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THE SEARCH FOR FAIR AGENCY PROCESS: The Immigration Opinions of Judge Michael Daly Hawkins 1994 to 2010

Lenni B. Benson*

“We review the work of government agencies with an understandable degree of deference. No amount of deference, however, can excuse the deliberate, calculated and cumulative unfairness which occurred here.”¹

I. THE LIMITS OF BUREAUCRATIC PROCESS

Judge Michael Daly Hawkins has been a member of the Ninth Circuit Court of Appeals since 1994; but he has been concerned with the forms and varieties of administrative or bureaucratic process his entire career. Perhaps because he spent several intense early years as a lawyer in the U.S. Marine Corps or because he grew up in a small Arizona town on the edge of the Navajo nation, Judge Hawkins has been aware that due process guarantees and the quality of the adjudication within a bureaucratic system may be even more important than the procedure in general commercial or criminal litigation. Judge Hawkins has been a scholar and architect of reform in bureaucratic justice. He followed his Marine Corps service by serving as the U.S. Attorney for the District of Arizona from 1976 to 1980. At 31, he was the youngest U.S. attorney in Arizona history. In the private sector, he made

* Professor of Law, New York Law School. I had the great honor of working for Judge Hawkins in my first job after graduation from Arizona State University's College of Law in 1983. He was then a partner at Dushoff and Sacks. I was fortunate to continue to work with him when he formed the firm of Daughton, Hawkins and Bacon and later become his partner when that firm merged with Bryan Cave. I entered academia in the summer of 1994 just as he joined the federal judiciary. I owe him many professional debts but notwithstanding those debts, I know that one of Judge Hawkins's highest values is professional integrity and I have done my best to both praise and critique his contributions to the field of immigration law during his service as a Judge on the Ninth Circuit Court of Appeals. As he continues as a Senior Judge, I trust that he is far from finished in making contributions to this field and will make many more. I would like to thank New York Law students Margaret Laufman (class of 2010) and Claire R. Thomas (class of 2011) for their many contributions to this article. I also benefitted from the comments of Nancy-Jo Merritt, Mathilde Cohen, and Anna O. Law.

1. Hawkins dissenting in *Circu v. Ashcroft*, 389 F.3d 938, 943 (9th Cir. 2004). As is discussed *infra* the case was reheard en banc and remanded to the agency for reconsideration.

significant contributions to local, state and national bar associations and through pro bono leadership within private firms. He made a long lasting and significant contribution during his years of service as a volunteer on the Administrative Conference of the United States (ACUS).² From 1989 to 1994, Judge Hawkins served on the ACUS. During this period, ACUS commissioned and analyzed several in-depth seminal studies of immigration adjudication. Michael Hawkins, with his ACUS colleagues from government, the judiciary, and the private sector, hammered out real world recommendations for this complex field and many of their recommendations became law either through legislative or administrative reforms.³ When he became a member of the federal judiciary, his role was clearly altered. However, his commitment to fairness and integrity in adjudication remained undiminished. This article will explore some of Judge Hawkins's many immigration decisions, both majority and dissenting opinions, which reflect his commitment to the preservation of a due process.

It is the pain and irony of bureaucratic legal process that the people subjected to bureaucratic process are least able to navigate its complexity. The most critical and life-changing decisions are often made by the small claims court, the tribunal authority or the administrative adjudicator. Moreover, the substantive and procedural rules within these specialty bureaus may also be some of the most complex and contain labyrinths that would ensnare even the most able and experienced advocate. Finding competent, affordable counsel, training agency adjudicators and administrators, and balancing crushing workloads against political pressure to produce are just some of the ordinary challenges of bureaucratic process. The last long tail of bureaucratic process may be judicial review, yet the doctrines and traditions of judicial review of administrative action constrain

2. The ACUS is an intergovernmental agency created by Congress to study issues of administrative process. The *Arizona State Law Journal* devoted an entire issue to a symposium discussing the legacy of the ACUS. See Victor G. Rosenblum, *Contrasting Perspectives on the Deeds and Demise of the Administrative Conference: Is There a Determinable Legacy?*, 30 ARIZ. ST. L.J. 1 (1998). After a twenty year period of desuetude, Congress has reauthorized funding for the ACUS in 2010. *Hearings on the Administrative Conference of the United States Before the Subcomm. on Commercial and Admin. Law Comm. on the Judiciary*, 111th Cong (2010) (Statement of Jeffrey S. Lubbers, Professor of Practice in Administrative Law, Washington College of Law, American University), available at <http://judiciary.house.gov/hearings/pdf/Lubbers100520.pdf>.

3. See, e.g., Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990). Both of these important law review articles were informed by empirical studies conducted on behalf of the ACUS that gave these authors access to the government official involved in managing the agency procedures. These and similar studies made real and lasting reforms for immigration adjudications.

the scope of judicial review because our society values the efficiency and independence of the administrative action.

Immigration law is a species of administrative law. For the vast majority of people who are touched by immigration law, every interaction is with one bureau of the federal government: the Department of Homeland Security (“DHS”).⁴ As in other forms of federal administrative law, an individual aggrieved by an adverse agency action has, after exhaustion of the administrative process, recourse through the federal courts for limited judicial review. Since 1961, Congress has largely channeled the judicial review of final removal to the federal courts of appeals bypassing the federal district courts.⁵ In the past fifteen years, during Judge Hawkins’s tenure as a judge on the Ninth Circuit Court of Appeals, the immigration workload of the federal courts has grown exponentially and now represents around 13% to 20% of the appellate docket.⁶ This growth has been even

4. In 2002 Congress reorganized the immigration control functions and created a new cabinet level agency, entitled the Department of Homeland Security (“DHS”). The former Immigration and Naturalization Service of the Department of Justice became part of DHS. Only the immigration administrative court, the Executive Office for Immigration Review (“EOIR”) and the appellate litigation team in the Office of Immigration Litigation (“OIL”) remained in the Department of Justice under the control of the Attorney General. See *Department of Justice Agencies*, U.S. DEP’T JUST., <http://www.justice.gov/agencies/index-org.html> (last visited Mar. 3, 2011); *Department of Homeland Security Organizational Chart*, DEP’T HOMELAND SEC., http://www.dhs.gov/xabout/structure/editorial_0644.shtm (last visited Mar. 3, 2011).

5. While the Administrative Procedure Act, 5 U.S.C. §§ 701–706, provides for judicial review of federal agency action, Congress has carved out limits to the form and scope of judicial review of removal orders. In 1996 and again in 2005 Congress amended § 242 of the Immigration and Nationality Act, 8 U.S.C. §§ 1101–1381, in an effort to streamline judicial review in this area. As I have written elsewhere, the attempt to cut off access did not lead to decline in the volume of petitions and moreover, increased the complexity and constitutionalization of the field. See, e.g., Lenni B. Benson, *You Can’t Get There From Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405 (2007) [hereinafter Benson, *You Can’t Get There*] (suggesting that reform cannot be focused simply on judicial review but must incorporate the various factors that interact within the system); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37 (2007) [hereinafter Benson, *Making Paper Dolls*] (evaluating why cuts lead to greater volume of work and providing demographic data on the immigration workload of the federal courts); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) [hereinafter Benson, *Back to the Future*] (analyzing why limiting judicial review to constitutional issues will increase the constitutionalization of immigration law generating a greater number of due process and other constitutional challenges); Lenni B. Benson, *The ‘New World’ of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 233–64 (1998) [hereinafter Benson, *New World of Judicial Review*] (providing a description of the 1996 changes and an explanation of prior structure for judicial review of deportation and exclusion orders).

6. COMM’N ON IMMIGRATION, AM. BAR ASS’N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE

more profound in the Ninth Circuit Court of Appeals, which represents the court with the largest number of immigration cases and the highest percentage of immigration cases on its docket. In 2009, the Ninth Circuit Court of Appeals received 3,351 petitions for review in immigration removal cases.⁷ This figure represented 27% of their total docket of 12,211 cases for 2009.⁸

The administration of such a large volume of cases, a caseload that has grown exponentially, has obviously required the judicial administration of the court to consider approaches to managing the workload.⁹ The Ninth Circuit has utilized a variety of approaches including: greater reliance on staff attorneys to prepare analysis of cases,¹⁰ decisions that are not designated for formal publication,¹¹ dispensing with oral argument in some

ADJUDICATION OF REMOVAL CASES 4-1, 4-2 (2010); *see also* Benson, *You Can't Get There, supra* note 5; Benson, *Making Paper Dolls, supra* note 5 at 47. There was a marked 26% decline in the number of immigration related petitions between 2008 and 2009 despite an overall increase of 6% in the total workload of the court. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2010), *available at* <http://www.uscourts.gov/Statistics.aspx>. While final BIA decisions declined 13% in the same time period, the decline is still quite marked.

