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Their research is individually cited below. The collective experience of working with them was invaluable. The author would also like to thank Gerald Neuman, Nancy Morawetz, Jill Family, John Palmer, Jean-Michel Voltaire, New York Law School Class of 2003, Lisa Compagno, New York Law School Class of 2002 and the faculty of New York Law School, especially Denise Morgan and Seth Harris, for comments on the draft of this article. The author has a long-standing and continuing interest in judicial review of immigration decisions and welcomes comments and suggestions for future study in this area.
I. MAKING THE DOLLS

Imagine you hold a large, unwieldy sheet of paper. The paper is too large. You find it hard to carry around, it is cumbersome. You decide to reduce its volume. You fold it once and you fold it again. You are still weighed down. You make some judicious cuts. You cut some from this edge and from that, but you leave a center — a portion you think will be sufficient for your needs. Satisfied, you try to place the folded, manicured paper into your portfolio. But as you put it in, a breeze stirs and voila! You find a long string of connected shapes — a small army of paper dolls. From one you have made many.

Surely the inventor of paper dolls must have been happy with the trick of magically making many from one. Yet members of Congress have been repeatedly surprised when efforts at reducing federal court review of immigration decisions produce a perverse multiplication. Angered, frustrated, eager, Congress once again picks up the shears. It strips from this corner and that. After Congress cuts, the federal judiciary must now interpret the jurisdictional restriction. Federal court jurisdiction is malleable and courts are loathe to find a complete bar to judicial review, especially where it involves constitutional questions such as individual liberty and fairness. Soon it becomes evident that the adjudicatory pattern does not match the legislative intent; the cases fail to fit Congress’s desired pattern.¹

Today, jurisdiction over immigration law is by no means well defined by clear limits. Instead the paper cutters find an unwieldy, complex mess defined by confusion and “loopholes.” Limitations on jurisdiction have bred a multitude of

¹ See infra Part II for a discussion of some of the patterns of federal court interpretation of restrictions on jurisdiction.
litigation. The number of federal court cases reviewing removal orders has increased 970% in the past ten years. As of September 2005, the immigration cases represented 18% of the appellate civil docket.

Congress and the courts are not alone in augmenting the number of immigration cases in the federal courts. Congress has also urged the agencies enforcing the immigration laws to increase enforcement, to reduce backlogs and to make removal more swift and certain. At the same time that Congress was shearing away at the forms of judicial review, the Department of Justice and its Executive Office for Immigration Review ("EOIR") together with the Department of Homeland Security ("DHS") were increasing the number, rate and speed of adjudication of removal cases. It is not only that Congress made the wrong cuts, it is also that the sheer volume of the caseload entering the administrative system has increased.

At its essence, my metaphor points out the failure of Congress and the agencies to recognize that people are not paper dolls. For unlike passive paper dolls, the non-citizens opposing their removal from the United States are actors animated and motivated to survive. What is at stake is their right to remain in the United States. Many non-citizens have spent the majority of their lives here or have spouses and children residing here lawfully. The jurisdictional statutes and agency procedures focus on the number of removals or on the speed of adjudication. The metaphor of paper dolls is chillingly accurate as a reflection of a system failing to fully acknowledge the human lives involved.

For these men, women and children in removal proceedings, the incentives to litigate beyond the agency have partially increased as a reaction to the narrowing and elimination of prior forms of relief. Prior to 1996, the immigration statutes provided many people with a way to regularize their status, to become

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4. There are various agencies responsible for the enforcement of the immigration law and removal orders in particular. The Bureau of Immigration and Customs Enforcement ("ICE") is a subdivision of the Department of Homeland Security ("DHS"). It provides the trial attorneys who represent the government position in removal proceedings. The U.S. Citizenship and Immigration Services ("CIS") provides services such as the processing of applications for lawful status and, during removal proceedings, a case may be referred to a division of CIS. CIS adjudicators may also refer cases to ICE for initiation of removal proceedings. The U.S. Customs and Border Protection ("CBP") is charged with border patrol and customs enforcement. See generally U.S. Citizenship and Immigration Services, http://uscis.gov/graphics/index.htm (last visited July 2, 2006); Immigration and Customs Enforcement, http://www.ice.gov/graphics/index.htm (last visited July 2, 2006); U.S. Customs and Border Protection, http://www.cbp.gov (last visited July 2, 2006); Department of Homeland Security, http://www.dhs.gov/dhspublic (last visited July 2, 2006).
“legal” through the removal process. Now, statutory bars on relief are very strict and other forms of relief have been entirely eliminated. Thus, the individual fights harder either to defeat the government assertion that he or she is subject to removal or in the hope that litigation or time will somehow prevent removal.\(^5\)

In this paper, I argue that many of the reforms taken by Congress or by the agency, although designed to increase efficiency have, in essence, backfired. I explore some of the statutory and administrative sources that are contributing to the increase in immigration-related federal court cases. I also discuss substantive immigration law issues and litigation strategies that, in combination with the statutory/regulatory architecture, are adding to the growth in the number of cases. I look at the interrelationship of these factors. Only by examining these interconnections can we seriously understand the nature of the “problem.” In fact, depending on our goal for the immigration adjudication system, we might conclude that judicial review of removal orders, even at this significant rate, is both manageable and essential for the development of our immigration law and policy.

