# A MORE PERFECT SYSTEM: THE 2002 REFORMS OF THE BOARD OF IMMIGRATION APPEALS

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## I. AN UNSUSTAINABLE SYSTEM

In February 2002, the Board of Immigration Appeals (BIA), which adjudicates appeals from the immigration courts of the United States, was broken and badly in need of repair.[1] The most obvious problem was a backlog of more than fifty-seven thousand pending cases—a number that had been steadily growing for more than a decade. Of those pending cases, more than thirty-eight thousand were over a year old. And more than thirteen thousand cases were over



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1. The Board of Immigration Appeals (BIA) is part of the Executive Office for Immigration Review, which is a component of the Department of Justice. *See* 8 C.F.R. § 3.0(a) (2008). Members of the BIA are executive branch officials whose decisions ultimately speak for the Department of Justice. The BIA has nationwide jurisdiction to review both immigration judges' decisions and some decisions made by district directors of the Department of Homeland Security. The BIA is "the highest administrative body for interpreting and applying immigration laws," U.S. Dep't of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm (last visited Apr. 6, 2009), subject to review by the attorney general, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 11 (2008), http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf. The attorney general has the authority to assign BIA cases to himself and to overrule BIA decisions that deviate from the executive branch's interpretation of immigration law. *Id.*

three years old. Even worse, a significant number of cases were over five years old.[2]

Such a massive case backlog severely impaired the rule of law in immigration and defeated the objective of timely and efficient adjudication of appeals. The backlog also gave opportunistic immigration lawyers an incentive to file frivolous appeals in which the aliens had no valid argument. Even though they knew their clients could not win, such lawyers could exploit the bottleneck in the system to guarantee their clients additional years within the United States.

A second problem, which was the chief cause of the first, was the method of adjudicating appeals. Until 1999, three-member panels reviewed all cases, even cases that presented no colorable basis for appeal.[3] This resulted in a colossal diversion of public resources to cases that did not merit the attention and coordination of three BIA members. In 1999, the Clinton Justice Department implemented a limited streamlining initiative to address the problem. That initiative allowed certain categories of appeals to be adjudicated by a single member rather than a three-member panel. The 1999 initiative was reviewed favorably by an external auditor in 2001. It had resulted in an approximately 50 percent increase in overall BIA productivity in fiscal year 2001.[4] The BIA reforms of 2002, described below, would build upon that success and focus the time and resources of three-member panels on cases that warranted this expenditure of public resources.

A third problem was the standard of review that the BIA routinely applied in reconsidering factual determinations made by immigration judges. Unlike Article III courts of appeals, the BIA was revisiting de novo the factual determinations made in the immigration courts below.[5] Instead of deferring to the factual findings of an immigration judge who had the benefit of live testimony to assess the credibility of witnesses, the BIA would make factual findings anew without appropriate deference to the court below. It is a well-settled

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2. In February 2002, the number of pending cases before the Board of Immigration Appeals was 57,949. Of these, 38,843 were more than a year old, and 13,707 were more than three years old. This information comes from Department of Justice statistics that are in the possession of the authors.

3. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

4. *See id.* (referencing the external audit). The Board decided 31,789 cases in FY 2001, *id.* at 54,878. Of those, 15,372 cases were decided under the streamlined procedures. *Id.* at 54,875.

5. *See id.* at 54,888 (eliminating de novo review of fact finding).

principle that courts of appeals do not lightly reopen the factual findings of the trial courts below. Reading a cold transcript long after the trial, appellate courts are too far removed from the evidence to evaluate it accurately. Therefore, appellate courts normally disrupt the factual findings of trial courts only when the findings rise to the level of being "clearly erroneous."

De novo review of factual findings is especially inappropriate in the immigration court context. Most immigration cases involve a sparse paper record and very few corroborating witnesses or none at all. Often the only live testimony is provided by the alien himself. In asylum cases, for example, there are rarely, if ever, corroborating witnesses testifying about specific threats to the alien in the alien's country of origin. General country condition reports from the State Department may be presented, but they leave many specific questions unanswered. The most salient evidence of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," which is the central requirement for the granting of asylum,[6] is usually the testimony of the alien himself. Thus, if the system is to render a correct judgment, an accurate evaluation of the alien's credibility is essential. Only the immigration judge has the opportunity to look the alien in the eye to assess his or her credibility. An immigration judge will often question an alien directly if gaps or inconsistencies in the individual's story emerge. By engaging in de novo review of factual findings on appeal, the BIA was giving aliens two bites at the apple—two opportunities to present their facts. And the higher court was in a worse position to make an accurate factual judgment. This odd appellate procedure called into question the correctness of many of the factual findings that the BIA offered.

