

AGENCY INDISCRETION: JUDICIAL REVIEW OF THE IMMIGRATION COURTS

CHRISTOPHER MANION[†]

INTRODUCTION

For many immigrants, becoming a permanent resident of the United States is a difficult process. Although the United States allowed virtually unrestricted immigration during its first one hundred years, federal legislation passed since then has limited immigrants' ability to become United States citizens.¹ Despite the restrictions placed on immigration by federal law, the United States remains a beacon of hope to many immigrants who flee from persecution endured in their home countries.²

People who fear persecution in their homelands and seek protection in another country such as the United States can generally be grouped into two categories: refugees and asylum

[†] J.D. Candidate, June 2008, St. John's University School of Law; B.A., 2002, Penn State University. I would like to thank Jenine Barunas, who helped me through the difficult times, and my parents, David and Treacy Manion, who never stopped believing in me.

¹ See Stephen Yale-Loehr & Lindsay Schoonmaker, Overview of U.S. Immigration Law (2006), http://www.millermayer.com/index2.php?this_cat=1&this_sub_cat=1&article_id=14&keyword=schoonmaker#14; see also U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power "[t]o establish an uniform Rule of Naturalization"); U.S. CONST. art. I, § 8, cl. 11 (granting the federal government power to prevent aliens from entering the United States and the President power to capture and remove aliens from the United States). See generally MARGARET C. JASPER, THE LAW OF IMMIGRATION (1996) (discussing the history of immigration law within the United States); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996) (presenting issues of constitutional rights afforded to immigrants throughout American history). For a list of federal immigration legislation from 1790 through 1996, see U.S. CITIZENSHIP & IMMIGRATION SERVS., HISTORICAL IMMIGRATION AND NATURALIZATION LEGISLATION, <http://www.uscis.gov/portal/site/uscis> (follow "Education & Resources" hyperlink; then follow "Immigration Legal History" hyperlink) (last visited Jan. 16, 2008).

² See generally TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, ASYLUM LAW, ASYLUM SEEKERS AND REFUGEES: A PRIMER (2006), <http://trac.syr.edu/immigration/reports/161/> [hereinafter TRAC REPORT] (describing the origins and continued significance of asylum and refugee law).

seekers.³ The main distinction between these two groups is their location. Refugees appeal for protection in the United States while located in another country, whereas asylum applicants have already entered the United States when they request protection.⁴ This Note focuses solely on the challenges faced by asylum applicants.

Asylum applicants in the United States must show a well founded fear of persecution in their home country on the basis of their "race, religion, nationality, membership in a particular social group, or political opinion."⁵ This burden is difficult for asylum applicants to meet, as they frequently arrive in the United States with little proof of the dangers from which they escaped.⁶ As a result, asylum applicants must often rely solely on their own oral testimony to convince the immigration authorities that they meet the requirements for asylum.⁷

Zhen Li Iao was an asylum applicant forced to rely on her oral testimony.⁸ Iao, a Chinese immigrant, was denied asylum by an immigration judge who based his decision in large part on the fact that Iao did not provide documentary evidence of her membership in a religion that had been outlawed in China and whose members were subjected to government persecution.⁹ Iao appealed this denial to the Seventh Circuit Court of Appeals, which ultimately vacated the immigration judge's ruling and remanded the case.¹⁰ Judge Posner's opinion criticized the immigration judge in particular and the immigration courts in general for their over-emphasis on asylum applicants' lack of documentary evidence supporting their claims.¹¹ Posner sardonically noted that an "illegal religious movement is unlikely to issue membership cards."¹²

The legal framework of the asylum application process is complex. Federal legislation has placed the power to regulate

³ See TRAC REPORT, *supra* note 2; Yale-Loehr & Schoonmaker, *supra* note 1.

⁴ See TRAC REPORT, *supra* note 2.

⁵ Immigration and Nationality Act, 8 U.S.C.A. § 1158(b)(1)(B)(i) (West 2007); see TRAC REPORT, *supra* note 2.

⁶ See TRAC REPORT, *supra* note 2.

⁷ See *id.*

⁸ See *Iao v. Gonzales*, 400 F.3d 530, 531 (7th Cir. 2005).

⁹ See *id.* at 532.

¹⁰ See *id.* at 533.

¹¹ See *id.* at 534.

¹² *Id.*

immigration in the hands of the executive branch, which in turn has created several agencies to control immigration in the United States.¹³ The Department of Justice oversees the immigration courts, the court system that must be navigated by many asylum applicants seeking to remain residents of the United States.¹⁴ Recently, the immigration judges who preside over these courts have come under fire for decisions that fail to meet the standards expected from them by the Department of Justice.¹⁵ Immigrants can appeal an immigration judge's ruling to the Board of Immigration Appeals ("BIA").¹⁶ However, this division of the Department of Justice is at the center of a recent circuit split over whether a particular type of ruling, in which the BIA affirms an immigration judge's ruling without issuing an opinion, is subject to judicial review by the circuit courts.

This Note examines the challenges faced by asylum applicants and the federal courts' disagreement about the extent to which the judicial branch can intervene in the executive branch's review of asylum applications. Part I of this Note provides an overview of the immigration court system and examines the recently alleged faults and abuses within the immigration courts. Part II examines the issue of whether the U.S. circuit courts have jurisdiction to review the decision by the appellate division of the immigration courts to affirm without opinion the ruling of an immigration judge. Finally, Part III reviews recently proposed changes to the immigration courts made by former Attorney General Alberto Gonzales and proposes a resolution to the circuit split addressed in Part II.

¹³ See Immigration and Nationality Act, 8 U.S.C. § 1103(a)(1) (2000 & Supp. III 2003); *Wang v. Attorney Gen.*, 423 F.3d 261, 262 n.1 (3d Cir. 2005) ("The Immigration and Nationality Act was amended by the Homeland Security Act of 2002 . . . [which] transferred the functions of the INS to various bureaus . . . within the Department of Homeland Security. The functions of the Executive Office for Immigration Review [which oversees the immigration courts] continue to reside in the Department of Justice, under the direction of the Attorney General."). See generally Yale-Loehr & Schoonmaker, *supra* note 1 (explaining the role of executive agencies).

¹⁴ See Yale-Loehr & Schoonmaker, *supra* note 1; *infra* notes 26–31 and accompanying text.

¹⁵ The immigration courts have recently been criticized by several different sources. Among the critics are the U.S. Courts of Appeals, a Syracuse University research organization, and the U.S. Department of Justice. See *infra* notes 46–86 and accompanying text.

¹⁶ See 8 C.F.R. § 1003.1(a)(1) (2006); Yale-Loehr & Schoonmaker, *supra* note 1.

I. THE IMMIGRATION COURT SYSTEM

A. *The Authority and Organization of the Courts*

The Constitution does not expressly address immigration, but within the enumerated powers it does confer on Congress some authority with respect to foreign citizens.¹⁷ These powers can be found in the Commerce Clause,¹⁸ the Naturalization Clause,¹⁹ the War Power Act,²⁰ and the Migration and Importation Clause.²¹ In addition to these enumerated powers, the Supreme Court has interpreted the Constitution as granting Congress complete power to make immigration law.²² Thus, Congress has complete authority over immigration issues. This authority has in turn been delegated by Congress to the executive branch of the federal government through a complex series of statutes.²³

Under the Immigration and Nationality Act²⁴ and its subsequent amendments, control of immigration has been divided primarily between the Department of Homeland Security and the Department of Justice, with a majority of the power vesting in the Department of Homeland Security.²⁵ Within the

¹⁷ See JASPER, *supra* note 1, at 1.

¹⁸ U.S. CONST. art. I, § 8, cl. 3. This clause grants Congress the power “[t]o regulate commerce with foreign Nations.” *Id.* The Supreme Court has defined the commerce power to include regulation of the carriage of passengers on boats. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 2–3 (1824).

