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The Summary Affirmance Proposal of the Board of Immigration Appeals

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THE SUMMARY AFFIRMANCE PROPOSAL OF THE BOARD OF IMMIGRATION APPEALS

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I. INTRODUCTION

The Board of Immigration Appeals is on the verge of making a tragic mistake, trading away a key element of fair adjudication—the written opinion—for the sake of what it hopes will be greater administrative efficiency. The cost of eliminating written adjudication is too great, and the Board has given no indication that it has sufficiently canvassed less drastic alternatives.

The Board of Immigration Appeals (the "Board") is the primary appellate body for immigration law.[1] The "staple" of its work is to decide appeals from decisions of Immigration Judges in removal proceedings,[2] though it also hears appeals in several other categories, such as decisions of Immigration Judges on petitions for approval of preferred immigration status by virtue of close relationship to a United States citizen or permanent alien.[3]

At present, the fifteen-member Board hears appeals in panels of three.[4] The panel issues a written decision in every appeal, and this decision must "discuss the evidence and the reasons for the Board's determination."[5] It may summarily dismiss an appeal only in very limited circumstances: when the appellant seeks relief from an order that he or she previously requested, when the notice of appeal specifies no reasons for the appeal, and when the appeal is frivolous and dilatory.[6] The "frivolous" appeal exception is itself a narrow one, which does not encompass summary dismissal simply because

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1. The Board exists by virtue of a regulation, 8 C.F.R. Part 3, and has never had statutory authority. 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 3.05[2] (1998). It is a constituent part of the Executive Office for Immigration Review, a component part of the United States Department of Justice that is independent of the Immigration and Naturalization Service. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 257 (4th ed. 1998).
2. ALEINIKOFF ET AL., *supra* note 1, at 257–58.
3. GORDON ET AL., *supra* note 1, § 3.05[3].
4. ALEINIKOFF ET AL., *supra* note 1, at 258.
5. GORDON ET AL., *supra* note 1, § 3.05[6][a].
6. *Id.* § 3.05 [4][f].

the appeal lacks a legal basis; advocates are encouraged to argue in good faith for the modification or reversal of existing law.[7]

Recently, however, the Executive Office for Immigration Review ("EOIR"), of which the Board is a part, proposed a radical change of procedure. Under its new proposal to establish a "streamlined appellate review procedure," the Board would issue summary affirmances in many, perhaps most, of its cases, without writing opinions.[8]

II. EOIR'S PROPOSAL

EOIR proposes to amend the Board's operating regulation to permit a

> single permanent Board member [to] affirm, without opinion, any decision in which the Board Member concludes that there is no legal or factual basis for reversal of the decision by the [Immigration and Naturalization] Service or the Immigration Judge . . . [provided that] the Board Member determines that the result reached in the decision under review was correct, [that] any errors in the decision under review were harmless or non-material; and [either that the] issue on appeal is squarely controlled by existing Board or federal court precedents and does not involve the application of such precedent to a novel fact situation; or [that] the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.[9]

Thus a single member to whom an appeal is initially assigned could make a threshold determination that the appellant's contentions were insubstantial. If so, the Board would issue an order stating that the "Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination."[10] The order "shall not include further explanation or reasoning."[11] If the single Board member does not think that he or she should summarily affirm the case, however, the member could refer the appeal for decision by a three-member panel. That panel could also decide, however, to affirm the decision below without opinion.[12]

The authority to affirm cases summarily would not necessarily be distributed evenly among the fifteen members of the Board. Rather, the Chairman of the Board would "designate, from time to time, the Board Members who are authorized to exercise the authority to affirm cases without opinion."[13]

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7. *Id.*
8. Board of Immigration Appeals: Streamlining, 63 Fed. Reg. 49043 (1998) (amending 8 C.F.R. § 3.1) (proposed Sept. 14, 1998).
9. *Id.* at 40945.
10. *Id.*
11. *Id.*
12. *See id.* at 49046.
13. *Id.* at 49045.

