

HOLDING THE DUE PROCESS LINE FOR ASYLUM

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MONICA GOODLING: I interviewed candidates who were to be detailed into confidential policy-making positions and attorney general appointments, such as immigration judges and members of the Board of Immigration Appeal. . . .

In every case I tried to act in good faith and for the purpose of ensuring that the department was staffed by well-qualified individuals who were supportive of the attorney general's views, priorities and goals.

Nevertheless, I do acknowledge that I may have gone too far in asking political questions of applicants for career positions, and I may have taken inappropriate political considerations into account on some occasions. . . .

REPRESENTATIVE ROBERT C. SCOTT, D-Va.: Did you break the law? Was it against the law to take those political considerations into account? . . .

GOODLING: I crossed the line of the civil service rules.

SCOTT: Rules—laws. You crossed the law on civil service laws. You crossed the line on civil service laws, is that right?

GOODLING: I believe I crossed the lines.¹

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1. For Goodling's initial written remarks and full examination, see Rep. John Conyers Jr. Holds a Hearing on the U.S. Attorney Firings, House Judiciary Committee, May 23, 2007 (available from LEXIS, Congressional Quarterly file). For Goodling's initial written testimony, see Monica M. Goodling, Remarks Before the Committee on the Judiciary, United States House of Representatives (May 23, 2007), available at <http://judiciary.house.gov/media/pdfs/GoodlingII070523.pdf> (last visited Nov. 11, 2007).

I. INTRODUCTION

In the summer of 2007, as scandals surround the Department of Justice (“DOJ”), Monica Goodling’s testimony before Congress drew national attention to the systemic failings of the U.S. immigration courts.² The improper hiring practices described by the former Justice Department White House Liaison is only one dimension of the immigration courts’ failure. Personal behavior of immigration judges, administrative regulations, and statutory amendments to U.S. immigration laws each raise discrete concerns. Combined, they converge to deny procedural due process to aliens.

Nowhere is the convergence more acute than for asylum seekers who risk persecution and death if improperly removed from the United States.³ The failure to provide basic procedural due process is widely recognized. Judicial contempt is unmistakable: “the volume of case law addressing the issue of the intemperate, impatient, and abrasive immigration judges should sound a warning bell to the Department of Justice that something is amiss.”⁴ Indeed, former Attorney General

2. Ms. Goodling served as the White House Liaison under Alberto Gonzales from approximately April 2006 until her resignation in April 2007. She began with the U.S. Department of Justice in 2002, serving in a variety of other capacities, including Senior Counsel to the Attorney General. In addition to her involvement in political hirings, Ms. Goodling was also questioned about the 2006 firing of nine federal prosecutors. For her full testimony, see Rep. John Conyers Jr. Holds a Hearing on the U.S. Attorney Firings, *supra* note 1. For news coverage see, for example, Dan Eggen, *Justice Dept. Expands Probe to Include Hiring Practices*, WASH. POST, May 31, 2007, at A4; Dan Eggen & Paul Kane, *Goodling Says She ‘Crossed the Line’: Ex-Justice Aide Criticizes Gonzales While Admitting to Basing Hires on Politics*, WASH. POST, May 24, 2007, at A1; *Excerpts from Former Justice Dept. Aide’s Statement on Attorney Removals*, N.Y. TIMES, May 24, 2007, at A21; David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. TIMES, May 24, 2007, at A1.

3. For thorough texts on U.S. asylum law see, for example, DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* (3d ed. 1999); DAVID A. MARTIN, *ASYLUM CASE LAW SOURCEBOOK* (4th ed. 2003).

4. *Giday v. Gonzales*, 434 F.3d 543, 549-50 (7th Cir. 2006) (citing *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004)); *Hasanaj v. Ashcroft*, 385 F.3d 780, 783-84 (7th Cir. 2004); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003)). A week earlier, the Seventh Circuit’s dissatisfaction was also evident:

At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum cases by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court by the [DOJ]. . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example.

Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005). For other instances of courts condemning the current immigration system see *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005), which notes that the adjudication of immigration cases at the administrative level “has fallen below the minimum standards of legal justice”; *Cham v. Attorney Gen.*, 445 F.3d 683, 686 (3d Cir. 2006), finding that “once again, under the ‘bullying’ nature of the immigration judge’s questioning, a

Alberto Gonzales readily admits to the “intemperate” and “abusive” behavior of the immigration judges.⁵ Such recognition prompted Gonzales to initiate a comprehensive review of the immigration courts and their administrative appellate unit, the Board of Immigration Appeals (“BIA”).⁶ Upon completion of such review in August 2006, Gonzales announced twenty-two measures to improve these critical agencies within the Executive Office for Immigration Review (“EOIR”).⁷ Such directives include performance evaluations for sitting judges, competence exams for newly appointed immigration judges, a

petitioner was ground to bits”; *Wang v. Attorney Gen.*, 423 F.3d 260, 268 (3d Cir. 2005), noting that “[a] disturbing pattern of [immigration judge] misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns.”

5. In relevant part, former Attorney General Gonzales said:

I have watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice. While I remain convinced that most immigration judges ably and professionally discharge their difficult duties, I believe that there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.

To better assess the scope and nature of the problem, I have asked the Deputy Attorney General and the Associate Attorney General to develop a comprehensive review of the immigration courts. . . .

In the meantime, I urge you always to bear in mind the significance of your cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve.

Memorandum from U.S. Attorney Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006), available at <http://www.immigration.com/newsletter1/attgenimmjudge.pdf>. For significant quotation of such memorandum, see *Cham*, 445 F.3d at 686. For discussion of Gonzales’s resignation, see *infra* note 22 and accompanying text.

6. Such review was announced simultaneously with Gonzales’s acknowledgment of the intemperate and abusive immigration judges’ behavior. See Memorandum from U.S. Attorney Gen. Alberto Gonzales to Immigration Judges, *supra* note 5.

7. Press Release, U.S. Dep’t of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. The actual substance and findings of the review are not publicized. For recognition of such limitation and call for the results to be disclosed, see Letter from Am. Immigration Lawyers Ass’n to Kevin Chapman, Acting Gen. Counsel, Executive Office for Immigration Review (July 30, 2007), available at <http://www.aiala.org/Content/default.aspx?docid=23005>. While the immigration judges (within the Office of the Chief Immigration Judge) and the BIA receive the greatest attention, the EOIR is actually comprised of three units. Its lesser known third office, the Office of the Chief Administrative Hearing Officer (“OCAHO”), conducts hearings relating to unauthorized employment practices and discrimination. See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 248-55 (5th ed. 2003); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 4-6, 634-45 (4th ed. 2005); Executive Office for Immigration Review, Organizational Information and Breakdown, <http://www.usdoj.gov/eoir/orginfo.htm> (last visited Nov. 11, 2007).

standard disciplinary system for judicial misconduct, personnel increases, and other technology and support system improvements.⁸

Yet now, over one year since Gonzales's announcement, there is little sign of the implementation of such measures. Inappropriate, if not illegal, political affiliation questioning which crosses the line is routine in the selection of immigration judges and members of the BIA.⁹ On the heels of Goodling's testimony, both official and non-official investigations report that such political maneuvering is endemic.¹⁰

8. Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals, *supra* note 7; see also Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A14; Sandra Hernandez, *Report from AG Calls for Testing Judges: Bench, Bar Find Immigration-Court Fix Controversial*, L.A. DAILY J., Aug. 10, 2006, at 1; Richard B. Schmitt, *Immigration Judges Get New Regulations; Atty. Gen. Gonzales Plans to Hire More Jurists and Improve Their Performance After a Review of Alleged Abuses and Incompetence*, L.A. TIMES, Aug. 10, 2006, at A15.

Prior to the completion of the review, Chief Immigration Judge Michael Creppy stepped down. Such move was interpreted outside the DOJ to be a result of the investigation. Creppy was replaced on a temporary basis and then permanently with David L. Neal. For Creppy's departure and initial replacement, see Sandra Hernandez, *Top Federal Immigration Judge Leaves: Former L.A. Attorney Will Become His Replacement*, L.A. DAILY J., Apr. 7, 2006, at 1. For the permanent appointment of Neal as Chief Immigration Judge, see Press Release, U.S. Dep't of Justice, Executive Office for Immigration Review, Director of EOIR Appoints New Chief Immigration Judge (Mar. 21, 2007), available at <http://www.usdoj.gov/eoir/press/07/NealPressRelease.htm>.

9. During her time at the DOJ, Ms. Goodling testified that she conducted or participated in hundreds of job interviews. Rep. John Conyers Jr. Holds a Hearing on the U.S. Attorney Firings, *supra* note 1. While the "vast majority" of such interviews were for political appointee positions, Ms. Goodling was also involved in hirings for career positions, including immigration judges and members of the Board of Immigration Appeals. *Id.* Ms. Goodling testified that she recommended approximately seven individuals to serve as immigration judges and four to be members of the BIA and that in these cases she sometimes took "political considerations into account." *Id.* Goodling testified that she had been advised by DOJ's Office of Legal Counsel that such appointments were exempt from civil service rules prohibiting political questioning. However at the end of 2006, hiring of such individuals was "frozen" when the Civil Division of DOJ "expressed concerns" regarding the political screening of immigration judges and BIA members. *Id.* For Goodling's testimony and news coverage, see *supra* notes 1-2 and accompanying text.

10. Within days of Goodling's testimony, the DOJ confirmed that political hiring extended well before Goodling's tenure and announced its own internal investigation of the matter. Dan Eggen, *Officials Say Justice Dept. Based Hires on Politics Before Goodling Tenure*, WASH. POST, May 26, 2007, at A2; Eggen, *supra* note 2. Shortly thereafter, the *Washington Post* published the "first systematic examination" of the hiring process for immigration judges, revealing that at least one-third of the immigration judges appointed by the Justice Department since 2004 have strong Republican affiliations and that half lacked experience in immigration law. The *Post's* report was based upon its review of Justice Department, immigration court and other records. Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1; see also Richard B. Schmitt, *Immigration Judges Lack Apt Backgrounds*, L.A. TIMES, May 26, 2007, at A14. For earlier reports of the political nature of immigration judge hiring, see, for example, Jason McLure, *Borderline Calls*, LEGAL TIMES, June 19, 2006, at 1. For former Attorney

Mixed signals from the DOJ also raise doubts about the adequacy of administrative reform. Reacting to Gonzales's report in March 2007 that reform measures have been "fully implemented," Immigration Judge Denise Slavin, speaking as union president of the National Association of Immigration Judges charged, "we ha[ve] not seen any changes on the ground."¹¹

More recent efforts to allay concerns instead raise further concerns. In July 2007, the Gonzales was called before the Senate Judiciary Committee to respond to ongoing questions involving institutional and personal improprieties.¹² In his opening remarks on the state of the DOJ, Gonzales touted various EOIR reforms implemented since the review was completed.¹³ Gonzales informed the senators of the recent introduction of a formalized process "to make the hiring of immigration judges and Board members more routine, consistent, and transparent" by placing "the initial vetting, evaluation, and interviewing functions" within the EOIR.¹⁴ He also reminded the senators that a proposed code of judicial conduct for immigration judges and BIA members had just been published.¹⁵

General Gonzales's subsequent announced effort to stem political hiring, see *infra* note 14 and accompanying text.

11. Pamela A. Maclean, *Mixed Signals from the DOJ: Immigration Bench Reforms: Implemented or Not?*, NAT'L L.J., Apr. 16, 2007, at 4.

12. Most of the hearing was devoted to events surrounding the 2006 firing of nine U.S. attorneys and the 2004 perpetuation of the controversial Terrorist Surveillance Program. For Gonzales's initial written remarks and full examination, see Sen. Patrick J. Leahy Holds a Hearing on Oversight of the U.S. Department of Justice, July 24, 2007 (available on LEXIS at CQ Transcriptions file). For Gonzales's initial written testimony, see also Statement of Alberto R. Gonzales, Attorney General, Before the Committee on the Judiciary, United States Senate, Concerning Oversight of the Department of Justice (July 24, 2007), available at http://judiciary.senate.gov/testimony.cfm?id=2842&wit_id=3936. For news accounts, see David Johnston & Scott Shane, *Gonzales Denies Improper Pressure on Ashcroft on Spying*, N.Y. TIMES, July 25, 2007, at A10; Richard B. Schmitt, *Gonzales Loses Ground on the Hill: His Explanations Leave Senators Questioning His Candor and Honesty*, L.A. TIMES, July 25, 2007, at A1.

13. In addition to speaking on immigration enforcement and border security, Gonzales's written opening remarks also refer to the Justice Department's recent work addressing terrorism and national security, violent crime, protection of children, drug enforcement, identity theft, intellectual property enforcement, crisis response, and the politicization of hiring. Statement of Alberto R. Gonzales, *supra* note 12; see also Senator Patrick J. Leahy Holds A Hearing, *supra* note 12 (reproducing Gonzales's testimony before the Senate Judiciary Committee on July 24, 2007).

14. Statement of Alberto R. Gonzales, *supra* note 12. In addition to improved hiring practices, Gonzales also acknowledged such other developments as new EOIR training and supervision programs, improved transcription systems, procedures to report fraud and abuse before the EOIR, and less BIA reliance on summary one-line decisions. *Id.*

15. See *id.* The proposed code is available at Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510 (June 28, 2007). Comments on the proposed code were accepted until July 30, 2007. *Id.* Finalization of any proposed immigration regulations can be a

Yet even these direct attempts to address the intemperance and incompetence of EOIR are insufficient. Assuming “initial” hiring recommendations from EOIR may be unbiased, there is no assurance that such recommendations will be followed. The proposed code of conduct is also flawed in numerous respects.¹⁶ It contains no measures detailing how violations of the code can be reported or how violations will be handled.¹⁷ The code also sets a standard of conduct which is higher than the general standard of due process.