While this article suggests some ways to achieve greater efficiency, I am mindful of the “efficiency conundrum” as identified by Margaret Taylor.\(^6\) By accepting efficiency as a primary goal, I do not mean to imply that it is the only goal of the adjudication system. The ideal system would also guarantee fair and individualized procedures and that people are not illegally ordered removed.

The real challenge in achieving the goal of an efficient but fair adjudication system for immigration cases is to recognize that unlike a method of making paper dolls, the dynamism inherent in any legal system will always be present. Even the closest observation of the existing conditions and interactions, and the keenest insights from the pitfalls of the past, will not guarantee the creation of a system free from problems. The parties within this world — Congress, the courts, the agencies and the individuals facing removal — will adapt and react. After discussing some of the problems and the dynamics of the players, this paper will suggest reforms aimed at achieving more clarity, efficiency and fairness.

\(^5\) See infra text accompanying notes 54–58.
\(^6\) Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 Conn. L. Rev. 1647 (1997). Taylor notes that advocates for immigrants have appealed to the governmental desire for a more efficient immigration enforcement system by arguing that providing legal representation to detained aliens will "speed up removal proceedings." Id. at 1709. However, she cautions that while this may seem like a logical argument, providing legal representation to detained aliens may not save the government time or money. Further, she notes the danger inherent in this characterization of the role of attorneys in immigration proceedings — as zealous advocates, attorneys for detained aliens should prioritize opposing governmental efforts to remove their clients, not speeding up the removal process. Id.
II. CONGRESS AND COURT-STRIPPING: CUTTING IS NOT A CURE

For the past ten years, Congress has tried to reduce the quantity and quality of judicial review of administrative removal orders.\(^7\) Congress has repeatedly tried to both narrow the appeals process and to bar categories of claims and claimants from federal court review of these administrative orders.\(^8\) Congress intended the statute to name specific situations where judicial review of the agency decision was preserved in a petition for review to the Court of Appeals and to expressly bar petitions for review challenging specific legal claims or made by specific categories of people.\(^9\) The litigation response was to argue about whether a person was within the barred group or making a disfavored claim. For example, the Immigration and Nationality Act ("INA") section 242(b) expressly barred an alien convicted of an aggravated felony as defined in the immigration statute from pursuing a petition for review. Thus, courts had to make a legal determination of whether or not the agency correctly found the underlying conviction was within the scope of the "aggravated felonies."\(^10\) At times the

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7. Removal is a technical term that refers to both deportation and exclusion after a finding of inadmissibility. Prior to 1996, the immigration statutes formally had two types of proceedings: one called a deportation hearing and the other called an exclusion hearing. Today there is a single type of hearing although the burdens of proof and forms of relief continue to vary depending on whether the government is charging a non-citizen as an alien removable after admission (removal) or removable upon seeking admission (inadmissibility). See generally INA § 240, 8 U.S.C. § 1229a (2000).


agency and courts seemed to be having a ping pong match bouncing back and forth complex definitions of which crimes were indeed within this disfavored class.

Courts also had to spend time exercising jurisdiction in order to determine whether they had jurisdiction. For those litigants who conceded the statute barred petitions for review in the courts of appeals, the vehicle to federal court became the statutory writ of habeas corpus found in 28 U.S.C. § 2241. While the immigration statutes did not expressly authorize judicial review under this statute, they also did not expressly limit habeas review. Thus, the Supreme Court affirmed that habeas review remained for those shut out of the petition for review.11

The perverse result was to push more cases into both the courts of appeals, in the form of standard petitions for judicial review of administrative orders,12 and into the district courts, in the form of habeas petitions13 challenging removal orders. In turn, the courts of appeals also heard appeals from the habeas cases in