The impetus for this proposed procedural change is the ever-increasing caseload of the Board. The Board handled as few as 3,000 cases annually as recently as 1984. By 1994, the number had grown to 14,000 cases, and by 1997, 25,000 cases.[14] In 1995, the Attorney General increased the size of the Board from five members to twelve, and she recently authorized expansion to eighteen members.[15] But even the expansions (and concomitant staff increases) have not enabled the Board to keep up with its burgeoning caseload. The Board has a considerable backlog, and it does not decide appeals quickly. For example, the author recently represented a refugee whose application for asylum was denied by an immigration judge in April, 1997, resulting in an immediate order for his deportation. The author filed a notice of appeal early in May, but not until late October had the Board's staff[16] typed the hearing transcript so that the author could write a brief. The author filed his brief within a month, and the Immigration and Naturalization Service (the "INS") replied seven days later. The Board decided the case (granting asylum and reversing the deportation order) efficiently, without ordering oral argument, but it did not render that decision until July 27, 1998.[17] Meanwhile, the appellant's situation was uncertain, and he was not permitted to leave the country without abandoning his appeal or to arrange for his wife (whom he had not seen since 1994) to visit him.[18] He had originally applied for asylum under now-repealed rules regarding employment, but if he had applied for asylum after January 4, 1995, he would have been barred, during the two years his appeal was pending, from working in the United States.[19]

Although the Board merits praise for attempting to address problems stemming from its increased caseload, its proposed solution would excessively curtail the procedural safeguards for aliens who appeal. The Board should adopt only the part of its proposal that would assign cases initially to one member rather than three. That single member should have authority to affirm decisions, to reverse them, or to refer cases involving important new legal issues to the full Board for decision. The part of the proposal authorizing summary affirmances without opinion should be abandoned. Lengthy opinions with full recitations of the facts and thorough legal analyses may not be necessary in every case. But every appellate decision by a member on behalf of the Board should be accompanied at least by an explanation of the decision that addresses the contentions of the parties.

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14. *See* Board of Immigration Appeals: Streamlining, 63 Fed. Reg. at 49043 (1998) (amending 8 C.F.R. § 3.1) (proposed Sept. 14, 1998).

15. *Id.* at 49044.

16. More likely, typing was performed not by federal employees but by an outside service with which the Board has a contract.

17. *In re* Getaneh M. Getaneh, July 27, 1998 (BIA).

18. A person living abroad may be granted asylum to join a spouse who has been granted asylum. *See* 8 C.F.R. § 208.19 (1998).

19. 8 C.F.R. § 208.7 (1998).

III. THE IMPORTANCE OF WRITTEN DECISIONS IN THE PROCESS OF APPELLATE DELIBERATION

The Board of Immigration Appeals exists for one reason: other immigration officials, including Immigration Judges, sometimes make mistakes—of law, of procedure, or of the application of law to fact. Exercising "their independent judgment and discretion,"[20] Board members may correct these errors. This function has become even more important since 1997, when new federal legislation curtailed aliens' rights to seek further review, in federal courts, of some Board decisions.[21] The Board is now in some instances the *only* institution that can correct errors.

Written reasoning has several functions. Explaining its proposal in the *Federal Register*, the Board focused on conserving its opinion-writing resources so that in important cases, it could better provide guidance to Immigration Judges and the bar.[22] The goal of explicating new law can probably only be achieved by writing full opinions with thorough statements of relevant facts and extensive legal analysis.[23] However, written adjudication has at least three other important values, and these other values do not require very lengthy or formal opinions.

First, written explanations enable the losing party to accept the legitimacy of an appellate decision. By definition, an alien who seeks review by the Board believes that he or she was not understood, or not treated fairly, by an entity of the United States government. That alien knows that the Board has been created by the Attorney General as an independent check on the lower body from which the alien appeals. Even if the alien ultimately loses the appeal, it is important for the appellant to know that his or her contentions regarding errors below were considered seriously and respectfully.

As John Dewey put it long ago, "Courts not only reach decisions: they expound them, and the exposition must state justifying reasons. . . . it is certain that in judicial decisions the only alternative to arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge, is a rational statement which formulates grounds and exposes connecting or logical links."[24]

Second, the requirement of a written explanation ensures that harried adjudicators actually read the parties' contentions and formulate reasoned

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20. 8 C.F.R. § 3.1(a)(1) (1998).

21. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998).

22. Eliminating much of the routine opinion-writing, it said, will allow it "to concentrate it resources primarily on those cases in which the decision below may be incorrect, or where a new or significant legal or procedural issue is presented." Board of Immigration Appeals: Streamlining, 63 Fed. Reg. 49043 (1998) (amending 8 C.F.R. § 3.1) (proposed Sept. 14, 1998).