Due process is violated whenever an immigration judge’s failure to reflect the “appearance of impartiality”¹⁸ has “the potential for affecting the outcome.”¹⁹ By contrast, the proposed code only deems an immigration judge’s behavior to offend notions of due process when a reasonable person believes “the immigration judge’s ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence *is impaired*.”²⁰ The proposed code of conduct pushes the due process line well above its true place.²¹

significant hurdle itself. In perhaps the most egregious case, regulations on gender-based asylum originally proposed in December 2000 remain pending, now seven years later. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt 208). For general discussion and criticism of gender-based asylum law as well as the history of such pending gender regulations, see, for example, Angélica Cházaro & Jennifer Casey, *Getting Away with Murder: Guatemala’s Failure to Protect Women and Rodi Alvarado’s Quest for Safety*, 17 HASTINGS WOMEN’S L.J. 141 (2006); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119 (2007); see also E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993-2002*, 95 LAW LIBR. J. 191 (2003), which discusses developments in gender-based asylum law and provides a bibliography of law review articles published between 1993 and 2002 that address gender-based persecution as a ground for asylum in the U.S.

16. In commenting on the proposed code, the American Immigration Lawyers’ Association (“AILA”), detailed numerous concerns. Amongst such concerns, AILA remarked on the proposed code’s “cursory nature” and emphasized a need for “more accessible and useable guidance,” particularly in light of the current criticism of EOIR and the fact that half of the respondents before EOIR appear pro se. Letter from Am. Immigration Lawyers Ass’n to Kevin Chapman, Acting Gen. Counsel, Executive Office for Immigration Review, *supra* note 7, at 3. AILA also systematically reviewed the code’s proposed canons, providing comment and possible alternative language. See *id.*

17. I thank Lecturer in Residence Kate Jastram, University of California, Berkeley, School of Law, for pointing out such omission to me. E-mail from Kate Jastram, Lecturer in Residence, University of California, Berkeley, School of Law, to author (July 25, 2007) (on file with author). For the proposed code, see *supra* note 15 and accompanying text. For a discussion of existing sanctioning mechanisms, see *infra* notes 141-51 and accompanying text.

18. See, e.g., *Sukwanputra v. Gonzales*, 434 F.3d 627, 637-38 (3d Cir. 2006); see also *infra* note 65 and accompanying text.

19. See, e.g., *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987); see also *infra* note 70 and accompanying text.

20. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. at 35,511 (emphasis added). The full text reads:

Gonzales's resignation and replacement as Attorney General by Michael Mukasey in late 2007 creates a new opportunity for the DOJ to address its numerous failings concerning EOIR and otherwise.²² In the early days of the new administration, one might be optimistic that it will more effectively implement EOIR reform. Yet no matter how sincere the efforts of any administration, it is virtually impossible to fully entrust immigration reform to the executive branch.

Advocating greater independence for immigration judges and BIA members, Stephen Legomsky envisions bestowing upon immigration judges sufficient "decisional independence" so that concerns regarding job security do not dictate case decisions.²³ Legomsky's proposal for

An immigration judge who manifests bias or engages in unprofessional conduct in any manner during a proceeding may impair the fairness of the proceeding and may bring into question the impartiality of the immigration court system. An immigration judge must be alert to avoid behavior, to include inappropriate demeanor, that may be perceived as prejudicial. The test for appearance of impropriety is whether the conduct would create in the mind of a reasonable person with knowledge of the relevant facts the belief that the immigration judge's ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence is impaired.

Id. BIA members are held to an identical test. *Id.* at 35,512-13.

21. For discussion of the theoretical guarantees of procedural due process for asylum applicants, see *infra* notes 54-70 and accompanying text. In critiquing the proposed code's Canon IX on courteous, unbiased behavior, AILA calls for adding language which specifically prohibits manifesting bias or prejudice "based upon, among other factors, *perceived, alleged* or actual alienage, race, nationality, ethnicity, national origin, religion, gender, sexual orientation, age, disability, membership in a particular social group, socioeconomic status or custodial status." Letter from Am. Immigration Lawyers Ass'n to Kevin Chapman, Acting Gen. Counsel, Executive Office for Immigration Review, *supra* note 7, at 7 (emphasis added). Within the commentary to such code, AILA also encourages providing examples as to what constitutes unacceptable behavior. See *id.* For judicial recognition on the appearance of impartiality standard, see *infra* note 65 and accompanying text.

22. Gonzales announced his resignation on August 27, 2007, to be effective September 17, 2007. Dan Balz & Michael Abramowitz, *In the End, Realities Trumped Loyalty*, WASH. POST, Aug. 28, 2007, at A1; Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. TIMES, Aug. 28, 2007, at A1.

Mukasey was sworn in as Attorney General on November 14, 2007, after a vote of 53-40 by the Senate. This Article goes to press within weeks of Mukasey's confirmation. Nominations for other vacant senior posts within the Justice Department await Senate confirmation. Dan Eggen & Paul Kane, *Senate Confirms Mukasey by 53-40, Historically Low Tally for New Attorney General*, WASH. POST, Nov. 9, 2007, at A1; Philip Shenon, *Bush Announces 5 Nominees for Top Justice Posts*, N.Y. TIMES, Nov. 16, 2007, at A20; Philip Shenon, *Challenges Awaiting, Mukasey Takes Ceremonial Oath*, N.Y. TIMES, Nov. 15, 2007, at A26.

23. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 385-94 (2006). In so doing, Legomsky is quite forgiving of the increasingly unconstitutional, unacceptable behavior of immigration judges who he sees as unfortunate political victims. Legomsky reviews the disturbing record of largely unveiled threats made by former Attorney General John Ashcroft to the job security of any immigration judge whose record reflects asylum grant rates deemed unacceptable by the Bush administration. See *id.* at 374-79. For others who have echoed the need for greater independence of the immigration court, see, for example, U.S. COMM'N

reform stops short of calling for immigration courts to achieve the “institutional independence” of Article III courts.²⁴ Such prescription reflects the undeniable reality.²⁵ Our legal tradition and near intuition direct that national sovereignty requires immigration authority to rest with the political branches.²⁶ In short, politics will always threaten the credibility of our immigration courts.

ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 174-82 (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>, for an argument favoring a separate executive branch Agency which will house both the immigration judges and the BIA; Dana Marks Keener & Denise Noonan Slavin, *An Independent Immigration Court: An Idea Whose Time Has Come*, 7 BENDER'S IMMIGR. BULL. 236 (2002), for the same discussion; Stephen Reinhardt, *Judicial Independence and Asylum Law*, 8 BENDER'S IMMIGR. BULL. 18 (2003), for a recognition of the need for greater BIA and immigration judge independence, particularly in light of the limited judicial review available.

24. Legomsky, *supra* note 23, at 386-87.

25. *Id.* at 403 (explaining that concessions in certain cases may be needed to leave “the ultimate decision in the hands of politically accountable officials” due to national security and other public safety concerns).

26. While the “plenary power” to exclude and deport aliens is the subject of much analysis and criticism, the power, *per se*, is not generally disputed. For a sampling of the wealth of literature on the plenary power doctrine, see, for example, ALENIKOFF ET AL., *supra* note 7, at 145-237, for a review of the history, sources, theories and morality of immigration; Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1059-68 (1994), which recognizes differences in rights accorded aliens inside and outside of immigration law; Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000), for an argument that the notion of federal plenary power over immigration is undercut by persistent racial and gender biases existing throughout U.S. law; Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, for a discussion of the plenary power doctrine and its theoretical underpinnings; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 931-34 (1995), for an examination of the judicial development of exceptions to plenary power doctrine; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter Motomura, *Procedural Surrogates*], for a comparison of the substantive and procedural rights afforded aliens; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Constitutional Norms*], which argues a decline in the plenary power doctrine; Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996), for an argument that plenary power over immigration should be limited to matters of community formation; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995), for a discussion of the conflict between the plenary power doctrine and aliens' rights tradition.

For discussion of the foundational immigration cases which granted the federal authority to expel and deport aliens and set the procedural standards, see *infra* notes 34-45 and accompanying text (discussing cases of *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Yamataya v. Fisher*, 189 U.S. 86 (1903)).

Notwithstanding the very real political pressures felt by immigration judges in their hiring, rendering of decisions, and firing, the wide disparities in asylum grant rates nationwide indicate that any given administration's agenda is not the singular, driving force behind asylum decisions.²⁷ The intemperance and incompetence problems of the immigration administrative bodies are not a recent phenomenon but problems of a much more long-standing nature.²⁸

The insufficiency, inadequacy, and at times, impropriety, of administrative measures leaves the judiciary as the last refuge for ensuring procedural protection is provided to individuals in our immigration courts. While this may seem a natural recourse, the circuits' response has been disappointing. Despite lamenting both the poor quality of these administrative adjudications and the longstanding nature of the problem, a typical refrain remains: the "power of correction" lays within the executive branch.²⁹

The courts' call for administrative reform may be, at least in part, a desperate last plea in reaction to their own dwindling rights of review.³⁰

27. In 2006 and 2007, two independent studies extensively documented the wide disparities that exist in asylum decisions. Approval rates by immigration judges in asylum cases over the course of several years were collected and compared in various manners so as to evidence large differences in the approval rates of immigration jurisdictions and individual immigration judges (even within a particular jurisdiction). Factors such as an asylum applicant's nationality or an immigration judge's gender or professional background are also shown linked to such differences. The 2006 report was completed by the Transactional Records Access Clearinghouse of Syracuse University ("TRAC"). TRAC IMMIGRATION REPORT, IMMIGRATION JUDGES, <http://trac.syr.edu/immigration/reports/160/> (last visited Nov. 11, 2007). The 2007 report was completed by three immigration professors. Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=983946>. See also Julia Preston, *Wide Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1, which reports on the 2007 study, and Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15, which reports on the 2006 study.

On the range of political pressures felt by immigration judges and the BIA, see Legomsky, *supra* note 23, at 372-79. For discussion of other pressures felt, particularly by the BIA due to increases in workload, see *infra* notes 103-05 and accompanying text.

28. "Whether [the inadequate administrative adjudication] is due to resource constraints or to other circumstances beyond the Board's and the Immigration Court's control, we do not know, though we note that the problem is not of recent origin." *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (relying on *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)).

29. *Id.* (calling upon "the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and the Board of Immigration Appeals"). For additional court criticisms and call for administrative reform, see *supra* note 4 and accompanying text.

30. Recognizing that an immigration judge's "requirement of neutrality is 'especially important where . . . the determination of the trier of fact are [sic] subject to particularly narrow appellate scrutiny.'" *Sukwanputra v. Gonzales*, 434 F.3d 627, 637 (3d Cir. 2006) (quoting *Abdulrahman v. Ashcroft*, 330 F.3d 587, 599 (3d Cir. 2003)). For discussion of other reasons behind

With the passage of the Real ID Act of 2005, Congress has again restricted judicial review, this time by statutorily endorsing an immigration judge's adverse credibility determination, even when only based upon minor inconsistencies which do not go "to the heart of the applicant's claim."³¹

As Justice Marshall reminded the Court, although "plenary power" is vested in the political branches to regulate the admission and expulsion of aliens, the judiciary is not "toothless."³² The judiciary has both the ability and the responsibility to ensure that the basic principles of due process are observed. Instead, the circuits today are avoiding legitimate due process challenges brought by asylum seekers. In so doing, circuits are failing to create reliable precedent for immigration courts in dire need of direction. Critically, such judicial avoidance also risks creating misleading precedent, setting the due process line higher than the Constitution dictates. As statutory review is further constricted, the normalization of such improper constitutional standards will translate into a complete denial of judicial review for aliens abused by the administrative process. The circuits must hold the line and restore due process in our immigration courts.

This Article takes up this judicial call by first providing the historical backdrop of the federal political branches' "plenary power" over substantive immigration matters and the judicial custody of procedural rights in Part II. In Part III, the dichotomy created between the process theoretically recognized and practically afforded by the circuits to asylum seekers is explored. Recognizing the many costs associated with the failure to provide due process in Part IV, Part V argues the circuits may ensure due process is upheld and, in turn, respected by the immigration courts by routinely protecting such right in conjunction with various paralegal tactics.

the judicial reluctance to become involved in perceived administrative immigration matters, see *infra* notes 97-98 and accompanying text.

31. Real ID Act of 2005, Pub. L. No. 109-13, Div. B, §§ 101(a), (b), 119 Stat. 231, 302-03 (May 11, 2005) (codified at INA § 208(b)(1)(B)(iii), 8 U.S.C.A. § 1158(b)(1)(B)(iii)). For further discussion of the Real ID Act's effort to strip judicial review and the history of such legislative efforts, see *infra* notes 110-28 and accompanying text.

32. *Fiallo v. Bell*, 430 U.S. 787, 805 (1977) (Marshall, J., dissenting) (critiquing the Court's failure to exercise even its "limited judicial responsibility" overseeing immigration matters). For further discussion of the plenary power doctrine, see *supra* note 26 and accompanying text.

II. THE DUE PROCESS STANDARD

A. *The Plenary Power Parallel*

While the “plenary power” is a longstanding, albeit much criticized tradition, there is also a strong tradition of recognizing procedural due process rights for aliens physically in the U.S. who are subject to immigration proceedings.³³ In fact, the procedural guarantees for aliens developed concomitantly with the plenary power doctrine. Unfortunately, while such procedural constants provide wide theoretical breadth, the practical coverage is consistently narrow.