The percentage of immigration related cases is even higher if criminal cases are added. The federal government has dramatically increased the number of immigration related criminal prosecutions. *See* TRAC IMMIGRATION REPORT, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES (2008), *available at* <http://trac.syr.edu/immigration/reports/188/>. According to the 2009 Ninth Circuit Annual Report, criminal appeals accounted for 13.7% of the total, with appeals involving criminal immigration offenses ranking as the second only to criminal appeals involving drug offenses. *See* U.S. DIST. COURTS, 2009 NINTH CIRCUIT ANNUAL REPORT 40 (2010), *available at* <http://www.ce9.uscourts.gov/publications/AnnualReport2009.pdf>.

7. *See id.*

8. *Id.*

9. *See* Benson, *Making Paper Dolls, supra* note 5 (discussing the rapid, exponential growth in the volume of immigration appeals); *see also*, John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965 (2006) (discussing the growth nationwide in immigration appeals).

10. In the Ninth Circuit, the Office of the Staff Attorneys ("OSA") "consists of over 35 attorneys who work for the entire court instead of for a single judge. Staff attorneys review the motions in all of the court's cases, and research and present them to the judges for decision." *See Appellate Court Participants*, OFFICE OF THE CIRCUIT EXEC., HISTORY AND GUIDE TO THE U.S. COURTS, <http://207.41.19.15/web/sdocuments.nsf/94dcdf31963df55d88256453006e368f9f803c4b86ed923c882564530083d159?OpenDocument> (last visited Feb. 24, 2011).

11. When the Ninth Circuit publishes a decision that is nonprecedential the decision is called a "memorandum" and not an "opinion." The court then marks the decision with this footnote: "This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." *See e.g.*, *Rutledge v. United States*, No. 09-15198, Mem. at 1 (9th Cir. 2011); *United States v. Folsom*, No. 10-50119, Mem. at 1 (9th Cir. 2011); *see also* U.S. COURT OF APPEALS FOR THE NINTH CIR., FEDERAL RULES OF APPELLATE PROCEDURE, NINTH CIRCUIT RULES, CIRCUIT ADVISORY COMMITTEE NOTES 36-3(a), *available at* <http://www.ca9.uscourts.gov/datastore/uploads/rules/rules.htm>. There is a significant body of

dispositions,¹² use of *en banc* panels to resolve some important issues,¹³ and the education and training of attorneys who regularly represent immigrants in the circuit.¹⁴

Certainly, one member of the entire Ninth Circuit judiciary was not single-handedly responsible for designing or implementing any of these reforms, but Judge Hawkins has taken an active role in many ways. He has organized formal training for the incoming law clerks. He has participated in annual trainings for immigration attorneys whom the court's staff identifies as repeatedly presenting deficient or inadequate briefs. He has

literature discussing the impact of courts issuing nonprecedential decisions. See, e.g., Hillel Y. Levin, *Making the Law: Unpublication in the Federal Courts*, 53 VILL. L. REV. 973 (2008); see also, William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429 (2003).

12. The Ninth Circuit rules allow the panel to decide a case without oral argument. See FED. R. APP. P. 34(a)(2) (stating “[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary”); Telephone Interview by Claire Thomas with Denise Leonard, Assistant Info. Sys. Manager for the Ninth Circuit Court of Appeals (Sept. 22, 2010) (indicating that during the twelve month period ending June 2010, the court heard 1,809 arguments and 6,743 cases were decided after procedural rulings and 4,225 cases ended after submission of brief). Based on these numbers, an estimated 63% of the appeals were handled without oral argument in that twelve month period. See also David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005) (criticizing the number of unpublished decisions).

13. “En banc” cases are heard by the Court of Appeals for the Ninth Circuit in panels consisting of the Chief Judge of the Circuit and ten other judges selected more or less at random from the active judges on the appellate court. See FED. R. APP. P. 35; 9TH CIR. R. 35-3 (revised Dec. 2009), available at <http://www.ca9.uscourts.gov/datastore/uploads/rules/rules.htm#1109234>.

According to FED. R. APP. P. 35(b)(1), a petition may be made for a hearing or rehearing en banc when:

the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

See ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 158–162 (2010) (providing a scholarly examination of the immigration cases in the Ninth Circuit and some of the approaches used to manage the workload).

14. Telephone Interview with Judge Michael Daly Hawkins, Ninth Circuit Court of Appeals (Aug. 25, 2010) (describing mandatory “moot court” training for attorneys who are unable to demonstrate competence as appellate counsel. The training instructs attorneys on the elements of appellate briefs, the rules of appellate procedure and the observation of skilled appellate advocates presenting oral argument.).

helped to recruit attorneys from the government and the private bar to present mock oral arguments and commentary to attorneys so that the quality of representation can improve.¹⁵

Still, the reality of immigration adjudication in the Ninth Circuit is that there are a vast number of non-precedential, “unpublished” decisions issued by three judge panels with a heavy role for the staff attorneys drafting all or parts of the opinion. It is in this context that we examine the key immigration cases of Judge Hawkins, knowing that no immigration opinion can be written in the Ninth Circuit without an understanding that perhaps one hundred or more immigration cases may be decided in a month within the Ninth Circuit alone.

In an interview with Juan Osuna, a former member of the Board of Immigration Appeals (“BIA”), I learned that in 2003–04 the BIA recognized a need for increased communication and contact with federal judges. Mr. Osuna reported that “the BIA reached out to the Ninth Circuit and invited one or more of the judges to attend an annual conference of the BIA and to speak directly to the members of the BIA and the Board’s attorney staff. Judge Hawkins accepted and his presentation was very well received.”¹⁶ Based on the initial meeting Judge Hawkins also worked with the leadership of the Ninth Circuit and other Circuit Courts to understand the changes within the Department of Justice that are contributing to the exponential growth in petitions for review.¹⁷ Judge Hawkins invited members of the BIA and its leadership to attend annual meetings of the Ninth Circuit Judicial Conference.¹⁸ These initial meetings were the beginning of a process that continues today and has expanded to Judges of the Second, Third, Sixth, Seventh and Ninth Circuit meeting with leadership of the BIA.¹⁹ Juan Osuna also reported that judges from other circuits have also participated in productive conversations and exchanges about judicial administration.²⁰

15. Interview with Judge Michael Daly Hawkins, *supra* note 14.

16. Telephone Interviews with Juan Osuna, former Chairman, Board of Immigration Appeals (conducted between Aug. and Oct. 22, 2010). The comments of Mr. Osuna are his personal recollections and are not meant to reflect the official opinion of the Department of Justice or the U.S. government. Mr. Osuna was a member of the Board of Immigration Appeals from August 2000 to 2009. He served as chairman of the BIA from September 2008 to May 2009. In 2009 and 2010 he held other positions of responsibility within the Department of Justice and as of January 2011 he is the Acting Director of the Executive Office for Immigration Review. See *Meet the Director*, U.S. DEP’T JUST., <http://www.justice.gov/eoir/meetdir.htm> (last visited Mar. 3, 2011).

17. Telephone Interviews with Juan Osuna, *supra* note 16.

18. *Id.*

19. *Id.*

20. *Id.*

This positive assessment from the former chair of the BIA is an example of how Judge Hawkins is able to build communication even if he is engaged in a serious critique of the agency performance. For example, Judge Hawkins reported in an interview he gave following a high level meeting with officials from the Executive Office for Immigration Review (“EOIR”), that he seriously discussed “shaming” by the Circuit Courts as a possible way to improve adjudication before the agency.²¹ He said that the audience applauded when he suggested that the Ninth Circuit could easily improve adjudication before the EOIR by naming immigration judges in its opinions.²² This is a federal judicial practice that Chairman Osuna strongly opposes.²³

By suggesting that opinions name the immigration judges, Judge Hawkins seriously endorsed a need for greater transparency and accountability. The volume of the cases, the lack of support resources such as court personnel and law clerks, the existing management culture and practices have created a cloud of anonymity. Moreover, the difficulty of managing complex decision-making required by deportation and asylum cases combined with all of these factors to reduce the effectiveness and quality of the adjudication in the immigration courts.²⁴ Appellate courts can remand erroneous decisions to the agency and can point out procedural errors, but they have no funds to address the budget shortfalls of the administrative adjudicator, nor can they create statutory substantive and procedural reforms that might reduce the problems and thus the rate of appeal.

When an immigration case reaches the federal courts, the entire removal proceeding record is transmitted to the court. Judicial review requires that

21. See Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts: As Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, at 1, available at <http://articles.latimes.com/2005/may/02/local/me-backlog2/5>.

22. While the Ninth Circuit does not routinely name individual immigration judges in its decisions, the Second Circuit Court of Appeals names the judge at the top corner of the slip opinions posted on the court’s website and formally names them in the body of the opinion. This was a procedure I recommended as a way of increasing transparency and accountability and allowing individual immigration judges to find appellate case law addressing their administrative decisions. See Benson, *You Can’t Get There*, *supra* note 5, at 427; see also Sydenham B. Alexander, *A Political Response to the Crisis in Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 31 n.161 (2006) (calling for reforms in the administrative process).