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shared/statistics/yearbook/2002/ENF2002.pdf, with Office of Immigration Statistics, Dep’t of Homeland Sec., 2004 Yearbook of Immigration Statistics 16 (2006), available at http://www.uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf. In contrast, the Eighth and Eleventh Circuit Courts of Appeals agreed with the Board of Immigration Appeals that a conviction for driving under the influence could indeed be an aggravated felony regardless of the sanction imposed. Ultimately, using ordinary rules of statutory interpretation, the Supreme Court rejected the agency’s interpretation of the statute and held that driving under the influence was not a crime of violence. See Leocal v. Ashcroft, 543 U.S. 1 (2004). In Leocal, the petitioner had initially been convicted on a DUI charge and ordered removed under BIA and Eleventh Circuit precedent that had found the BIA inclusion of DUI convictions as aggravated felonies to be reasonable. See id. at 4–5. Prior to Leocal’s filing of a petition for review, the BIA changed its mind, finding that DUI convictions would not qualify as an aggravated felony and render an alien deportable. Id. at 6 n.2. The BIA, however, declared that it would only apply the change in interpretation in circuits that had not already determined the issue. See Matter of Ramos, 23 I. & N. Dec. 336, 346–47 (2002). The Eleventh Circuit accordingly rejected the petition for review, recognizing that it had already supported the BIA’s prior determination that DUIs were aggravated felonies in Le v. Arty General, 196 F.3d 1352 (11th Cir. 1999). See Leocal, 543 U.S. at 6 n.2. In fact, this decision may ultimately increase litigation as the Supreme Court did not discuss the standard rules of deference to agency interpretation. Chief Justice Rehnquist elected to use plain meaning interpretation of the statutory language rather than granting deference to the agency’s decision. This approach was, in part, necessitated by the BIA’s reversal of its own interpretation. The Supreme Court heard oral argument in October 2006, on the issue of whether state drug convictions qualify as an “aggravated felony” for purposes of immigration laws. See Lopez v. Gonzalez, No. 05-547; Toledo-Flores v. U.S., No. 05-7664 (cases consolidated), available at http://www.ilw.com/immigdaily/news/2006,0810-scourt.pdf.


13. 28 U.S.C. § 2241 (2000). This is the federal statutory grant of habeas corpus jurisdiction which was passed by the first Congress of the United States in 1789.
the district courts. The net effect was a multiplication of levels and forms of judicial review.

Most recently, Congress passed the REAL ID Act and took the dramatic step of explicitly barring habeas corpus review of removal orders. Time will tell how this will play out in the courts. In the short term it has meant a transfer of all habeas petitions from the district court to the appeals courts, even in cases where the district court had heard all arguments and was ready to make a decision.

III. EXECUTIVE ENFORCEMENT: MORE PAPER

At the same time that Congress was formally restricting judicial review via statutory amendments, the Departments of Justice and Homeland Security were increasing enforcement of the deportation/removal statutes and streamlining the administrative review process. The changes were, and remain, dramatic. In 2002, the EOIR looked for ways to speed cases through the administrative appel-

14. 28 U.S.C. § 2253 (2000). This statute allows habeas cases to be appealed to the circuit courts of appeals and by certiorari to the Supreme Court. This differs from 28 U.S.C. § 2241, which creates original jurisdiction of habeas cases in the federal courts.

15. An example of the ping pong game that occurs when the non-citizen is not given a forum to review the decisions of the BIA is illustrated by Flores–Garza v. INS, 328 F.3d 797 (5th Cir. 2003). Flores–Garza was lawfully in the United States and was ordered removed because of two convictions. He had initially pled guilty to a burglary charge and received a suspended five-year sentence. Twenty years later, Flores–Garza pled guilty to a second charge of marijuana possession. The IJ determined that he was removable because of both convictions. Flores–Garza requested relief under INA § 240A, 8 U.S.C. § 1229(b), which allows certain permanent residents to request cancellation of removal and adjustment of status but the IJ denied the request based on a determination that the crimes were aggravated felonies. The BIA affirmed the IJ’s decision and dismissed Flores–Garza’s appeal. He filed a petition for review of the BIA’s final order of removal, arguing that the charging document did not include an aggravated felony. While the government’s motion to dismiss was pending, Flores–Garza filed a petition for a writ of habeas corpus. “Flores’s habeas petition raised statutory and constitutional claims and reiterated the arguments raised in his petition for review.” 328 F.3d at 800. The district court dismissed the habeas petition for lack of jurisdiction. Id. The Fifth Circuit Court of Appeals later dismissed his petition for review of the BIA order of removal. Flores–Garza filed a notice of appeal for the dismissal of the habeas petition and a motion to reinstate his petition for direct review of the BIA order. The Fifth Circuit granted Flores–Garza’s motion to reinstate the petition for review, and the issues were briefed. The Fifth Circuit consolidated the petition for review with his appeal of the dismissal of the habeas petition, but then found that they lacked jurisdiction to review the BIA decision. However, they determined that the district court did have jurisdiction to decide the habeas petition. Thus the Fifth Circuit ultimately vacated the district court’s dismissal and remanded the habeas case to the district court. Id. at 799. If the case is still pending there, the REAL ID Act provides for the re-transfer of the case back to the Court of Appeals.