¹⁹ U.S. CONST. art. I, § 8, cl. 4. This clause grants Congress the power “[t]o establish an uniform Rule of Naturalization.” *Id.*

²⁰ U.S. CONST. art. I, § 8, cl. 11. This clause grants Congress the power to declare war, the federal government power to prevent aliens from entering the United States, and the President power to capture and remove aliens from the United States. JASPER, *supra* note 1, at 1.

²¹ U.S. CONST. art. I, § 9, cl. 1. This clause actually prevented Congress from restricting the states from admitting persons, but the restriction was limited in duration, ending in 1808. *Id.*

²² See *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 270–71, 274 (1875); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Smith v. Turner (Passenger Cases)*, 48 U.S. 283, 304–05 (1849). See NEUMAN, *supra* note 1, at 44–51, for a discussion of this line of Supreme Court cases.

²³ For a list of federal legislation from 1790 through 1996, see U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 1.

²⁴ 8 U.S.C. § 1101 (2000).

²⁵ See 8 U.S.C. § 1103(a)(1) (2000 & Supp. III 2003); *Wang v. Attorney Gen.*, 423 F.3d 260, 262 n.1 (3d Cir. 2005). “The Immigration and Nationality Act was amended by the Homeland Security Act of 2002 . . . [which] transferred the functions of the INS to various bureaus . . . within the Department of Homeland Security. The

Department of Justice, however, is the Executive Office for Immigration Review (“EOIR”), an administrative unit consisting of the immigration judges (“IJs”) and the BIA.²⁶ The IJs conduct removal hearings, at which foreign nationals²⁷ present in the United States face the possibility of deportation or exclusion from the country.²⁸ The BIA hears appeals from the IJs’ decisions in these matters.²⁹ The BIA is made up of attorneys who “act as the Attorney General’s delegates in the cases that come before them.”³⁰ The EOIR is “responsible for the . . . supervision of the [BIA and] the Office of the Chief [IJ] . . . in the execution of their respective duties.”³¹

B. The EOIR’s Response to Overcrowded Immigration Courts

In 1984, the BIA received less than 3,000 new appeals.³² By 1998, however, the BIA “received ‘in excess of 28,000 appeals.’ ”³³ As a result of the backlog, some cases have taken more than five years to be resolved.³⁴ It has been suggested that many of the appeals were filed in order to take advantage of the delay that the backlog of cases created.³⁵ In order to eliminate overcrowding in the BIA’s caseload, the EOIR enacted streamlining procedures.³⁶ These measures, passed in 1999 and amended in 2002, sped up the time it took for the BIA to rule on appeals.

functions of the Executive Office of Immigration Review continue to reside in the Department of Justice, under the direction of the Attorney General.” *Id.*; see Yale-Loehr & Schoonmaker, *supra* note 1.

²⁶ See Yale-Loehr & Schoonmaker, *supra* note 1.

²⁷ A foreign national is “a foreign-born person who is not a citizen or national of the United States.” *Id.*

²⁸ See *id.* The proceeding varies depending on the status of the foreign national involved. If the foreign national seeks admission to the United States, he has the burden of showing that he is admissible. In contrast, if the foreign national proves that he has already been lawfully admitted, the burden is on the government to show that the foreign national is deportable. *Id.*

²⁹ *Id.*

³⁰ 8 C.F.R. § 1003.1(a)(1) (2007). Thus, the BIA is “directly accountable to the Attorney General.” Yale-Loehr & Schoonmaker, *supra* note 1.

³¹ 8 C.F.R. § 1003.0(b)(1) (2007).

³² *Kambolli v. Gonzales*, 449 F.3d 454, 458 (2d Cir. 2006).

³³ *Id.* (quoting Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 53,136 (Oct. 18, 1999)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *id.*

The streamlining provision, contained in 8 C.F.R. § 1003.1, provides that when an IJ's removal order is appealed to the BIA, the case is first reviewed by a single member of the BIA. Prior to the enactment of the streamlining rules, such appeals were heard by a panel of three BIA members.³⁷ The single BIA member has three options when hearing an appeal: He may affirm without opinion the decision of the IJ;³⁸ he may "issue a brief order affirming, modifying, or remanding the decision under review;"³⁹ or he may order that the case be heard by a three member panel of the BIA.⁴⁰ The regulations provide that the "[BIA] members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board"⁴¹

The Code of Federal Regulations provides explicit instructions on the procedures a BIA member is to follow in affirming without opinion the ruling of an IJ. The relevant section states:

The Board member to whom a case is assigned shall affirm the decision of the Service or the [IJ], without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.⁴²

In contrast, the BIA member "may" only assign the case to a three member panel if the case presents one of the following circumstances:

- (i) The need to settle inconsistencies among the rulings of different [IJs];
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an [IJ] or the Service that is not in

³⁷ See Jessica R. Hertz, Comment, *Appellate Jurisdiction over the Board of Immigration Appeals's Affirmance Without Opinion Procedure*, 73 U. CHI. L. REV. 1019, 1021, 1023 & nn.24-25 (2006).

³⁸ 8 C.F.R. § 1003.1(e)(4) (2007).

³⁹ *Id.* § 1003.1(e)(5).

⁴⁰ *Id.* § 1003.1(e)(6).

⁴¹ *Id.* § 1003.1(d)(1)(ii).

⁴² *Id.* § 1003.1(e)(4).

conformity with the law or with applicable precedents; (iv) The need to resolve a case or controversy of major national import; (v) The need to review a clearly erroneous factual determination by an [IJ]; or (vi) The need to reverse the decision of an IJ or the Service, other than a reversal under § 1003.1(e)(5).⁴³

These procedures helped the BIA reduce its backlog of cases, which numbered 57,879 on September 30, 2001, to about half by 2006.⁴⁴

The streamlining procedure has been at the center of a recent split in the circuit courts. Several circuits have held that they have jurisdiction to review the decision of a single BIA member to streamline the decision of an IJ, while other circuits have held that such decisions are committed to agency discretion and thus not subject to judicial review.⁴⁵

C. *Recently Alleged Faults in the Immigration Courts*

Recently, the immigration courts have come under fire from various sources. Several circuit court decisions reviewing the cases of aliens denied asylum by the immigration courts have been highly critical of the manner in which the IJs handled the cases. Additionally, a recent study released by the Transactional Records Access Clearinghouse (“TRAC”), a research organization affiliated with Syracuse University, indicates a wide discrepancy in the rates at which IJs have granted asylum in the past ten years and suggests that the immigration courts have failed to apply uniformly its internal procedures.⁴⁶ Finally, the Department of Justice recently engaged in an investigation of the immigration courts in response to the aforementioned allegations of misconduct. This investigation concluded with former Attorney General Gonzales announcing the enactment of widespread alterations to the immigration court system.

1. Circuit Court Critiques

In *Iao v. Gonzales*,⁴⁷ Judge Posner criticized the analysis of an IJ in denying the asylum request of Zhen Li Iao, a Chinese

⁴³ *Id.* § 1003.1(e)(6).

⁴⁴ *See* *Kamboli v. Gonzales*, 449 F.3d 454, 458 (2d Cir. 2006).

⁴⁵ *See* discussion *infra* Part II.

⁴⁶ *See* TRAC REPORT, *supra* note 2.