23. Telephone Interviews with Juan Osuna, *supra* note 16.

24. The vast majority of the opinions prepared by immigration judges are dictated and few are formally published. Of the more than 30,000 decisions rendered by the appellate body, the Board of Immigration Appeals, only a fraction are formally published or made available on the agency website. See *AG/BIA Decisions Listing*, EOIR VIRTUAL LAW LIBRARY, http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html (last visited Feb. 25, 2011).

the court consider the entire record—a record that can easily exceed 400 to 600 pages in a contested asylum case. Moreover, immigration court proceedings are not officially transcribed. The proceedings are recorded and a transcript is only prepared if there is an appeal. These transcripts can be rough, both because the pace of the litigation is quite fast and because the average immigration judge handles a docket of more than 1,200 cases a year. Unfortunately, most of the arguments, motions and decisions presented in removal proceedings are made orally. The press of the immigration court docket requires immigration judges to dictate a final decision with rarely an opportunity to edit and rewrite the final order.²⁵ Well aware of these practical and budgetary limitations, Judge Hawkins and other members of the federal judiciary have tried to work with leadership within the EOIR to improve the procedures and the court's workloads. In testimony before Congress, several members of the federal judiciary decried the lack of resources for immigration judges, a problem Judge Hawkins frequently noted.²⁶

When I asked Juan Osuna to evaluate Judge Hawkins contribution, he responded that the Judge's efforts:

have been critically important to exchange information and ideas that make the process work better. The federal courts have learned much more about the process of adjudication of cases in the immigration court system, including the overwhelming numbers of cases, the resource constraints that the immigration courts work under, the complexity of the legal and factual issues that come before immigration judges and the BIA, and the various federal government players that have a significant role in the process.²⁷

He continued to say that the BIA and immigration courts also benefitted from the exchange:

The immigration courts and the BIA have learned first-hand from Judge Hawkins and others about the issues that the federal courts see, about how federal judges look at the immigration cases that reach them, and about recurring problems that arise in cases and ideas on how to address them. This has informed and contributed to an overall improvement in the process at all levels.²⁸

25. COMM'N ON IMMIGRATION, AM. BAR ASS'N, *supra* note 6, at 3-16.

26. *See, e.g., Immigration Litigation Reduction: Hearing Before the Subcomm. on the Judiciary*, 109th Cong. (2006) (statement of Chief Judge John M. Walker, U.S. Court of Appeals for the Second Circuit), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=1845&wit_id=5214.

27. Telephone Interviews and Emails with Juan Osuna, *supra* note 16.

28. *Id.*

Judge Hawkins and other members of the Ninth Circuit have also commented that the government attorneys representing the government in the removal hearings also have a responsibility for the development of an adequate administrative record.²⁹ In an interview, Judge Hawkins said it is quite distressing to see government counsel failing to take an adequate role to clarify an important factual point in a record, or responding with silence to counsel's statutory arguments about a respondent's eligibility for relief.³⁰ Judge Hawkins said it is critical to the efficiency and accuracy of the administrative system that the "government has a duty to do justice and that means being prepared and engaged in an administrative process."³¹ For example, in *Cinapian v. Holder*, Judge Hawkins found that the government made a mistake in failing to notify the respondents in advance of the hearing that the government would challenge their documents establishing prior residence in Iran.³² This type of ambush was a shortcut that became a mistake requiring remand.³³

While Congress and the Department of Justice must shoulder the responsibility for full reform, the federal circuit courts can affect some change. In the next section of this article, I will address several of the cases in which Judge Hawkins presented majority or dissenting opinions that strongly indicate how the federal judiciary must continue to serve as (1) the guardians of individual rights, (2) the necessary protector of government independence, and (3) at times, the engine for reform.

II. A REFEREE WHO WILL CALL A FOUL

Scholars of administrative law and immigration law know that the scope of review is narrow and extremely deferential to the agencies. Moreover, since the late 1880s, immigration cases have developed a jurisprudence resulting in an extremely deferential doctrine—the plenary power doctrine—that may insulate government action from even constitutional limitations.³⁴ Still, since 1903, the Supreme Court has affirmed that people

29. John T. Noonan, Jr., *Immigration Law 2006*, 55 CATH. U. L. REV. 905, 907–09 (2006) (citing a transcript from an immigration case and noting that the trial attorney did nothing to improve or clarify the administrative record).

30. Interview with Judge Michael Hawkins, *supra* note 14.

31. *Id.*

32. 567 F.3d 1067, 1076 (2009).

33. *Id.* at 1076–77.

34. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1703 (1992) (explaining how courts focus on procedure to give non-citizens opportunities perhaps in part because they lack full incorporation into the substantive protections of the Constitution).

within the United States are entitled to due process of law and immigration hearings must meet a minimum guarantee of due process to ensure that the hearing is not fundamentally unfair.³⁵ Thus, in some rare circumstances, members of the federal judiciary will examine the procedures used by the government to secure a removal order and find that the government has gone beyond those very broad limits of fundamental fairness.

Still, while judicial review is structured through the lens of administrative law, Judge Hawkins never seems to lose understanding of the larger context that removal decisions are as important as most criminal cases and in many situations much more significant to the lives involved. So while his opinions stay within the structure of judicial review of agency action, they reflect a real concern for the process used to adjudicate the facts and although he cannot alter the substantive rules, he is willing to question whether the rules are being applied fairly.

His opinions show a preference for representation, evidence, notice, accurate translation, remedies for long delays, matters of context, separation of powers, and acknowledgement of the problems in the system.

For example, in a case where the Board of Immigration Appeals (“BIA”) rejected a woman’s claim that she never received notice of her removal hearing and in the context of a motion to reopen an *in absentia* hearing to allow her to apply for cancellation of removal, the government argued for a very high burden of proof to establish the existence of a negative—that she prove she did not receive notice sent by regular mail.³⁶ In *Salta v. INS*,³⁷ the government argued it was appropriate to place the burden on the respondent to establish a lack of notice because both the BIA and the Ninth Circuit had previously ruled that if an individual is challenging receipt of service where the government used certified mail, the challenger had to provide evidence

that her mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service, then she has rebutted the presumption of effective service. If this is the case, the burden shifts to the INS to show that a responsible party refused service.³⁸

35. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); Gerald L. Neuman, *The Constitutional Requirement of ‘Some Evidence’*, 25 SAN DIEGO L. REV. 631, 637 (1988) (discussing early immigration cases and the due process requirement that removal orders be supported by “some evidence”).

36. *Salta v. I.N.S.*, 314 F.3d 1076 (9th Cir. 2002).

37. *Id.*

38. *Id.* at 1079 (quoting *Arrieta v. I.N.S.*, 117 F.3d 429, 432 (9th Cir. 1997)).

Judge Hawkins wrote that while this burden of proof might make sense if an individual is challenging certified mail,

delivery by regular mail does not raise the same “strong presumption” as certified mail, and less should be required to rebut such a presumption. Indeed, many of the previously required forms of evidence, such as documentary evidence from the Postal Service or proof that no responsible person refused service, only make sense in the context of certified mail. We therefore hold that it was an abuse of discretion for the BIA and the IJ to apply the [higher] evidentiary requirements in denying Salta’s motion to reopen.³⁹

The panel then remanded the case to the BIA for remand to the Immigration Judge to allow Ms. Salta to supply an affidavit of non-receipt and for the agency to consider whether this type of evidence alone should be sufficient where the government only used regular mail.⁴⁰

This decision is a good example of Judge Hawkins acting as referee. He is not “calling the game” and mandating that the agency reopen the proceedings, but instead, he patiently explains where the agency overstepped the line in shifting burdens and reminds it of the important context, that Ms. Salta was a person who had initially appeared for her hearing and sought an opportunity to submit relief—relief only available to someone who had lived more than ten years within the United States. While it may be understandable why the agency would want to defend notice by regular mail, the blind application of a higher burden of proof used to rebut certified mail makes it almost impossible for an individual to prove lack of notice.⁴¹

While the government and agency adjudicators might prefer a “bright line” rule that shifts the burden uniformly to the challenger to disprove notice, Judge Hawkins’s decision, while decided on general statutory and regulatory grounds, echoes the constitutional case law on the importance of providing adequate notice.⁴²

The INA permits service of NTAs and hearing notices either in person or by mail. 8 U.S.C. § 1229(c). Service by mail is statutorily sufficient so long as the notice was sent to “the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.” *Id.*; see also 8 U.S.C. § 1229a(b)(5)(A) (authorizing IJs to enter removal orders in absentia only “if the

39. *Id.*

40. *Id.* at 1080.