16. See infra notes 87–90 and accompanying text.

17. See infra note 87 (discussing the REAL ID Act).

18. See supra note 4 for a description of the agencies. While the statutory reorganization in 2002 was intended to allow coordination of immigration and national security, the reorganization did not give DHS total control because it left the immigration administrative courts within the Department of Justice. This is an odd structure for efficiency. One agency can set an agenda without coordination with the other agency and the values of one may not be shared by another. Moreover, the multiple agencies increase the complexity of coordination of actions within the cases and communication among the key participants.

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late process, where the Board of Immigration Appeals ("BIA") hears the administrative appeals from individual removal orders. These changes sought to reduce the backlog but at the same time the Attorney General reduced the number of BIA members from twenty-three to eleven. Among other changes, the reforms authorized the review of the administrative hearing below by a single member of the BIA rather than the existing practice of review by a panel of three members. Further, that member could summarily affirm the Immigration Judge's ("IJ") decision without an opinion. Most importantly, the BIA altered the standard of administrative review. Rather than reviewing the decision de novo as it has always done previously, the new regulations limit de novo review to issues of law or the exercise of discretion and declare that findings of fact will be reviewed only on a clearly erroneous standard.


20. Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1). While it may seem perverse to reduce appellate administrative judges when the agency faced a huge backlog, the Attorney General removed from the BIA those members who were most likely to provide dissents or to write concurring opinions that suggested alternative legal analysis. The Dorsey Study cited above contains a productivity study of the BIA. Today, the BIA's support staff has grown quite large and the initial screening mechanism for determining which cases fit streamlining criteria are handled by staff attorneys. There are currently 115 staff attorneys and ten paralegals who support BIA members. E-mail from Elaine Komis, EOIR Legislative and Public Affairs, to Roderick Potts, Research Assistant, New York Law School (July 27, 2005, 03:22 EST) (on file with the New York Law School Law Review).


23. 8 C.F.R. § 1003.1(d)(3) (2006). The clearly erroneous standard was apparently adopted from Rule 52 of the Federal Rules of Civil Procedure and is the standard an appellate court uses to review the findings of fact made in a bench trial. Of course, in a civil court proceeding, the findings are also shaped by the Federal Rules of Evidence. These rules do not formally or habitually apply in immigration proceedings, a species of administrative hearings. For a thoughtful critique of this standard and a query about why no cases had resulted in reversal one year after the adoption of this higher standard, see Lory Diana Rosenberg, Separate Opinion: Independence and Deference Under the Clearly Erroneous Standard of Review, 8 Bender's IMMIGR. BULL. 1805 (2003).

This standard of review of the factual findings is particularly disturbing because the judicial review provision is also extremely deferential. The INA provides that a court may not reverse the agency finding of facts unless no reasonable adjudicator could have come to that conclusion. See INA § 242(b)(4)(B), 8
These streamlining changes were extremely successful in lowering the BIA's backlog of cases. Even as more and more appeals were filed for the consecutive years, the BIA still managed to lessen its backlog considerably (by the thousands for each year that cases were filed). Generally, of the cases that were pending in the BIA in September of 2004, over 84% had been adjudicated by the following year. Figure 1 shows the dramatic decrease over time in the backlog.

U.S.C. § 1252(b)(4)(B) (2000). If the BIA is not reviewing the factual findings or is summarily affirming the IJ opinion, the decision of the single administrative officer becomes the entire support for the factual basis of removal. IJ decisions are frequently dictated at the end of the administrative proceeding and may or may not include citation to the documents or exhibits in the case.

I was only able to find a single reported BIA case reversing the IJ using this standard of “clearly erroneous.” See Matter of Budi Santoso, 31 Immig. Rptr. B1-15 (BIA 2005). The IJ’s decision on the credibility of the non-citizen’s statements was based entirely on the fact he had not filed his asylum application in a timely manner. The case appears to be fairly extreme, for the BIA commented about the complete absence of the usual criteria for determining credibility. “Notably, the Immigration Judge did not cite to any inconsistencies or discrepancies between the respondent’s testimony and his application or accompanying statement. He made no mention of the respondent’s demeanor, and he did not express any concerns over the reliability or authenticity of the respondent's documentary evidence. Instead, the immigration judge concluded that ‘the respondent did not experience these incidents to which he testified,’ because ‘a reasonable person’ who had endured such suffering ‘would have made an application for asylum’ sooner (I.J. at 6).” Id.

After I presented this paper, Walter H. Ruehle, an attorney in Buffalo, New York, sent me a redacted unpublished BIA decision where the BIA also found clear error. In this unpublished case dated March 11, 2005, the BIA found that the IJ’s findings that the petitioner lacked credibility were not based on material findings nor supported by the record.