At the turn of the twentieth century, the Supreme Court authorized the federal plenary power over the admission and expulsion of aliens through two well known cases. When Chae Chan Ping was denied entry (that is, admission) to the United States as a result of an amendment to the Chinese Exclusion Act, the Supreme Court in 1889 endorsed such legislation despite Chae Chan Ping’s twelve years of lawful U.S. residency and the amendment voiding the re-entry authorization Chae Chan Ping had secured prior to his departure.³⁴ The Supreme Court easily rationalized that as Congress has the right to protect the country from invading armies, it surely has an inherent right to protect the country from “vast hordes of . . . people crowding in upon us.”³⁵ Four years later, the petitioners in *Fong Yue Ting* met a similar fate when they challenged their deportation (that is, expulsion).³⁶ Deportation was a result of another amendment to the Chinese Exclusion Act which allowed Chinese residents to be deported if they could not obtain proof of residency through proper certification or the testimony of “one credible white witness.”³⁷ Consistently, the Court found the right to deport aliens, like the right to exclude them, is “an inherent and

33. For a variety of discussions on the plenary power doctrine, see *supra* note 26 and accompanying text.

34. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

35. *Id.* at 606. For discussions of *Chae Chan Ping*, see, for example, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 863 (1989) (considering the Supreme Court’s analogy between armies and aliens in *Chae Chan Ping*); Taylor, *supra* note 26, at 1128-29 (examining Supreme Court’s rationale in *Chae Chan Ping*).

36. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

37. *Id.* at 727.

inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”³⁸

B. *The Procedural Foundation*

Despite ceding the political branches such sweeping substantive immigration powers, the Court quickly acknowledged that individual procedural rights were, at least in theory, to be more closely guarded by the judiciary.³⁹ In 1903, *Yamataya v. Fisher* set the standard.⁴⁰ Subject to an investigation instituted four days after her entry to determine whether she was illegally in the country, Mrs. Yamataya challenged the statutory basis for the investigation, arguing that the statute failed to provide her notice of the charges and the opportunity to be heard.⁴¹ Breathing constitutional life into the statute, the Court decreed that while it is “settled” that the power to exclude or expel aliens belongs to the political branches, procedural due process is still guaranteed.⁴²

[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard⁴³

38. *Id.* at 711. For discussions of *Fong Yue Ting*, see, for example, Aleinikoff, *supra* note 35, at 863 (observing *Fong*’s bold language); Taylor, *supra* note 26, at 1128-29 (recognizing *Fong*’s extension of plenary power to deportation).

39. Hiroshi Motomura offers valid reasons for the Court’s effort to create a “procedural due process exception” to the plenary power doctrine. Unlike judicial involvement in “substantive” immigration matters, court protection of “process” may be viewed as less threatening by the political branches. Failure to afford such safeguards may even be seen as an abdication of judicial duties. Motomura, *Procedural Surrogates*, *supra* note 26, at 1646. However, Motomura also notes the judicial “reluctance to give real content to procedural due process.” *Id.* at 1650. He then argues that the combinations of such substantive and procedural limitations on the judicial role in immigration have given rise to “procedural surrogates,” a means by which the judiciary stretches procedural rights to address extreme substantive problems which may arise when immigration law and policy implicate such matters as gender or detention. *Id.* at 1656-79. T. Alexander Aleinikoff makes similar observations regarding the Court’s close scrutiny of procedural rights in deportation cases. T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”*: A Response to David Martin, 44 U. PITT. L. REV. 237, 238 (1983).

40. *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86 (1903).

41. *Yamataya* was charged as being inadmissible upon entry for she was believed to be a pauper who was likely to become a public charge. *Id.* at 87.

42. *Id.* at 100.

43. *Id.* at 100-01.

While *Yamataya*'s due process guarantee was a theoretical victory, particularly in the face of the substantive severity of *Chae Chan Ping* and *Fong Yue Ting*, Mrs. Yamataya enjoyed no practical relief. Mrs. Yamataya pled that she did not receive a formal notice of the basis for the investigation, that she did not understand the English language in which the administrative proceeding was conducted, that she did not understand the nature and import of the questions asked, that the investigation was a "pretended" one, and ultimately, that she did not know the investigation was in reference to her deportation.⁴⁴ Nevertheless, the Court was satisfied. "These considerations cannot justify the intervention of the courts."⁴⁵

44. *Id.* at 101-02.

45. *Id.* at 102. As to the lack of formal notice, the Court was satisfied that Yamataya had actual notice given that she was before the officer charged with the investigation. The Court further believed that despite remaining complaints also raising due process issues, they should have been raised at the administrative level through an appeal to the Secretary of the Treasury. *Id.*

As *Yamataya* reflects, immigration matters at one time were within the authority of the Secretary of the Treasury. In 1940, the DOJ finally gained control of all immigration duties after such duties were first transferred from the Department of the Treasury to the Department of Labor and Commerce in 1903 and then to the Department of Labor in 1913 after Labor and Commerce split.

A more recent organizational split, produced by the Homeland Security Act of 2002, allowed the immigration courts to remain within the DOJ. Prosecutorial and enforcement duties, formerly belonging to the Immigration and Naturalization Service ("INS") within DOJ, were then transferred into the newly created Department of Homeland Security ("DHS").

In many other respects the administrative investigation and process which *Yamataya* was subject to also bears little resemblance to the current structure and level of process available in immigration proceedings. At the time of *Yamataya*'s investigation, the investigation officer assumed prosecutorial and adjudicative duties. While such individuals were later to be referred to as "special inquiry officers," the dual role was largely retained until 1952. At such time, the passage of the Immigration and Nationality Act of 1952 gave the Attorney General the authorization to separate the prosecutorial and adjudicative duties within the INS. "Special Inquiry Officers" could now assume a more impartial role and in 1973 were officially given the title of "immigration judge" as well as the right to wear black robes. This potential for impartiality increased in 1983 when EOIR was created, thereby setting the special inquiry officers outside of the INS. With the 2003 creation of DHS, another vestige of partiality was removed when the Attorney General's dual authority over INS and EOIR was split, leaving the Attorney General only in control of EOIR. For further discussion of such historical developments, see ALENIKOFF ET AL., *supra* note 7, at 240-59, which provides a brief overview of the entire history and organizational structure of immigration departments within the executive branch; Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 661-91 (2006), for a detailed history of the immigration courts from 1907 to present; Keener & Slavin, *supra* note 23, for a discussion of the details of current immigration court structure; LEGOMSKY, *supra* note 7, at 2-9, which details the organizational developments of the immigration departments resulting from the Homeland Security Act of 2002. For further discussion of the current structure of EOIR, see *supra* note 7 and accompanying text.

C. *The Contemporary Position*

Since such early developments, procedural rights for aliens in immigration proceedings have continued to receive such dichotomous treatment, the practical protection short shrifted against the theoretical declaration. At times, theory has also suffered. In 1950, the Supreme Court, in *United States ex rel. Knauff v. Shaughnessy*, upheld the power of the U.S. Attorney General to exclude a first-time entrant without a hearing, despite the woman's marriage to a United States citizen.⁴⁶ Three years later, the Court "accomplished the improbable feat of rendering the *Knauff* outcome more severe," by extending its holding to returning residents.⁴⁷ Affirming *Knauff*, *Shaughnessy v. United States ex rel. Mezei* boldly restated: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁴⁸

Such procedural setbacks were relatively short-lived. In 1982, *Landon v. Plasencia* modified *Mezei*, finding that a returning lawful permanent resident is generally entitled to the same due process protections as a resident who never left.⁴⁹ *Plasencia* understands the "weighty" liberty interest of a returning resident and embraces the traditional due process calculus set out in *Mathews v. Eldridge*.⁵⁰

46. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). The Attorney General's unreviewable power to exclude Ellen Knauff was based solely upon the Attorney General's statement that her admission to the United States "would be prejudicial to the interests of the United States." *Id.* at 539-40, 543. Knauff was held at Ellis Island and initially paroled after a public outcry of support. Ultimately, the Board of Immigration Appeals reversed an earlier decision by the Board of Special Inquiry which had found her excludable as a threat to national security. The BIA found that such determination had been based upon uncorroborated evidence and could not be sustained. As a result, Knauff was finally legally admitted as a resident. For an autobiographical account of Knauff's story and a copy of the BIA opinion, see ELLEN RAPHAEL KNAUFF, *THE ELLEN KNAUFF STORY* (1952) (BIA opinion reprinted as appendix). For other detailed discussions of Knauff's case, see, for example, Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955-64 (1995).

47. ALEINIKOFF ET AL., *supra* note 7, at 453.

48. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). Mezei was the husband of a U.S. citizen who had been lawfully residing in the United States for twenty-five years. After a nineteen month absence to visit his dying mother in Romania, Mezei was denied re-entry, being found by the Attorney General to be a threat to national security who could be "detained indefinitely, perhaps for life, for a cause known only to the Attorney General." *Id.* at 220 (Jackson, J., dissenting). Like Knauff, Mezei was ultimately afforded a hearing after the Supreme Court upheld his exclusion. However, because Mezei's exclusion was upheld, Mezei never secured legal admission but was paroled after four years at Ellis Island. Weisselberg, *supra* note 46, at 964-84.

49. *Landon v. Plasencia*, 459 U.S. 21, 33-34 (1982).

50. As *Plasencia* sets out:

Today, procedural due process rights continue to be acknowledged for aliens subject to deportation.⁵¹ The Court has also recently confirmed that procedural due process rights extend to all aliens on U.S. soil, “whether their presence here is lawful, unlawful, temporary, or permanent.”⁵² The Supreme Court’s clear recognition of procedural due process rights for all aliens is a particularly important development for aliens who are not legally admitted or paroled but are nevertheless on U.S. soil and are now considered inadmissible.⁵³

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

Plasencia, 459 U.S. at 34 (relying on *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

51. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”).

52. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.

Id. (citations omitted). Writing in favor of an independent immigration court, two immigration judges also recognize the due process guarantees of all aliens within the United States. Keener & Slavin, *supra* note 23.

Despite statutory changes in 1996 resulting in “illegal entrants” being considered inadmissible rather than deportable, *Zadvydas* maintains the *Mezei* Court’s earlier dicta that “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Mezei*, 345 U.S. at 212. Previous cases deftly sidestep the question of whether an illegal alien could invoke the due process clause. *See, e.g., Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (“Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely . . .”). For discussion of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), see *infra* note 53.

53. An alien may be in the United States without legal admission as a result of being paroled or a surreptitious (that is, illegal) entry. Prior to 1996, aliens who entered illegally were considered deportable and thus procedurally protected by the rights afforded individuals in deportation proceedings. However, in 1996, significant amendments to the Immigration and Nationality Act (“INA”) statutorily transformed aliens who enter the United States illegally from being deportable to now being inadmissible. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of the Immigration and Naturalization Act, 8 U.S.C.). As a result of IIRIRA, aliens who formerly were deportable for having “entered without inspection,” are now characterized as inadmissible because they have not been “admitted.” Such changes also involved replacing the previous term of “entry” with “admission.” *See* INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (2000). The previous ground of deportability for “entry without admission” was struck and replaced with a new ground of inadmissibility for individuals who are “present without admission or parole.” INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) (2000); *cf.* INA § 241(a)(1)(B), 8 U.S.C. § 1251(a)(1)(B) (1994) (former deportation ground of entry without inspection). For discussion of such critical changes for aliens

III. THE THEORETICAL AND PRACTICAL DUE PROCESS DICHOTOMY

A. *The Theoretical Right*

In theory, the procedural guarantees promised aliens subject to removal are significant.⁵⁴ The “Fifth Amendment entitles aliens to the ‘opportunity to be heard at a meaningful time and in a meaningful manner.’”⁵⁵ Such “opportunity” requires assessing whether “given the totality of the circumstances, the petitioner had a full and fair opportunity to put on her case.”⁵⁶

For the asylum applicant, procedural due process challenges repeatedly arise in two contexts. One context involves the pro-activeness of the immigration judge. Unlike Article III judges, an immigration judge has an obligation to establish the record in addition to serving as fact-finder and adjudicator.⁵⁷ Such role makes it within an immigration

present in the United States without legal admission, see David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 64-66.

Through IIRIRA, Congress also combined “deportation” and “exclusion” proceedings into a single “removal” proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 304(a), 110 Stat. 3009, 3009-587 to 3009-597 (adding INA § 239, 8 U.S.C. § 1229(a) (2000)). Such simplification also encourages consistent procedural rights for aliens subject to removal.

As a general matter, IIRIRA increased the nonreviewability of federal immigration actions and broadened the grounds for removing aliens. In 1996, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) of 1996 also had critical measures directed at aliens, particularly those charged as criminals and/or suspected terrorists. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401-443, 110 Stat. 1214, 1258-81. For further discussions of the significance of these two major pieces of immigration legislation passed in 1996, see, for example, Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERPRETER RELEASES 245 (1997); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997); Daniel Kanstrom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997); Juan P. Osuna, *The 1996 Immigration Act: Criminal Aliens and Terrorists*, 73 INTERPRETER RELEASES 1713 (1996).

54. For discussion of the relatively new nomenclature of “removal” and its current application to all aliens, whether they are inadmissible or deportable, see *supra* note 53.

55. *Sukwanputra v. Gonzales*, 434 F.3d 627, 632 (3d Cir. 2006) (citing *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003) and quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); see also *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (no constitutional right to asylum but a right to a full and fair hearing); *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (same).