In short, the BIA had reached a crisis point by 2002. The backlog was out of control. Justice was being delayed, creating a perverse incentive to appeal meritless cases. Public resources were being squandered in these cases through the inefficient use of three-member panels. And the BIA was calling into question its own decisionmaking by engaging in ad hoc factual inquiries under the inappropriate de novo standard. Reform was required.

6. 8 U.S.C. § 1101(a)(42) (2006).

## II. THE 2002 BIA REFORMS

On February 6, 2002, the Department of Justice announced a package of sweeping reforms of the BIA.[7] The department's objectives were to eliminate the case backlog gradually, apply the appellate practices and standards of Article III courts to the BIA, focus the resources of three-member panels on those cases that needed them the most, prevent unwarranted delays, and enhance the quality of BIA decisionmaking.[8] All of this would be done while ensuring that due process would be provided in every case. The proposed rule implementing these reforms was promulgated on February 19, 2002,[9] and the final rule was promulgated on August 26, 2002.[10] The elements of the 2002 reforms were as follows.

(1) Instead of automatically going to a three-member panel of the BIA, all cases would go first to a screening panel, where a single member would either decide the case or determine that it was appropriate for three-member panel review.[11] Instead of squandering the time and attention of three-member panels on cases that were relatively simple, the BIA would be able to focus those resources on cases in which searching appellate review was most needed.[12] Three-member panels would be used in six situations:

(a) to settle inconsistencies between the rulings of different immigration judges,

(b) to resolve ambiguities in the immigration laws,

(c) to decide appeals involving matters of national importance,

(d) to correct decisions that are plainly not in conformity with the law,

(e) to correct factual determinations that appear to be clearly erroneous, and

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7. Press Release, U.S. Dep't of Justice, Department of Justice Unveils Administrative Rule Change to Board of Immigration Appeals in Order to Eliminate Massive Backlog of More than 56,000 Cases (Feb. 6, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/February/02_ag_063.htm.

8. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7309–10 (proposed Feb. 19, 2002) (describing the objectives of the rule changes).

9. *Id.* at 7309–18.

10. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878–905.

11. *Id.* at 54,880.

12. *Id.*

(f) to reverse the decision of an immigration judge or the Immigration and Naturalization Service, other than a reversal under sec. 3.1(e)(5).[13]

All aliens would retain their right to appeal any board decision to the appropriate U.S. court of appeals.[14]

(2) The reforms eliminated the BIA's de novo review of factual issues. The BIA would accept the factual findings of the immigration judges, disturbing them only if they were "clearly erroneous"[15]—

suspending the time limits described above.[23] The BIA was also directed to assign priority to cases involving detained persons, ensuring that those individuals have their cases resolved without delay.[24] In addition, the chairman of the BIA was directed to establish a case management system for the expeditious resolution of all appeals.[25] Cases would no longer sit idle before the BIA for several years.

(4) The reforms restored a regulatory provision that allowed the BIA to summarily dismiss an appeal that is filed for an improper purpose, such as to cause unnecessary delay.[26]

(5) Jurisdiction over appeals of Immigration and Naturalization Service (now Immigration and Customs Enforcement) decisions imposing administrative fines were transferred from the BIA to the Office of the Chief Administrative Hearing Officer (OCAHO).[27]

In addition to these procedural reforms, the Department of Justice modified the size of the BIA to eleven members.[28] Beginning in 1995, the department had incrementally increased the number of BIA members from five to twenty-three.[29] This expansion of the board, however, did not speed up the completion of decisions. Rather, the backlog of cases only grew larger.[30] It was plain that the backlog was not a personnel problem; it was fundamentally a problem of procedure. In 2006, the department modified the size of the BIA once again, changing it to a fifteen-member body.[31] This Article will not focus on the fluctuating size of the BIA, which does not trigger

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23. *Id.* at 54,902.

24. *See id.* at 54,896 ("The Department also believes that 8 CFR 3.1(e)(8) sufficiently directs the Board to assign priority to deciding case appeals involving detained respondents.").

25. *Id.* at 54,903.

26. *Id.* at 54,902.

27. *See id.* at 54,900 (stating that this issue will be addressed in a separate final ruling).

28. *Id.* at 54,901. At the time the 2002 BIA reforms were announced, the number of BIA positions was twenty-three, with nineteen positions filled and four vacancies. *Id.* at 54,878. On April 18, 2003, the board was reduced to eleven members after a 180-day transition period as directed by the regulations. *See id.* at 54,901 (stating that the reduction should occur within six months of the implementation of the screening system). Normal attrition had reduced the board to sixteen members, and the remaining five were reassigned to vacancies in Executive Office of Immigration Review.

29. *Id.* at 54,878.

30. *See* Kris W. Kobach, *Courting Chaos: Senate Proposal Undermines Immigration Law*, HERITAGE RESEARCH (Heritage Found., WebMemo No. 1083, 2006), http://www.heritage.org/Research/Immigration/wm1083.cfm.