Unfortunately, this pattern reminds me of an earlier time when Congress chose to put reliance on a single examiner. See, e.g., Nishimura Eiku v. United States, 142 U.S. 651 (1892) (the finding of the border officer is conclusive and sufficient to determine who may be admitted); see also Lucy Salyer, Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law (1995). In this historical assessment of the administration of the immigration laws at the turn of the twentieth century, Salyer points out how often the officer’s decision could be based on bias or erroneous stereotyping and how insulation from judicial review shaped the adjudication culture. Id. at 136–56.

24. The statistical analysis of the BIA workload and the relationship to the increase in the federal courts caseload is largely based on the detailed and excellent analysis prepared by Sarah Kroll-Rosenbaum. See Kroll-Rosenbaum, supra note 2.

Still, the streamlining itself led to two types of litigation. First, there were and continue to be challenges to the process itself. By and large, these cases have resulted in the courts of appeals finding that the single BIA member review and altered standards by themselves did not deny a non-citizen due process of law. The second form of litigation challenges the accuracy and merits of the BIA decision itself. The non-citizen who disagreed with the IJ's assessments and receives a summary affirmance via the streamlining regulations had no opportunity to have that decision tested except via judicial review in federal court. Moreover, the complexity of the immigration law itself increased in the incentives to seek further review. A study produced by Dorsey & Whitney, LLP found that the large number of new immigration cases and novel legal issues may have also contributed to judicial review of BIA decisions.

26. Id.

27. See, e.g., Ngure v. Ashcroft, 367 F.3d 975 (8th Cir. 2004); Falcon Carriche v. Ashcroft, 335 F.3d 1009 (9th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830 (5th Cir. 2003) (per curiam); Albathani v. I.N.S., 318 F.3d 365 (1st Cir. 2003); see also Stein, supra note 19. Some circuit courts have raised questions as to the propriety of the use of the streamlining provisions in certain circumstances. See, e.g., Smrko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); Zhu v. Ashcroft, 382 F.3d 521 (5th Cir. 2004); Haoud v. Ashcroft, 350 F.3d 201 (1st Cir. 2003).

28. In some cases it is possible that the non-citizen would file a motion to reconsider or reopen with the BIA pointing out the errors of the streamlining decisions. Strategically, an attorney may hesitate to bring a motion to reconsider rather than directly seeking judicial review because the regulations limit the non-citizen to a single motion except in limited circumstances. Attorneys might choose to let the federal court of appeals or the district court, in a habeas proceeding, remand the case and thus win the reopening rather than "waste" the motion to reconsider or reopen. 8 C.F.R. § 1003.2(c) (2006) (only a single motion to reopen authorized unless joined by counsel for the government).

29. See DORSEY & WHITNEY, LLP, supra note 19.

30. Id. at 13. The study points to nine statutes promulgated by Congress, including the Patriot Act, that have contributed to the complexity of issues that are considered at the administrative level and upon review by the courts of appeals. Id. at 14. The courts of appeals appear to be growing increasingly frustrated by the BIA's summary affirmances. In Lanza v. Ashcroft, 389 F.3d 917 (9th Cir. 2004), the Ninth Circuit Court of Appeals recognized that the BIA had summarily affirmed a decision of an IJ that may have touched on issues that fell outside of the Court of Appeals' jurisdiction. However, the court could not know what basis the BIA relied on for its affirmation without an opinion to review. The court had no choice but to remand the case to the BIA for a clarification of the grounds for its summary affirmation, just so they could later determine a threshold jurisdictional question. In the nine months following Lanza, the Ninth
The details of the administrative streamlining are beyond the scope of this article; however, the statutory restrictions and litigation about the nature of jurisdiction itself combined with increased enforcement and administrative appellate streamlining to create an explosion in the workload of the federal courts. How large an explosion? As noted above, the total number of federal court cases reviewing orders of the BIA has increased 970% in the past ten years. This enormous increase means that immigration cases represent more than 18% of the federal appellate court civil docket. Further, the BIA cases make up a remarkable 88.2% of all administrative appeals heard in the courts of appeals.

Focusing on the period between 2000 and 2004, BIA appeals have soared almost 357% since 2000 and have more than doubled in every circuit since Circuit remanded twenty-four decisions to the BIA for the same clarification. Other circuit courts have begun to find that the BIA is glossing over complex jurisdictional issues. See, e.g., Zhu v. Ashcroft, 382 F.3d 521, 527 (5th Cir. 2004) (describing how the BIA summary affirmation created a "jurisdictional conundrum"); Gjyzi v. Ashcroft, 386 F.3d 710, 716 (6th Cir. 2004) ("[T]he failure of the BIA to explain its decision in this case unnecessarily frustrates our review."); Lin v. Dep't of Justice, 132 F. App'x 920, 923 (2d Cir. 2005) (remanding the case seven years after the IJ decision because it was unclear on what grounds BIA affirmed).

31. For an assessment of the streamlining regulations see Evelyn H. Cruz, Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals' Summary Affirmance Procedures, 16 STAN. L. & POL'Y REV 481 (2005). I also benefitted from a paper by a NYLS honors student. See also Stein, supra note 19.