⁴⁷ 400 F.3d 530 (7th Cir. 2005).

citizen.⁴⁸ Judge Posner concluded that the IJ's decision was "unreasoned" and thus vacated the decision and remanded the case to the immigration court.⁴⁹ The IJ's opinion listed five reasons for denying Iao's asylum application. Posner took issue with each of them.⁵⁰ First, the IJ stated that Iao had not been persecuted in China.⁵¹ Actual persecution, however, is not necessary for the granting of asylum, and thus Posner called this reason a "nonissue."⁵² Another reason given by the IJ for denying Iao's application was based on an error in the IJ's reading of the record.⁵³ The remaining three rationales of the IJ were based on the IJ's lack of familiarity with Iao's foreign culture and communication barriers caused by Iao's inability to speak English and the use of an interpreter who did not have a "good command of English."⁵⁴

Judge Posner concluded his opinion by noting "six disturbing features" in the way Iao's case was handled that seemed to be a recurrent problem with IJ decisions.⁵⁵ First, he pointed to the lack of familiarity with relevant foreign cultures exhibited by IJs.⁵⁶ Second, he pointed to the IJ's "exaggerated notion of how much religious people know about their religion."⁵⁷ Third, he criticized the IJ's emphasis on Iao's lack of documentary evidence

⁴⁸ *See id.* at 533. While living in China, Iao practiced Falun Gong, a religion that had been outlawed by the Chinese government in 1999. When Chinese government officials became aware of Iao's affiliation with Falun Gong, police tried to confront her and make her abandon the religion. Iao, however, was able to evade the police and fled to the United States. At her removal hearing, the IJ concluded that she did not have a "well-founded fear of being persecuted by the Chinese government," and therefore, the IJ denied her asylum application. The BIA streamlined her case, affirming without opinion the IJ's ruling. *See id.* at 531-32.

⁴⁹ *See id.* at 533. Judge Posner did not comment as to whether Iao should have been granted asylum. Posner merely concluded that Iao was entitled to a "rational analysis of the evidence" by the immigration courts, an analysis that Iao was denied. *Id.* Posner stated that because the BIA affirmed without opinion, a rational analysis of Iao's claims could not be identified from the BIA. *Id.*

⁵⁰ *See id.* at 532-33.

⁵¹ *See id.* at 532.

⁵² *See id.*

⁵³ *See id.* The IJ indicated that although Iao's brother was a follower of Falun Gong, he failed to submit an affidavit stating that Iao was as well. It turned out, however, that Iao's brother was not a follower of Falun Gong and that the IJ had simply "misread the record." *Id.*

⁵⁴ *See id.* at 532-33.

⁵⁵ *Id.* at 533-35.

⁵⁶ *See id.* at 533. "The [IJ] offered no justification for regarding a person's lack of knowledge of Falun Gong doctrines as evidence of a false profession of faith." *Id.*

⁵⁷ *Id.* at 534.

of her membership in Falun Gong.⁵⁸ Fourth, Posner criticized the IJ's "insensitivity" to the communication difficulties posed by the use of an interpreter in the proceedings.⁵⁹ Fifth, he faulted the IJ's failure "to make clean determinations of credibility," stating that the IJ's statement that Iao did not meet her burden left the reviewing court with no idea if this failure was based on the credibility of the asylum applicant or on other reasons.⁶⁰ Finally, Posner criticized the BIA's affirmance without opinion in cases like *Iao*, where the opinion of the IJ contained "manifest errors of fact and logic."⁶¹

In pointing out the above disturbing features, Posner stated that he did not offer them in "a spirit of criticism," and that the cases before his court were "not a random sample of all asylum cases."⁶² But this Note contends that these critiques are indicative of widespread flaws in the EOIR's management of the immigration court system. Moreover, Judge Posner and the Seventh Circuit Court of Appeals are not alone in their critiques of the immigration courts.

In *Wang v. Attorney General*,⁶³ the Third Circuit Court of Appeals criticized an IJ's conduct during the asylum hearing of another Chinese citizen.⁶⁴ The plaintiff in this case, Qun Wang,

⁵⁸ *See id.*

The [IJ's] zeal for documentation reached almost comical proportions when after Li had testified . . . in considerable detail about locations . . . in which she had participated in demonstrations against the persecution of Falun Gong, he upbraided her for having "failed to submit to the court any letters or photographs or any other evidence whatsoever to corroborate these claims." Since the demonstrators are mainly Chinese who might one day want or be forced to return to China, they are hardly likely to be taking photos of each other demonstrating, or to be creating other documentary proof of participating in demonstrations of which the Chinese government deeply disapproves.

Id.

⁵⁹ *See id.*

⁶⁰ *See id.* at 534–35.

⁶¹ *See id.*

⁶² *See id.* at 535. Posner went on to state:

Even if they are representative, given caseload pressures and . . . resource constraints [of the EOIR], it is possible that nothing better can realistically be expected than what we are seeing in this and like cases. But we are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned.

Id.

⁶³ 423 F.3d 260 (3d Cir. 2005).

⁶⁴ *See id.* at 267–70.

appealed the ruling of an IJ, affirmed by the BIA, which denied his application for asylum.⁶⁵ The Third Circuit concluded that the IJ's determination that Wang was not credible was not supported by substantial evidence and remanded the case to the immigration courts.⁶⁶ The Third Circuit noted "[a] disturbing pattern of IJ misconduct [that] has emerged notwithstanding the fact that some of [its] sister courts have repeatedly echoed [the Third Circuit's] concerns."⁶⁷

The Third Circuit issued a scathing rebuke of the IJ's conduct throughout the asylum hearing and noted numerous other instances of similar conduct by other IJs.⁶⁸ The court found that the IJ's apparent bias against Wang was sufficient to overturn her decision.⁶⁹ The record from Wang's case was littered with belittling and humiliating remarks directed at Wang by the IJ. In her oral opinion, the IJ stated that she was "embarrass[ed]" to have Wang in her courtroom and that she was "comfortable denying asylum to the respondent as a matter of discretion because [he was] a horrible father;" moreover, "she was not bothered by the respondent's plight."⁷⁰ According to the Third Circuit, "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ seem[ed] more appropriate to a court television show than a federal court proceeding."⁷¹ The court further found that the substantive issues on which the IJ based her decision were irrelevant to Wang's asylum claim.⁷² The court also noted

⁶⁵ *See id.* at 261. Wang applied for asylum claiming that he had been subject to past persecution in China. After his wife gave birth to their first child, Wang alleged that government officials forcibly inserted an intrauterine device into his wife. Wang and his wife requested permission to have another child, but the request was denied. Wang's wife had the intrauterine device removed by a private doctor and she subsequently became pregnant. Soon after giving birth to the child, Wang claimed that government officials subjected his wife to involuntary sterilization under government regulations. Wang's asylum application was denied by the IJ, and that ruling was affirmed by a BIA member who issued a one paragraph opinion adopting the position of the IJ. *See id.* at 261–67.

⁶⁶ *See id.* at 271.

⁶⁷ *See id.* at 268.

⁶⁸ *See id.* at 267–71.

⁶⁹ *Id.* at 269 ("[E]ven if the IJ was not actually biased—and we do not speculate here as to her state of mind—the 'mere appearance of bias' on her part 'could still diminish the stature' of the judicial process she represents." (quoting *Clemmons v. Wolfe*, 377 F.3d 322, 327 (3d Cir. 2004))).

⁷⁰ *Id.* at 265.

⁷¹ *Id.* at 269.

⁷² *See id.* According to the Third Circuit, the issues that should have been addressed by the IJ were "whether Wang's wife had been forcibly sterilized" and

several other cases in which IJs had displayed similarly deplorable conduct.⁷³ Taken together, *Iao* and *Wang* illustrate a recurring problem of IJs abusing their authority.

2. Disparity in the Rate at Which IJs Grant Asylum

In 2006, TRAC released a report that called into question the EOIR's "commitment to providing a 'uniform application of the nation's immigration laws in all cases.'" ⁷⁴ The report analyzed rulings of individual IJs in asylum cases and found a wide disparity in the rate at which IJs granted asylum.⁷⁵ The report was based on data collected from the EOIR from the years 1994 through 2005, including all recorded asylum cases from that period.⁷⁶

The report indicated that the median denial rate for IJs was 65%—i.e., one-half of the IJs denied asylum claims in more than

whether he would be subject to "improper punishment" by the Chinese government if he were removed from the United States; instead, the IJ's opinion focused on "whether Wang was a good father and son." *Id.* at 269–70.