41. There is no reported decision issued after remand.

42. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Service establishes by clear, unequivocal, and convincing evidence that . . . notice was . . . provided at the most recent address provided under section 1229(a)(1)(F) of this title.”). What it means to be an address “provided under section 1229(a)(1)(F),” in turn, was the focus of *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001) (en banc), which held that an alien can be said to have “provided” his address to the Service “under” § 1229(a)(1)(F) only if he has actually received, or can be fairly charged with receiving, the specific advisals and warnings enumerated at § 1229(a)(1)(F) [footnote omitted] regarding the consequences of his failure to provide and update his address once removal proceedings have begun. That advisal is usually conveyed to an alien for the first time in an NTA. *G-Y-R-*, 23 I. & N. Dec. at 187. Because the parties agree that Al Mutarreb never actually received his NTA, *G-Y-R-*’s application in this case turns upon whether Al Mutarreb can be “properly charged” with having received notice. The parties agree that whether an alien is properly charged with receiving an NTA he did not in fact get requires a due process inquiry—whether the method of service is “‘reasonably calculated, under all the circumstances, to appri[s]e interested parties of the pendency of the action.’” *Matter of M- D-*, 23 I. & N. Dec. 540, 542 (BIA 2002) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); accord *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997).⁴³

Like the referee who ensures that the play is fair for persons involved in a sports event, Judge Hawkins ensured that all participants in his courtroom were allotted their due process rights. His decisions reflect a concern for ensuring that procedural safeguards do not go by the wayside simply because the respondent is not a citizen of the United States.

For example, in *Colmenar v. INS*, Judge Hawkins reviewed a decision of the BIA denying asylum to a native and citizen of the Philippines.⁴⁴ Colmenar’s claim was based on political persecution. Judge Hawkins found that Colmenar was not given a full and fair opportunity to present evidence in support of his asylum claim in his hearing before an immigration judge. The immigration judge indicated at the beginning of the hearing that he had already judged Colmenar’s case referring to the case as, “a possible medical malpractice suit rather than anything else.”⁴⁵ The immigration judge also refused to allow Colmenar to testify regarding certain details, which would

43. *Al Mutarreb v. Holder*, 561 F.3d 1023, 1026–27 (9th Cir. 2009).

44. 210 F.3d 967 (9th Cir. 2000).

45. *Id.* at 969.

have provided elaboration of his fears.⁴⁶ Judge Hawkins closed his decision with strong language:

Judges do little to impress the world that this country is the last best hope for freedom by displaying the hard hand and closed mind of the forces asylum seekers are fleeing. Better that we hear these claims out fully and fairly and then make an informed judgment on the merits. This is consistent with our role as judges, and the values of our Constitution demand no less.⁴⁷

Additionally, in *Lopez-Galarza v. INS*, Judge Hawkins reviewed a BIA decision in which a native and citizen of Nicaragua and her son were ordered removed from the U.S.⁴⁸ In this case, Ms. Lopez-Galarza had been raped, sexually-abused and physically imprisoned on account of her political opinion.⁴⁹ Judge Hawkins stated that “[i]n exercising its discretion to deny asylum in this case, the BIA simply failed to consider the level of atrocity of past persecution as the law of this Circuit and the BIA’s own precedent requires.”⁵⁰ Judge Hawkins criticized the BIA and explained that “[b]ecause the BIA deviated from the law of this Circuit as well as from its own precedent, its decision was ‘contrary to law’ and therefore an abuse of decision.”⁵¹ Judge Hawkins decided that Ms. Lopez-Galarza established her eligibility for asylum through a sufficient demonstration of past persecution.⁵² By remanding her case back to the BIA in order to allow the BIA panel to decide whether Ms. Lopez-Garcia and her son were entitled to asylum as a matter of discretion, Judge Hawkins again took on the role of a referee.

At times, Judge Hawkins has had to raise his objections by dissent. In *Circu v. Ashcroft*, the Immigration Judge relied on a State Department report describing human rights and religious freedom in Romania.⁵³ This

46. *Id.* at 970.

47. *Id.* at 973.

48. 99 F.3d 954 (9th Cir. 1996).

49. *Id.* at 957.

50. *Id.* at 963.

51. *Id.* Prior to 1996, federal courts could reverse a BIA decision where the agency abused its discretion, a standard but difficult hurdle in judicial review of administrative action. One of the changes made to the scope of judicial review after 1996 was to insulate all decisions committed to agency discretion from judicial review. Recently the ABA Commission on Immigration published a report calling for the restoration of judicial review of abuse of discretion. COMM’N ON IMMIGRATION, AM. BAR ASS’N, *supra* note 6, at 3–9; *see also* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the ‘Rule’ of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006).

52. *Lopez-Galarza*, 99 F.3d at 960.

53. 389 F.3d 938, 939 (9th Cir. 2004), *vacated en banc sub nom.* *Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2006).

report was dated two years after the original removal hearing. According to the Immigration Judge, this report contradicted the Respondent's claim of religious persecution.⁵⁴ The Immigration Judge gave no notice to the Respondent and used the report a full two years after the original hearing was held.⁵⁵ Further, this error was appealed to the BIA but the Board found no error in failing to give the Respondent notice and opportunity to respond to the report.⁵⁶ Judge Hawkins noted that this was untenable and he vigorously dissented.⁵⁷ He found that immigration judge's use of a controversial report without providing an opportunity to Ms. Circu to respond was a violation of fundamental fairness.⁵⁸ Later the case was reheard en banc and although Judge Hawkins was not a member of that en banc panel, the Ninth Circuit adopted his position and remanded the case to the agency saying that the BIA's action had violated due process and prejudiced the Respondent.⁵⁹

Judge Hawkins also demonstrated his concern for ensuring the due process of participants in his courtroom in the case of *Tawadrus v. Ashcroft*, which involved an Egyptian national who claimed he was persecuted through economic sanctions for his failure to convert to Islam.⁶⁰ At the master calendar hearing,⁶¹ Tawadrus was represented by counsel.⁶² The immigration judge set a date for a merits hearing, but counsel could not make it, and the immigration judge reset the merits hearing for six months later.⁶³ Tawadrus objected to the new date stating he had to get his case heard as expeditiously as possible in order to get his children out of Egypt.⁶⁴ The immigration judge moved the hearing to the same afternoon.⁶⁵ Citing a schedule conflict, Tawadrus' counsel withdrew.⁶⁶ Tawadrus appeared later that afternoon and proceeded without counsel.⁶⁷ The immigration judge denied asylum and withholding.⁶⁸ Tawadrus (with new counsel) appealed

54. *Id.*

55. *Id.* at 942.

56. *Id.*

57. *Id.* at 941-43.

58. *Id.* at 943.

59. *Circu v. Gonzales*, 450 F. 3d 990 (9th Cir. 2006).

60. 364 F.3d 1099, 1101 (9th Cir. 2004).

61. A master calendar hearing is usually the first hearing in a removal case. The hearing is used by the immigration judge to determine the scope of the pleadings and the issues in contention and to identify what relief, if any, the respondent will seek in a "merits hearing."

62. *Tawadrus*, 364 F.3d at 1101.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1102.

68. *Id.*

the decision to the BIA.⁶⁹ The BIA summarily affirmed the decision of the immigration judge without opinion.⁷⁰ Judge Hawkins again located the right to counsel among the rights within the Fifth Amendment guaranteed by due process.⁷¹ Judge Hawkins found that the immigration judge's failure to inquire specifically whether petitioner wished to continue without a lawyer and receive a knowing and voluntary affirmative response was an effective denial of right to counsel.⁷² By not having counsel, Tawadrus was unable to present a clear and internally consistent account and also unknowingly abandoned claims for relief. These failures established that Mr. Tawadrus was prejudiced by the immigration judge action.⁷³

Further, in *Cinapian v. Holder*, Judge Hawkins addressed the importance of rights related to the admission of evidence in his courtroom. In this case, the Iranian respondents claimed persecution on account of religion.⁷⁴ To corroborate their claim, Respondents provided a certificate from an Armenian church and an original birth certificate of the husband.⁷⁵ DHS submitted these documents for forensic analysis.⁷⁶ The DHS attorney made the forensic reports available to petitioners for the first time at their asylum hearing.⁷⁷ Counsel for the Respondents objected, claiming that the reports should have been available prior to the hearing so that the Respondents had an opportunity to review and respond to the content.⁷⁸ Further, Respondents' counsel should have had an opportunity to cross-examine the author of the reports.⁷⁹ The immigration judge refused to reset the case or grant a continuance to allow time to respond to the forensic evidence.⁸⁰ Further, the immigration judge eventually concluded that the Respondents were not credible because they could not present evidence to corroborate that the family had lived in Iran.⁸¹

Judge Hawkins pointed out that while the Federal Rules of Evidence do not formally apply in immigration proceedings, "evidence is admissible only if it is probative, and its use is fundamentally fair."⁸² Judge Hawkins

69. *Id.*

70. *Id.*

71. *Id.* at 1103.

72. *Id.* at 1103–05.

73. *Id.* at 1106.

74. 567 F.3d 1067, 1070–71 (9th Cir. 2009).

75. *Id.* at 1071.

76. *Id.*

77. *Id.* at 1071–72.

78. *Id.* at 1072.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

stressed the importance of the right to confront evidence and cross-examine witnesses in immigration cases.⁸³ He concluded that the failure of the government to make the reports available in advance of the hearing or to make the report's author available for cross-examination combined with the immigration judge's subsequent consideration of the reports, denied the Iranian respondents a fair hearing.⁸⁴

In dissent, Judge Hawkins identified the challenge of judicial review of administrative hearings that inadequately develop a claim for asylum:

Asylum cases, by their very nature, are difficult to review. The claims relate to events in faraway places, often described by individuals who speak an unfamiliar language, and rarely, if ever, does the government present evidence. The asylum seeker's testimony is often the sole basis for decision, and the hearing transcript, in turn, provides the sole basis for our review. . . .