33. MECHAM, supra note 3, at 114. There has also been a large increase in the federal courts' criminal docket related to the prosecution of immigration-related offenses. From 2003 to 2004, immigration appeals ranked second in overall criminal appeals filings, behind appeals involving drugs. OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 9 (2004), available at http://www.uscourts.gov/caseload2004/front/judbus04.pdf. "Criminal appeals rose 4 percent in 2004 to 12,056, mainly because of increases in filings related to firearms and immigration violations." Id. at 8. This paper does not address those criminal prosecutions that were regular criminal cases and not judicial review of administrative proceedings.

34. MECHAM, supra note 3, at 88. Of the 12,255 administrative appeals made in 2004, 10,812 of them were from the BIA. Id. I note the irony that most administrative law casebooks pay little, if any, attention to immigration cases.
2002. 35 "The surge in BIA appeals has particularly stretched the resources of the Ninth and Second Circuits, which received 47 percent and 25 percent, respectively, of all BIA petitions filed in 2004." 36 In those circuits, immigration cases now make up more than thirty percent of all cases. 37 The circuits are hearing almost as many administrative appeals as criminal appeals. A significant portion of those appeals have come from asylum-seekers challenging final orders of removal and denial of asylum relief. 38 Moreover, as evidenced by the chart below, the rate of increase has not been incremental. As several authors have characterized it, there has been a "surge" in immigration cases. 39

**Figure 2: Appeals Cases Filed in Federal Circuit Courts, by type of Appeal**

<table>
<thead>
<tr>
<th>Year filed</th>
<th>Prisoner Petitions</th>
<th>Criminal Appeals</th>
<th>Administrative Agency Appeals</th>
<th>Total Circuit Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>18,343</td>
<td>11,281</td>
<td>3,300</td>
<td>57,464</td>
</tr>
<tr>
<td>2002</td>
<td>18,272</td>
<td>11,569</td>
<td>5,789</td>
<td>57,555</td>
</tr>
<tr>
<td>2003</td>
<td>17,691</td>
<td>11,968</td>
<td>9,988</td>
<td>60,847</td>
</tr>
<tr>
<td>2004</td>
<td>16,561</td>
<td>12,506</td>
<td>12,255</td>
<td>62,762</td>
</tr>
<tr>
<td>2005</td>
<td>17,034</td>
<td>16,060</td>
<td>13,713</td>
<td>68,473</td>
</tr>
</tbody>
</table>

IV. THE PAPER DOLLS ANIMATED

The increase in the number of cases in the federal courts is not explained by the increase in the workload of the agency alone. The rate of people seeking review of the BIA decisions has also dramatically increased. 40 What is motivat-

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35. Office of Judges Programs, Statistics Division, Admin. Office of the U.S. Courts, supra note 33, at 8. The Administrative Office further concluded that the surge in BIA filings since 2000 can be mostly attributed to changes made by the 2002 streamlining guidelines for processing BIA cases. Id.

36. Id.; see also Palmer, et al., supra note 19.


38. See Palmer, et al., supra note 19, at 71–72. The authors estimate that of BIA appeals of IJ decisions within the Second Circuit, Chinese asylum-seekers make up between thirty-five and fifty-five percent of the population of the petitions for review. Id. at 72. The workload of decisions within the Ninth Circuit is distributed more widely between asylum and non-asylum claims. Id. The authors suggest that the relatively high rate of appeal in these two circuits may be due to the relatively high percentage of asylum-seekers in those two geographic regions. Id.

39. Id. at 3 & n.1; see also Comm. on Fed. Courts, Ass'n of the Bar of the City of N.Y., supra note 32.

40. John R.B. Palmer, The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis, 51 N.Y.L. Sch. L. Rev. 13 (2006); see also Palmer et al., supra note 19. These authors discovered a 34% total appeal rate for all circuits, lead by the high number and rate of appeals of BIA cases which ultimately are heard by the Second Circuit Court of Appeals (42% of the BIA cases arising in the Second Circuit are appealed) and the Ninth Circuit Court of Appeals (45% of the BIA cases arising in the Ninth Circuit are appealed). Id. at 53–54. From May to August 2004, the BIA
ing these litigants? In this section I explore some of the strategic reasons litigants are seeking review in the federal court. I also discuss some of the characteristics of the repeat players in the system.