31. *See* Memorandum from U.S. Att'y Gen. to the Deputy Att'y Gen. et al. (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

any colorable due process claims and was not central to the 2002 BIA reforms. Rather, this Article will consider the various procedural issues presented by the reforms, and subsequent judicial review of those reforms.

The 2002 BIA reforms are often associated with an increase in BIA cases that are "affirmed without opinion" (AWO). In such a decision, which is rendered by a single member, the following boilerplate language must be used: "The Board affirms, without opinion, the result of the decision below. The decision is, therefore, the final agency determination."[32] The decision to affirm without opinion "approves the result reached in the decision below," but "does not necessarily imply approval of all of the reasoning of that decision."[33] An affirmance without opinion, however, does "signify the Board's conclusion that any errors in the [immigration judge's] decision . . . were harmless or immaterial."[34]

Although the use of the AWO did increase because the percentage of BIA cases decided by single members increased after 2002, the 2002 BIA reforms neither mandated this result nor created the AWO. Indeed, the AWO was introduced in the 1999 streamlining reforms, which gave the chairman of the BIA authority to designate categories of cases that would be decided by single members, but *mandated* that all single-member decisions be affirmances without opinion.[35] In fiscal year 2001, over 58 percent of BIA cases were decided by single members who affirmed without opinion.[36] The 2002 BIA reforms actually *removed* the 1999 requirement that a single-member decision be an AWO and provided that, "[i]f the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review."[37] The 2002 BIA reforms also gave single members deciding cases the option to "reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or

32. 8 C.F.R. § 1003.1(e)(4)(ii) (2008).

33. *Id.*

34. *Id.*

35. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,141 (Oct. 18, 1999) (codified at 8 C.F.R. pt. 3).

36. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

37. *Id.* at 54,903 (codified at 8 C.F.R. § 1003.1(e)(5)).

judicial precedent, by an intervening Act of Congress, or by an intervening final regulation."[38]

Thus, for the first time, the 2002 reforms provided single members deciding cases with multiple options in addition to the AWO. It is therefore incorrect to assert, as one observer has, that the 2002 BIA reforms "encourag[ed] routine 'affirmances without opinion.'"[39] On the contrary, the issuance of an AWO became less routine and more discretionary. It is also true, however, that an increase in AWO opinions was a foreseeable result of the 2002 BIA reforms. The total number of AWO opinions per year increased as the 2002 BIA reforms allocated a larger share of the board's cases to single-member decisions.[40] Accordingly, this Article will consider the use of the AWO and its impact within the larger context of the 1999 and 2002 BIA reforms.

The 2002 BIA reforms had an immediate and significant impact on the efficiency of the BIA. After the reforms were implemented, the board was able to complete a far higher number of cases per month, more than keeping up with its workload. The following figures illustrate the improvement. In fiscal year 2001, the board completed an average of 2,649 cases per month.[41] After the reforms, in fiscal year 2003, the board had increased its average to 4,314 cases per month.[42]

This improved efficiency enabled the BIA to reduce the backlog of older cases progressively. When the Department of Justice announced the reforms in February 2002, the number of pending cases was 57,949. Of these, 38,843 were more than a year old. And 13,707 were more than three years old.[43] By May 2003, the number of pending cases was down to just over thirty-eight thousand. Of these, 10,117 were more than a year old. And only 1,521 were more than

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38. *Id.*

39. DORSEY & WHITNEY LLP, SUMMARY OF FINDINGS AND CONCLUSIONS 1 (2003), *available at* http://www.dorsey.com/files/upload/Summary-Conclusion_DorseyABAStudy.pdf (summarizing the results of the full report, *infra* note 40).

40. DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO ENHANCE CASE MANAGEMENT 40 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

41. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878 (presenting data that in fiscal year 2001, the Board decided 31,789 cases).

42. This information is from Department of Justice statistics in the possession of the authors.

43. *See supra* notes 1–2 and accompanying text.

three years old. Thus, the backlog of cases more than a year old had been reduced by more than twenty-eight thousand in fifteen months.[44] By 2006, the BIA would eliminate the backlog entirely, resolving the vast majority of cases within one year. In January 2006, the number of pending cases was down to approximately twenty-eight thousand.[45] This is the normal level that one would expect in a system that receives more than forty thousand new appeals per year and resolving all but the most extraordinary cases in less than twelve months.[46]

## III. THE BIA STREAMLINING REFORMS: UNDEFEATED IN THE CIRCUIT COURTS

The 2002 reforms, in combination with the earlier reforms of 1999, prompted a volley of due process challenges in eleven U.S. circuit courts of appeals, all of which were decided in 2003 and 2004. The challenges were aided by amicus briefs submitted by organizations such as the American Immigration Law Foundation and the American Immigration Lawyers Association.[47] Their concerted arguments, however, were met with no success. *Every single one* of these due process challenges was rejected. As a result, a stable and overwhelming consensus among the circuits emerged in an unusually short period of time.