23. In a common law system, thorough statements of fact in precedential cases are essential so that the facts in future cases can be analogized to or distinguished from those in the precedent.

24. 15 JOHN DEWEY, *Logical Method and Law*, *in* THE MIDDLE WORKS 1899–1924 73 (Jo Ann Boydston ed., 1983).

responses to them. The Board's reported current caseload of 25,000 new cases per year amounts to about seven new cases per member per day.[25] This is indeed a crushing burden, and any adjudicator who was not required to write an explanation would be understandably tempted, at least at times, to affirm some of the cases without studying them carefully in order to clear the docket. That practice, of course, would sacrifice the rule of law. As a matter of good institutional practice, the Board should resist temptation by requiring its members to write responses to the parties' contentions.

The importance of writing opinions for the purpose of ensuring that contentions are actually addressed is particularly clear in cases in which appeal to the Board is the final stage of review, because further recourse to courts is not allowed. One such type of case involves review of Immigration Judges' orders removing aliens after rejecting their asylum applications on the ground that they were filed more than a year after the alien entered the United States and did not qualify for one of the exceptions provided in section 208 of the Immigration and Nationality Act (the "INA"). The INA appears to give the Board rather than the courts the final word on what types of circumstances will qualify as "changed" or "extraordinary," excusing compliance with the one-year deadline.[26] The consequence of an Immigration Judge's erroneous rejection of a proffered excuse could be the unjustified deportation of a refugee to a country where he or she will be tortured and killed. An alien's contentions about why his or her circumstances should qualify for exceptional treatment, notwithstanding the contrary view of an Immigration Judge, should therefore never be dismissed summarily without explanation.

A third reason warranting written opinions applies in cases where further judicial review (including habeas corpus review) is permitted. Written explanations give the federal courts insight into why the agency did not agree with appellant's contentions. Indeed, many circuits insist that the Board provide such explanations, holding that the statutes providing for judicial review implicitly require the Board to explain its decisions. For example, the Court of Appeals for the Ninth Circuit recently reversed a Board decision because the Board had dismissed an alien's asylum claim in a single sentence. The Court held that "failure by the [Board] to support its conclusions with a reasoned explanation based upon legitimate concerns" constituted an "abuse of discretion," and that when "the Board denies eligibility for relief, it must give reasons for its decisions."[27] Similarly, the Court of

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25. Not all of these cases require the kind of decision making advocated in this article. Some are motions requiring near-ministerial action, such as applications for extensions of time or motions by the Immigration and Naturalization Service for summary dismissal of an appeal after an alien has failed to file a promised brief.

26. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, sec. 604, § 208(a)(3), 110 Stat. 3009–546, 3009–690 (*amending* Immigration and Nationality Act, § 208(a)(3); *added by* Refugee Act of 1980, Pub. L. No. 96–212, § 201(b), 94 Stat. 102, 105).

27. Velarde v. INS, 140 F.3d 1305, 1310 (9th Cir. 1998).

Appeals for the Tenth Circuit has said that "we do not grant unrestricted license to the Board automatically to summarily adopt Immigration Judges' decisions without examining those decisions to ensure that all of the factors urged by the alien were in fact fully considered by the immigration judge. To do so would effectively remove the Board as a separate reviewing body. . . ."[28]

IV. THE FAILED MANHATTAN EXPERIMENT

The Board should avoid repeating the mistake made by the Appellate Division, First Department [Manhattan and Bronx], of the New York State Supreme Court. For many years, the First Department, an intermediate appellate state court, affirmed without opinion the decision below in "[ninety] percent of criminal appeals and a smaller percentage of civil appeals." It did so because its caseload had become "extremely heavy." Under pressure from practitioners, however, the Court had to abandon this practice in 1989.[29]

While the court's summary affirmance practice was in effect, appellants' attorneys complained that "when extensive briefs are written and the result is a curt [affirmance without opinion], there is 'often disappointment' by lawyers and clients, that the issues may not have been carefully considered, although this may not be so." Such decisions "leave a bad taste in your mouth, [and] you don't get any guidance for going up," one lawyer said.[30] Thirty years ago, the author offered an even more bitter reflection on the First Department's no-opinion practice:

> Here, then, in its entirety is the response of the Appellate Division to what is probably the most important consumer law issue of the decade:

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28. Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994). *See also* Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984) (an opinion addressing the parties' contentions is necessary "to enable a reviewing court" to know that the Board considered the contentions presented); Zlatkov v. INS, 1996 U.S. App. LEXIS 4571 (7th Cir. 1996) (Board decision affirmed because it "is not of the type which would generally be characterized as summary" but "analyzed Zlatkov's claims in six pages of discussion and analysis"); Sanon v. INS, 52 F.3d 648 (7th Cir. 1995) (Board reversed because it "did not address adequately the issues Sanon's petition raised" and "we require some proof that the Board has exercised its expertise in [an asylum] case"); Dulane v. INS, 46 F.3d 988 (10th Cir. 1995) (Board reversed for abuse of discretion because it "did not announce its decision [denying motion to reopen on the issue of suspension of deportation] in terms sufficient for us to conclude that it cumulatively considered all the relevant evidence" and also reversed for failure to base decision on substantial evidence because it "failed to address" whether Dulane established a well-founded fear of future persecution); Turri v. INS, 997 F.2d. 1306 (10th Cir. 1993) (reversing Board because it did not "announce its decision in terms sufficient for us, as the reviewing court, to see that the Board 'heard, considered, and decided' based on all the relevant factors"); Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) (reversing Board for abuse of discretion because its decision "is made without rational explanation"); Saldana v. INS, 762 F.2d 824 (9th Cir. 1985) (reversing Board and noting that "when the [Board] dismisses an alien's claims with conclusory or laconic statements, this court may conclude that the [Board] has abused its discretion by failing to 'give reasons which show that it has properly considered the facts which bear on its decision' ").

29. The New York experience is described in Martin Fox, "Appeals Court to Alter Policy on Affirmances; Murphy Says Panel Will Issue Written Opinions," N.Y.L.J., Sept. 27, 1989, at 1.

30. *Id.*

> "Order entered Aug. 28, 1968, and judgment, unanimously affirmed, without costs and without disbursements. No opinion. Order filed."[31]

By contrast, lawyers preferred the practice of the neighboring Second Department, which provided reasons, albeit often brief, for its affirmances. "At least they tell you why they killed you," one lawyer said.[32]

Lawyers who practiced in the First Department complained that the judges seemed to be avoiding troubling issues by not addressing them. "You are providing a built-in incentive to duck the hard issues," attorney Richard Ware Levitt noted. Leonard Levenson, another Manhattan lawyer, had written twenty-five briefs and never received a opinion. He concluded that the practice "discourages counsel from submitting professional briefs."[33] Professor Robert Pitler of Brooklyn Law School cited six cases that seemed so clear-cut to the Appellate Division that they required no opinion, but were later heard by the United States Supreme Court.[34]

Disappointment, puzzlement, and feeling disrespected by summary affirmances were not the only reasons given by members of the New York bar for their dislike of the Appellate Division's practice. They also believed that the Court's practice favored respondents by not clarifying issues for possible further appellate review. One lawyer quoted by the press noted that the practice was "favored by respondents because 'it doesn't give any loopholes to go up.' "[35] Thus the Court was thought by some to be subtly biasing its jurisprudence in favor of the government, which was the respondent in the vast majority of criminal appeals.

When the court abandoned its "no opinion" practice in response to these criticisms, the bar noted that giving reasons in all cases would not significantly slow the work of the court because even in the cases summarily affirmed, clerks had always prepared internal memoranda that could be turned into statements of reasons. The Presiding Justice agreed that reverting to its former practice of giving reasons would have "minimal effect, at best" on the court's workload.[36]

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31. Philip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115, 158 (1969). The case about which the author complained was Hall v. Coburn Corp., 31 A.D.2d 892, 298 N.Y.S.2d 894 (1st Dept. 1969), testing whether consumer class actions could be maintained under New York State's civil procedure law. Although the Appellate Division thought this issue too trivial to merit an opinion, the state's Court of Appeals agreed to review the decision. Hall v. Coburn Corp., 25 N.Y.2d 738 (1969). Criticism of that Court's opinion, Hall v. Coburn Corp., 26 N.Y.2d 396 (1970) (rejecting the use of the class action device for consumers who signed separate but identical installment contracts) led to the New York State legislature's passage of a new class action statute. William E. Nelson, *Civil Procedure in Twentieth Century New York*, 41 ST. LOUIS U. L.J. 1157, 1212–13 (1997).