Because an adequate record is so essential to meaningful review, we as an appellate body must insist on a record that is properly translated and transcribed. Because this record cannot even charitably be described as adequate, I believe the proper course would be to grant the petition for review and remand the transcript for clarification.⁸⁵

Moreover, Judge Hawkins seems well aware that the complexity of immigration law with its multiple agency divisions, the variety of visa petitions and procedures, and the lack of coordination within the agency can also create fundamental unfairness. In a case regarding a Congolese woman's right to immigrate through marriage, Judge Hawkins took the time in the dissent to unwind the complex procedural history of the case. He began by patiently explaining:

This case brings Abbott & Costello's "Who's on First" routine to life. A woman seeks a visa as the spouse of a United States citizen. Her husband first signs the application on her behalf, then withdraws it saying the marriage was a sham, only to file a second application, saying the withdrawal was done in haste and that the marriage was legitimate all along. In the meantime, making use of the husband's initial withdrawal, the government seeks and obtains a removal order based on marriage fraud. She appeals the removal order to the BIA. When her visa application is denied, she appeals that also and asks the BIA to consolidate the two obviously related matters. Without explanation, the BIA fails to

83. *Id.* at 1073–75.

84. *Id.* at 1075.

85. *Singh v. Ashcroft*, 367 F.3d 1139, 1144 (9th Cir. 2004) (Hawkins, J., dissenting).

act on Ngongo's efforts to consolidate and her cases proceed on two tracks, as two separate appeals. Not only does the BIA fail to act on Ngongo's consolidation request, it sends the visa denial to a BIA merits panel, and, at nearly the same time, sends the removal appeal to a single BIA member for summary affirmance.⁸⁶

Unlike the majority of the panel who affirmed the removal order, it is clear that Judge Hawkins was willing to untangle a bureaucratic mess. At the end of his dissent he wrote:

Without even asking for an explanation, the panel majority seems content to approve the removal (deportation) of someone the agency says has entered into a fraudulent marriage, while the same agency finds no proof that fraudulent marriage exists. No responsible, sane system of justice should sanction such a result. Alphonsine Ngongo is either eligible to proceed with her visa application or removable because of fraudulent marriage—she cannot be both.⁸⁷

Throughout his opinions this search for fairness and rationality is evident as he digs through the brush and bramble of immigration cases and administrative obfuscation. Not every judge works as hard as Judge Hawkins to try to not only produce the right result in the particular case, but to educate the public and the bureaucracy about the defects of the immigration procedures at the same time.

III. PRESERVING THE ROLE OF THE COURT

Judge Hawkins joined the Ninth Circuit Court of Appeals in the fall of 1994.⁸⁸ In 1996 Congress passed two bills amending the provisions governing judicial review of removal proceedings.⁸⁹ For the next ten years, the federal courts heard frequent arguments from both individual and government counsel about the scope and form of judicial review in this area.⁹⁰ When the restrictions on judicial review of immigration cases first became law, many, including a significant number of federal judges,

86. *Ngongo v. Ashcroft*, 397 F.3d 821, 823 (9th Cir. 2005) (Hawkins, J., dissenting).

87. *Id.* at 826.

88. *Ninth Circuit Judicial Conference 2009: Speakers, Panelists and Special Guests*, U.S. COURTS 9TH CIRCUIT, OFFICE OF THE CIRCUIT EXEC., <http://www.ce9.uscourts.gov/jc2009/promo/speakers.html#hawkins> (last visited Feb. 25, 2011).

89. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-54.

90. *Seeking Review Symposium*, 51 N.Y.L. Sch. L. Rev. 1 (2007).

believed that the Congress had exercised legitimate authority in foreclosing judicial review of many types of claims.⁹¹ On its face, the language of the statute certainly purports to close the courthouse to claims by aliens in expedited removal proceedings, to aliens who have been convicted of aggravated felonies, and to preclude review of claims where the ultimate decision about relief is committed to the agency discretion.⁹² But as the litigation developed, two major themes undergirded the ability of non-citizens to seek review: (1) if the case law did not clearly establish that a particular conviction fit the categorical bar, he or she continued to have a right to judicial review; and (2) if a petition for review was barred, the individual might have continued access to federal courts via a writ of habeas corpus.⁹³ In this first category of cases, one of the critical aspects of the doctrine is the approach the court takes to reading the breadth of the statutory preclusions. While some judges may have claimed to conduct straight textual reading of the preclusions, many others, including Judge Hawkins, examined the context of the preclusions and worried about the unfettered scope of agency action if the preclusion causes were read too broadly.

In an early case where the government argued that all review was precluded, Judge Hawkins held that notwithstanding a bar on a direct petition for review to the Court of Appeals, the respondent had the right to seek habeas review in the district court to determine if his constitutional rights had been violated in the original immigration hearing.⁹⁴ In *Dearinger ex rel. Volkova v. INS*, a writ of habeas corpus was raised on behalf of the asylum seeker.⁹⁵ Judge Hawkins held that the district court had jurisdiction over the habeas claim, and jurisdiction was not precluded by the Illegal Immigration Reform and Immigrant Responsibilities Act ("IIRIRA").⁹⁶ In concluding that jurisdiction was valid, Judge Hawkins analyzed the petitioner's claim of error based on ineffective assistance of counsel.⁹⁷ Judge Hawkins located the right to counsel in deportation proceedings as

91. See David R. McConnell, *Judicial Review Under the Immigration and National Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 75 (2007) (written by a senior attorney in the Office of Immigration Litigation, Civil Rights Division, Department of Justice, discussing history of Congressional attempts to control access to the federal courts and judicial review of immigration cases).

92. See Kanstroom, *supra* note 51 (discussing limitation on judicial review of discretionary decisions).

93. Benson, *Back to the Future*, *supra* note 5; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 988 (1998).

94. *Dearinger ex rel. Volkova v. I.N.S.*, 232 F.3d 1042 (9th Cir. 2000).

95. *Id.* at 1044.

96. *Id.*

97. *Id.* at 1044-45.

arising under the Fifth Amendment.⁹⁸ He went on to hold that where an alien is prevented from filing an appeal in immigration proceedings due to counsel's error, the error deprives the alien of the appellate process entirely and prejudice is presumed.⁹⁹ Judge Hawkins rejected the Government's argument that due process in immigration does not require an appeal to the U.S. court of appeals.¹⁰⁰ His reasoning was that just because an alien may not have a constitutional right to an appeal, there may still be a constitutional violation where deprivation of the right is ineffective assistance of counsel.¹⁰¹

Even if attorney error did not prevent access to the federal courts, Congress has also blocked that access by precluding or dramatically limiting judicial review of many immigration decisions. Perhaps one of the most dramatic examples illustrating Congressional "court stripping"¹⁰² is the Ninth Circuit opinion in *Meng Li v. Eddy*.¹⁰³ In this case, a Chinese business woman, Ms. Meng Li, presented a valid passport and a visa for a business visit (B-1) to the U.S. inspectors in Anchorage, Alaska.¹⁰⁴ Although her ultimate destination was New York, the government inspected all foreign passengers before allowing them to proceed to flights in the interior of the United States.¹⁰⁵ Ms. Li had also applied to INS for classification as an L-1 intracompany transferee; while her flight was heading for the United States, that petition was approved, but Ms. Li was unaware of the approval.¹⁰⁶ When Ms. Li reached Anchorage, the immigration inspector accused Ms. Li of fraud, but would not tell her why; it later came to light that the inspector thought incorrectly that a person with a B-1 visa was not permitted to enter the US if an L-1 petition had also been

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. "Court stripping" or "jurisdiction stripping" is a reference to statutes that block access to judicial review. *See, e.g.,* Richard Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010).

103. 259 F.3d 1132 (9th Cir. 2001), *vacated and appeal dismissed by* Li v. Eddy, 324 F.3d 1109 (9th Cir. 2003). This case was vacated as moot because more than five years passed from the time of the original exclusion order and according to the government Ms. Li would suffer no further consequences of the order. The Court perhaps misunderstands that any order of exclusion can later be a basis for determining whether an individual is subject to permanent bars to admission to the U.S. for material misrepresentation or fraud. *See generally* INA § 212(a)(6)(c), 8 U.S.C. § 1182(a)(6)(c) (Westlaw through P.L. 111-382, approved 2011).

104. *Li*, 259 F.3d at 1133.