At the outset, it must be noted that the U.S. Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment does not confer any right to appeal, even in criminal prosecutions.[48] As the Supreme Court held in *Ross v. Moffitt*,[49] "[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the

44. *See supra* notes 1–2 and accompanying text.

45. U.S. DEP'T OF JUSTICE, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES 2 (2006), http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf.

46. *See id.*

47. Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1018–20, 1030 (2006).

48. It is recognized, of course, that the Due Process Clause of the Fifth Amendment governs the procedures of the BIA and immigration courts, because those adjudicative bodies are part of the federal government. The Supreme Court, however, has not stated or suggested that the extent of those due process protections differs in any material way.

49. Ross v. Moffitt, 417 U.S. 600 (1974).

State need not provide any appeal at all."[50] The same conclusion applies with respect to appellate review in the administrative process of immigration proceedings. As the Seventh Circuit put it:

> The Constitution does not entitle aliens to administrative appeals. Even litigants in the federal courts are not constitutionally entitled to multiple layers of review. The Attorney General could dispense with the Board [of Immigration Appeals] and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review (a la the Appeals Council of the Social Security Administration, or the Supreme Court exercising its certiorari power). The combination of a reasoned decision by an administrative law judge plus review in a United States Court of Appeals satisfies constitutional requirements.[51]

This basic principle has been reiterated by every circuit to consider the question. As the First Circuit put it, "An alien has no constitutional right to any administrative appeal at all."[52] The Third Circuit agreed.[53] And the Tenth Circuit added, "Rather, the right to appeal is merely a regulatory creation of the Attorney General."[54] The Eighth Circuit similarly opined: "[A]n alien has no constitutional or statutory right to an administrative appeal from the decision of an IJ."[55] Against this backdrop, any due process challenge to the BIA streamlining reforms of 1999 and 2002 was destined to be an uphill struggle.

There were essentially three due process challenges that were leveled against the reforms. The first and most frequent challenge was to the BIA's use of the AWO. The argument against the procedure

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50. *Id.* at 611; *see also* Abney v. United States, 431 U.S. 651, 656 (1977) ("[I]t is well settled that there is no constitutional right to an appeal." (citing McKane v. Durston, 153 U.S. 684 (1894))); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) ("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." (citation omitted)).

51. Guentchev v. INS, 77 F.3d 1036, 1037–38 (7th Cir. 1996).

52. Kechichian v. Mukasey, 535 F.3d 15, 22 (1st Cir. 2008) (quoting Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003)).

53. Dia v. Ashcroft, 353 F.3d 228, 242 (3d Cir. 2003) (en banc) ("The 'right to meaningful review' . . . is clearly distinguished from 'the fundamental requirement of due process [that] is the opportunity to be heard at a meaningful time and in a meaningful manner . . . .").

54. Tsegay v. Ashcroft, 386 F.3d 1347, 1353 (10th Cir. 2004); *see also* Yuk v. Ashcroft, 355 F.3d 1222, 1232 (10th Cir. 2004) ("We therefore agree with the analysis of *Albathani* and those other courts and join them in holding that the summary affirmance procedures do not violate principles of administrative law or due process.").

55. Ngure v. Ashcroft, 367 F.3d 975, 981 (8th Cir. 2004).

was that the issuance of the AWO denied the alien a meaningful explanation for the affirmance of the immigration court ruling and a sufficient basis on which to appeal to the Article III courts, thus denying the alien due process. The second challenge was that the AWO denied due process by denying the alien a sufficiently individualized determination on appeal. The third challenge was that a decision by a single member of the BIA, as opposed to a three-member panel, did not provide a meaningful opportunity to appeal and therefore denied the alien due process. All three challenges have been rejected resoundingly.

In 2003, the First Circuit, in *Albathani v. INS*,[56] was the first to confront the question of whether the lack of explanation in an AWO denied an alien due process. The case involved a citizen of Lebanon who sought asylum on the basis that he was a Christian who feared persecution by members of Hezbollah in Lebanon.[57] The immigration judge denied Albathani's application for asylum, withholding of removal, and relief under the United Nations Convention Against Torture, finding Albathani's story not credible.[58] The BIA summarily affirmed the immigration judge's decision by issuing an AWO.[59] Albathani appealed to the First Circuit, raising his due process claim.