⁷³ *See id.* at 267 ("Time and time again, we have cautioned [IJs] against making intemperate or humiliating remarks during immigration proceedings."); *see also* *Fiadjo v. Attorney Gen.*, 411 F.3d 135, 155 (3d Cir. 2005) ("The conduct of the IJ itself would require a rejection of his credibility finding."); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (concluding that IJ's determination of aliens' credibility was "skewed by prejudice, personal speculation, bias, and conjecture"); *Zhang v. Gonzales*, 405 F.3d 150, 158 (3d Cir. 2005) (stating that the IJ apparently searched for ways to "undermine and belittle" the alien's testimony); *Huang v. Gonzales*, 403 F.3d 945, 950 (7th Cir. 2005) (faulting IJ's use of his own knowledge of Catholicism to aggressively question an alien); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 287 n.20 (3d Cir. 2005) (criticizing the "extreme hostility the IJ exhibited toward [the petitioner] throughout the hearing, commencing at its very inception, as well as the inevitable effect upon an individual seeking asylum of an interrogation conducted in so intimidating a manner by a government official supposed to be a neutral arbiter"); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (finding that the IJ's opinion "consist[ed] not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that [gave] the impression that she was looking for ways to find fault with Dia's testimony"); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) (holding that the IJ abandoned her role as neutral fact finder and faulting the IJ's "sarcastic commentary and moral attacks"); *Damaize-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986) (cautioning IJ not to determine credibility based upon "personal choices that an asylum applicant has made concerning marriage, children, and living arrangements").

⁷⁴ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION JUDGES (2006), <http://trac.syr.edu/immigration/reports/160/> [hereinafter IMMIGRATION JUDGES].

⁷⁵ *See id.*

⁷⁶ *See id.* During that time period, the EOIR handled 297,240 cases. *Id.*

65% of their cases while one-half of the IJs denied asylum claims in less than 65% of their cases. It also found that out of the 208 IJs that had decided more than 100 cases, there were eight IJs that denied asylum to nine out of ten applicants, and there were two IJs that granted asylum to nine out of ten applicants.⁷⁷ The data also indicated that 10% of IJs denied asylum in 86% or more of their decisions and 10% of the IJs denied asylum in 34% or less of their decisions.⁷⁸ To ensure accurate analysis of data by comparing similarly situated asylum seekers, the report went on to compare only asylum seekers from China who were represented by attorneys and who came before IJs in New York City.⁷⁹ The results of this analysis were consistent with the results of the broader survey: There was a similar disparity in the rate at which the specific IJs denied asylum requests. Then, reviewing the results of the same IJs for cases involving non-Chinese asylum seekers, the results were again similarly disparate.⁸⁰ The report stated that “[g]iven the broad constitutional hope that similarly situated individuals will be treated in similar ways and the EOIR’s stated goal of providing uniform application of the immigration laws, the disparities in this aspect of the court’s operations are surprising.”⁸¹ The findings of this report suggest that the problems in the immigration courts that were pointed out by the federal court judges in Part II.A are a significant problem. Additionally, as the next section will illustrate, former Attorney General Alberto Gonzales, the former head of the EOIR, has virtually conceded that there are widespread problems in the immigration court system.

3. Department of Justice Investigation and Overhaul

In January of 2006, former Attorney General Gonzales initiated an investigation of the immigration courts in response to the criticisms leveled at his agency by the federal courts.⁸² In his statement regarding the investigation, Gonzales remarked

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See* 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), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

that the conduct of some IJs “can aptly be described as intemperate or even abusive” and that their work “must improve.”⁸³ After reviewing the results of the investigation, Gonzales directed the implementation of twenty-two measures aimed at improving the operation of the EOIR.⁸⁴ Among the reforms called for by Gonzales were improving the BIA’s streamlining procedure, periodically evaluating the performance of IJs and BIA members, and requiring that all IJs appointed after December 31, 2006 pass a written examination on immigration law prior to adjudicating matters.⁸⁵

While it is clear that former Attorney General Gonzales took the allegations against the immigration courts seriously, it is not clear that the implementation of these changes will remedy the situation. Moreover, the circuit courts are currently in dispute over a key issue of the EOIR controversy, the extent to which judicial review can assist in maintaining the fairness of BIA decisions.

II. JUDICIAL REVIEW OF THE BIA’S STREAMLINING PROCEDURE

The circuit courts disagree over whether they have jurisdiction to review the BIA’s decision to affirm without opinion a case on appeal from an IJ ruling. Under the Immigration and Nationality Act (“INA”),⁸⁶ a court reviewing a final order of removal can review “all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien.”⁸⁷ And under the Administrative Procedure Act (“APA”),⁸⁸ “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁸⁹ Thus, the general rule is that actions of the BIA and the IJs are subject to judicial review when a foreign national challenges his final order of removal.

⁸³ IMMIGRATION JUDGES, *supra* note 74.

⁸⁴ Press Release, *supra* note 82.

⁸⁵ U.S. DEPT OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 1–5 (2006), <http://bibdaily.com/pdfs/22measuressummary.pdf>.

⁸⁶ 8 U.S.C. § 1252 (2000).

⁸⁷ *Kambolli v. Gonzales*, 449 F.3d 454, 461 (2d Cir. 2006).

⁸⁸ 5 U.S.C. § 551 (2000).

⁸⁹ 5 U.S.C. § 702 (2000).

The APA, however, expressly precludes judicial review of agency action in two situations. First, judicial review is not available if any statute precludes judicial review.⁹⁰ Second, judicial review is not available if the agency's "action is committed to agency discretion by law."⁹¹ All of the circuit courts considering the issue have concluded that no statute precludes them from reviewing the BIA's decision to affirm without opinion under the streamlining regulations. Thus, the first exception under the APA does not prevent review of the streamlining decision. However, the circuit courts addressing the issue are split on whether the streamlining decision is "committed to agency discretion by law."

A. *Jurisdiction to Review*

The First, Third, and Ninth Circuits have concluded that they have jurisdiction to review the BIA's decision to affirm without opinion the decision of an IJ.⁹² The courts' analysis of the issue focused on the APA and *Heckler v. Chaney*,⁹³ a case in

⁹⁰ 5 U.S.C. § 701(a)(1) (2000).

⁹¹ *Id.* § 701(a)(2).

⁹² At least one court has questioned the necessity of reviewing the BIA's streamlining decision because review of an IJ's ruling, as the final agency action, is expressly provided for in the INA. *See Ngure v. Ashcroft*, 367 F.3d 975, 986 (8th Cir. 2004). Thus, *Ngure* argued that deciding whether the BIA was appropriate in ruling that the IJ was correct made little sense when the court could simply determine for itself whether the IJ was correct. *See id.* ("[A]n appeal to determine whether the BIA was correct to find that the IJ's decision was correct serves 'no purpose whatever' when the court can directly review the IJ's decision."). But, there are circumstances in which review of the BIA's decision to streamline is more significant than *Ngure* contends. Under the INA, not every removal order is reviewable. *See* 8 U.S.C. § 1158(a)(3) (2000). In *Haoud v. Ashcroft*, review of the BIA's ruling was necessary to determine on what grounds the BIA affirmed the IJ's removal order because that determination would inform the court as to whether it had jurisdiction to review the IJ's decision. 350 F.3d 201, 206 (1st Cir. 2003); *see also infra* notes 96–99 and accompanying text. Furthermore, in *Chen v. Ashcroft* the Ninth Circuit stated that where the BIA streamlined a case "despite the presence of novel legal questions, a complex factual scenario, and applicability to numerous other aliens," review of the IJ's ruling and the BIA's ruling do not "collapse into one analysis" as the Eighth Circuit suggested it does in *Ngure*. *Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (quoting *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 853 n.7 (9th Cir. 2003)); *see also infra* notes 100–07 and accompanying text.