56. *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005); see also *Giday v. Gonzales*, 434 F.3d 543, 548 (7th Cir. 2006).

57. See, e.g., *Giday*, 434 F.3d at 549.

judge's "province to evaluate evasiveness."⁵⁸ The circuits admit this recognition has, at times, "given impatient and inappropriate judges a pass."⁵⁹ Nevertheless, deference to an immigration judge's behavior must end when it becomes so aggressive that it amounts to "wholesale nitpicking"⁶⁰ or "overly-active" questioning which distorts rather than develops the record.⁶¹ The second variety of due process challenges arise when an immigration judge bars relevant testimony or evidence from being introduced.⁶²

58. *Giday*, 434 F.3d at 549 (citing *Korniejew v. Ashcroft*, 371 F.3d 377, 386 (7th Cir. 2004); see also *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004) (citing 8 U.S.C. § 1229a(b)(1) (2000)); *Hasanaj v. Ashcroft*, 385 F.3d 780, 783 (7th Cir. 2004).

59. *Giday*, 434 F.3d at 549.

60. "Beyond the belligerence, there was wholesale nitpicking of [respondent's] testimony with an eye towards finding inconsistencies and contradictions that Judge Ferlise undoubtedly believed would nail the lid shut on [respondent's] case. And nitpicking it was." *Cham v. Attorney Gen.*, 445 F.3d 683, 691 (3d Cir. 2006) (footnote omitted). Examples of Immigration Judge Ferlise's nitpicking included making much of a one-month discrepancy in the testimony of the respondent regarding a coup which occurred in his country when he was fifteen, nine years prior to his testimony and a one-year discrepancy in the respondent's birthdate, despite recognizing that translation problems existed. *Id.* at 691-92.

61. *Giday*, 434 F.3d at 548-50 (recognizing a "close call" on due process challenge which the court avoided by remanding instead on credibility when the immigration judge asked almost as many questions as asylum applicant's attorney and "charged into the fray, cross-examining Giday about even the most mundane facts of her life story"). For other examples of an immigration judge assuming an overly-active role, see *Rodriguez Galicia*, 422 F.3d at 538-39 (7th Cir. 2005) (recognizing "overly active role" of the immigration judge who "frequently interrupted . . . testimony," appeared to be hostile to the petitioner, and engaged in active, "de-facto cross examination" as though he were counsel for the government rather than a neutral arbiter, but instead relying upon judge's barring of chunks of testimony to find due process rights violated); *Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003) (finding that an applicant's due process rights were violated when the judge continually interrupted testimony and took over questioning); *Podio v. INS*, 153 F.3d 506, 510-11 (7th Cir. 1998) (no fair hearing where immigration judge frequently interrupted and took over questioning).

62. *Rodriguez Galicia*, 422 F.3d at 539 (barring testimony by imposing a "strict time limit" on the respondent which prevented her from presenting the expert testimony of two witnesses); see also *Bella v. Gonzales*, 157 F. App'x 522, 525 & n.2 (3d Cir. 2005) (overturning "selective[] use[]" of alien's testimony as means of reaching adverse credibility determination and *sua sponte* noting due process concerns); *Matter of R-A-*, (Immigration Judge "inhibited [pro se respondent's] presentation of his evidence . . . [creating] unintentional gaps in the evidence") (BIA, June 29, 2007, unpublished), available at www.bibdailly.com/pdfs/biau%206-29-07%20R-A-.pdf; *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) (failure to consider evidence "is an affront to [petitioner's] right to be heard"); *Shah v. Attorney Gen.*, 446 F.3d 429, 437 (3d Cir. 2006) (rejecting immigration judge's conclusions reached by "selectively consider[ing] evidence").

Despite such constitutional recognition of the right to introduce testimony and evidence, due process allows Congress to impose reasonable filing limitations. Consequently, the statutory requirement that most asylum applications must be filed within one year of the potential applicant's arrival in the United States has been upheld as reasonable. *Sukwanputra v. Gonzales*, 434 F.3d 627, 632 (3d Cir. 2006) (upholding INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2) (2000)).

In either context, due process always demands a “neutral and impartial arbiter[]”⁶³ who can “assiduously refrain from becoming [an] advocate[].”⁶⁴ Meeting this standard does not require establishing that an immigration judge was “actually biased” but rather showing her failure to reflect the “appearance of impartiality.”⁶⁵ While in some instances the lack of impartiality is distinguished from the opportunity to be heard⁶⁶ other courts view impartiality as an implicit component of the opportunity to be heard.⁶⁷ Regardless of such syntactical parsing, the demand for impartiality is clear. “[A]n immigration judge, like any judge, must display the ‘patience and decorum befitting a person privileged with this position.’”⁶⁸

To further underscore the importance of these procedural safeguards, due process challenges are accorded de novo review.⁶⁹

Similarly, due process challenges to the recent streamlining of the BIA membership and process of review have been struck down. *See, e.g.,* Capital Area Immigrants’ Rights Coal. v. U.S. Dep’t of Justice, 264 F. Supp. 2d 14, 39 (D.D.C. 2003); *Dia v. Ashcroft*, 353 F.3d 228, 243 (3d Cir. 2003) (en banc) (“unmoved” by the argument that streamlining violates due process notions of “fairness”); *Georgis v. Ashcroft*, 328 F.3d 962, 966-67 (7th Cir. 2003) (streamlining upheld against due process claim); *see also* Recent Cases, *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596, 2601 & n.42 (2006). For further discussion of the BIA streamlining, see *infra* notes 103-05 and accompanying text.

63. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003) (quoting *Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999)).

64. *Sukwanputra*, 434 F.3d at 637 (quoting *Abdulrahman*, 330 F.3d at 596).

65. *Id.* at 638; *see also* *Wang v. Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“[T]he ‘mere appearance of bias’ on [immigration judge’s] part ‘could still diminish the stature’ of the judicial process she represents.”) (quoting in part *Clemmons v. Wolfe*, 377 F.3d 322, 327 (3d Cir. 2004)).

66. *See, e.g., Abdulrahman*, 330 F.3d at 596 (defining a “full and fair hearing” as allowing an asylum applicant “a reasonable opportunity to present evidence” before a “neutral and impartial arbiter[]”); *see also* *Cham v. Attorney Gen.*, 445 F.3d 683, 691 (3d Cir. 2006) (due process would have provided the asylum applicant with a “neutral and impartial arbiter[]’ of the merits of his claim and ‘a reasonable opportunity to present evidence on [his] behalf’”).

67. *See, e.g., Wang*, 423 F.3d at 269 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)) (“[N]o person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”).

68. *Giday v. Gonzales*, 434 F.3d 543, 550 (7th Cir. 2006) (quoting *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004)). For other unequivocal demands for impartiality, see also *Sukwanputra*, 434 F.3d at 637 (3d Cir. 2006) (requiring that an immigration judge “assiduously refrain from becoming [an] advocate[]” (quoting *Abdulrahman*, 330 F.3d at 596)); *Iliev v. INS*, 127 F.3d 638, 643 (7th Cir. 1997) (“It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect. . . . [A] particularly severe wound is inflicted on that principle when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness.”). On former Attorney General Gonzales’s similar remarks, see *supra* note 5 and accompanying text.

69. *Cham*, 445 F.3d at 691 n.6; *see also* *Giday*, 434 F.3d at 547 (“The question of whether an asylum hearing comported with the requirements of due process is purely a legal one which we

Moreover, a successful challenge to the process does not require the asylum applicant to clearly establish that any negative determination in his case resulted from the lack of process. Instead, in a majority of jurisdictions, the applicant need only show “that the violation of a procedural protection . . . had the *potential* for affecting the outcome of [the] deportation proceedings.”⁷⁰

B. The Practical Denial

1. Intemperance vs. Incompetence—Caveats and Distinctions

As former Attorney General Gonzales acknowledges and at least one circuit corroborates, “[M]ost immigration judges ably and professionally discharge their difficult duties.”⁷¹ However, the intemperance which immigration judges display toward asylum seekers is at an unacceptable level. Such intemperance is compounded by the somewhat distinct problem of incompetence.

Quite simply, immigration judges oftentimes do not understand the law.⁷² Opinions are so devoid of reason as to be “literally

review *de novo*.”); *Abdulrahman*, 330 F.3d at 595-96 (giving *de novo* review to due process challenge).

70. *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987); *Cham*, 445 F.3d at 694 (requiring only showing that due process violation had “*potential* for affecting the outcome”); *Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002) (due process violation requires showing that “better procedures are likely to have made a difference in the outcome of [the] hearing”); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (rejecting a showing of actual “prejudice” when immigration agency action implicates fundamental rights derived from the Constitution or federal statutes); *United States v. Cerda-Pena*, 799 F.2d 1374, 1379 (9th Cir. 1986) (due process violation shows alien “prejudiced in a manner so as potentially to affect the outcome of the proceedings”).

Counter to this “potential” for affecting the outcome standard, there are other circuits which require a greater showing of connection between the due process violation and the outcome. *See, e.g., Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir. 1987) (due process violation requires alien showing of substantial prejudice). The proposed EOIR code of conduct seems to adhere to this higher standard given the commentary’s instruction that due process is only violated upon showing that a reasonable person would believe the immigration judge “is impaired.” Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,511 (June 28, 2007). For further discussion of the proposed rules, see also *supra* notes 16-17 and accompanying text.

71. *Cham*, 445 F.3d at 686 (3d Cir. 2006) (quoting Attorney General Gonzales Memorandum, *supra* note 5).

72. The BIA’s competence has likewise come under harsh attack. *See, e.g., Forteau v. Attorney Gen.*, No. 07-2326, 2007 U.S. App. LEXIS 17281, at *6 (3d Cir. July 20, 2007) (unpublished) (“The BIA simply ignored [the immigration judge’s factual] findings and replaced them with its own version of the facts.”); *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (“In the cases we’ve cited—as in this case—the Board has failed to explain how their rejection of the claimed social group squared with the test the Board had adopted in *Acosta*.”); *Benslimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005) (Board’s action “appears to have been completely

incomprehensible.”⁷³ Credibility findings are repeatedly found baseless; a product of “factual error, bootless speculation, and errors of logic.”⁷⁴

arbitrary”); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (“[T]he Board was not aware of the most basic facts . . .”).

For Gonzales’s efforts to improve the legal training of immigration judges and Board members, and criticism of such efforts, see *supra* notes 7-11 and accompanying text.

73. *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005). For other examples of poorly reasoned opinions, see *Banks v. Gonzales*, 453 F.3d 449, 452-53 (7th Cir. 2006) (finding immigration judge’s treatment of the evidence as “hard to fathom” and reminding the court that the correct legal standard for asylum “must be followed whether or not an alien draws it to the agency’s attention”); *Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006) (“Like all asylum applicants, [respondent] is entitled to a well-reasoned, documented, and complete analysis that engages the evidence The [immigration judge’s] decision falls far short of this standard, and we hold that his conclusions are not supported by substantial evidence in the record.”); *Cao He Lin v. U.S. Dep’t of Justice*, 428 F.3d 391, 406 (2d Cir. 2005) (“[T]he [immigration judge] relied on speculation, failed to consider all of the significant evidence, and appeared to place undue reliance on the fact that [respondent’s] documents were not authenticated”); *Jin Chen v. U.S. Dep’t of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge’s finding is “grounded solely on speculation and conjecture”); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (“The [immigration judge’s] opinion is riddled with inappropriate and extraneous comments”); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005) (the immigration judge’s unexplained conclusion is “hard to take seriously”); *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) (“[I]mmigration judge’s opinion cannot be regarded as reasoned”); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (“[I]t is the [immigration judge’s] conclusion, not [the petitioner’s] testimony, that ‘strains credulity.’”); *Elzour v. Ashcroft*, 378 F.3d 1143, 1154 (10th Cir. 2004) (“[T]he [immigration judge’s] reasoning fell short of his obligation to ‘provide a foundation’”); *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) (“There is a gaping hole in the reasoning of the board and the immigration judge.”); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002) (“At least on the record it does not appear that the [immigration judge’s] conclusions are supported.”). For further discussions of the problems besetting immigration judges and BIA members, see Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11-37 (2006); Legomsky, *supra* note 23, at 372-79. For recent efforts to address both the intemperance and the incompetence, see *supra* notes 5-11 and accompanying text.

74. *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006) (“The immigration judge . . . doubted the applicant’s credibility on grounds that, because of factual error, bootless speculation, and errors of logic, lack a rational basis.”). For other examples of irrational credibility determinations, see *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) (“An [immigration judge] must analyze inconsistencies against the backdrop of the whole record No such examination occurred here”); *Cao He Lin*, 428 F.3d at 404 (“[T]he [immigration judge’s] principal reasons for generally discounting [petitioner’s] credibility are seriously flawed.”); *Tabaku v. Gonzales*, 425 F.3d 417, 423 (7th Cir. 2005) (“[W]e will not uphold an [immigration judge’s] speculative alternative if it has no basis in the record.”); *Hor v. Gonzales*, 421 F.3d 497, 500 (7th Cir. 2005), (noting where the immigration judge’s credibility assessment was based on “unsubstantiated conjectures”); *Lin v. Ashcroft*, 385 F.3d 748, 755-56 (7th Cir. 2004) (“The [immigration judge’s] skepticism—utterly unsupported by any facts in the record—with respect to [one] detail of her story does not form a valid basis for a negative credibility determination, in the face of the other corroborating information”); *Elzour*, 378 F.3d at 1153 (“[The immigration judge] failed to substantiate his skepticism with any record support.”); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (en banc) (“[The immigration judge’s] opinion consists not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that [the immigration judge] was looking for ways to find fault with [petitioner’s]

At times, the incompetence of immigration judges is attributed to the undeniably overwhelming workload they face.⁷⁵ Fortunately, such explanation provides little defense in the circuits. Immigration judges are not “excused from having to deliver reasoned judgments because they are too busy to think.”⁷⁶ And notwithstanding an immigration judge’s unique duty to establish the record while serving as fact-finder and adjudicator,⁷⁷ she may neither serve as an expert on country conditions⁷⁸ nor rely upon other unreliable sources such as “[j]unk science” [which] has no more place in administrative proceedings than in judicial ones.”⁷⁹

testimony.”); *Gao v. Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002) (“The [immigration judge’s] rested his decision on a credibility determination that is not supported by substantial evidence in the record.”).