The First Circuit held that the lack of substantive explanation did not constitute a denial of due process: "The court thus reviews the BIA decision without knowing its basis. The summary affirmance scheme does create these problems, but they do not render the scheme a violation of due process or render judicial review impossible. Nor does the scheme violate any statute."[60] The court also reasoned that any "problem" was self-correcting: "In functional terms, if the BIA does not independently state a correct ground for affirmance in a case in which the reasoning proffered by the IJ is faulty, the BIA risks reversal on appeal."[61] Alternatively, the BIA might risk remand; the relevant circuit may conclude that the AWO and immigration judge's opinion, combined, leave important questions unanswered. In these cases, the court may vacate the BIA's dismissal of the alien's appeal and remand with instructions to the

56. Albathani v. INS, 318 F.3d 365 (1st Cir. 2003).
57. *Id.* at 367.
58. *Id.*
59. *Id.*
60. *Id.* at 377.
61. *Id.* at 378.

BIA to issue an opinion clarifying its reasons for dismissing the appeal.[62] "In sum, the IJ's decision provides the reasoned explanation for the agency's decision, its existence enables [the court] to review the agency decision, and the BIA knows that faulty or inadequate reasoning in the IJ's decision will lead to the reversal of a BIA summary affirmance of that decision."[63]

The First Circuit also noted that the U.S. courts of appeals utilize one-line decisions to dispose of appropriate cases:

> Courts themselves use 'summary affirmance' or 'summary disposition' procedures in which parties may receive one-line dispositions of their appeals. These are workload management devices that acknowledge the reality of high caseloads. They do not, either alone or in combination with caseload statistics, establish that the required review is not taking place.[64]

Other circuits soon thereafter adopted the reasoning and conclusion of the First Circuit on the matter. The Fifth, Seventh, and Eleventh Circuits all followed suit within a few months.[65] The Ninth Circuit summarized the emerging consensus favorably and joined: "The First Circuit's opinion in *Albathani* was the first to address the issue. Its careful reasoning is persuasive and, like the other courts of appeal that followed, we embrace its rationale."[66] The Ninth Circuit rejected the argument that the AWO limited the alien's ability to seek review of the agency action in a U.S. court of appeals:

> Nor is it a due process violation for the BIA to affirm the IJ's decision without issuing an opinion. The IJ's decision becomes the final agency action when a case is streamlined. Thus, the streamlining procedures do not compromise our ability to review the INS's decision, to the extent we have jurisdiction to do so, because we can review the IJ's decision directly.[67]

By effectively referring the court of appeals to the IJ decision, the AWO would not deny due process—just as a BIA opinion stating "we

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62. *See* Zhu v. Gonzales, 493 F.3d 588, 592 (5th Cir. 2007).

63. Yuk v. Ashcroft, 355 F.3d 1222, 1231 (10th Cir. 2004).

64. *Albathani*, 318 F.3d at 379 (citation omitted).

65. *See* Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003).

66. Falcon Carriche v. Ashcroft, 350 F.3d 845, 850 (9th Cir. 2003).

67. *Id.* at 851 (citation omitted).

adopt the reasoning and analysis of the immigration judge" would not deny due process.[68]

In December 2003, the Third Circuit—the only circuit to consider the question en banc—addressed the issue in *Dia v. Ashcroft*.[69] The case involved a citizen of Guinea who had illegally entered the United States and applied for asylum, withholding of removal, and relief under the United Nations Convention Against Torture. Dia claimed that he would be persecuted in Guinea due to his political opinions.[70] The immigration judge had rejected Dia's claims, based on her conclusion that he was not credible, and the BIA summarily affirmed without opinion.[71] In a lengthy opinion addressing every permutation of Dia's due process claims, the Third Circuit opined:

> Neither the Constitution nor Congress guarantee a de novo review by the BIA nor do they guarantee a right to a fully reasoned opinion by the BIA. We are able to meaningfully review the final determination of the agency, and, in this context, that is all that due process requires.[72]

The Third Circuit also noted the circumstances that had precipitated the streamlining reforms, pointing to the "crushing caseload, the number of cases having increased exponentially in a little over a decade."[73]

In the same month, the Sixth and Eighth Circuits concurred.[74] A month later, in January 2004, the Tenth Circuit would join its sister circuits, repeating the observation that "a BIA summary affirmance is not unlike the summary affirmance or summary disposition procedures employed by courts, which are workload management devices that acknowledge the reality of high caseloads."[75]

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68. *See Yuk*, 355 F.3d at 1230.

69. Dia v. Ashcroft, 353 F.3d 228 (3d Cir. 2003) (en banc).

70. *Id.* at 233–34.

71. *Id.* at 234.

72. *Id.* at 243 (citations omitted).

73. *Id.* at 235.

