation for American Immigration Reform as Amicus Curiae Supporting Petitioners at 6, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1992) (No. 92-344) [hereinafter Brief for FAIR].

454. *Id.*; *see also* U.S. CENSUS BUREAU, GLOBAL POPULATION GROWTH: 2002, 12-13 (2002).

455. Brief for FAIR, *supra* note 453, at 7.

456. *See* Martin, *supra* note 1, at 1268.

457. *See id.* at 1268-69.

458. *Id.* at 1268.

459. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 32 (1983).

B. Relief as a Form of Amnesty

There is little conceptual difference between an appellate system, wherein petitioners are to be given the benefit of the doubt, and an amnesty system where periodic amnesties are considered a desirable and efficient means of overcoming the dysfunctionality of the law of relief from expulsion.[460]

The substantive grounds for relief draw some non-citizens from those who might otherwise participate in expulsion proceedings, and "act as release valves through which cases may exit."[461] Professor Martin underscored

> the singular trumping power of a successful asylum claim. Such a claim overcomes virtually all the other qualifying requirements for immigration to the United States. It also moves the applicant to the head of the line for early permanent residence rights, even if [the alien] first established his presence in the territory in knowing violation of the regular provisions of the immigration laws.[462]

Other important forms of relief are registry and legalization or "amnesty."[463] "Some of these grounds, such as the mass legalization program enacted in 1986, have had massive, if temporary, impacts on

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460. *See* Martin, *supra* note 1, at 1267-68 (observing that "[t]hose who have been victimized by persecution should indeed receive, early on, a secure new status that will allow them to rebuild a new life in a new homeland, without undue insistence on the bureaucratic niceties of ordinary immigration law. [However, there are] those who learn about the power of a claim to refugee status [and] might choose to try their luck with an asylum application.").

461. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 11.

462. Martin, *supra* note 1, at 1267-68.

463. *See* IRCA, Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3394-3404 (codified as amended in scattered sections of 8 U.S.C.). The 1986 legalization program under INA section 245A and the amnesty program under INA section 210 created a window during which illegal aliens could apply for lawful status. *See* U.S. Citizenship and Immigration Services, This Month in Immigration History: May 1987, http://www.uscis.gov/graphics/aboutus/history/may1987.htm. Eligibility for legalization was based, with variations, on entry before 1982 and continuously unlawful residence thereafter; eligibility for Special Agricultural Worker (SAW) amnesty required U.S. residence and performance of seasonal agricultural services between May 1985 and May 1986. *Id.* During the IRCA application window in 1987-88, almost 2.7 million illegal aliens adjusted status to temporary legal resident status. *See* JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 610 (2002). Legalization applicants were then required to apply for legal permanent resident status within forty-three months after obtaining temporary status. 8 C.F.R. § 245a.3(b)(1) (2006). SAW applicants were automatically adjusted to legal permanent resident status in December 1989 or 1990. *Cf.* Applicant Processing for the Legalization Program, 56 Fed. Reg. 482, 482-83 (Jan. 7, 1991) (codified at 8 C.F.R. pt. 264).

reducing the number of cases in the system."[464] But over time, these grounds have helped cause new and ever larger backlogs in the appeals system.[465] So long as global demand for immigration benefits remains massive and unquenchable, relief from expulsion through group legalization provisions will always push the administrative and judicial review systems over the edge.

C. The Problem of Accuracy

Critics of EOIR have described it scathingly as a safe haven for scofflaws, where unnecessary formalism "literally makes a federal case out of every single illegal alien on our shores," crippling the detention and removal system.[466]

But a more significant critique, in my view, is that neither EOIR nor appellate court decisions have proven to be accurate or efficient predictors of future impermissible persecution or hardship for aliens who have been expelled from the United States.[467] This constitutes a fundamental problem of accuracy. Immigrant advocates make the claim that the current appellate review system plays a critical function of actually saving lives and improving human rights globally, and that this humanitarian mission outweighs whatever deterrent effect that a more rigorous expulsion review system might provide.[468]

No reasonable person would suggest that since 1980, persecution and hardship have continued to be tragic common features of life in many areas of the world. Nonetheless, for the generation since the enactment of asylum relief in 1980, authoritative studies documenting subsequent persecution of persons expelled from the United States after their applications for relief were denied simply do not exist in the legal literature. There have been no "voyage[s] of the damned" from American soil.[469] Even claims of mere harassment of persons denied

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464. Palmer, Yale-Loehr & Cronin, *supra* note 2, at 12.