⁹³ 470 U.S. 821 (1985). *Heckler* involved a death row inmate's challenge of the Food and Drug Administration's decision not to undertake an enforcement action with respect to drugs used in lethal injections that allegedly violated the Food, Drug, and Cosmetic Act. In reversing the Court of Appeals, which held it could review the agency's decision not to act, the Supreme Court indicated that there was a

which the Supreme Court examined the APA's two exceptions to the general rule allowing review of agency action. The dispositive question for these courts was whether the decision to streamline a case was "committed to agency discretion by law." Under *Heckler*, an agency's action is committed to agency discretion if the law under which the agency exercises its authority is "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."⁹⁴

In *Haoud v. Ashcroft*,⁹⁵ the First Circuit concluded it had jurisdiction to review the BIA's decision to affirm without opinion because the decision was not committed to agency discretion.⁹⁶ The Attorney General argued that under *Heckler*, the BIA's decision to streamline was committed to the discretion of the EOIR, and thus, not reviewable. Distinguishing the case from *Heckler*, the First Circuit reasoned that the streamlining rules provided a sufficient standard for reviewing the BIA decision⁹⁷:

Here, the Board's own regulation provides more than enough "law" by which a court could review the Board's decision to streamline . . . [T]he Board cannot affirm an IJ's decision without opinion if the decision is incorrect, errors in the decision are not harmless or immaterial, the issues on appeal are not squarely controlled by Board or federal court precedent and involve the application of precedent to a novel fact situation, or the issues raised on appeal are so substantial that a full written opinion is necessary.⁹⁸

In *Chen v. Ashcroft*,⁹⁹ the Ninth Circuit Court of Appeals concluded that it had jurisdiction to review the BIA's streamlining decision. Using an analysis similar to that used by the First Circuit in *Haoud*, the Ninth Circuit noted that decisions that are committed to agency discretion by law are not subject to judicial review.¹⁰⁰ The court then defined a discretionary issue as a "'subjective question' that depends on the value judgment 'of

presumption that "judicial review is not available" when agencies refuse to take enforcement steps. *See id.* at 831.

⁹⁴ *Id.* at 830.

⁹⁵ 350 F.3d 201 (1st Cir. 2003).

⁹⁶ *Id.* at 206.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ 378 F.3d 1081, 1087 (9th Cir. 2004).

¹⁰⁰ *Id.* Similar to *Haoud*, the court relied on the *Heckler* case for this conclusion. *Id.*

the person or entity examining the issue.’”¹⁰¹ The court concluded that specific subsections of the streamlining provision in the regulations were “clearly non-discretionary.”¹⁰² A case can only be streamlined by the BIA if the issues presented are “squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation”¹⁰³ A further requirement of the streamlining procedure is that the “factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.”¹⁰⁴ The court found that the first of these two requirements was “clearly” not a discretionary issue.¹⁰⁵ Moreover, while the second requirement’s “insubstantial” language “will often warrant deference,” the court reasoned that in this case, such deference was not appropriate because the decision would impact many other similarly situated immigrants.¹⁰⁶

In *Smriko v. Ashcroft*,¹⁰⁷ the Third Circuit concluded that it had jurisdiction to review the decision of the BIA to affirm without opinion an IJ’s ruling. The court commenced its discussion of the jurisdiction issue with an analysis of the APA, noting that “there is a strong presumption that Congress intends judicial review of administrative action.”¹⁰⁸ The court determined that the dispositive issue was whether the decision to streamline a case was committed to agency discretion by law.¹⁰⁹ Similar to the First Circuit in *Haoud*, the court here relied on *Heckler*’s discussion of when agency action is committed to the agency’s discretion by law.¹¹⁰ As in *Haoud*, the court here

¹⁰¹ *Id.* (quoting *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003)).

¹⁰² *Id.* at 1088.

¹⁰³ 8 C.F.R. § 1003.1(e)(4)(i)(A) (2007).

¹⁰⁴ *Id.* § 1003.1(e)(4)(i)(B).

¹⁰⁵ *Chen*, 378 F.3d at 1088.

¹⁰⁶ *See id.* at 1086, 1088.

¹⁰⁷ 387 F.3d 279 (3d Cir. 2004).

¹⁰⁸ *Id.* at 290 (quoting *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474 (3d Cir. 2003)). The *Smriko* court concluded its analysis noting that it had jurisdiction to review the agency action so long as the relevant statute—here the INA—did not preclude judicial review and the issues presented were not committed to agency discretion. *Id.* at 291. The court then indicated that the INA “clearly [did] not preclude review” *Id.*

¹⁰⁹ *Id.* at 292.

¹¹⁰ *Id.* (“[R]eview is not to be had’ in those rare circumstances where the relevant [law] is ‘drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” (alteration in original) (quoting

concluded that the requirements for streamlining, imposed by the Code of Federal Regulations, provided ample law with which to review the BIA's decision.¹¹¹

The Third Circuit went on to address the Attorney General's argument that the streamlining provision was intended to address the limited resources available to the IJs. According to this argument, the regulation requires the BIA to make a determination as to whether the issues presented are "substantial" enough to warrant a written opinion in light of the limited agency resources.¹¹² The court rejected this argument, however, reasoning that the language of the regulation focused on the importance of the issues rather than the BIA's caseload and that the subsection was part of a section addressing case management that was "based solely on the correctness of the result."¹¹³

Thus, the First, Third, and Ninth Circuits concluded that the Supreme Court's ruling in *Heckler* and the Code of Federal Regulations provided a clear solution to the issue. The streamlining regulation described specific criteria that must be met in order to streamline a case. These courts contended that these specific criteria provided a meaningful standard against which to judge the agency's exercise of discretion.¹¹⁴

Lincoln v. Vigil, 508 U.S. 182, 190–91 (1993)).

¹¹¹ See *id.* at 292–93.

[T]he law to be applied is provided by the criteria of the regulations, and it will be [a] rare case . . . where the reviewing court . . . will have any difficulty . . . reaching a decision as to whether the [BIA] was so wide of the mark in applying those criteria that his action can be characterized as arbitrary and capricious.

Id. at 293–94.

¹¹² *Id.* at 293. 8 C.F.R. § 1003.1(e)(4)(i)(B) states that in order to streamline a case, the BIA member must determine that the issues presented "are not so substantial that the case warrants" a written opinion. The Attorney General argued that this determination was committed to agency discretion because only the agency is able to consider its available resources. See *Smriko*, 387 F.3d at 293.

¹¹³ See *id.* at 293. *But see* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3). This enactment amended the streamlining provisions and noted that the BIA's overwhelming caseload was the primary concern addressed by the new provisions.

¹¹⁴ See *supra* Part II.A.

B. No Jurisdiction to Review

The Second, Eighth, and Tenth Circuits have concluded that they do not have jurisdiction to review the BIA's decision to streamline a case. Similar to the courts discussed in Part II.A of this Note, these courts focused their analysis on the APA and the Supreme Court's decision in *Heckler* to determine whether the streamlining decision was committed to the BIA's discretion by law.