75. In fiscal year 2006, approximately 215 judges decided 365,851 cases (more than six per day). Two hundred fifty two languages were spoken by the aliens, with 12% speaking English and 70% speaking Spanish. Nearly two-thirds of the applicants lacked counsel. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2006 STATISTICAL YEARBOOK B2, F1, G1 (2007), available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> [hereinafter FY 2006 STATISTICAL YEARBOOK].

The reported approximation of 215 immigration judges is based on numerous sources. See, e.g., Bernstein, *supra* note 8 (reporting 215 immigration judges); MacLean, *supra* note 11 (reporting 215), McLure, *supra* note 10 (reporting “200-odd judges”); Schmitt, *supra* note 8 (reporting 224 immigration judges).

For a similar summary of 2005 statistics, see Recent Cases, *supra* note 62, at 2599 (quoting statistics from EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK A1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>). For other recognition of the overwhelming workload of the immigration courts, see Alexander III, *supra* note 73, at 19-20.

76. *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004); see also *Banks*, 453 F.3d at 454 (recognizing that immigration judges are improperly doubling as country condition specialists). But cf. *Recinos de Leon*, 400 F.3d at 1193 (“We acknowledge . . . that under current circumstances, it is difficult for [immigration judges] to explain their often complicated decisions adequately.”).

77. For further discussion of balancing such duties, see *supra* note 57 and accompanying text.

78. *Banks*, 453 F.3d at 454 (as “an overworked lawyer who spends his life in the Midwest,” an immigration judge cannot “play the role of country specialist”). For the Seventh Circuit’s repeated emphasis on such point, see also *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006); *Kllokoqi v. Gonzales*, 439 F.3d 336, 344 (7th Cir. 2005); *Xiu Ping Huang v. Gonzales*, 403 F.3d 945, 949-51 (7th Cir. 2005); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003). *Banks* also urges the relevant offices of the executive branch to remedy the need for country specialists by creating a team of experts comparable to the “vocational experts” who provide evidence to the Social Security Administration when hearing disability claims. 453 F.3d at 453-54.

79. *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005) (recognizing that “the spirit of *Daubert*,” which filters against unreliable expert testimony, is applicable to immigration proceedings even if the federal rules of evidence do not formally apply) (quoting *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) and referencing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

2. The Many Forms of Intemperance

a. Circuit Avoidance

Incompetence provides a thin veil for intemperance. Bias may be revealed by the “weirdness” of an adverse credibility determination, so stretched that it ignores or disputes irrefuted evidence.⁸⁰ In other cases, there is no effort to hide the intemperance felt toward asylum seekers. Examples of immigration judges denying due process by engaging in over-active questioning, barring testimony, or otherwise evidencing a lack of impartiality “fairly leap off the pages.”⁸¹

Yet despite the “disturbing pattern of [immigration judge] misconduct,”⁸² the circuits are not assuming a sufficient role in correcting the trend. Instead, they often choose to “duck” the serious procedural failures by avoiding the constitutional challenge and then “punt” by claiming the matter is one the DOJ and DHS are best suited to address.⁸³

80. *Pramatarov v. Gonzales*, 454 F.3d 764, 765-66 (7th Cir. 2006) (critiquing Immigration Judge Brahos’s factual conclusions that: 1) the applicant could not be a gypsy despite an uncontested birth certificate in the record establishing that he was and 2) that the applicant could not have been beat up in the prison lavatory because the guards would have discovered he was not in his bed, although there was no evidence of bed checks in the court record); *see also* *Shah v. Attorney Gen.*, 446 F.3d 429, 430 (3d Cir. 2006) (finding that while no reasonable person would have found the asylum applicant not credible, Immigration Judge Ferlise in “his apparent zeal to deny relief” found the asylum applicant not credible by ignoring strong documents regarding his father’s death and relying on weak support).

81. *Cham v. Attorney Gen.*, 445 F.3d 683, 692 (3d Cir. 2006); *see also* *Qun Wang v. Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“The tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding.”); *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting that the immigration judge’s “hostile” and “extraordinary abusive” conduct toward petitioner “by itself would require a rejection of his credibility finding”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“[T]he [immigration judge’s] assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture . . .”).

82. *Qun Wang*, 423 F.3d at 268 (also noting that “our sister circuits have repeatedly echoed our concerns” regarding misconduct); *see also* *Giday v. Gonzales*, 434 F.3d 543, 549-50 (7th Cir. 2006) (“[T]he volume of case law addressing the issue of the intemperate, impatient, and abrasive immigration judges should sound a warning bell to the Department of Justice that something is amiss.”); *Pasha*, 433 F.3d at 531.

At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court by the Justice Department’s Office of Immigration Litigation. . . . The performance of these federal agencies is too often inadequate. This case presents another depressing example.

Id.

83. For an example of the call for administrative action, see *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (“[T]he adjudication of these [immigration] cases at the

Courts cannot continue to place their “thumbs on the deference side of the scale.”⁸⁴ Rather than adhering to the “appearance of impartiality standard,” this inappropriate degree of judicial deference to the immigration courts mistakenly suggests that an immigration judge must either display actual bias in a particular case or a lengthy history of bias in a series of cases before the lack of impartiality becomes the explicit basis for a successful appeal.⁸⁵

b. Intemperance Ignored

In *Sukwanputra*, Immigration Judge Donald Ferlise openly admonishes an Indonesian asylum seeker, advising him, “You have no right to be here. All of the applicants that are applying for asylum have no right to be here. . . . You have to understand, the whole world does not revolve around you and other Indonesians that just want to live here because they enjoy the United States”⁸⁶

On review, the Third Circuit is “deeply troubled” by the immigration judge’s behavior, recognizing that such an “intemperate and bias-laden remark[]” “gives the appearance that the [immigration judge] has a predisposition to find against petitioner.”⁸⁷ Yet despite clear language reflecting the judge fails the “appearance of impartiality” standard, the Third Circuit avoids the due process challenge and remands only on the adverse credibility determination.⁸⁸

For the Third Circuit, it is not until Immigration Judge Ferlise’s intemperance presents a case of actual bias that it is confident due process is denied.⁸⁹ In *Cham v. Attorney General*, the Third Circuit sees an asylum applicant successfully “ground to bits” over the course of a two-day hearing in which Immigration Judge Ferlise “continually

administrative level has fallen below the minimum standards of legal justice. . . . [T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.”).

84. *Giday*, 434 F.3d at 550.

85. For discussion of the appearance of impartiality standard, see *supra* note 65 and accompanying text.

86. *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006).

87. *Id.*

88. *Id.* (“[A]lthough we need not reach the due process issue, in order to ensure fairness and the appearance of impartiality, we strongly encourage that on remand, the BIA assign any further proceedings to a different [immigration judge].”).

89. *Cham v. Attorney Gen.*, 445 F.3d 683, 694 (3d Cir. 2006) (“We, therefore, conclude that [petitioner] ‘must be given a second, and a real, chance to “create a record” in a deportation hearing that comports with the requirements of due process.’”) (quoting in part *Podio v. INS*, 153 F.3d 506, 511 (7th Cir. 1998)).

abused an increasingly distraught petitioner, rendering him unable to coherently respond.”⁹⁰ Emboldened by facts sufficient to overcome its past reluctance, the Third Circuit upholds the due process challenge.⁹¹ Absent shocking fact patterns, other courts reviewing intemperate immigration judge behavior similarly stop short of finding due process violations and contribute to pushing the practical standard of due process beyond the theoretical.⁹²

c. Bias Pardoned

Courts also are reluctant to squarely protect constitutional rights when immigration judges take an overly active role and assume a bias, prosecutorial position.⁹³ For the Seventh Circuit, an Immigration Judge presents a “close call” but does not openly cross the line between establishing the record and nitpicking despite “charg[ing] into the fray, cross-examining [the asylum applicant] about even the most mundane facts of her life story.”⁹⁴ In another instance of aggressive behavior, there is no due process violation when the [immigration judge] asks nearly as many questions as the applicant’s attorney, far more questions than the government’s attorney and earlier, controversial cases seem to “pale in comparison.”⁹⁵

90. *Id.* at 691. Emphasizing the egregiousness of the immigration judge’s behavior, Cham used the “ground to bits” characterization twice. *Id.* at 686, 691. The “ground to bits” language has been similarly adopted in other instances to denounce the administrative process. See *Benslimane v. Gonzales*, 430 F.3d 828, 833 (7th Cir. 2005) (“We are not required to permit [the applicant] to be ground to bits in the bureaucratic mill against the will of Congress.”); see also Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants are ‘Ground to Bits’ in a System that Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, A.B.A. J., Nov. 2006, at 36 (discussing the immigration judge system that leaves some immigrants “ground to bits”).

91. The Third Circuit confessed that “[i]n the past, we have been reluctant to speculate as to the state of mind of an immigration judge.” *Cham*, 445 F.3d at 691 n.8 (citing *Sukwanputra*, 434 F.3d at 638; *Qun Wang v. Attorney Gen.*, 423 F.3d 260, 269 (3d Cir. 2005)).

92. See, e.g., *Fiadjoe v. Attorney Gen.*, 411 F.3d 135, 144, 154, 155 (3d Cir. 2005) (reversing only on credibility despite finding that immigration judge’s questioning amounted to “bullying” and was “extreme[ly] insensitiv[e],” and his tone was “hostile and at times became extraordinarily abusive”); *Hassan v. Gonzales*, 403 F.3d 429, 437 (6th Cir. 2005) (concluding that while immigration judge’s language was “brusque” and less than “artful,” alien received due process).

93. For a discussion of the impartiality standard, see *supra* notes 62-67 and accompanying text.

94. *Giday v. Gonzales*, 434 F.3d 543, 548-549 (7th Cir. 2006) (remanding on credibility).

95. In *Giday*, the immigration judge asks seventy-three questions, the petitioner’s attorney asks eighty-seven and the government asks four. *Id.* at 548. The questioning by the immigration judge in *Giday* is found even more objectionable than *Rodriguez Galicia v. Gonzales*, 422 F.3d 529 (7th Cir. 2005), which itself had “expressed deep concern when the immigration judge frequently interrupted testimony, appeared to be hostile to the petitioner, and engaged in active, ‘de-facto cross-examination’ as though he were counsel for the government rather than a neutral arbiter.”

Despite clear due process violations, a successful asylum appeal is more likely to be had upon a non-constitutional issue, such as challenging an adverse credibility determination.⁹⁶ Avoiding reliance on constitutional arguments when other sufficient challenges exist is a long recognized judicial practice.⁹⁷ However, significant problems are created when the judiciary limits immigration court reversals to erroneous credibility determinations and avoids due process challenges.⁹⁸ Such problems currently range from setting unreliable and misleading precedent, to miscalculating the reform capability of the DOJ, to damaging public perceptions of our judicial system. The imminent implementation of the Real ID Act poses a further threat.

IV. THE COST OF AVOIDANCE

A. Precedential Loss

As an initial matter, when the circuits avoid constitutional questions they ignore a valuable opportunity to instruct and warn immigration judges as to what constitutes appropriate constitutional behavior.⁹⁹ This problem is compounded by the creation of misleading precedent which occurs when the courts reserve correcting procedural violations for only the most extreme instances.¹⁰⁰ While asylum applicants “ground to bits” certainly have valid due process claims, due process is not measured by the “ground to bits” standard.¹⁰¹ By only recognizing these most egregious abuses, the circuits are raising the due process standard beyond its “appearance of impartiality” level.¹⁰²

Giday, 434 F.3d at 548 (relying on *Rodriguez Galicia*, 422 F.3d at 539). *Rodriguez Galicia* avoids addressing the immigration judge’s overly active questioning by remanding upon the immigration judge’s inappropriately barring two experts from testifying for the petitioner. *Rodriguez Galicia*, 422 F.3d at 540.

96. For reliance on credibility despite serious due process challenges, see, for example, *Sukwanputra*, 434 F.3d at 637, 638; *Giday*, 434 F.3d at 548-49; *Fiadjoe*, 411 F.3d at 154, 163.

97. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341, 347 (Brandeis, J., concurring).

98. For a discussion of the numerous justifications for and against the avoidance principle, see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 922-27 (2005).

99. For instances of ignoring procedural challenges, see *supra* note 96 and accompanying text.

100. For examples of creating misleading precedent, see *supra* notes 86-98 and accompanying text.

101. *Cham v. Attorney Gen.*, 445 F.3d 683, 686, 691 (3d Cir. 2006). For further discussion of *Cham* and extreme due process violations, see *supra* notes 89-92 and accompanying text.