465. *Cf. id.* at 22-23.

466. Juan Mann, *Abolish the EOIR! Juan Mann's Absolutely Definitive Essay*, VDARE.COM, Dec. 6, 2005, http://www.vdare.com/mann/051206_essay.htm.

467. *See* Martin, *supra* note 1, at 1285.

468. *Cf. Tibetan Nun Detained in Virginia Jail Denied Parole Again*, ASYLUM PROTECTION NEWS 22 (Human Rights First, New York, N.Y.), Jan. 30, 2004, http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_22.htm (recommending that DHS "[g]ive asylum seekers the chance to appeal parole denials to immigration judges").

469. On the other hand, commentators have noted that lengthy delays in the expulsion of criminal aliens, particularly in the case of Mexican and Central American nationals, have created significant transnational crime problems for the receiving countries. Mary Helen Johnson, *National Policies and the Rise of Transnational Gangs*, MIGRATION INFO.

nonrefoulement have been weak. A good example is provided by a 1993 Human Rights Watch report on Haiti:

> The *best-documented story of persecution of returnees* is the case of 154 people who were arrested by Haitian police on August 14, shortly after being repatriated by the U.S. Coast Guard. An Associated Press report said the "roundup took place minutes after the U.S. cutter Confidence dropped off the Haitians at a Port-au-Prince dock." According to the Haitian police, the repatriates were questioned about the reported hijacking of the boat in which they had been attempting to flee. Police the next day said that all but six had been released. An August 25 report noted that one was still in police custody.[470]

The measurable advancement of transformational justice overseas should be a prominent objective of further reform of the law of relief from expulsion. The BIA and the Article III courts will function more effectively if they recognize that, other factors being equal, tougher or speedier review of alien petitions for relief does not increase the actual incidence of death, imprisonment, or torture of unsuccessful alien applicants. If advocates for the persecuted were serious about using U.S. immigration law to deter overseas persecution, rather than to expand asylum as a route to permanent immigration, two immediate tools are available: a carrot and a stick.

The "carrot" would be expanded *refoulement* services provided through the United States Department of State or the United Nations High Commissioner for Refugees (UNHCR). Aliens removed after unsuccessful asylum or COR claims could be registered and tracked in their home countries, in order to publicly monitor their safety, ensure their protection during a transitional period, and improve the accuracy and relevance of country condition reports. Similarly, relatives of United States citizens who were the subject of hardship-related removals could be provided specialized consular and contracted adjustment services overseas on a very economic basis.

The "stick" would be a greatly expanded use of the INA section 243(d) model of denial of visa privileges to a class of foreign nationals implicated in persecution.[471] The federal government could implement a

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SOURCE (Migration Policy Inst., Wash., D.C.), Apr. 1, 2006, http://www.migrationinformation.org/feature/display.cfm?id=394.

470. HUMAN RIGHTS WATCH, HAITI: HUMAN RIGHTS DEVELOPMENTS (1993), http://www.hrw.org/reports/1993/WR93/Amw-07.htm (emphasis added).

471. INA § 243(d), 8 U.S.C. § 1253(d) (2000). The statute pertains to discontinuing granting visas to nationals:

> On being notified by the Attorney General that the government of a foreign country denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks

routine practice of denial of travel and immigration benefits (possibly in cooperation with other nations) to foreign officials, agencies, and classes of related private parties who actually fail to provide protection or abet persecution.[472]

VIII. PHYSICAL FRONTIERS AND VIRTUAL LEGAL BORDERS: SPECULATION ON FUTURE TRENDS

"'The public will not allow governments to be generous if it believes they have lost control.'"[473]

The long-term operation of a body of law that fails to perform its key adjudicative role presents a profound crisis of justice to both the responsible administrative agencies, as well as the judicial system.[474] In alien claims for relief from expulsion, a body of eccentric substantive law is applied, many times without employing evidentiary standards.[475] This results in profound consequences not only for the applicants, but for the far larger numbers of citizens who have no right or role whatsoever beyond the ballot box in the operation or direction of the adjudicative system.

While it is reasonable to conclude that the EOIR case-management reforms have been implemented efficiently, no serious observer believes that the reforms will satisfactorily resolve the jurisdictional struggles between the agency and the courts.[476] Moreover, the limited physical capacity of the existing expulsion review system strongly implies that any

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> whether the government will accept the alien under this section, the Secretary of State shall order consular officers in that foreign country to discontinue granting immigrant visas or non-immigrant visas, or both, to citizens, subjects, nationals, and residents of that country until the Attorney General notifies the Secretary that the country has accepted the alien.