In *Ngure v. Ashcroft*,¹¹⁵ the Eighth Circuit concluded that it did not have jurisdiction to review a BIA member's decision to affirm without opinion an IJ's ruling. The court gave three reasons to support its decision not to review the BIA's decision. First, referring to the separation of powers provided by the Constitution and Supreme Court precedent, the court stated that "an administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission traditionally has been free from judicial supervision."¹¹⁶ This deference, the court argued, was appropriate here because the BIA was more familiar with the issues presented than either Congress or the judiciary.¹¹⁷ Furthermore, the court argued that deference was especially important in the immigration context because in this setting agency officials "exercise especially sensitive political functions that implicate questions of foreign relations."¹¹⁸ Second, the court concluded that the streamlining procedures were intended to provide the BIA with a way to efficiently use the agency's scarce resources and not to create substantive rights for aliens in the immigration courts.¹¹⁹ Allowing review of the decision to streamline would frustrate the entire purpose of the Attorney General's rule.¹²⁰ Third, and most significantly, the court concluded that it could not review the BIA's streamlining

¹¹⁵ 367 F.3d 975 (8th Cir. 2004).

¹¹⁶ *Id.* at 983 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)).

¹¹⁷ *See id.*

¹¹⁸ *Id.* (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

¹¹⁹ *Id.* at 983–84. The court noted that the promulgation of the streamlining provisions by the Department of Justice was accompanied by the following statement: "The summary affirmance process . . . allows the Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised in the appeal . . ." *Id.* at 984.

¹²⁰ *Id.*

provision because it was “not possible to devise a meaningful and adequate standard” against which to review the BIA’s decision.¹²¹

The court’s third reason for rejecting jurisdiction focused on two elements that must be met under the regulation in order to affirm without opinion. First, the court addressed 8 C.F.R. § 1003.1(e)(4)(i), which required that the result reached by the IJ was correct. The court found that review of whether the BIA properly satisfied this requirement would “serve no purpose whatever” because the Court of Appeals has jurisdiction to review a final agency determination.¹²² When the BIA affirms without opinion, the IJ’s ruling is considered the final agency determination.¹²³ Thus, rather than reviewing the BIA decision to streamline based on the conclusion of the IJ, the court should simply review the determination of the IJ.¹²⁴

Next, the court addressed 8 C.F.R. § 1003.1(e)(4)(i)(B), which required that the issues presented on appeal were not “so substantial that the case warrants the issuance of a written opinion”¹²⁵ The court found that this language made the streamlining determination a “function of the BIA’s limited resources,” and thus, particularly within the expertise of the BIA.¹²⁶ Therefore, the court concluded that the decision was committed to the BIA’s discretion by law and thus not subject to judicial review.¹²⁷

In *Tsegay v. Ashcroft*,¹²⁸ the Tenth Circuit held that it did not have jurisdiction to review the BIA’s decision to affirm without opinion. The court’s analysis was guided by *American Farm Lines v. Black Ball Freight Service*,¹²⁹ in which the Supreme

¹²¹ *Id.* at 985. This conclusion was opposite of the one reached by the courts that concluded they had jurisdiction to review the BIA’s streamlining decision. *See supra* Part II.A.

¹²² *Ngure*, 367 F.3d at 986 (quoting *ICC v. Bd. of Locomotive Eng’rs*, 482 U.S. 270, 279 (1987)).

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.* The court concluded that the requirement under 8 C.F.R. § 1003.1(e)(4)(i)(A)—that “issues on appeal are squarely controlled by board precedent and do not involve the application of precedent to a novel factual situation”—was not important to its analysis because even if this requirement was satisfied, the BIA could still streamline if 8 C.F.R. § 1003.1(e)(4)(i)(B) was met; the test was disjunctive. *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ 386 F.3d 1347 (10th Cir. 2004).

¹²⁹ 397 U.S. 532 (1970).

Court stated that unless there was a showing of “‘substantial prejudice to the complaining party’ [judicial] review of an agency decision is always circumscribed when ‘a procedural rule is designed primarily to benefit the agency carrying out its functions,’ rather than ‘intended primarily to confer important procedural benefits upon individuals.’”¹³⁰ The court provided three reasons why the BIA’s decision was committed to agency discretion by law. First, the court reasoned that the streamlining regulation was enacted for the benefit of the BIA in the “orderly management of its immigration docket.”¹³¹ Therefore, the court concluded that under *American Farm Lines* the decision to streamline was in the “category of decisions committed to the agency’s discretion and beyond [the court’s] jurisdiction to review.”¹³² Second, the court reasoned that because the regulation expressly prohibited the BIA from issuing a reasoned opinion when affirming without opinion, judicial review of such action would be “impractical.”¹³³ Third, the court concluded that because an asylum applicant will have received a written opinion on the merits by the IJ before the BIA streamlines the case, the applicant is not “substantially prejudiced.”¹³⁴

In *Kambolli v. Gonzales*,¹³⁵ the Second Circuit concluded that it did not have jurisdiction to review the BIA’s decision to streamline a case because there was “no meaningful standard against which to judge the agency’s exercise of discretion.”¹³⁶ The court first noted that the regulation expressly prohibited the BIA from issuing an opinion when streamlining and thus, a reviewing court would have “no knowledge . . . of the decision making process of the BIA member.”¹³⁷ The court also found that judicial review of the decision to streamline would inappropriately undermine the streamlining rules.¹³⁸

¹³⁰ *Tsegay*, 386 F.3d at 1355 (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970)).

¹³¹ *Id.* at 1356.

¹³² *Id.*

¹³³ *Id.* at 1356–57.

¹³⁴ *Id.* at 1357.

¹³⁵ 449 F.3d 454 (2d Cir. 2006).

¹³⁶ *Id.* at 461 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)).

¹³⁷ *Id.* at 461–62. The court also noted that the regulation’s prohibition on written opinions is a clear indication that the Attorney General did not intend the streamlining decision to be subject to judicial review. *See id.* at 462.

¹³⁸ *Id.* at 463.

Relying on the Supreme Court's statement in *Vermont Yankee*, that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties," the *Kambolli* court "decline[d] the invitation to cripple the streamlining process" by subjecting it to judicial review.¹³⁹ Furthermore, the court stated that it lacked the "expertise" required to decide whether streamlining was appropriate, whereas the BIA was exceptionally qualified to do so.¹⁴⁰ The court finally noted that a lack of jurisdiction in this area would not deprive aliens of substantive rights because the courts have jurisdiction to review an IJ's decision.¹⁴¹

In sum, the courts that denied jurisdiction to review the streamlining decision have given several reasons for denying it. First, they argued that review would be impractical because there is no rationale to review when the BIA affirms a case without opinion. Additionally, they asserted that the principle of the separation of power requires judicial deference to the BIA in carrying out its administrative tasks. Finally, these courts concluded that the BIA's decision to affirm without opinion is "committed to agency discretion by law" under the APA.¹⁴²

III. ATTORNEY GENERAL'S CHANGES AND A PROPOSED RESOLUTION OF THE SPLIT

In August 2006, subsequent to the rulings in the six cases discussed in Part II, former Attorney General Alberto Gonzales announced that he would implement twenty-two measures aimed at overhauling the immigration courts and the BIA.¹⁴³ Most significantly for the purposes of this Note, Gonzales announced an alteration of the streamlining provision to allow for the more frequent use of written opinions by the BIA to explain their rationale. This Note contends that the circuit courts should have jurisdiction to review the BIA's decision to affirm without opinion because one of the key rationales given by the courts opposing

¹³⁹ *Id.* at 464 (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)).

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² 5 U.S.C. § 701(a)(2) (2000).

¹⁴³ *See supra* notes 82–85 and accompanying text.

review was that the BIA was expressly prohibited from writing opinions when streamlining a case. This section will address the issue of written opinions by the BIA, as well as several other reasons why the courts opposing judicial review were misguided, and will conclude that judicial review of the BIA's decision to affirm without opinion should be permitted.