32. Fox, *supra* note 29.

33. Roger Parloff, *Affirmed. No Opinion. All Concur.*, THE MANHATTAN LAW., Aug. 29, 1989, at 1.

34. *Id.*

35. Fox, *supra* note 29.

36. *Id.*

V. AN ALTERNATE PROPOSAL: SINGLE-MEMBER REVIEW, WITH REASONS

Although written reasoning is central to a fair appellate process, most cases do not require multi-member review. In principle, multi-member review is preferable to single-member review because reasonable people often disagree with each other, and a discussion among people with possibly opposing views is more likely to result in well-reasoned adjudication. However, the multi-member deliberative process that serves well in the United States Supreme Court (which renders only about 100 decisions per year) or the United States Courts of Appeal is a luxury that an appellate body with 25,000 cases per year cannot afford. As a practical matter, even fifteen judges working individually, without panels, could not provide fully deliberative adjudication in so many cases, and the Board delegates much of its decision-making work to its more than 100 staff attorneys who read the records of decisions of lower bodies and make recommendations to the members. The Board's proposal to solve its caseload problem by permitting summary affirmances without opinion in some cases and panel decisions in others is excessively complicated as well as unfair.

Instead, the Board should simply assign cases to a single member for decision.[37] Taking into account the advice of a staff attorney and his or her own analysis of the prior decision and any record below, that member should write at least a short decision affirming, reversing, or remanding the decision and a memorandum responding to the contentions of the parties. The memorandum would not have to be a full or formal decision.[38] It would not need to discuss undisputed facts or law. The appellant's contentions should be noted and discussed. If the appellant is an unrepresented alien, he or she may not have stated legal or factual contentions clearly, but the member should at least attempt to understand the claims and discuss them in writing. In such cases, the member should also peruse the record for any obvious errors of law or procedure and remand where necessary.

No more than several times a year, individual members would probably find cases worthy of referral to the entire Board because they raise new issues of law as to which guidance to the Immigration Judges and the bar would be desirable. Such referrals would be made in their discretion, but the full Board would have control over the plenary docket and could decide to hear the case and render a full, formal opinion or, alternatively, to remand to the original member who would then write a more informal decision, addressing the parties' contentions.

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37. Permission for oral argument would be granted in the discretion of the individual member. If the member referred the case to the full Board as proposed below, the Board could order oral argument in its discretion. However, the number of plenary cases each year would be so small that oral argument in such cases might become routine.

38. Briefer opinions that addressed the parties' contentions would probably satisfy the courts. "The Board need not write an exegesis on every contention . . . but its opinion must reflect that it has heard and thought and not merely reacted." Opie v. INS, 66 F.3d 737, 740 (5th Cir. 1995).

VI. THREE OTHER FLAWS IN EOIR'S PROPOSAL

The most serious flaw in EOIR's proposal is its elimination of written decisions in many cases. But the proposal includes three other flaws as well.

A. *The standard for referral doesn't appear in the rule, and it is probably unworkable.*

According to one part of EOIR's *Federal Register* description of the new plan, the single member to whom cases were initially assigned would refer to a panel all cases which seemed to have a "realistic chance" of reversal[39] and would affirm the others without opinion. But another part of the description states that referral to a panel should occur when there is "a chance that the result below was incorrect",[40] and at still another point in terms of whether "the appellant makes a substantial argument" for reversal.[41] These are three very different standards. Furthermore, none of these standards appears in the proposed rule itself. The text of the proposed rule would allow the single member to affirm whenever he or she concludes that there "is no" legal or factual basis for reversal, or where he or she determines that the result under review "was" correct.[42] In other words, contrary to the explanation in the *Federal Register*, the proposed rule suggests that the member should make an appellate determination of the correctness of the decision below, not a threshold assessment of whether the appellant's argument is "substantial" or whether any other Board member might reasonably think that reversal would be warranted.

If the Board adopts its proposed "referral" procedure rather than the suggestion of this article, a proper standard should be written into the rule. It seems clear from the Board's *Federal Register* explanation that the single member's first task should be to make a threshold judgment of whether or not any Board member could reasonably support reversal. (This standard is akin to the role of a judge granting a motion for summary judgment rather than allowing a civil case to be decided by a jury). Only after determining that no reasonable Board member could support reversing the decision below should the single member affirm. If the Board rejects the proposed system of single-member review, its rule should be rewritten to reflect this standard for referral to a three-member panel.