Id.

472. In October 2001, the Secretary of State exercised INA section 243(d) authority to suspend the issuance of "all nonimmigrant visas to nationals of Guyana who are employees of the Government of Guyana or of any of the companies owned in whole or in substantial part by the Government of Guyana." U.S. DEP'T OF STATE, PUBL'N NO. 179574, SUSPENSION OF ISSUANCE OF NONIMMIGRANT VISAS IN GUYANA (Oct. 2001), *available at* http://www.immigration.com/newsletter/guyana.html. The suspension also applied to spouses and children, both minor and adult, of the individuals. *Id.* The action was described as a "targeted imposition of visa sanctions under section 243(d) that focuses on those persons most likely to pressure Guyana's policy makers." *Id.*; *cf.* Rachel Canty, *The New World of Custody Determinations After* Zadvydas v. Davis, 18 GEO. IMMIGR. L.J. 467, 469 (2004).

473. Martin, *supra* note 1, at 1269-70 (quoting W. SMYSER, REFUGEES: EXTENDED EXILE 2 (1987).

474. *See id.* at 1269-72.

475. *Cf. id.* at 1269, 1271-72.

476. *See, e.g., id.* at 1272; Seipp & Feal, *supra* note 9, at 2005-06.

attempt by the government to formally expel a significant number of deportable aliens at one time would cause the system to implode.[477]

The most likely legislative outcome will be a continuation of the trends in streamlining and jurisdiction-stripping occurring over the past decade. Deep and growing political divisions in the nation may prevent Congress from acting on immigration reform. But those divisions are much less significant when it comes to national security. Fears of terrorism have led Congress to create a "virtual legal border wall" for aliens deemed terrorists and security threats that begins well beyond our weak and permeable geographic frontiers.[478]

The legal border wall concept derives from the 1996 reforms, where inadmissibility replaced entry.[479] Aliens who are apprehended outside the legal wall have extremely limited due process rights, and therefore can be diverted before ever entering EOIR and the court system.[480] There is every reason to believe that Congress will seek to expand the virtual border wall statutes to include the ever-increasing number of alien applicants for admission of all types. With continued sympathy in Congress, there has already been slow but steady progress towards promulgating bars to relief and review based on virtual legal borders, rather than physical frontiers.[481] One tool already available is administrative expansion of INA section 235(b)(1)(A)(iii) "expedited removal" to its broadest scope.[482]

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477. *Cf. Operations of the Executive Office for Immigration Review: Hearing Before the H. Subcomm. on Immigration and Claims*, 107th Cong. 33-43 (2002) (statement of Michael J. Heilman, Former Member, Board of Immigration Appeals) (describing the BIA's expulsion review process).

478. *See, e.g.*, INA § 212(a)(6)(C), (G), 8 U.S.C. § 1182(a)(6)(C), (G) (2000), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, 8 U.S.C.A. § 1182(a) (West Supp. 2006).

479. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2000), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, 8 U.S.C.A. § 1101(a) (West Supp. 2006) (defining admission as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer"); 8 U.S.C. § 1182(a)(6)(A)(i) (deeming persons who have not been lawfully admitted and who entered without inspection to be inadmissible as if they were detained at the border).

480. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protection available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

481. *Cf., e.g.*, Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482-84 (1999) (allowing the Attorney General to have discretion in executing removal and other deportation processes).

482. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004).

Legislative additions of "zipper clause"-type language to narrowly restrict habeas corpus review, for example a revision of INA section 242(g) to overturn *Reno v. American-Arab Anti-Discrimination Committee* would be a natural complement to this approach.[483] The increasing availability of electronic tracking of alien entries and exits through the US VISIT system will increase the utility of such summary removal procedures.

The congressional approach will most likely continue to be fragmentary, rather than comprehensive, and it is likely to consist primarily of new procedural restrictions that will provoke additional administrative and judicial appeals that, in turn, magnified by unrelenting demand, will continue to generate new backlogs. But Congress is not likely to become overly concerned, because agency demands for bureaucratic relief through streamlining will always succeed in political struggles over competing alien demands for statutorily expanded due process.

Speed-based solutions will reflect the reality that, without fast adjudication at all stages of review, pressure from applicants with marginal or fraudulent claims will inevitably threaten the system with collapse.[484] Expedited implementation of integrated electronic case filing and management techniques at both the agency and judicial levels is already occurring.[485] Moreover, Congress will always be under pressure to hire more US attorneys and IJs.