A. *Adjustments to the BIA*

In his announcement of the measures to improve the immigration courts and the BIA, former Attorney General Gonzales stated that “[s]ome adjustments to streamlining . . . are appropriate to allow the Board to improve and better explain its reasoning in certain cases.”¹⁴⁴ Accordingly, Gonzales announced:

The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate [IJ] decisions that reach the correct result but would benefit from discussion or clarification; and (ii) allow the limited use of three-member written opinions—as opposed to one-member written opinions—to provide greater legal analysis in a small class of particularly complex cases. . . . The Assistant Attorney General for Legal Policy . . . will draft a proposed rule that would return cases to the [BIA] for reconsideration when [the Office of Immigration Litigation] identifies a case that has been filed in federal court and, in OIL's view, warrants reconsideration.¹⁴⁵

This proposal made it clear that Gonzales felt more explanation was appropriate in many cases that previously had been affirmed without opinion. It also deflated the argument posed by the courts rejecting the exercise of judicial review of streamlining decisions that review was impractical because the streamlining regulation expressly prohibited the issuance of written opinions when the BIA decided to affirm without opinion.¹⁴⁶ In *Ngure*, the Eighth Circuit implied that, based on the “basic principle of administrative law,” if an agency is subject to judicial review it must provide an “adequate reasoned explanation of its decision,” the decision to affirm without opinion

¹⁴⁴ U.S. DEP'T OF JUSTICE, *supra* note 85, at 4.

¹⁴⁵ *Id.* at 4–5.

¹⁴⁶ The relevant regulation states: “An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning.” 8 C.F.R. § 1003.1(e)(4)(ii) (2007).

must be free from judicial review because the regulation prohibits the issuance of an explanation.¹⁴⁷ Additionally, in *Tsegay*, the Tenth Circuit noted that the regulation's prohibition of written opinions makes judicial review impractical because the reviewing court would be forced to remand the case to the BIA for an explanation before reviewing it. This act, in essence, would be the equivalent of the courts "rewriting the Attorney General's own regulation."¹⁴⁸ Former Attorney General Gonzales's announcement indicated, however, that his "own regulation" will be rewritten. The increased emphasis on written opinions in Gonzales's announcement showed that he was in favor of more written opinions, and thus, remand by the courts to the BIA for an explanation will not conflict with the intent of the regulation. Another important consideration is the indiscretion exhibited by many IJs in the cases coming before them, discussed previously in Part I of this Note.¹⁴⁹ As former Attorney General Gonzales's proposals made clear, the EOIR is charged with fixing the problems it has had with intemperate IJs. Allowing judicial review of the BIA's decision to streamline IJ decisions will allow the courts to further ensure that IJs carry out their duties professionally.

B. Application of Heckler to the Controversy

Most of the circuits ruling on whether they have jurisdiction to review the BIA's streamlining decision have grounded their analysis in *Heckler*.¹⁵⁰ In *Heckler*, the Supreme Court indicated that there was a presumption that "judicial review [was] not available" when agencies refused to take enforcement steps.¹⁵¹ The Court first noted that the "committed to agency discretion" exception to the general rule of judicial reviewability under the APA was a "very narrow exception," and that "the legislative history of the [APA] indicate[d] that it [was] applicable in those rare instances where 'statutes [were] drawn in such broad terms that in a given case there [was] no law to apply.'"¹⁵² The reasons

¹⁴⁷ *Ngure v. Ashcroft*, 367 F.3d 975, 984 (8th Cir. 2004).

¹⁴⁸ *Tsegay v. Ashcroft*, 386 F.3d 1347, 1357 (10th Cir. 2004).

¹⁴⁹ *See supra* Part I.C.

¹⁵⁰ *See supra* notes 91–92 and accompanying text.

¹⁵¹ *Heckler v. Chaney*, 470 U.S. 821, 830–31 (1985).

¹⁵² *Id.* at 830 (citation omitted) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

supporting this presumption were that in deciding not to act (1) the agency undertook a complex balancing procedure, the factors of which were particularly within the expertise of the agency; (2) the agency did not exercise coercive power over an individual, and “thus [did] not infringe upon areas that courts often are called upon to protect;” and (3) the decision shared some of the characteristics of prosecutors’ decisions not to indict, a decision that has long been regarded as beyond review.¹⁵³ Applying these factors to the BIA’s decision to affirm without opinion leads to the precisely opposite conclusion—that judicial review of the BIA’s action is appropriate.

The *Heckler* court first asked whether the agency’s decision involved a complex balancing procedure that was particularly within the expertise of the agency.¹⁵⁴ When deciding to affirm without opinion, the BIA has three specific criteria to analyze. First, the result of the IJ must be correct.¹⁵⁵ Since the courts already have jurisdiction to review the decision of the IJ for correctness, this requirement poses no obstacle for the courts. Second, the BIA must determine whether the issues on appeal are squarely controlled by existing precedent and if they involve the “application of precedent to a novel factual situation.”¹⁵⁶ This step certainly does not involve any type of balancing procedure. Moreover, determining whether precedents apply to particular fact patterns is within the expertise of a court. Third, the BIA must determine whether the issues on appeal are substantial enough to warrant a written opinion.¹⁵⁷ This requirement is the most difficult of the three on which to conclude. The courts holding that they cannot review the streamlining decision argue that the substantial requirement involves a complex balancing process that must take into account the resource constraints of the BIA, thus analogizing the BIA’s decision to the FDA’s decision in *Heckler*.¹⁵⁸ In contrast, the courts holding that they can review the streamlining decision argue that the streamlining

¹⁵³ *Id.* at 831–32.

¹⁵⁴ *Id.* at 831.

¹⁵⁵ 8 C.F.R. § 1003.1(e)(i)(4) (2007).

¹⁵⁶ *Id.* § 1003.1(e)(i)(4)(A).

¹⁵⁷ *Id.* § 1003.1(e)(4)(i)(B). This requirement and the second requirement are joined in the C.F.R. by the word “or” and thus satisfaction of either is sufficient to streamline the case. *Id.* § 1003.1(e)(4)(i)(A)–(B).

¹⁵⁸ See, e.g., *Kambolli v. Gonzales*, 449 F.3d 454, 461 (2d Cir. 2006); *Tsegay v. Ashcroft*, 386 F.3d 1347, 1356 (10th Cir. 2004).

decision focuses on reaching the correct result in a case and thus does not give any consideration to the BIA's resource allocation.¹⁵⁹ This issue, however, is not dispositive because the remaining two steps in the *Heckler* analysis make it clear that the streamlining decision does not deserve the same deference that agency inaction is given.

The next factor in the *Heckler* analysis focused on the agency's inaction.¹⁶⁰ In *Heckler*, the plaintiff challenged the FDA's decision not to bring enforcement proceedings.¹⁶¹ The Court reasoned that deference was appropriate in such a situation because the agency did not "exercise coercive power over an individual's liberty or property rights . . ." ¹⁶² In contrast to a failure to act, when an agency does act, "that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."¹⁶³ Similarly, when the BIA streamlines a case, it exercises its power by affirming the result reached by the IJ.¹⁶⁴ This affirmation makes the IJ's decision the "final agency determination" and thus is an "exercise of power" by the BIA over the petitioner's individual liberty.¹⁶⁵ Thus, application of this prong of the *Heckler* analysis suggests that the streamlining decision is subject to judicial review.

The third and final factor in the *Heckler* analysis asks whether the challenged act "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict."¹⁶⁶ The decision to streamline a case in no way resembles the decision of a prosecutor not to indict and thus, this prong of the analysis leads to the conclusion that judicial review of the streamlining decision is permissible.

In *Heckler*, the Court distinguished between an agency's affirmative acts and an agency's decision not to act. The Court reversed the Court of Appeals, which held that the FDA's refusal to act was reviewable based on the "presumption of reviewability" implied by a narrow construction of the

¹⁵⁹ See, e.g., *Smriko v. Ashcroft*, 387 F.3d 279, 292 (3d Cir. 2004).