In the initial administrative removal hearing the responding non-citizen may contest the allegations of the government charging document, the Notice to Appear, or may concede his or her removability. While there are no detailed published statistical studies, the government reports that in a significant percentage of cases the non-citizen does not appear. The IJ proceeds with an in absentia order of removal and the administrative case is final. Recently, the EOIR reported a large increase in the number of in absentia orders, from 47,408 in 2004 to 100,994 in 2005. In another large percentage of the cases, the non-citizen facing removal concedes the allegations and moves directly to request a statutory form of relief from removal. In 1996 Congress greatly restricted the forms of relief. For example, in the past an individual might have been able to admit that he or she was removable, ask for voluntary departure and then apply for an immigrant visa at the U.S. consulate abroad based on a sponsoring employer or family member. Since 1996 departure from the United States after a

issued 11,296 final orders and of these, 6514 petitions for review were filed in those two circuits alone. Id. at 54.


42. In 2003, a small sample indicated that 66% of non-citizens failed to appear for their hearings and were ordered removed in absentia. See OFFICE OF THE INSPECTOR GENERAL EVALUATION AND INSPECTIONS DIV., U.S. DEP’T OF JUSTICE, THE IMMIGRATION AND NATURALIZATION SERVICE’S REMOVAL OF ALIENS ISSUED FINAL ORDERS, REPORT NUMBER I-2003-004 13 (2003), available at http://www.usdoj.gov/oig/reports/INS/e0304/final.pdf (“We examined the in absentia rate within our sample of 308 nondetained cases and found that 204 (66%) of the aliens failed to appear for their removal proceedings and were ordered removed in absentia. We examined the correlation between removals and court attendance and found that the aliens’ failure to appear before the Immigration Judge at removal proceedings is a significant and strong negative indicator for the likelihood of removal by the INS. Of the 204 aliens ordered removed in absentia [sic], only 14 had been removed, a removal rate of 7 percent. In contrast, 26 of the 103 aliens who attended the hearing where they received their removal order had been removed, a rate of 25 percent.”).


44. OFFICE OF PLANNING, ANALYSIS, & TECH., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, supra note 26, at H2. For analysis purposes, the EOIR combines in absentia orders with administrative closures where the IJ does not order the alien removed, under the category of “Failures to Appear.” Between 2004 and 2005, there was a 103% increase in Failure to Appear completions. However, 52% of the completions occurred in just two Immigration Courts, in San Antonio and Harlingen, Texas. Id. at H1.

45. Immigration Judges are not empowered to grant relief in a general equitable sense but can only consider those forms of relief from removal authorized by statute.
period of unlawful presence triggers a three- or ten-year bar on returning to the United States. Many people subject to these bars are not eligible for any waivers. Even though qualified to immigrate under the preference categories, statutory bars on adjustment of status within the U.S. and bars on return if they depart create an incentive to delay the departure. Congress has also limited or eliminated waivers for those convicted of crimes, even minor crimes, and created statutory bars to asylum. The form of relief previously called “suspension of deportation” that allowed adjustment after seven years of physical presence, proof of good moral character, and proof of hardship to the individual facing removal was transformed into “cancellation of removal.” Congress expanded the residence period to ten years and now requires that the individual prove his or her deportation will create exceptional and extremely unusual hardship to a U.S. citizen or permanent resident spouse, parent or child.

Today an attorney advising a client about his or her defenses to removal is more likely to suggest contesting the allegations of removability, especially where the government allegations characterize a criminal conviction as an “aggravated felony.” The consequences of allowing the allegation of aggravated felony to stand include not just preclusion from most forms of relief but also a lifetime bar to naturalization and potentially to ever regaining lawful residence in the United States. The government lawyers and Congress may object that the in-


47. See generally, Stephen Yale-Loehr & Brian Palmer, Unlawful Presence Update, 6 BENDER’S IMMIGR. BULL. 507 (2001) (describing the different bars applicable when a person is unlawfully present within the United States).

48. See generally DAN KESSELBRENNER, IMMIGRATION LAW AND CRIMES (2002). This treatise explores the many varied immigration consequences of criminal convictions.


51. See INA § 101(a)(43). Those unfamiliar with this long statutory definition may not be aware that the label, aggravated felony, has been broadened to include crimes that are only misdemeanors under the relevant state, foreign or federal statute. Recently the BIA found that “unauthorized use of a vehicle” qualified as an aggravated felony because the BIA accepted the government’s assertion that it was a “crime of violence.” See In re Brieva-Perez, 23 I&N Dec. 766 (BIA 2005). The decision is of questionable validity given the Supreme Court’s prior decision in Leocal v. Ashcroft, discussed supra note 10; unfortunately, the BIA did not distinguish Leocal in its opinion. This is just one example of the broad scope of criminal convictions that the government may classify as an aggravated felony under immigration law. See also Lopez v. Gonzalez, No. 05-547; Toledo-Flores v. U.S., No. 05-7664 (cases consolidated), discussed supra note 10.

dividends who challenge these classifications are merely obstructing removal or litigating to buy time, but given what is at stake, it is understandable that attorneys and pro se litigants challenge the allegation. Indeed, they have been fairly successful. In a significant number of cases, the agency has found that its characterization of a conviction has been based on an erroneous reading of the immigration statutes.53