102. For further discussion of the appearance of impartiality standard, see *supra* note 65 and accompanying text.

B. *Misplaced Reliance*

The opportunity cost of the circuits' noninvolvement and call for DOJ corrective action becomes even more dear when one accounts for the widespread skepticism regarding the Attorney General's ability to correct the immigration court failings "in-house" either through the administrative appeal process¹⁰³ or the much publicized effort to reform the EOIR.¹⁰⁴

103. In addition to the BIA sharing many of the incompetence and intemperance problems plaguing the immigration courts, the BIA is also suffering due to recent "streamlining" measures. In 1999, former Attorney General Janet Reno increased reliance upon summary affirmation and one-member decisions because of the BIA's own staggering backlogs. The successive administration of John Ashcroft built upon such measures. In 2002, Ashcroft instituted two critical "reforms." He instructed that virtually all Board opinions could be rendered by one line summary affirmations made by one Board member, instead of the traditional practice of a panel of three rendering fully reasoned opinions. He also gutted the BIA, reducing the corps from twenty-three to eleven members. For the original announcements, see Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

Reports and statistics confirm the enormous workload. Shortly after the streamlining, there is at least one documented instance of fifty cases decided in one day by one member. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at 1; see also *Kadia v. Gonzales*, No. 06-1299, 2007 U.S. App. LEXIS 21456 (7th Cir. Sept. 7, 2007); *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003). In 2006, with eleven members, the Board decided 41,479 cases. Such figures translate into approximately sixteen cases per day, per Board member. Number of appeals reported at FY 2006 STATISTICAL YEARBOOK, *supra* note 75, at T2. The five "involuntarily removed" members have persuasively been shown to have ruled more frequently in favor of the alien. For extensive discussion of such BIA reform and the "scalding" criticism, see Legomsky, *supra* note 23, at 375-79. See also Alexander III, *supra* note 73, at 11-13; John R.B. Palmer, *The Immigration Surge in the Federal Courts of Appeals*, 11 BENDER'S IMMIGR. BULL. 54 (2006) [hereinafter Palmer, *Immigration Surge*]; John R.B. Palmer et al., *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, 17-19 (2005); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Court of Appeals: A Preliminary Analysis*, www.nyls.edu/pdfs/Palmer.pdf (last visited Nov. 1, 2007) [hereinafter Palmer, *Nature and Causes*].

Recognizing the "current caseload is extremely burdensome and may become overwhelming," former Attorney General Gonzales announced the increase in the Board to fifteen members in December 2006. Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006). Such increase was to allow for "more detailed one-member orders and more three-member orders." *Id.* Gonzales maintained that by limiting the increase to four members, the Board may achieve "the goal of maintaining cohesion and the ability to reach consensus." *Id.* at 70,856. Former Board member Lory Rosenberg criticizes Gonzales's corrective measures, emphasizing that all the recent appointments are temporary and thereby leave a Board of seven permanent members, simply adding four to the additional three existing temporary members. She also criticizes Gonzales's "specious argument" that only a small permanent Board can work together, pointing to the Board's long history of issuing 238 precedent decisions, en banc, between 1995 and 2003. E-mail from Lory Rosenberg, Of Counsel, Paparelli & Partners, LLP, to Immigration Law Professors List (Dec. 8, 2006, 01:29AM) (on file with author).

104. For further discussion of Gonzales's recognition and effort to correct the failings of the EOIR, see *supra* notes 5-8 and accompanying text.

The vast increase in appeals into the circuits and the disproportionate rate of immigration court reversals further confirms the need for more aggressive judicial action.¹⁰⁵

Costs become even greater for the vast majority of aliens who can not afford to hire the counsel effectively necessary to bring a federal appeal.¹⁰⁶ For these aliens, there is no hope of having due process grievances addressed, even indirectly, through an appellate reversal along the lines of credibility or other nonconstitutional issues. If the administration cannot effectively bring reform, clear and consistent due

105. Judge Posner reports in *Benslimane* that in the year prior to case argument, the Seventh Circuit reversed the BIA in a “staggering” forty percent of the 136 petitions for review the BIA resolved on the merits. By comparison, only eighteen percent of the eighty-two civil cases brought against the United States were reversed. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). For further discussion of efforts to gather data on reversal rates nationally and the DOJ’s dispute with Posner’s statistics, see Alexander III, *supra* note 73, at 13-15.

Regardless of differences regarding the exact rate of reversals, there is widespread acknowledgment that there has been an enormous increase in circuit appeals since the streamlining of the BIA. Estimates range as high as a fivefold national increase in circuit appeals between 2001 and 2005. The Second and Ninth Circuits are the hardest hit, with nearly forty percent of their caseload reported to involve immigration. Mark Hamblett, *Circuit Struggles to Cope with Upsurge in Asylum Appeals*, N.Y.L.J., Nov. 25, 2005, at 1 (focusing on the Second Circuit increased workload); Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases: Pattern of Bias Alleged*, N.Y. TIMES, Dec. 26, 2005, at A1 (looking at impact of immigration appeals on Second and Ninth Circuits). In 2005, the Second Circuit reported a 781% increase between February 2002 and February 2003, with the surge continuing “unabated.” 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, 244 (2005). One quiet, recent attempt to reduce the impact on the circuits is allowing Justice Department attorneys greater leeway to settle cases by agreeing to their remand back to the BIA. Sandra Hernandez, *U.S. Eases Policy on Immigration Settlements*, L.A. DAILY J., Dec. 21, 2005, at 1.

Such sharp increases in circuit appeals are attributed to increasing frustration with poor administrative review as well as immigration lawyers increasing experience and comfort with appellate practice. For extensive analysis of the statistics and use of circuit appeals for immigration matters, see Alexander III, *supra* note 73, at 13-15; Palmer, *Immigration Surge*, *supra* note 103, at 59-60; Palmer, *Nature and Causes*, *supra* note 103, at 9-12; Palmer et al., *supra* note 103, at 43-54.

106. In immigration matters, aliens have the right to be represented but at no expense to the government. INA § 240(a)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2000). On the effective need for counsel to bring a federal appeal, see, for example, Comm. on Fed. Courts, *supra* note 105, at 251 & n.29 (reporting that the approximately twenty percent of pro se aliens appearing before the Second Circuit are disadvantaged because there is no use of the circuit’s “conferencing system” set up for opposing counsel to mediate); Palmer et al., *supra* note 103, at 89-90 (reporting that in 2005, over eighty-seven percent of the immigration appeals on file before the Second Circuit were represented).

On ongoing efforts to improve access to representation for individuals in immigration proceedings, see, for example, Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739 (2002); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997); Beth J. Werlin, Note, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393 (2000).

process precedent from the circuits in the cases of the fortunate few who are able to raise federal appeals will provide a critical incentive for immigration judges to regularly display the “patience and decorum befitting a person privileged with this position” before *all* asylum applicants.¹⁰⁷

C. Perception Failures

Critical perceptions are also shaped and confirmed by judicial inaction. Given the public’s current recognition of the immigration courts’ intemperance and bias, every chance to address such failings must be taken.¹⁰⁸ Such efforts will also well serve the judiciary. It is our long-standing expectation that the judiciary vigilantly protects process even in administrative matters such as immigration.¹⁰⁹ By failing to preserve it, the circuits threaten their own integrity.

107. *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004) (remanding and urging a different immigration judge to be assigned after finding the original immigration judge to “be impatient and at, at times, inappropriate” but not violating due process).

108. Two immigration judges openly acknowledge the public’s perception of the immigration courts as “rigged,” referencing a recent poll in which sixty-eight percent of those surveyed believe the Immigration Courts are part of the then INS (now DHS), with twenty-two crediting close personal relationships between the courts and the prosecutorial branch as a factor in their belief that the two were intertwined. Keener & Slavin, *supra* note 23 (relying on MICHAEL J. CREPPY ET AL., *THE UNITED STATES IMMIGRATION COURT IN THE 21ST CENTURY* 100-05 (1999)).

Of course, numerous articles in major newspapers also keep the public abreast of the immigration courts myriad problems. *See, e.g.*, Bernstein, *supra* note 8 (Gonzales’s announcement of administrative reform); Nina Bernstein, *Immigration Judge Is Reassigned to a Desk Job*, N.Y. TIMES, Mar. 13, 2007, at B1 [hereinafter Bernstein, *Reassigned to a Desk Job*] (removal of Immigration Judge Jeffrey Chase); Nina Bernstein, *New York’s Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at A1 [hereinafter Bernstein, *Growing Burden*] (discussing the growing caseload of immigration judges and an ensuing increase in circuit appeals); Eggen, *supra* note 2 (Goodling’s congressional testimony on political hiring); Eggen & Kane, *supra* note 2 (same); Goldstein & Eggen, *supra* note 10 (political hiring of immigration judges); Sandra Hernandez, *Immigration Judges Face Investigation: AG Plans Probe of Behavior Toward Aliens in Courts*, L.A. DAILY J., Jan. 11, 2006, at 1 (Gonzales’s initiation of immigration court review); Hernandez, *supra* note 105 (increased use of DOJ settling to address surge in circuit appeals); Johnston & Lipton, *supra* note 2 (Goodling’s congressional testimony on political hiring); Liptak, *supra* note 105 (increase in circuit appeals); Preston, *supra* note 27 (asylum disparities); Schmitt, *supra* note 12 (Gonzales’s congressional testimony); Schmitt, *supra* note 8 (Gonzales’s announcement of implementation of immigration court reform); Swarns, *supra* note 27 (asylum disparities).

109. For a discussion of the judiciary’s traditional protection of process even in administrative matters such as immigration, see Motomura, *Procedural Surrogates*, *supra* note 26, at 1632-56; *see also supra* notes 39-53 and accompanying text.

D. The Real ID Act of 2005

1. Stripping Credibility from Judicial Review

Finally, as some courts already understand, the need for the circuits to honestly and directly address due process by asylum applicants is critical as their claims are generally “subject to particularly narrow appellate scrutiny.”¹¹⁰ In 1992, *INS v. Elias-Zacarias* raised the standard of review for asylum to “compelling evidence.”¹¹¹ Within four years, Congress followed the Court’s lead, limiting appellate reversal of most administrative findings in removal proceedings to instances in which “any reasonable adjudicator would be compelled to conclude to the contrary.”¹¹²

110. An immigration judge’s “requirement of neutral is ‘especially important where . . . the determination of the trier of fact are [sic] subject to particularly narrow appellate scrutiny.’” *Sukwanputra v. Gonzales*, 434 F.3d 627, 637 (3d Cir. 2006) (quoting *Abdulrahman v. Ashcroft*, 330 F.3d 587, 599 (3d Cir. 2003)).

111. 502 U.S. 478 (1992). This was done through a mere sentence and a footnote. As the text of *Elias-Zacarias* sets out, in order for an applicant “to obtain judicial reversal of the [administrative] determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” *Id.* at 483-84. Through a footnote, *Elias-Zacarias* instructs that in order to reverse an administrative determination regarding an applicant’s political opinion and the nexus between such characteristic and claim of persecution asylum, the evidence must “compel” such conclusion “and also compel[] the further conclusion that [the respondent] had a well-founded fear that the [persecutor] would persecute him *because of* that political opinion.” *Id.* at 481 n.1.

Prior to the “compelling evidence” standard, asylum appeals were reviewed upon the “substantial evidence” standard. For further discussion of the history and application of the judicial standards of asylum review, see Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133 (2005); Reinhardt, *supra* note 23.

While these few sentences of *Elias-Zacarias* critically change the standard of judicial review, *Elias-Zacarias* is also well remembered for interpreting the “on account of . . . political opinion” criteria of asylum to necessitate that the asylum seeker, not the persecutor, must hold such opinion or have it imputed to him. *Elias-Zacarias*, 502 U.S. at 482. For lengthy analysis of *Elias-Zacarias*’s restrictive interpretation of the nexus requirement, see, for example, Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT’L L. 223 (2002); see also Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265 (2002); Arthur C. Helton, *Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: A Comparative Perspective*, 29 SAN DIEGO L. REV. 581, 585-87 (1992); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 749-55 (1998).

112. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a), 110 Stat. 3009, 3009-608 (codified as amended at INA § 242(b)(4)(B), 8 U.S.C.A. § 1252(b)(4)(B) (2007)). Such legislation further directed that the discretionary judgment of the Attorney General on asylum matters “shall be conclusive unless manifestly contrary to law and an abuse of discretion.” *Id.* (codified as amended at INA § 242(b)(4)(D), 8 U.S.C.A. § 1252(b)(4)(D) (2007)).

The “compelling evidence” standard of review served as a “formidable” means of limiting judicial review for asylum seekers.¹¹³ However, in 2005, Congress further foreclosed the appeals options for all individuals seeking asylum or any form of relief from removal.¹¹⁴ While such restrictions to asylum passed under ominous headings implying terrorists are threatening the asylum process, the relevant section contains no measures directed at discovering terrorists.¹¹⁵ Instead, within this section, Congress endorses upholding adverse administrative credibility assessments for asylum seekers “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.”¹¹⁶ Such

These provisions were part of an ongoing effort launched to strip the federal courts of authority to review immigration matters. The effort began in earnest in 1996 with the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996). Such efforts have received a great deal of attention by academics, practitioners, and of course, the courts. For extensive academic and practitioner discussion of the limits of appellate review, see, for example, IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 889-999 (10th ed. 2006); LEGOMSKY, *supra* note 7, at 727-61; Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

113. Knight, *supra* note 111, at 153.

114. The Real ID Act of 2005 was passed within the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, 302-23.

In addition to other measures affecting aliens, the Real ID Act of 2005 may be best publicly remembered for enacting controversial national standards for drivers’ licenses and other forms of personal identification. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, 311-16 (codified as amended in scattered sections of INA, 8 U.S.C.). For critical examination of these types of personal identification provisions, see, for example, Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004); María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004).