105. *Id.*

106. Email from Margaret D. Stock, Adjunct Professor, University of Alaska Anchorage to Lenni Benson, Professor of Law, New York Law School (Oct. 29, 2010) (on file with author).

approved on the person's behalf.¹⁰⁷ Ms. Li did not speak fluent English, but tried to explain to the inspectors that she was traveling to New York on behalf of her Chinese employer, a real estate developer.¹⁰⁸ In New York she expected to complete negotiations for the purchase of materials and fixtures for shipment to China.¹⁰⁹ The inspector apparently misunderstood the law related to B-1 and L-1 visas and after questioning Ms. Li, informed her that she was going to be returned to China on the next available flight and that she was formally ordered excluded from the United States.¹¹⁰ The Ninth Circuit majority opinion described the inspector's findings as follows:

The order itself was issued on a form stating that the INS had determined the named alien to be excludable because of an attempt to enter the country through fraud or misrepresentation. The form included a space for a description of the nature of the fraud or misrepresentation, but the INS left that space blank in Li's order.¹¹¹

After hearing she was to be excluded, Ms. Li became distraught and the interpreter told the inspector that Ms. Li was afraid to return to China.¹¹² Apparently, the interpreter believed the only way to delay Ms. Li's departure was to have her seek political asylum.¹¹³ The interpreter was not completely incorrect because the statute and regulations provide that expedited removal cannot be used if a person has a "credible fear" of returning to his or her country of origin.¹¹⁴

Upon hearing incorrectly from the interpreter that Ms. Li was afraid to return to China, the inspector transferred Ms. Li to the local jail until she could be interviewed by a member of the asylum corps.¹¹⁵ While she was being held in the local jail, Ms. Li met attorney Margaret Stock, who had been called by Ms. Li's company and asked to find out what had

107. *Li*, 259 F.3d at 1133.

108. *Id.* at 1136.

109. Benson, *New World of Judicial Review*, *supra* note 5, at 246 & n.82.

110. Expedited Removal is a streamlined procedure where no immigration court hearing is involved in admissibility determinations. See INA § 235(b), 8 U.S.C. § 1252(e)(2) (Westlaw through P.L. 111-382, approved 2011).

111. *Li v. Eddy*, 259 F.3d 1132, 1133 (9th Cir. 2001).

112. Anthony Lewis, *Abroad At Home, It Can Happen Here*, N.Y. TIMES, Sept. 8, 1997, Editorial Page; Telephone Interview with Margaret D. Stock, Adjunct Professor, University of Alaska Anchorage (Oct. 29, 2010); Email from Margaret D. Stock, *supra* note 106.

113. Email from Margaret D. Stock, *supra* note 106.

114. INA § 235(b)(1)(A)(i); 8 C.F.R. § 235(b)(4) (Westlaw through Feb. 24, 2011). In theory, an expedited removal order could be stopped if the inspector's supervisor does not concur in the assessment of the inspector. See 8 C.F.R. § 235(b)(7).

115. Email from Margaret D. Stock, *supra* note 106.

happened.¹¹⁶ Ms. Li explained that the officer refused to accept her business visitor visa and that she didn't know why she was in jail.¹¹⁷ Ms. Stock then learned from INS that they were holding Ms. Li for a credible fear interview. Ms. Li was adamant that she was not afraid to return to China and did not want to apply for asylum in the United States. Although Ms. Stock attempted to speak to the inspectors informally and ask them to rescind the expedited removal order, the Anchorage District Office refused.¹¹⁸ Ms. Stock filed a habeas petition challenging the erroneous determination of the inspector that Ms. Li was not a bona fide tourist for business purposes.¹¹⁹

Prior to the 1996 changes, if a business visitor or other non-immigrant visa holder was told by an inspector that he or she would not be admitted to the United States, the individual had the right to seek review of that inspector's decision before an immigration judge.¹²⁰ If the immigration judge affirmed the agency determination that the person lacked the proper visa or was otherwise subject to a ground of inadmissibility, the individual could challenge the exclusion order by filing a habeas petition in federal district court.¹²¹ The statutory authority for this habeas review was part of the INA former § 106.¹²² In 1996, Congress created a new form of exclusion proceedings for two categories of applicants for admission: (1) people who lacked documents or presented false documents and people who the inspector found to be making a material misrepresentation;¹²³ or (2) people who engaged in fraud in connection with their admission application.¹²⁴ The new expedited removal system authorizes the inspector to determine whether an individual is subject to either of these grounds of exclusion and then, with the approval of a "second-line supervisor,"¹²⁵ formally order the

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See Benson, *New World of Judicial Review*, *supra* note 5 (discussing the procedures available prior to 1996 reforms).

121. *Id.*

122. INA § 106 (repealed 1996).

123. The specific ground is found in INA § 212(a)(7) and 8 U.S.C. § 1182(a)(7). INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (Westlaw through P.L. 111-382, approved 2011).

124. The specific ground of inadmissibility is found in INA § 212(a)(6)(c) and 8 U.S.C. § 1182(a)(6)(c) (Westlaw through Dec. 17, 2010).

125. See 8 C.F.R. § 235.3(b)(7) (Westlaw through Feb. 11, 2011) (Stating that "[a]ny removal order entered by an examining immigration officer pursuant to section 235(b)(1) of the Act must be reviewed and approved by the appropriate supervisor before the order is considered final. Such supervisory review shall not be delegated below the level of the second line supervisor, or a person acting in that capacity. The supervisory review shall include a review of the sworn statement and any answers and statements made by the alien regarding a fear of

individual to be removed.¹²⁶ The impact of an expedited removal order is that the individual is barred from seeking readmission to the United States for five years.¹²⁷ Potentially, the impact is permanent if the ground used to sustain inadmissibility was fraud or misrepresentation because that finding could be used to bar future applications for visas or admission to the United States.¹²⁸ Finally, to ensure that the removal proceeds quickly, Congress eliminated the role of the immigration court except for people who made a claim of a credible fear of persecution or harm if they were to be returned.¹²⁹ Later, by regulation, the agency expanded these exceptions to individuals claiming to be U.S. citizens, lawful permanent residents, or persons already granted asylee or refugee status and seeking readmission to the United States.¹³⁰ As a safeguard, Congress created a narrow grant of specific habeas review in INA § 242(e)(2), 8 U.S.C. § 1252(e), that allows review as follows:

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.¹³¹

removal or return. The supervisory review and approval of an expedited removal order for an alien described in section 235(b)(1)(A)(iii) of the Act must include a review of any claim of lawful admission or parole and any evidence or information presented to support such a claim, prior to approval of the order. In such cases, the supervisor may request additional information from any source and may require further interview of the alien.”)

126. 8 C.F.R. §235.3(b)(2) (Westlaw through Dec. 17, 2010).

127. INA § 212(a)(9)(A), 8 U.S.C. §1182 (Westlaw through P.L. 111-382, approved 2011).

128. *Id.*

129. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (Westlaw through P.L. 111-382, approved 2011); 8 C.F.R. § 235.3(b)(2)(ii) (Westlaw through Dec. 17, 2010).

130. 8 C.F.R. § 235.3(b)(5).

131. INA § 242(e)(2), 8 U.S.C. § 1252(e).

Ms. Li filed a habeas petition using both the specific provision of the INA and the general federal habeas statute, 28 U.S.C. § 2241.¹³² The District Court rejected the habeas petition, flatly stating that Congress had meant to insulate all expedited removal decisions from judicial review unless the individual was a citizen or lawful permanent resident.¹³³ Ms. Li then filed a petition for review of the denial of habeas.¹³⁴ The Ninth Circuit majority affirmed the lower court and found that Congress had intended to preclude judicial review.¹³⁵ The court ruled that normal habeas review had been expressly limited to the form and content found in the INA alone.¹³⁶ The majority also rejected Ms. Li's argument that her removal violated procedural due process, finding that an alien who is at the border of the United States and not yet formally admitted into the interior is not entitled to the protections of procedural due process.¹³⁷

Judge Hawkins wrote a powerful dissent that reveals his philosophical approach to preserving the role of the court as a guarantor of fair agency procedure and to ensure the agency acts within its statutory power. Using conservative canons of statutory construction and the earlier decisions of the Ninth Circuit, particularly *Magana-Pizano*¹³⁸ preserving the ability of

132. *Li v. Eddy*, 259 F.3d 1132, 1133–35 (9th Cir. 2001).

133. *Id.* at 1136.

134. *Id.* at 1132. Statutory habeas is found in 28 U.S.C. § 2241. An appeal of a federal denial of habeas can be filed under 28 U.S.C. § 2254. Here Ms. Stock argued that both this statute and the INA guarantee of habeas within INA § 242(b) authorized judicial review of whether the government had the authority to use expedited removal in this factual context.

135. *Li*, 259 F.3d at 1134–35.

136. *Id.*

137. *Id.* at 1136. Physical presence within the interior has long been a constitutional dividing line, limiting the rights of non-citizens not yet admitted to the territory of the U.S. The Ninth Circuit specifically noted that it was not considering whether an individual subjected to expedited removal procedures who was in the United States might have due process protections. *See id.* at 1135. This is an important limitation because the expedited removal procedures are used within the physical borders of the United States. People apprehended within 100 miles of the international border who cannot establish they have been in the U.S. for at least fourteen days or people who have entered illegally by sea who cannot establish that they have been in the U.S. for at least two years are subject to expedited removal procedures. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877–81 (proposed Aug. 11, 2004); Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924–25 (proposed Nov. 13, 2002). The expedited removal procedure could, in time, produce more removal orders than the entire removal procedure before the immigration courts. In fiscal year 2009, 27% of all removal orders were issued by expedited removal procedures as opposed to court procedures. *See* DHS ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2009 1 (2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf.