Judicial resource rationing will be a second type of congressional reform that is likely to occur through fragmentary legislative actions. Judicial resource rationing would include a combination of techniques to discourage appeals in general, including the application of the case-management reform techniques adopted by BIA.

I would expect to see a continued gradual tightening of filing deadlines and other jurisdictional limits. Also, measures to keep more applicants for relief in detention, or under electronic monitoring, will most likely

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483. The REAL ID Act of 2005, P.L. No. 109-13 § 106(b) 119 Stat. 305 (May 11, 2005), used this approach to amend INA §242(b)(9) (Consolidation of issues for judicial review) by adding a new "zipper clause" at the end:

> Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

Id.

484. *See* Martin, *supra* note 1, at 1322-26, 1367-69.

485. *See, e.g.*, EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FISCAL YEARS 2005-2010 STRATEGIC PLAN 2, 5, 6, 8 (2004) (indicating a desire to make as many procedures electronic as possible).

occur as Congress percieves an increasing threat from terrorism—especially as this perception will make concerns over any impact on appeals backlogs a much lower political priority.

Further congressional tinkering with jurisdiction-stripping provisions to limit appeal court review of IJ and BIA denials of relief, following the direction of the REAL ID Act, are possible, given the deliberate obscurity that characterizes the legislative history of previous "reforms."

In 1990, Professor Martin recommended the elimination of judicial review except in the form of a certiorari-like "leave to appeal."[486] That approach deserves renewed consideration.[487]

> The streamlined review process [established by the BIA] . . . is different from the "leave to appeal" and certiorari systems that some appellate courts and administrative tribunals use to control their dockets. These [alternate] systems often look to a variety of factors apart from whether the decision for which appellate review is sought reached a correct result.[488]

If the scheme worked as envisioned by Martin, all denied claimants would have access to an Article III judge.[489] Judicial review of asylum appeals would be discretionary, with important exemptions for withholding of removal and Convention Against Torture (CAT) cases that raise factual claims of actual harm to the alien's life or liberty. A reform of this kind would promote a more skeptical approach to petitions for review by the court, while preserving the agency incentives for self-policing that are implicit in the REAL ID Act language.[490] Unfortunately, there is no constituency for this kind of comprehensive

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486. *See* Martin, *supra* note 1, at 1356-57, 1364. Martin based his proposal on Canadian legislation that established a new asylum adjudication system which eliminated any centralized administrative review by a body equivalent to our BIA. *Id.* at 1335 (citing Immigration Act, 1976, R.S.C., ch. 35 §§ 46, 48.02, 69, 71.1, *amended by* 1992 S.C., ch.46 (Can.)). The legislation also disallowed judicial review of denied refugee claims unless the applicant first obtained "leave to appeal" from a specified court. *Id.* at 1363 (citing §§ 83.1-85.1). Martin noted that the nearest United States analogue was the certiorari process in the Supreme Court. *See id.*

487. Martin, *supra* note 1, at 1364 (noting that appeal would occur only when there was "a substantial likelihood of reversal of the administrative action").

488. Streamlining, *supra* note 27, at 56,137-38.

489. Martin, *supra* note 1, at 1363.

490. *See id.* at 1363. *See generally* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8, 49 U.S.C.). Professor Martin states:

> The officials involved in adjudication would know that in some cases (exactly which ones cannot be known in advance) the independent judicial branch will be reviewing their work. But the initial access to the courts would be of a strictly limited character. Within perhaps forty-five days, judicial review in a large majority of cases would be at an end, and the underlying deportation or exclusion order would become fully enforceable.

Martin, *supra* note 1, at 1365.

approach in the immigration bar or any of the other institutional stakeholders.

A political direction the current Congress would be more likely to take is the consolidation of appellate review of denial of relief from expulsion claims to a single federal appellate court, with the Court of Appeals for the District of Columbia Circuit being the most likely candidate.[491] Geographic restriction will be less vulnerable to challenge on due process grounds and will not be opposed by the majority of federal judges who are unhappy with the pressures that the surge in immigration appeals has placed on their dockets. The public perception that consolidation of appeals in the District of Columbia Circuit will bring improved consistency and predictability to expulsion proceedings—whether apparent or real—will have a strong political attraction to lawmakers as well.

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491. Bob Egelko, *Plan to Unify Immigrant Appeals*, S.F. CHRON., Mar. 13, 2006, *available at* http://www.shns.com/shns/g_index2.cfm?action=detail&pk=IMMIGRATION-03-13-06.