The Real ID Act of 2005 also contains important provisions recognizing the ongoing propriety of judicial review orders of removal raising constitutional claims and questions of law. Real ID Act of 2005 § 106. For a discussion of these measures, see, for example, Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006/2007).

For a brief article and overview of the earlier version of the Real ID Act of 2005 passed by the House of Representatives, see Brian Murphy, *Development in the Legislative Branch, The Real ID Act of 2005: Tightening the Burden on Asylum Seekers, Federal Standards for Driver’s Licenses, and Patching a Hole in a Border Fence at the Cost of Other Legislation*, 19 GEO. IMMIGR. L.J. 191 (2004).

115. Section 101 addressing credibility determinations and judicial standards of review is entitled “Preventing Terrorists from Obtaining Relief from Removal.” It is within Title I of the Real ID Act which is titled “Amendments to Federal Laws to Protect Against Terrorist Entry.” Real ID Act of 2005 § 101. Other sections of the Real ID Act of 2005 did specifically create grounds of inadmissibility and removability of terrorists. *See, e.g.*, Real ID Act of 2005 §§ 103, 105.

116. In full, the provision reads:

statutory language mandates a standard in direct contradiction to previous judicial insistence that adverse credibility determinations must be based on inconsistencies which “go to the heart of the applicant’s claim.”¹¹⁷ To foreclose any possible loophole upon appeal, an additional provision mandates that a trier of fact’s determination regarding the availability of corroborating evidence for asylum applicants must be upheld unless a “reasonable trier of fact” would be “compelled” to conclude otherwise.¹¹⁸

(iii) CREDIBILITY DETERMINATION. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Real ID Act of 2005 § 101(a)(3) (codified at INA § 208(b)(1)(B)(iii), 8 U.S.C.A. § 1158(b)(1)(B)(iii) (2007)). Other provisions apply the identical standard to individuals seeking any other relief from removal or withholding of removal. Real ID Act of 2005 § 101(c)-(d) (codified at INA § 240(c)(4)(c), 8 U.S.C.A. § 240(c)(4)(c); INA § 241(b)(3)(c), 8 U.S.C.A. § 1231(b)(3)(c)).

117. This contradiction is recognized by the courts. *See, e.g.,* *Giday v. Gonzales*, 434 F.3d 543, 550 n.3 (7th Cir. 2006) (noting distinction in pre- and post-Real ID credibility standard); *Bella v. Gonzales*, 157 F. App’x 522, 524 & n.1 (3d Cir. 2005) (relying on “heart of the asylum claim” standard and noting Real ID Act of 2005, when applicable, will impose opposite standard). For earlier circuit explicit use of the “heart of the claim” standard for asylum applicants, *see, for example, Korniejew v. Ashcroft*, 371 F.3d 377, 383 (7th Cir. 2004); *Daneshvar v. Ashcroft*, 355 F.3d 615, 619 n.2 (6th Cir. 2004); *Uwase v. Ashcroft*, 349 F.3d 1039, 1043 (7th Cir. 2003); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002).

Such “heart of the claim” standard has logically applied to asylum, withholding of removal, and Convention Against Torture claims. *See, e.g., Stroni v. Gonzales*, 454 F.3d 82, 88 (1st Cir. 2006) (relying on “heart of the claim” standard throughout discussion of asylum, withholding of removal and Convention Against Torture claims).

Interestingly, guidelines published by the INS (now DHS) impose the lesser standard on asylum officers charged with reviewing affirmative asylum claims that can be made by individuals who have not yet been placed in removal proceedings. *See* INS Supplementary Refugee/Asylum Adjudication Guidelines, *reprinted in* 67 INTERPRETER RELEASES 85, 101-03 (1990) (“Minor inconsistencies, misrepresentations, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim.”).

118. The corroborative evidence standard of judicial review is also applicable to all others seeking relief for removal or withholding of removal. Real ID Act of 2005 § 101(e) (codified at INA § 242(b)(4), 8 U.S.C.A. § 1252(b)(4) (2007)). While acknowledging the deference required to such standard, at least one court has found that as a “precondition to deference” the immigration

2. The Due Process Incentive

Limiting review of credibility determinations further undercuts favoring judicial reserve regarding due process challenges raised by asylum seekers. With little room left to review credibility determinations, due process violations can no longer be ignored.¹¹⁹

As of this Article's drafting, no cases have yet reached the circuits based upon these credibility provisions of the Real ID Act.¹²⁰ Yet the targets of these provisions of the Real ID Act are clear. Courts routinely reverse adverse credibility determinations when finding them based on "minor inconsistencies" rather than "substantial evidence."¹²¹ At least

judge must "explain (unless it is obvious) why he thinks corroborating evidence, if it existed, would have been available." *Hor v. Gonzales*, 421 F.3d 497, 500-01 (7th Cir. 2005); *see also* *Zhang v. Gonzales*, 434 F.3d 993, 998-99 (7th Cir. 2006).

Closely related to such standard of review in the Real ID Act of 2005 is another provision addressing corroborative evidence as part of an Immigration Judge's duty to make a credibility determination. Such provision allows an immigration judge to require that an otherwise credible asylum applicant provide corroborative evidence in support of his claim unless it cannot reasonably be obtained. Real ID Act of 2005 § 101(a)(3) (codified at INA § 208(b)(1)(B)(ii), 8 U.S.C.A. § 1158(b)(1)(B)(ii) (2007)). This corroborative evidence requirement is also applicable to all others seeking relief for removal or withholding of removal. Real ID Act of 2005 § 101(c)-(d) (codified at INA § 240(c)(4)(c), 8 U.S.C.A. § 1229a(c)(4)(c); INA § 241(b)(3)(c), 8 U.S.C.A. § 1231(b)(3)(c)).

Prior to such statutory directive, the BIA held that an asylum seeker could only meet her burden of proof by producing corroborative evidence when it was reasonable to expect it or provide an explanation as to why it was not being presented. *In re S-M-J*, 21 I. & N. Dec. 722, 725-26 (B.I.A. 1997). At least one court has determined that the Real ID Act standard of review of corroboration determinations has not been altered from that created previously by case law. *Toure v. Attorney Gen.*, 443 F.3d 310, 325 (3d Cir. 2006).

119. While further limiting factual review, the Real ID Act explicitly does not preclude judicial review of either "constitutional claims or questions of law." Real ID Act of 2005 § 106 (codified at INA § 242(a)(2)(D), 8 U.S.C.A. § 1252(a)(2)(D) (2007)). Consequently, appeals based upon an error of law standard may remain feasible, although such standard may have been inadvertently raised. Stephen Knight writes persuasively that the compelling evidence standard first established in *Elias-Zacarias* as a factual standard of review has been conflated with the legal standard to inappropriately raise the legal standard of review. *See* Knight, *supra* note 111, at 147. Moreover, while such challenges, if successful, may root out the incompetence of the immigration courts, they will do little to end the intemperance.

120. Such provisions only prospectively affect individuals applying for asylum or other forms of relief after the legislation's May 11, 2005 enactment date. Real ID Act of 2005 § 101(h)(2). As with the other provisions addressing immigration judge credibility determinations, the statutory right of an Immigration Judge to request corroborative evidence of an otherwise credible relief applicant is also applicable only to relief applications filed after the Real ID Act's effective date. *Id.* By contrast, the corroborative evidence standard of judicial review applies immediately to all final administrative orders of removal. *Id.* § 101(h)(3). For discussion of the similar statutory and case directive regarding the need to produce corroborative evidence, *see supra* note 118.

121. For examples of the numerous cases reversed upon characterization of the inconsistencies as minor, *see Pavlova v. INS*, 441 F.3d 82, 90 (2d Cir. 2006), where the applicant's "minor fault" in improperly using medical terminology was, according to the court, "at most, the sort of *de minimis*, nonmaterial inconsistency that we have often stated may not form the basis for an adverse credibility determination"; *Giday*, 434 F.3d 543, 552 (7th Cir. 2006); *Latifi v. Gonzales*, 430 F.3d

one court acknowledges that the new provisions will prevent such reversals.¹²² It is also cynically suggested that the new standard risks simply providing statutory cover for a trier of fact eager to make an adverse credibility determination “at all costs.”¹²³

Arguments for a clearer credibility standard are warranted. Prior to the Real ID Act of 2005, some courts criticized the ability of more zealous courts to overturn an immigration judge’s adverse asylum credibility determination simply by “pick[ing] apart the [immigration judge’s] findings piece by piece” so that each inconsistency becomes unconnected to the rest of the story and can be charged off as “minor” or “merely incidental to [the] asylum claim.”¹²⁴ Heeding traditional judicial deference to administrative bodies, these courts warned against “micromanag[ing] [immigration judge] decision-making”¹²⁵ and creating rules which “obscure [the] clear standard” and “flummox immigration judges.”¹²⁶

Such observations properly caution against judicial abuse. However, they do not support either ignoring or underutilizing due process safeguards. Indeed, Congress itself was clear when it passed the Real ID Act that no provisions of the Immigration and Nationality Act

103, 105 (2d Cir. 2005), which reversed a credibility determination made on “insignificant and trivial” discrepancies; *Gao*, 299 F.3d at 268, where the court found no “significant inconsistencies”; *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir. 1988), which declared that minor inconsistencies and minor admissions that “reveal nothing about an asylum applicant’s fear for his safety are not an adequate basis for an adverse credibility finding.”

122. *Cham v. Attorney Gen.*, 445 F.3d 683, 692 & n.10 (3d Cir. 2006) (finding that none of the discrepancies found by the immigration judge “even came close to the ‘heart of the claim’” and noting that adverse credibility determinations for petitions filed after May 11, 2005 are to be made without regard to whether the inconsistencies “‘go[] to the heart of the [] claim’”). The First Circuit, also in dicta, suggests that the Real ID Act’s minor inconsistency standard is akin to “*falsus in uno, falsus in omnibus*,” false in other thing, false in all things. *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 23 n.6 (1st Cir. 2007). By contrast, the Seventh Circuit seems unmoved by the Real ID Act’s credibility standard, emphasizing in dicta that the statutory credibility standard still explicitly requires the fact-finder to consider “the totality of the circumstances, and all relevant factors.” *Kadia v. Gonzales*, 2007 U.S. App. LEXIS 21456, at *11 (7th Cir. 2007).

123. *Cham*, 445 F.3d at 692.

124. *Kumar v. Gonzales*, 444 F.3d 1043, 1060-61 (9th Cir. 2006) (Kozinski, J., dissenting) (quotations omitted). For similar criticisms within the Ninth Circuit, see also *Vera-Villegas v. INS*, 330 F.3d 1222, 1231 (9th Cir. 2003); *Abovian v. INS*, 257 F.3d 971, 978-79 (9th Cir. 2001) (critiquing earlier credibility reversals in *Vilorio-Lopez*, 852 F.2d at 1142; *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000); *Garrovillas v. INS*, 156 F.3d 1010, 1013-14 (9th Cir. 1998)). Perhaps hinting at its approval of the Real ID Act’s minor inconsistency standard, the Eleventh Circuit has dubbed the standard a “totality of the circumstances test.” *Ndi v. Attorney Gen.*, 229 F. App’x 877, 879 n.1 (11th Cir. 2007).

125. *Tewabe v. Gonzales*, 446 F.3d 533, 540 (4th Cir. 2006).

126. *Jibril v. Gonzales*, 423 F.3d 1129, 1138 (9th Cir. 2005).

(“INA”) “shall be construed as precluding review of constitutional claims or questions of law.”¹²⁷

Intended or inadvertent, the Real ID Act’s credibility provisions encourage bias. By eliminating the need for inconsistencies which go to the heart of the claim, Congress has effectively encouraged “selective listening”—allowing immigration administrators to pick and choose amongst the evidence presented in order to support their credibility determinations.¹²⁸ The Real ID Act thereby threatens the most basic tenet of due process—that an individual has a full opportunity to be heard by an impartial adjudicator. Finding this statutory weakness, the courts may maintain the duty to protect due process. However, many other steps can also be taken by the judiciary.

V. AN AGGREGATE JUDICIAL PRESCRIPTION

A. *Dual Reversal: Due Process and Credibility*

In every case, due process ensures each person a full and fair opportunity to present one’s case. Courts cannot wait for the most egregious due process violations and base reversals solely on credibility. Because such judicial reserve risks inadvertently raising the due process standard, in every case where the minimal standard of due process is violated by the immigration judge, appellate courts must so hold. The need to adhere to the true minimal due process standard will become all the more critical as the circuits’ ability to review credibility determinations becomes more severely constricted when the credibility measures of the Real ID Act of 2005 become fully effective.¹²⁹

127. Real ID Act of 2005 § 106 (codified at INA § 242(a)(2)(D), 8 U.S.C.A. § 1252(a)(2)(D) (West 2007)); see also Neuman, *supra* note 114, at 136-41 (discussing the Real ID Act in relation to judicial and habeas review).

128. Prior to the Real ID Act, selective consideration of evidence has been clearly rejected. *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) (“The [immigration judge] cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole.”); *Shah v. Attorney Gen.*, 446 F.3d 429, 437 (3d Cir. 2006) (“Although we don’t expect an Immigration Judge to search for ways to sustain an alien’s testimony, neither do we expect the judge to search for ways to undermine and belittle it.’ Nor do we expect a judge to selectively consider evidence, ignoring that evidence that corroborates an alien’s claims and calls into question the conclusion the judge is attempting to reach.”) (quoting in part *Zhang v. Gonzales*, 405 F.3d 150, 158 (3d Cir. 2005)) (citation omitted); *Bella v. Gonzales*, 157 F. App’x 522, 525 & n.2 (3d Cir. 2005) (sua sponte suggesting that the immigration judge’s “selective[] use[]” of petitioner’s testimony raised due process concerns). For further discussion of the general requirement of impartiality, see *supra* notes 63-68 and accompanying text.