As expedited removal becomes more prevalent it is likely collateral and direct attacks on the fairness of the procedure will grow.

138. *See Magana-Pizano v. I.N.S.*, 200 F.3d 603 (9th Cir. 1999).

people to raise jurisdictional arguments challenging the sweeping jurisdictional bars, Judge Hawkins found that Congress had not precluded a limited form of statutory habeas within the INA:

Congress can expressly remove habeas review, but that is not what it did in § 1252(e)(2). Rather, Congress limited our review. In such a situation, we retain jurisdiction to determine whether we have jurisdiction, just as in part II of *Magana-Pizano*. The only way that we can determine whether Li was “ordered removed under [§ 1225],” § 1252(e)(2)(B), and “whether such an order in fact was issued,” § 1252(e)(5), is to determine whether INS has, to whatever extent, identified any conduct that offends § 1225. Thus, the reasoning of part II of *Magana-Pizano* should control this case—the legal satisfaction of statutory predicates has to be determined to establish jurisdiction.¹³⁹

Earlier in the decision, Judge Hawkins framed the issue as:

The majority argues that § 1252(e)(2)(B) “does not appear to permit the court to inquire into whether section 1225(b)(1) was properly invoked, but only whether it was invoked at all.” If true, this means that INS [now DHS] can issue an expedited removal order for *any* alien seeking to enter the United States (other than a permanent resident, refugee, or asylum-seeker) for *any* reason, including clearly improper grounds such as racial or ethnic bias, and the courts cannot review the legal basis of that order. A careful reading of § 1252(e)(2)(B), grounded in the overall expedited removal provisions of IIRIRA, coupled with our precedent interpreting similar review provisions, compels the opposite result.¹⁴⁰

While the majority opinion acknowledges Judge Hawkins’s critique, it refused to allow any check on whether the government is properly using the expedited removal procedure.¹⁴¹ Judge Hawkins’s dissent is grounded in traditional canons of statutory construction such as reading the statute consistently and reading all of the provisions rather than isolating terms in a particular subsection, but his analysis is clearly informed by a pragmatic awareness that power wielded in the shadows may become abusive. In the years that have followed, concern has grown that expedited removal is being used inappropriately and that the process is almost entirely invisible

139. *Li v. Eddy*, 259 F.3d 1132, 1139–40 (9th Cir. 2001) (citation omitted).

140. *Id.* at 1138 (alteration in original).

141. *Id.* at 1135.

to external review.¹⁴² Judge Hawkins wisely foresaw that if the courts rejected challenges that assert that the agency acted in excess of its authority, the culture and behavior within the agency might exceed the narrow parameters Congress intended.

There are other examples of Judge Hawkins's efforts to preserve access to the federal courts. In 2005, Congress once again revised the judicial review provisions of the INA.¹⁴³ After the U.S. Supreme Court found that for those individuals who could not seek judicial review of a removal order in the courts of appeals, access to the federal courts remained via a writ of habeas corpus;¹⁴⁴ Congress passed the REAL ID Act that restored petitions for review for most applicants who had previously been barred as a constitutional substitute for habeas review.¹⁴⁵ The statutory change also altered the scope of review to specifically include challenges raising "constitutional claims or questions of law."¹⁴⁶ Soon litigation arose questioning the meaning of "questions of law." Could a petitioner challenge mixed questions of law and fact? Could agency decisions, which included legal conclusions that appear unsupported by the factual record, be reviewed by the federal courts of appeal? In *Ramadan v. Gonzales*,¹⁴⁷ Judge Hawkins and two other members of the Ninth Circuit, in a case of first impression, addressed one of the critical questions about the scope of the REAL ID changes. Ms. Ramadan applied for asylum, but filed her application more than one year after entry to the United States.¹⁴⁸ The INA specifically allows an immigration judge to accept a late filing but only if the judge finds that the late filing was based on "exceptional circumstances."¹⁴⁹ The statute and regulations have basically created two types of exceptions: (1) country conditions have changed justifying a late

142. Congress did create a special commission to study the impact of expedited removal on asylum claims. That commission issued a very critical report. See U.S. COMM. ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL (2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892. The ABA Commission on Immigration has also repeatedly questioned the validity and accuracy of expedited removal. In a recent report the Commission calls for the restoration of immigration judge review, increased use of asylum officers for those presenting claims of fear or persecution and restoration of judicial review. COMM'N ON IMMIGRATION, AM. BAR ASS'N, *supra* note 6, at pt. 4.

143. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, § 106(a)(1)(A)(iii) (2005) (amending 8 U.S.C. § 1252(a)(2)(D) (2008)).

144. *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

145. REAL ID Act § 106(a)(1)(A)(iii).

146. *Id.*

147. 479 F.3d 646 (9th Cir. 2007).

148. *Id.* at 649.

149. See 8 U.S.C. § 1158(a)(2)(D) (Westlaw through P.L. 111-382, approved 2011) (describing exceptional or changed circumstances); see also 8 C.F.R. § 208.4(a)(4)(i)(B).

filing; or (2) the applicant faced exceptional circumstances that interfered with her ability to prepare and file a claim.¹⁵⁰ Congress also specifically precluded judicial review of the immigration judge's determination about whether one of the statutory circumstances could be met in INA § 208(a)(3), 8 U.S.C. § 1158(a)(3).¹⁵¹ Judge Hawkins wrote the first opinion in this case and concluded that while the REAL ID amendments had expanded judicial review of matters that had previously been precluded, the Ninth Circuit lacked jurisdiction to consider whether or not Ms. Ramadan had met her burden to establish an exception for a late filing because she had not presented a claim involving a legal question—a claim involving a statutory interpretation.¹⁵² The opinion was also careful to note that Ms. Ramadan had not made the argument that the immigration judge decision was so unfair or arbitrary that it would have violated procedural due process.¹⁵³

In a rather unusual procedure, the panel accepted a motion for rehearing. The case was reargued and *amici curiae* entered the case.¹⁵⁴ The same panel issued a *per curiam* decision rejecting their earlier position.¹⁵⁵ Judge Hawkins and the other members of the panel had clearly changed their view of the scope of judicial review after the REAL ID amendments. The *per curiam* panel now issued a very careful assessment of the statutory purposes of REAL ID and whether, as required by *St. Cyr* and the habeas corpus clause, judicial review of “questions of law” included mixed questions of law and fact.¹⁵⁶ The opinion goes into detail of the evolution of judicial review of immigration cases and the traditional content of habeas review.¹⁵⁷ It also examines the legislative history and the conference committee report discussing the scope of review.¹⁵⁸ The *per curiam* opinion states:

Because the Conference Report indicates congressional adherence to *St. Cyr*'s constitutional mandates, and because preclusion of judicial review over mixed questions of law and fact would raise

150. 8 U.S.C. § 1158(a)(2)(B)–(D).

151. 151 CONG. REC. H2813-01, H2873 (daily ed. May 3, 2005) (statement of Rep. Lewis), 2005 WL 1025891 (emphasis added) (cited in *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005)).

152. *Ramadan*, 427 F.3d at 1222.

153. *Id.* at 1222 n.6.

154. The ACLU Foundation Immigrant Rights Project and the American Immigration Law Foundation both appeared as *amici*. Both organizations had been actively litigating the contours of the jurisdictional barriers since the first major restrictions appeared in 1996.

155. The panel consisted of Judge Hawkins, Judge Pregerson and Judge Thomas. *Ramadan v. Gonzales*, 479 F.3d 646 (2007).

156. *Id.* at 650–55.

157. *Id.*

158. *Id.*

serious constitutional questions under *St. Cyr*, the legislative history indicates that Congress intended to grant review over such questions. *Cf. Chen*, 471 F.3d at 378–28 (holding that because historical habeas review extended beyond statutory construction, as indicated in *St. Cyr*, the scope of “questions of law” of the Real ID Act was similarly extended). Indeed, the Conference Report explicitly envisions judicial review of mixed questions of law and fact, stating: “When a court is presented with a mixed question of law and fact, the court should analyze it to the extent that there are legal elements, but should not review any factual elements.” *Id.* at 175. This statement squarely fits within our holding, which mandates review only when the underlying facts are undisputed.¹⁵⁹

In the end, rather like poor Mr. Marbury,¹⁶⁰ the court found jurisdiction, but no relief for the petition.¹⁶¹ Ms. Ramadan did not win her petition for review. The panel found that as a matter of law, her particular undisputed factual argument about changed conditions did not directly relate to the basis of her application for asylum and therefore she had not presented a qualifying changed circumstance justifying a late application.¹⁶² Still, the opinion is a very important one in examining the power of willing judges to narrowly construe restraints on federal court jurisdiction.