74. Loulou v. Ashcroft, 354 F.3d 706, 709 (8th Cir. 2003); Denko v. INS, 351 F.3d 717, 732 (6th Cir. 2003).

75. Tsegay v. Ashcroft, 386 F.3d 1347, 1356 (10th Cir. 2004); Yuk v. Ashcroft, 355 F.3d 1222, 1232 (10th Cir. 2004).

Finally, in March 2004, the Second and Fourth Circuits reached the same conclusion.[76] The Second Circuit noted the uniformity with which its sister circuits had rejected similar due process challenges.[77] Neatly summarizing the conclusion of the other circuits, the court held:

> Our concern is whether streamlining deprives an alien of the process that he is due by law. Under applicable laws and regulations, even after streamlining, an applicant for asylum or withholding of removal remains entitled to a full hearing on his asylum claims, a reasoned opinion from the IJ, the opportunity for BIA review, and the right to seek relief from the courts. This is the process Zhang received.[78]

The Second Circuit also mentioned in passing the complaint of some judges that the streamlining reforms of 1999 and 2002 had, by removing the logjam of cases, sent a surge of appeals to the circuits. The court brushed the issue aside as irrelevant: "Whether the streamlining regulations will or will not add to our burden, however, is not the issue before us."[79] Although the streamlining reforms had indeed increased the caseload of the U.S. courts of appeals, such an increase was inevitable if the backlog was ever to be resolved.

The Fourth Circuit, the final circuit to rule on the question, reiterated that the AWO was similar to the summary affirmance procedures used by the U.S. courts of appeals. What was good for the goose was good for the gander. "The BIA summary affirmance procedures are not unlike summary disposition procedures routinely used by appellate courts to resolve cases which do not raise novel or complex questions and whose issues the lower court has adequately addressed."[80] And so the cascade of opinions ended. Within a thirteen-month period from February 2003 to March 2004, eleven circuits had arrived at the unanimous conclusion that the AWO did not violate due process. On very few questions have so many circuits come together so quickly.

The second due process challenge—that an AWO denies the alien an individualized determination—was addressed by the Third

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76. Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 281 (4th Cir. 2004); Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 160 (2d Cir. 2004).

77. *Zhang*, 362 F.3d at 156–57.

78. *Id.* at 159.

79. *Id.*

80. *Blanco de Belbruno*, 362 F.3d at 281.

Circuit in *Dia*. Dia seized upon a statement in an earlier Third Circuit opinion stating that an alien seeking relief from removal has the due process right to "'an individualized determination of his [or her] interests.'"[81] Dia combined this statement with language from another Third Circuit opinion suggesting that "the BIA denies due process to an alien when it 'acts as a mere rubber-stamp.'"[82] Dia maintained that the boilerplate statement of an AWO was therefore a denial of an individualized determination.[83] The Third Circuit rejected the argument, distinguishing its earlier statements as applying to a case in which the BIA had chosen to speak and present its own rationale for its decision. "The situation here is very different; the BIA did not opine on its own, but, instead, referred us to the IJ's decision."[84] This distinction may not have been entirely persuasive as a means of extricating the court from its prior language, but the court's conclusion certainly was:

> Dia, nonetheless, also insists that the streamlining regulations violate his right to an "individualized determination" because they specifically state that an AWO does not necessarily imply approval of all of the reasoning of the IJ's decision. But he fails to articulate why or how this is so. We are unaware of any requirement, let alone any constitutional requirement, that an agency adjudicator must commit to writing or otherwise verbalize his or her reasoning, where, as here, the agency has directed us to an opinion for review. In Dia's case, the due process right to an "individualized determination" was accorded to Dia at the IJ level, where the IJ "reasoned" her decision, and the BIA gave the result its imprimatur pursuant to its regulations. Certainly, the BIA could have articulated its reasons for affirming the IJ's order, but just because it had the power to do so, does not mean the Constitution required it to exercise that power.[85]

Thus, the BIA's use of standardized language in issuing an AWO did not deny due process.[86]

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81. Dia v. Ashcroft, 353 F.3d 228, 239 (3d Cir. 2003) (en banc) (quoting Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001) (quoting Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1994))).

82. *Id.* (quoting *Abdulai*, 239 F.3d at 550 (quoting Marincas v. Lewis, 92 F.3d 195, 202 n.7 (3d Cir. 1996))).

83. *Id.*

84. *Id.* at 240.

85. *Id.* (citation omitted).

86. *See id.*

The third due process challenge—that due process requires an appeal to a three-member panel rather than a single member of the BIA—has also been presented less frequently. Its rejection, however, has been equally emphatic in the three circuits that have addressed it. The argument was presented to the Ninth Circuit in *Falcon Carriche v. Ashcroft*,[87] a case involving citizens of Mexico whose request for cancellation of removal was denied.[88] The immigration judge rejected the Falcon Carriches' claim that their U.S. citizen daughter would suffer "exceptional and extremely unusual hardship" if the family were removed to Mexico because the daughter would have difficulty adapting to the Mexican educational system and because the family would face economic difficulty in providing for her. The immigration judge found that any difficulties the daughter would face were neither exceptional nor unusual.[89] A single member of the BIA affirmed the immigration judge's opinion via AWO.[90] The Falcon Carriches maintained that review by a three-member panel of the BIA constituted "an additional procedural safeguard" necessary to ensure due process.[91] The Ninth Circuit disagreed:

> Their assertion that "it takes at least three board members to identify, shape and determine important issues" in every appeal finds no support in the law. Nor is there any support for their assertion that a single board member will not conduct the required review of the IJ's decision. The Carriches received all of the administrative appeals to which they were entitled by statute and the Constitution does not require that the BIA do more.[92]

The court also went on to point out that the aliens still possessed, and were exercising, their right to seek review before a U.S. court of appeals—which rendered their claim of inadequate appellate review hollow.[93] The Ninth Circuit concluded by reiterating the Supreme Court's statement that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of

87. Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003).

88. *Id.* at 848.

89. *Id.* The "exceptional and extremely unusual hardship" criterion is found in 8 U.S.C. § 1229b(b)(1)(D) (2006).

90. *Falcon Carriche*, 350 F.3d at 845.

91. *Id.* at 850.

92. *Id.* (citations omitted) (quoting Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003)).

93. *Id.*

inquiry capable of permitting them to discharge their multitudinous duties."[94]

The Fourth Circuit also disposed of the notion that a magic number of three judges was required to meet the requirements of due process:

> Belbruno also claims a due process violation, because a single BIA member, rather than a three-member panel, decided her appeal. She claims the resolution of her appeal by a single person resulted in a greater chance of an inaccurate and constitutionally impermissible result. But there is no magic—and certainly no due process implications—in any given number of reviewing judges. What matters is that Belbruno was able to take the decision of the Immigration Judge to an authority with the responsibility to overturn an erroneous decision. And, of course, Belbruno both possessed and exercised the right to appeal the agency decision to a panel of this court whose members, coincidentally, are three in number.[95]

The court wisely declined to accept the invitation to hold that due process required a particular number of appellate judges to guarantee a certain probability of reversal.[96]

The Third Circuit entertained the same due process argument, phrased as a contention that the single-member review procedure was unfair to the alien.[97] The en banc panel rejected this claim:

> We find nothing "unfair" in a constitutional sense about the INS's streamlining procedures. An applicant retains a full and fair opportunity to make his case to the IJ, and has a right to review of that decision by the BIA, and then by a court of appeals. The fact that the review is done by one member of the BIA and that the decision is not accompanied by a fully reasoned BIA decision may be less desirable from the petitioner's point of view, but it does not make the process constitutionally "unfair."[98]

The court's conclusion is hardly surprising. To hold otherwise would be to interpret the Due Process Clause as requiring an appellate body of a minimum size—a difficult conclusion to reach when the Supreme

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94. *Id.* (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978)).

95. Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 282 (4th Cir. 2004).

96. *Id.* at 283.

97. Dia v. Ashcroft, 353 F.3d 228, 243 (3d Cir. 2003).

98. *Id.* at 243–44 (citations omitted).

Court has held that no appeal at all is necessary to satisfy the requirements of due process.

In sum, there has been an unusual degree of unity among the circuits that the BIA reforms of 1999 and 2002 do not deprive an alien of due process in any way. The only divergence that has emerged among the circuits is not on the due process question, but on the tangential question of whether the courts of appeals possess jurisdiction under the Administrative Procedure Act to review whether the BIA properly followed federal regulations in deciding to use the AWO procedure in a particular case. The First,[99] Third,[100] and Ninth[101] Circuits have held that they do possess jurisdiction to assess whether the AWO procedure is appropriate in a given case, whereas the Eighth[102] and Tenth[103] Circuits have held that they are without jurisdiction to do so.[104] In any event, this circuit split is largely irrelevant to the due process issue.

## IV. MORE ACCURATE APPELLATE ADJUDICATION

A final argument made by critics of the 1999 and 2002 BIA reforms is that the BIA reversed a lower percentage of immigration judge opinions after the reforms than it did before the reforms.[105] This argument was actually presented to the Fourth Circuit, which had little use for it. In the words of Judge Wilkinson, "Such statistics prove little, however. We have no idea what the optimal rate of affirmance or reversal of Immigration Judge decisions is, if such an optimal rate even exists. And [the petitioner] has made no showing that the BIA has failed to conduct the necessary review."[106] If there were an objectively correct percentage of reversals that the BIA should aspire to, such an argument might have merit; but no such target exists.

Indeed, a stronger argument could be made that, prior to the 2002 reforms, the BIA was more prone to producing inaccurate

99. Haoud v. Ashcroft, 350 F.3d 201, 206 (1st Cir. 2003).

100. Smriko v. Ashcroft, 387 F.3d 279, 294 (3d Cir. 2004).

101. Falcon Carriche v. Ashcroft, 350 F.3d 845, 852–53 (9th Cir. 2003).

102. Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

103. Tsegay v. Ashcroft, 386 F.3d 1347, 1355–56 (10th Cir. 2004).

104. *See* Jessica R. Hertz, Comment, *Appellate Jurisdiction over the Board of Immigration Appeals's Affirmance Without Opinion Procedure*, 73 U. CHI. L. REV. 1019, 1019–20 (2006) (discussing the circuit split and arguing that jurisdiction should exist).