129. For a discussion of the heightened credibility standard of review created by the Real ID Act of 2005, see *supra* notes 110-18 and accompanying text.

However, whatever the relevant standard may be, if an adverse credibility finding does not meet the standard, courts can and should reverse on credibility as well.

In addition to due process combined with credibility reversals (if such credibility reversals remain within the statutory scope of judicial review), other “paralegal” efforts can also be made by the circuits to encourage the minimal standard of due process is provided asylum applicants.

B. Naming the Villains

Typically, a circuit opinion does not specifically indicate the immigration judge who heard the case. Naming the “villains” is an effective way to reveal the immigration judges who repeatedly offend basic principles of justice.¹³⁰ Public exposure of abusive immigration judges by the media may have contributed to several immigration judges being removed from the bench and reassigned to other positions within the Executive Office. However, without circuit involvement, pressure by the media or a strong, local immigration bar may backfire. The reassignment of several criticized immigration judges is feared to have been done in order to move them to less visible immigration courts.¹³¹ Circuit use of pressure tactics yields swifter results. The Third Circuit believes “[i]t is not coincidental” that the Attorney General’s comprehensive review of the “intemperate” and “abusive” practices throughout the immigration courts was announced the very day the *Cham* court had a Deputy Assistant Attorney General appear, at its request, to explain what, if any, procedures are followed when “repeated conduct of this nature is seen.”¹³² It is perhaps also not coincidental that Immigration Judge Donald Ferlise, who originally heard *Cham*, has since been removed from the bench.¹³³ Immigration Judge Jeffery S. Chase has similarly been removed from the bench after mounting

130. Such tactic has also been advocated by Sydenham B. Alexander in two pieces. *See* Recent Cases, *supra* note 62, at 2603. Alexander’s student note is developed into a fuller article. Alexander III, *supra* note 73, at 1.

131. *See* John Roemer, *Jurist’s Asylum-Seeker Rulings Earn Rebukes*, L.A. DAILY J., Jan. 31, 2006, at 1.

132. *Cham v. Attorney Gen.*, 445 F.3d 683, 686 (3d Cir. 2006).

133. To add to the pressure, another case highly critical of Ferlise was also argued and decided on the same days as *Cham*. *Id.* at 686 n.2; *Shah v. Attorney Gen.*, 446 F.3d 429 (3d Cir. 2006). For further reports on Immigration Judge Ferlise’s misconduct, see Alexander III, *supra* note 73, at 30-32; Tebo, *supra* note 90, at 40.

pressure by the Second Circuit and public.¹³⁴ By naming hostile immigration judges, their track records remain well publicized and easily accessible.¹³⁵ Moreover, this naming tactic helps create increasingly compelling evidence of the harm and futility of maintaining immigration judges who are routinely reversed.¹³⁶

C. Requesting Specific Case Removal

Other auxiliary tactics can also be employed by the circuits. One includes requesting an immigration judge be removed from a particular case when the remand involves concerns of bias. Such pressure is exerted despite the circuits' awareness that sole authority to remove an immigration judge lies with the Attorney General.¹³⁷

For certain immigration judges, such tactic already gets extensive use. The Seventh Circuit's mounting frustration with Immigration Judge Craig M. Zerbe is a good example. In 2005, despite recognizing Judge

134. After mounting public and circuit pressure, Immigration Judge Jeffrey S. Chase was given a desk job. As Syndeham B. Alexander III, *supra* note 73, at 32 & n.164 (noting *Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006); *Ti Wu Gao v. Gonzales*, 200 F. App'x 31, 34-35 (2d Cir. 2006) (unpublished summary order); *Guo-Le Huang v. Gonzales*, 453 F.3d 142, 150 (2d Cir. 2006); *Jin Yong Chen v. Gonzales*, No. 04-5826-ag, 2006 U.S. App. LEXIS 32566, at *5-6 (2d Cir. Apr. 28, 2006) (unpublished summary order); *Meizi Liu v. BIA*, 167 F. App'x 871, 873 (2d Cir. 2006) (unpublished summary order); *Hajderasi v. Gonzales*, 166 F. App'x 580, 582 (2d Cir. 2006) (unpublished summary order)). On Immigration Judge Chase's history of abusive conduct and removal, see also Bernstein, *Reassigned to a Desk Job*, *supra* note 108; Bernstein, *Growing Burden*, *supra* note 108; Ray Rivera, *Court Urges Review of New York Judge's Immigration Cases That Are on Appeal*, N.Y. TIMES, Feb. 25, 2007, at 25.

135. Judge Anna Ho is another example of an immigration judge under fire. Currently serving as an Immigration Judge in Los Angeles, she previously served in Seattle. On the Ninth Circuit's recognized history of Immigration Judge Ho's due process violations, see, for example, *Smolniakova v. Gonzales*, 422 F.3d 1037, 1047 n.2, reversing Immigration Judge Ho for due process violations and noting that she had been similarly reversed in at least three other cases within the last year: *Zolutukhin v. Gonzales*, 417 F.3d 1073, 1077 (9th Cir. 2005); *Singh v. Gonzales*, 403 F.3d 1081, 1090 (9th Cir. 2005); *Rivera v. Ashcroft*, 387 F.3d 835, 842 (9th Cir. 2004); see also Alexander III, *supra* note 73, at 32-36; Roemer, *supra* note 131.

136. Such futility is already recognized by at least one court. See, e.g., *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) ("All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerns with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts . . .").

137. See, e.g., *Floroiu v. Gonzales*, 481 F.3d 970, 976 (7th Cir. 2007); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (requesting new immigration judge when immigration judge found asylum applicant not credible based on his personal experience because the applicant did not dress, act or speak like a homosexual); *Guo-Le Huang*, 453 F.3d at 151. For further discussion of *Shahinaj*, see Pamela A. MacLean, *Immigration Judges Behaving Badly Again*, NAT'L L.J., Apr. 6, 2007, available at <http://www.nlj.com>.

Zerbe to have engaged in aggressive questioning which improperly relied upon his own personal knowledge of Catholicism, the Seventh Circuit remands upon credibility alone.¹³⁸ Refraining from finding a due process violation, it “encourage[s]” the BIA to assign another immigration judge upon remand because of concerns about Judge Zerbe’s conduct.¹³⁹ By 2007, as Judge Zerbe’s record of due process violations increased, so did the reaction of the Seventh Circuit. After Judge Zerbe refers to Romanian Seventh-Day Adventists as “essentially zealots” who contribute to their own persecution by “their aggressive proselytizing,” the Seventh Circuit “*strongly* encourage[s]” the assignment of another judge *and* took the additional step of “direct[ing]” a copy of the latest violation to the Attorney General so that disciplinary action against Judge Zerbe may be considered.¹⁴⁰

D. Calling for Disciplinary Action

Direct judicial involvement in the disciplinary process is another useful tactic. The existing disciplinary process of immigration judges is “shrouded in secrecy,” giving rise to concerns regarding its effectiveness.¹⁴¹ Current regulations simply state that all complaints regarding the conduct of immigration judges, BIA members or other government attorneys be referred to the Office of Professional Responsibility within the DOJ.¹⁴² Standardizing the disciplinary process was amongst the reforms announced by Gonzales in 2006.¹⁴³ Unfortunately, the current proposed rules of conduct provide little new

138. *Huang v. Gonzales*, 403 F.3d 945, 949, 950-51 (7th Cir. 2005) (reversing only on credibility and not due process despite finding immigration judge “exceeded his proper role in questioning Huang and his conduct during the hearing tainted his credibility finding”); *see also* Libby Sander, *Immigration Judge Overstepped Bounds in Asylum Case: Court*, CHI. DAILY L. BULL., Apr. 15, 2005, at 3 (reporting and attributing the *Huang* decision to Immigration Judge Zerbe).

139. *Huang*, 403 F.3d at 951.

140. *Floroiu*, 481 F.3d at 973, 976 (emphasis added) (failure to provide a fair hearing). While the *Floroiu* opinion refrains from naming Judge Zerbe, the decision is identified as belonging to him in a legal journal. MacLean, *supra* note 137 (attributing the *Floroiu* decision to Immigration Judge Zerbe). On court naming of Judge Zerbe and other instances of his abusive behavior, see *Nahhas v. Ridge*, No. 03C3336, 2003 U.S. Dist. LEXIS 21546 (N.D. Ill. Nov. 25, 2003) (denying federal government’s motion to dismiss plaintiffs’ claim that Immigration Judge Zerbe had violated their rights to equal protection by discriminating on the basis of race and national origin).

141. Roemer, *supra* note 131; *see* Pamela A. MacLean, *Immigration Bench Plagued by Flaws*, NAT’L L.J., Feb. 6, 2006, at 1.

142. 8 C.F.R. §§ 292.3(i), 1003.109 (2007).

143. *See supra* notes 7-15 and accompanying text (discussing 2006 comprehensive review and reform effort).

direction.¹⁴⁴ By contrast, the government's authority to sanction immigration practitioners is clearly set out and well-detailed.¹⁴⁵ The EOIR also regularly publishes disciplinary actions taken against immigration practitioners, posting all relevant details on their website.¹⁴⁶

While improvements in the disciplinary process of immigration judges would be strongly welcomed, circuit pressure upon the Attorney General to utilize the existing system can be effective.¹⁴⁷ The clear control the Attorney General wields over the immigration courts provides broad sanctioning powers: from verbal sanction to outright dismissal.¹⁴⁸

Appropriately, the sanctioning authority is not entirely discretionary. Any sanctioned immigration judge or other government attorney is entitled to administrative review by the DOJ's Merit Systems Protection Board and the Federal Circuit.¹⁴⁹ The Attorney General is required to "consider[] all relevant factors" and to exercise his authority "within tolerable limits of reasonableness."¹⁵⁰

This process was an effective way to remove at least one immigration judge. Immigration Judge Mitchell Levinsky's long history of discriminatory statements to staff and aliens before him includes: "women are inherently homosexual," "all Colombians and Cubans are drug dealers," "Mexicans are drunks," "Salvadorans prefer incest," "Dominican women will have children with anyone," "Poles drink too much," "Chinese are kidnappers," "Jamaicans, Dominicans and Cubans

144. For discussion of the proposed rules of conduct and their limitations, see *supra* notes 15-17 and accompanying text.

145. For discussion of the disciplinary authority, rules, and procedures governing immigration practitioners, see 8 C.F.R. §§ 292.3(a)-(g), 1003.1(d)(5), 1003.101, 1003.103-108 (2007). DHS attorneys who prosecute removal cases before the DOJ are not subject to such rules. See 8 C.F.R. §§ 292.3(a)(2), 1003.109 (2007) (directing under § 1003.109 that complaints regarding their conduct shall be directed to the Office of Professional Responsibility).

146. U.S. Dep't of Justice, Executive Office for Immigration Review, List of Suspended and Expelled Practitioners, Oct. 31, 2007, <http://www.usdoj.gov/eoir/profcond/chart.htm>; see also Roemer, *supra* note 131.

147. For the Third Circuit's earlier recognition of their own immediate results when employing this tactic, see *supra* notes 132-33 and accompanying text (discussing Immigration Judge Ferlise's removal shortly after the *Cham* court became involved in the disciplinary process).

148. For discussion of the Attorney General's authority over immigration judges, see Legomsky, *supra* note 23, at 374-75.

149. 5 U.S.C. § 7703 (2000); see also *Levinsky v. DOJ*, 208 F. App'x 925 (Fed. Cir. 2006).

150. *Levinsky v. DOJ*, 99 M.S.P.R. 574, 580 (2005), *aff'd*, 208 F. App'x 925 (Fed. Cir. 2006); see also 5 U.S.C. § 7703(c) (2000) (requiring Federal Circuit to affirm Merit Systems Protection Board decision unless it is arbitrary, an abuse of discretion, otherwise not in accordance with the law, obtained without proper procedures, or unsupported by substantial evidence).

are murderers,” “Jamaican women make good housekeepers and nannies,” and “[dislike for] Japanese people.”¹⁵¹

Much like the high standard an alien must display before a due process challenge is acknowledged, it is troubling that Immigration Judge Levinsky had the opportunity to display such an extreme and lengthy history of bias. Ironically, the removal process for aliens *and* immigration judges both risk setting a practical standard well in excess of the theoretical. In each context, the judiciary has a pivotal role in ensuring constitutional standards are met and that immigration judges are held accountable.

VI. CONCLUSION

To truly achieve immigration court reform, circuits must rely upon aggregate action in any given case. Circuits must reverse based upon due process *and* credibility *as well as* rely upon paralegal measures such as specifically naming the judge, strongly encouraging a judge be removed from the case and directing that disciplinary action be pursued. Asylum advocates can ably assist the courts and their clients by calling for such action.

While the executive branch may achieve some reform, it is the judiciary which is well poised to serve “the interest of the immigration authorities, the taxpayer, the federal judiciary, [and] citizens concerned with the effective enforcement of the nation’s immigration laws.”¹⁵² Moreover, nothing prevents the judiciary effort from complementing any administrative measures. Demanding nothing less is the wisest calculated prescription. If administrative reforms eventually prove sufficient, the judicial role will be obviated. Until such time, judicial action prevents aggravating matters by raising the due process bar beyond its constitutional base. The circuits must hold the line.

151. *Levinsky*, 99 M.S.P.R. at 579.

152. *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (calling for administrative, not judicial action).