The government sought en banc redetermination but an insufficient number of judges voted to rehear en banc and the case ended.¹⁶³ Judge O’Scannlain wrote a dissent, primarily arguing that the opinion extended jurisdiction beyond the narrow grounds restored by Congress or mandated by the habeas minimum.¹⁶⁴ He was joined by eight other members of the court.¹⁶⁵ The *Ramadan II* decision also stands largely alone as all but the Second Circuit Court of Appeals have rejected any ability to review the determination of an immigration judge that an asylum application was untimely.¹⁶⁶

159. *Id.* at 653.

160. *Marbury v. Madison*, 5 U.S. 137 (1803).

161. Technically in *Marbury v. Madison*, Chief Justice John Marshall found the court had jurisdiction to determine that as a matter of constitutional law it was unconstitutional for Congress to have created original jurisdiction in the Supreme Court. *See id.*

162. *Ramadan*, 479 F.3d at 658.

163. *Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007).

164. *Id.* at 973–74 (O’Scannlain, J., dissenting).

165. *Id.* at 973.

166. The Second Circuit Court of Appeals ruled in *Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 329 n.7 (2d Cir. 2006), that the REAL ID Act did allow review of mixed issues of law and fact. In later cases, the Second Circuit appears to have also narrowed its review of mixed issues of law and fact to only review the legal elements. *See Gui Yin Liu v. I.N.S.*, 508 F.3d 716, 722 n.3 (2d Cir. 2007); *see also* Jessamyn L. Vogel, Note, *Ending the Tug of War Between Congress*

This case presents another example where Judge Hawkins and other members of the Ninth Circuit understood the importance of the petitioner's ability to challenge the agency's application of procedural and legal standards. Judge Hawkins's original decision already demonstrated a sensitivity to the need to preserve review if the agency had acted in a manner that curtailed due process of law and the later, important *per curiam* decision, indicates that with due respect to the Congressional intent and statutory language, the court was equally concerned with preserving the ability to right erroneous legal determinations.

It would be an error to state that Judge Hawkins will always creatively read the INA to the advantage of the non-citizen. In fact, in several important cases, Judge Hawkins found that the INA denies relief to individuals who many would find quite sympathetic. For example, in the case of Mr. Moreno, Judge Hawkins rejected the argument that extreme and exceptional hardship to his grandchildren, children that he had raised as part of his immediate family, could qualify them as his children under the INA.¹⁶⁷ Mr. Moreno lived in the United States for more than ten years and was eligible to seek cancellation of removal, but only if he could show hardship to a U.S. citizen's or a permanent resident's "spouse, parent or child."¹⁶⁸ Although Mr. Moreno had been awarded legal custody of his five U.S. citizen grandchildren, he had not formally adopted the children.¹⁶⁹ The Immigration Judge found that short of adoption, Mr. Moreno did not have a qualifying relative in order to seek cancellation and the resulting permanent resident status.¹⁷⁰ Judge Hawkins's opinion carefully considered the statutory interpretation arguments and reviews of prior Ninth Circuit and Supreme Court decisions that followed the strict definitions of the INA in defining qualifying family relationships. One can sense Judge Hawkins's and the Ninth Circuit's empathy for Mr. Moreno in its concluding paragraphs as the court found that grandchildren were not qualifying children as defined in the cancellation statute:

Though this result—separating five U.S. citizen children from their grandfather, who appears to be their only loving and stable source of care and support—may seem unduly harsh and perhaps illogical, it is the result dictated by law. Congress is of course free

and the Courts: Discerning the Reviewability of "Changed or Extraordinary Circumstances" within Section 106 of the REAL ID Act of 2005, 40 RUTGERS L.J. 285 (2008).

167. *Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1178 (9th Cir. 2007).

168. 8 U.S.C. § 1229b(b)(1)(D) (Westalw through P.L. 111-382, approved 2011).

169. *Moreno-Morante*, 490 F.3d at 1174.

170. *Id.*

to correct any inequities resulting from our application of its plain statutory language, as it has done in the past. . . .

Moreno's grandchildren thus do not meet the statutory definition of "child" for purposes of cancellation of removal. Neither do they qualify by virtue of his de facto parent-child relationship with them because Congress has specifically precluded such a functional approach to defining the term "child" for cancellation of removal purposes.¹⁷¹

In the footnote I omitted in the above quotation, Judge Hawkins gave an example where Congress acted to overturn a particularly harsh bright line test in the INA.¹⁷² This opinion and others repeatedly demonstrate that while Judge Hawkins is willing to carefully consider the statutory limits of the INA, there are simply times when only Congress has the authority to remold the terms and conditions of the law.

IV. STANDING UP FOR FAIRNESS

As I have written, if there is a broad theme in the immigration opinions of Judge Michael Daly Hawkins, it is that he recognizes the need for fair procedures. In an interview with one of his former partners, Roxana C. Bacon, she said:

Immigration law has been my entire career. Mike made time to listen to my cases, too often stories of administrative law gone off the rails. Mike understands that recourse to federal courts is often the only opportunity immigrants have to level the playing field. His varied professional and personal experience informs his deep appreciation of the ordinary person's need for law as a protector of rights. Championing the rights of immigrants in a bureaucratic system whose rigidity is matched only by its intricacy is commitment to due process writ large. There is no reward for such allegiance other than the satisfaction of using law as a tool for justice.¹⁷³

171. *Id.* at 1178 (footnote omitted).

172. He references the Congressional amendment restoring the ability of an individual to qualify for suspension of deportation, a precursor to cancellation, even if he or she had brief and casual departures. *Id.* at 1178 n.10. The Congressional amendment reversed the Supreme Court's literal reading of the prior statute that no departure in the seven year residence period could be allowed. *Id.* (discussing the overruling of *I.N.S. v. Phinpathya*, 464 U.S. 183 (1984)).

173. Interview with Roxana C. Bacon, Gen. Counsel, Dep't of Homeland Sec., Citizenship and Immigration Ctr. (Aug. 28, 2010). Roxana Bacon was a partner with Judge Hawkins in three different law firms. She retired from private practice in 2009. She came out of retirement to serve in the government. She became the General Counsel for the Department of Homeland

During our discussion, Judge Hawkins and I agreed that his upbringing in Winslow, Arizona, a hardscrabble town in Northern Arizona, and his success in different and challenging environments made him a unique federal judge. His varied professional and personal experience informs his deep appreciation of the ordinary person's need for law as a protector of rights. Playing baseball in the rural West means you understand how a non-contact sport can be played so hard it draws blood. Graduating at the top of the class at Arizona State University means you have your eye on the prize. Everyone in law knows that serving in the Marine Corps is not for the faint-hearted. Managing successful campaigns in places where the Minutemen stand proud requires every strategic skill. Being the U.S. Attorney who invokes civil rights laws to bring brutal criminals to justice defines professional integrity and courage. Roxana Bacon commented, "Now I read his thoughtful and well-crafted opinions with particular pleasure because I trace his roots through his prose. Mike's multiple careers and interests are never flaunted, but they are the bedrock for his view that law is the fulcrum for fairness."¹⁷⁴

Judge Hawkins has also made a lasting contribution to the adjudication process. Juan Osuna, former chair of the BIA, wrote to me:

Judge Hawkins in particular has always stressed the paramount necessity for robust adjudication at the administrative level, as a way of giving the federal courts confidence that the immigrants' claims are being handled appropriately, carefully and according to due process protections. His insights and those of other federal judges have been invaluable to immigration judges and the BIA. His actions and efforts represent those of a true public servant. He saw a problem represented by the rising caseload, engaged in a productive way with the various players in the system, provided useful feedback that has helped improve the system.¹⁷⁵

After reading the past fifteen years of Judge Hawkins immigration cases, and considering his published opinions as well as many of the memorandum decisions issued by panels including Judge Hawkins, it is clear that the Ninth Circuit has been and continues to be one of the most important developers of immigration law. Unfortunately, the law is developed in a cauldron overflowing with cases in a murky soup of administrative opinions, constitutional law, and narrow opportunities for judicial review. The restrictions on judicial review make it particularly difficult for courts to

Security, Citizenship and Immigration Service and left office at the end of 2010. Her comment is personal and not meant to represent any official view of the federal government.

174. *Id.*

175. Interviews and Emails with Juan Osuna, *supra* note 16.

play a significant role in the development of immigration law. Yet, attorneys are likely to keep trying to find a way to expand individual rights in immigration law as significant immigration reform does not appear to be a political priority in the winter of 2010.¹⁷⁶ It is to be hoped that Senior Judge Hawkins will not give up his efforts to improve immigration adjudication within the administrative courts charged with adjudicating immigration claims and the Ninth Circuit. Knowing his lifelong pattern of standing up for principle and fairness, I believe we can expect to be learning from Judge Hawkins's opinions and actions for many years to come.

176. For a recent symposium addressing possible restructuring or other administrative reforms in immigration adjudication, see the *Fortieth Annual Administrative Law Symposium*, 59 DUKE L.J. 1501 (2010), in particular, Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010); and Russel L. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847 (2010).