105. *See* DORSEY & WHITNEY LLP, *supra* note 40, at 40.

106. Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 282 (4th Cir. 2004).

results by engaging in de novo review of factual findings based on the reading of cold transcripts. It is difficult to deny that an immigration judge is in a better position to evaluate the credibility of an alien testifying before him than a BIA member reading the transcript years after the words were uttered. The 2002 reforms appropriately recognized the immigration judge as the primary factfinder in immigration proceedings.

One possible method of assessing the accuracy of BIA rulings is to look at the percentage of BIA decisions that are reversed by the U.S. courts of appeals. Of course, this method assumes that circuit judges are in the best position to determine the factual accuracy of results in immigration decisions, which may or may not be the case. At any rate, the Department of Justice considered this metric in 2006 and found that "the affirmance and reversal (or remand) rates of BIA decisions have not changed significantly in the wake of the [2002] restructuring regulation. The vast majority of BIA decisions—more than 90 percent—continue to be affirmed in federal court."[107] This suggests that the factual accuracy of BIA decisionmaking remained the same after the reforms as it had been before the reforms. In any event, there is no compelling evidence indicating that the reforms reduced the accuracy of the BIA's adjudicative process. And if a massive improvement in efficiency was achieved with no cost whatsoever in accuracy—and more likely with an improvement in accuracy in those cases in which the BIA would have otherwise engaged in de novo review of factual finding—then the BIA streamlining reforms were a profound success.

## CONCLUSION

The story of the BIA streamlining reforms of 1999 and 2002 is essentially the recurring story of balancing the public's need for efficient, accurate, and timely administration of justice against the individual's desire to maximize procedural protections and the number of layers of appellate review. In the landmark due process case of *Mathews v. Eldridge*[108] the Supreme Court conceived of due process in similar terms:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private

107. U.S. DEP'T OF JUSTICE, *supra* note 45, at 2.

108. Mathews v. Eldridge, 424 U.S. 319 (1976).

> interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[109]

It is always possible, at least in theory, to add another layer of review to any adjudicative process. And it is similarly possible to add multiple adjudicators to the layer of review and to free the reviewing body from the constraints of deference to the lower court. But doing so exacts a public cost; and it is far from clear that doing so results in greater accuracy of decisionmaking. In other words, the *Mathews* Court contemplated that due process must encompass the procedural demands of society as well as the procedural demands of the individual.[110]

It bears mentioning that an alien in removal proceedings still enjoys more layers of review than does a U.S. citizen in federal criminal or civil proceedings. An alien enjoys three layers of administrative review (immigration judge, BIA, and potentially the review of the attorney general), plus two layers of judicial review (U.S. court of appeals and potentially the review of the U.S. Supreme Court). In contrast, a citizen only enjoys three layers of review in federal proceedings (U.S. district court, U.S. court of appeals, and potentially the review of the U.S. Supreme Court). Yet no serious person would claim that such federal proceedings constitute a denial of due process for lack of appellate review.

It is often said that justice delayed is justice denied. That aphorism is certainly true in most criminal proceedings. It is even more pertinent, however, in immigration proceedings. This is because in immigration cases, *time* is the primary objective. In just about every removal hearing, what the alien seeks, fundamentally, is more time in the United States. Conversely, what the government seeks in most immigration cases is to remove the alien from the United States sooner rather than later. Therefore, to provide an alien whose appeal lacks merit more time in the United States simply because of an

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109. *Id.* at 335.

110. *Id.* at 334 ("Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.").

unnecessary backlog at the BIA is to deny justice. Or to put it differently, the more expeditious resolution of immigration cases is a win-win proposition in terms of justice. If the alien will be the prevailing party, he or she is better off receiving vindication quickly. This is particularly true if the alien is detained during the immigration proceedings. On the other hand, if the government will be the prevailing party, the country is plainly better off if that determination is reached sooner. Every additional day that the ultimately removable alien spends in the United States because of unnecessary delay in the system is a denial of justice.

Which brings us back to the crisis of backlogged cases that necessitated the BIA reforms in the first place. There is a weighty public interest in the administration of the immigration laws without unnecessary delay. When such delay reaches a point at which it creates a perverse incentive to file frivolous appeals, the system becomes unsustainable. This was where the immigration court system was in February 2002. By 2006, that unnecessary delay had been eliminated, with no loss of due process and with no loss of accuracy in decisionmaking. A more perfect system had been achieved.