¹⁶⁰ *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

¹⁶¹ *Id.* at 823.

¹⁶² *Id.* at 832.

¹⁶³ *Id.*

¹⁶⁴ 8 C.F.R. § 1003.1(e)(4)(ii) (2007).

¹⁶⁵ See *id.*

¹⁶⁶ *Heckler*, 471 U.S. at 832.

“committed to agency discretion” exception.¹⁶⁷ The lower court based its “presumption of reviewability” on *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁶⁸ the first case in which the Supreme Court addressed the “committed to agency discretion” exception.¹⁶⁹ In reversing the appellate court’s decision in *Heckler*, the Supreme Court stated:

Overton Park did not involve an agency’s refusal to take requested enforcement action. It involved an affirmative act of approval under a statute that set clear guidelines for determining when such approval should be given. Refusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available.¹⁷⁰

Thus, when an agency affirmatively approves an action under a statute that provides clear guidance in granting that approval, judicial review of the agency’s action is permissible. This situation is analogous to the BIA’s streamlining decision, which is an affirmative act of approval effected under the clear guidance provided in the Code of Federal Regulations.

C. Separation of Powers Argument Is Misguided

The Second and Eighth Circuits both argued that the judiciary should show deference to the BIA’s decision making power, and thus should not review the decision to streamline.¹⁷¹ These courts grounded this rationale primarily on *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,¹⁷² in which the Supreme Court expressed great deference to agency rulemaking procedures. The Eighth Circuit further supported its argument with *Immigration and Naturalization Services v. Aguirre-Aguirre*, which spoke of the executive branch’s protected operation in immigration issues where it “‘exercise[s] especially sensitive political functions that implicate questions of foreign relations.’”¹⁷³ This section argues

¹⁶⁷ See *id.* at 831.

¹⁶⁸ 401 U.S. 402, 410 (1971).

¹⁶⁹ See *Heckler*, 471 U.S. at 829–31.

¹⁷⁰ *Id.* at 831.

¹⁷¹ See *Kambolli v. Gonzales*, 449 F.3d 454, 456 (2d Cir. 2006); *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004).

¹⁷² 435 U.S. 519 (1978).

¹⁷³ *Ngure*, 367 F.3d at 983 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

that the holdings of these two cases are not applicable to the streamlining issue, and thus they fail to adequately support the Second and Eighth Circuit conclusion that they cannot review the streamlining decision.

At issue in *Vermont Yankee* was a rulemaking proceeding instituted by the Atomic Energy Commission (“AEC”) to adopt rules that considered the environmental impact of nuclear power plant construction.¹⁷⁴ The Natural Resources Defense Council challenged the rule promulgated by the proceeding, and the Court of Appeals of the District of Columbia ruled that the rulemaking proceedings were inadequate, overturning the rule.¹⁷⁵ The Supreme Court held that the Court of Appeals overstepped its authority in overturning the AEC’s rule, stating that “[a]bsent constitutional constraints or extremely compelling circumstances the ‘administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’”¹⁷⁶

The Court’s focus in this case was on the procedures employed by the AEC during its rulemaking proceedings, rather than, as is the focus when determining the applicability of judicial review to the streamlining decision, an agency’s application of a previously enacted rule.¹⁷⁷ In *Vermont Yankee*, the Court reversed the decision of the Court of Appeals to strike down a “rule because of the perceived inadequacies of the procedures employed in the rulemaking proceeding.”¹⁷⁸ The Court concluded that “Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed.”¹⁷⁹

In contrast, the BIA streamlines a case pursuant to an enacted rule. No party has challenged the legitimacy of the rule itself or the proceedings under which it was enacted. At issue is whether the judiciary should review the decision to affirm without opinion. The issue, holding, and rationale of *Vermont*

¹⁷⁴ *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 519.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at 543 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

¹⁷⁷ *See id.* at 539–43.

¹⁷⁸ *Id.* at 541.

¹⁷⁹ *Id.* at 546.

Yankee are inapposite to this issue and thus reliance on it for any conclusion is inappropriate. The deference called for by *Vermont Yankee* is distinct from the deference suggested by the Second and Eighth Circuits. Courts have traditionally reviewed decisions of agencies under agency rules according to the APA. The APA provides for a general rule of reviewability except in the rarest of circumstances.

In *Aguirre-Aguirre*, the Supreme Court stated that judicial deference was especially appropriate in the immigration context because of the implications such intrusions may have on foreign relations.¹⁸⁰ Yet, all three circuits ruling against jurisdiction to review the streamlining decision have conceded that the judiciary can review the decision of the IJ, as the final agency action, and thus intrude into this delicate sphere.¹⁸¹ Moreover, judicial review of the BIA's decision to streamline, because it will not always directly affect the final outcome of the case, surely poses less of a threat of damaging foreign relations than does the judiciary's review of the final agency action of removal, which it does when reviewing the IJ's opinion. The APA expressly provides for judicial review of the final agency action, and the INA expressly provides for judicial review over the final order of removal.¹⁸² In light of the clear congressional intent to allow for judicial review in these circumstances, courts seem misguided in using this argument to support a holding against judicial review.

Furthermore, the Code of Federal Regulations sections addressing the BIA's case management system, of which the streamlining provisions are a part, also provide that cases of "major national import" can be assigned by the BIA to a three member panel.¹⁸³ If a court reviewing the decision to streamline a case found that it implicated issues significantly affecting

¹⁸⁰ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

¹⁸¹ See *Kambolli v. Gonzales*, 449 F.3d 454, 456 (2d Cir. 2006) (stating that the courts have jurisdiction to "review the IJ's decision as the final agency action"); *Tsegay v. Ashcroft*, 386 F.3d 1347, 1353 (10th Cir. 2004) ("[T]he INA grants us general jurisdiction to review a 'final order of removal'..." (quoting 8 U.S.C. § 1252(a)(1) (2000))); *Ngure v. Ashcroft*, 367 F.3d 975, 986 (8th Cir. 2004) ("When the BIA summarily affirms, the decision of the IJ becomes the final agency determination. An alien may petition the court of appeals for review of the agency decision.").

¹⁸² Administrative Procedure Act § 704, 5 U.S.C. § 704 (2000); Immigration and Nationality Act § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2000).

¹⁸³ See 8 C.F.R. § 1003.1(e)(6)(iv) (2000).

2008]

AGENCY INDISCRETION

815

foreign relations, the appropriate response would be to remand it to the BIA for analysis by a three member panel.

CONCLUSION

The APA and the INA, which grant authority to the immigration courts, provide a general rule that agency action is subject to judicial review. The Supreme Court's interpretation of these statutes has concluded that the exception to this general rule is "very narrow."¹⁸⁴ The Court has only denied judicial review of agency action where the agency decided not to act or where the law is drawn so broadly that a court would have no standard to apply. In contrast to these situations, the decision to streamline is an affirmative act based on a narrowly drawn rule. The courts ruling against judicial review of streamlined cases have misconstrued Supreme Court precedent, analogizing the streamlining decision to agency decisions too dissimilar to provide adequate support. Given the narrow reading the Supreme Court applies to the exceptional situations in which review of agency action is not permissible and the fact that the decision to streamline does not fit neatly into the Court's previous analysis, judicial review of the streamlining decision should be allowed.

Furthermore, the recent critiques of the immigration courts by the federal courts, TRAC, and the former Attorney General emphasize the importance of judicial review in these cases. Judicial review is an integral component of the system of checks and balances, which is designed to correct and prevent the type of abuses that have occurred within the immigration court system. Applicants for asylum in the United States face many obstacles. Improperly placing additional obstacles in their path benefits neither the immigration courts nor the federal courts.

¹⁸⁴ Heckler v. Chaney, 470 U.S. 821, 830 (1985).