B. *The Board's plan appears to include a systematic, institutional bias against alien appellants.*

The Board's proposal is flawed in another way, too. It allows affirmances by one member, without opinion, while requiring three members, and full

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39. Board of Immigration Appeals: Streamlining, 63 Fed. Reg. 49043, 49044 (1998) (amending 8 C.F.R. § 3.1) (Sept. 14, 1998).
40. *Id.*
41. *Id.* at 49045.
42. *Id.* (text of the proposed amendment to 8 C.F.R. § 3.1(a)(5)).

opinions, for all reversals. This seems unbalanced and unfair, and it creates at least the appearance of an appellate tribunal systematically biased in favor of removing aliens, because reversing a removal order would involve considerably more work for the Board than affirming one.[43]

If the Board adopts its proposed "referral" system rather than a simple single-member system for most cases, it should at least restore symmetry to the system (at least for all cases involving the possible removal of an alien from the United States). In cases in which a single member believes that a remand or reversal of a removal order is clearly warranted by the record that the member has reviewed, that single member should be authorized to grant the remand or reversal. As in the case of summary affirmances, cases should be referred to panels, rather than summarily remanded or reversed, if another member might reasonably vote to affirm. However, sometimes a record will reveal a clear procedural or legal error, making referral to three members a waste of Board resources. Streamlining the Board's work is equally appropriate in such cases, and authorizing one-member summary reversals (with summary explanations) would avoid making the Board appear to be a one-way ratchet in favor of expelling aliens who contest decisions of Immigration Judges.

C. *The Board's plan appears to allow selective delegation of authority.*

The proposed rule would permit the Chairman to "determine who from among the Board members or the Chief Attorney Examiner is authorized" to affirm cases without opinion or to dismiss certain appeals summarily.[44] No standards are set forth for the Chairman's determinations, and no rotational order is established. While no one would think that the present Chairman would abuse this authority, nothing in the proposed rule would prevent a future Chairman from selectively delegating this power only to members who agreed with his or her outlook on certain issues. Federal appeals court panels were once constituted at the discretion of the Chief Judge of a circuit, but that practice has generally been abandoned in favor of a more neutral or random system.[45] Similarly, the Board should not have a practice that could be used to allow one member to grant more decision-making authority to some members than to others.

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43. This bias would reinforce rather than counteract the possible pro-respondent (usually government) bias, described above, that would result from not articulating reasons for decisions. Of course appeals by the Service after deportation orders were denied would also be subject to summary affirmance, but such situations are rare compared to appeals by aliens who are ordered removed or denied relief.

44. Board of Immigration Appeals: Streamlining, 63 Fed. Reg. at 49044.

45. *See* David Segal, *A Game of Judicial Roulette*, WASH. POST, Nov. 20, 1998, at D1 (quoting Marilyn Sargent, Chief Deputy Clerk of United States Court of Appeals for the D.C. Circuit, who reports that "we try to get [the assignment of appellate judges to cases] as random as possible.").

VII. THE MOST URGENTLY NEEDED "STREAMLINING"

The most urgently needed "streamlining" of the Board's process is not addressed by the proposed rule. Aliens who are detained pending appeal wait in jail for many months while the transcripts of their hearings are typed so that the Board can consider their cases. Even many aliens who are not detained must endure considerable hardship and uncertainty because appeals to the Board take so long.[46] A substantial portion of this delay has nothing to do with the Board's deliberative process or the time it takes for opinions to be written; it results from a long backlog in the process of typing transcripts of hearings, causing many months to be wasted before cases ever get to Board members.[47] Before reorganizing the Board's internal deliberative processes, EOIR should arrange for more typists or take whatever other actions are necessary to reduce to an absolute minimum the amount of time that some aliens must spend in detention, and other aliens must wait in limbo, before their appeals can be resolved.

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46. *See supra* text accompanying notes 18–19.

47. In the case of the author's recent appeal, *see supra* note 17, typing the transcript took six of the fourteen months during which the case was before the Board. This calculation disregards the additional month of appeal time during which the parties wrote their advocacy documents.