Put another way, in the past if a client was facing removal due to a criminal conviction, many attorneys would not spend time or money contesting whether the grounds for conviction were in fact the same as the grounds for deportability. Instead, the attorney would recommend to the client that he or she concede removability and instead seek relief from removal such as the discretionary section “212(c)” waiver that was previously available to long term permanent residents.54 Because the waiver required the IJ to find that the person was unlikely to commit another crime and had experienced some type of rehabilitation, attorneys and clients feared antagonizing the IJ by first litigating the technical statutory grounds of removal.55

Another factor increasing the incentive to litigate is the statutory preclusion of seeking judicial review of a discretionary decision.56 While judicial review of immigration discretionary decisions was always deferential — the court had to find that the agency acted in an arbitrary or capricious manner to reverse a

53. See, e.g., Gill v. INS, 420 F.3d 82, 91 (2d Cir. 2005) (holding that BIA erroneously found that attempted reckless assault was an aggravated felony); Lara-Cazares v. Gonzales, 408 F.3d 1217, 1218 (9th Cir. 2005) (holding that BIA erroneously found that gross vehicular manslaughter while intoxicated was an aggravated felony); Argaw v. Ashcroft, 395 F.3d 521, 523 (4th Cir. 2005) (legal determination that khat, a traditional herbal stimulant, is a controlled substance was incorrect, "[b]ecause khat is not listed as a controlled substance and it has not been established when khat might contain a controlled substance"); Knapik v. Ashcroft, 384 F.3d 84, 93 (3d Cir. 2004) (reversing the BIA's finding that "attempted reckless endangerment in the first degree" was a crime involving moral turpitude); Garcia-Lopez v. Ashcroft, 334 F.3d 840, 846 (9th Cir. 2003) (holding that BIA erroneously rejected the state court's determination that the crime of stealing a purse was a misdemeanor and petty offense); Francis v. Reno, 269 F.3d 162, 174–75 (3d Cir. 2001) (explaining that the Pennsylvania statute defined homicide by vehicle as a misdemeanor and the BIA erroneously rejected that definition and charged removability based on an aggravated felony of a "crime of violence"); Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997) (holding the BIA erroneously found that solicitation to possess cocaine was an aggravated felony).

54. The section 212(c) waiver was the subject of litigation in INS v. St. Cyr, 533 U.S. 289 (2003). Basically the waiver allowed long-term residents of the U.S. to seek a discretionary waiver of deportation notwithstanding criminal conduct or other characteristics that might render them subject to removal. Congress repealed the waiver in 1996. But in INS v. St. Cyr, the Supreme Court found the waiver was not completely retroactive.

55. I base this understanding of the strategies in removal proceedings in part on my ten years of practice experience. See also MANUEL v ARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (3d ed. 2003).

56. See, e.g., INA § 208, 8 U.S.C. § 1158 (2000) (grant of asylum is discretionary); INA § 240A, 8 U.S.C. § 1229b (grant of cancellation of removal is discretionary); INA § 245, 8 U.S.C. § 1255 (adjustment of status is discretionary). Almost every form of relief from removal is, by statute, committed to the discretion of the Attorney General and therefore delegated to the discretion of the IJ or BIA.

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discretionary decision — in 1996 Congress blocked judicial review of all decisions committed to the discretion of the agency.\textsuperscript{57} Knowing there is no judicial review of the discretionary decision, an attorney may now recharacterize litigation to raise constitutional or statutory issues. Barring review of the act of discretion has frequently only shifted the litigation strategy not eliminated litigation. Therefore, foreclosing judicial review of the discretionary decisions raised the stakes for the agency’s adjudication of other issues and increased the likelihood that the predicate legal facts of either removability or of qualification for the discretionary relief would be litigated.\textsuperscript{58}

For those people seeking asylum in the United States, the petition for review is the last chance to have a claim to refugee status recognized. Since the creation of the statutory right to seek asylum in 1980, Congress has preserved the right of an applicant to seek judicial review of the agency rejection of a claim of asylum. At times, Congress has restricted the time period to seek asylum or created statutory bars to eligibility for asylum relief; but in general, the law of asylum has developed on a case-by-case basis before the BIA and after review in the federal courts of appeals. In some circuits, a large percentage of the cases on appeal are from people seeking asylum.\textsuperscript{59} Preliminary studies suggest that the increase in appeals is due to streamlined review before the administrative agency.\textsuperscript{60} Several of the attorneys I interviewed for this paper suggested that they were now seeking federal court review of denial in asylum cases because of the poor quality of the reasoning in the administrative process and because the majority of the asylum claims were based on the IJ rejecting the credibility of the applicant.\textsuperscript{61} While judicial review of credibility determinations is extremely deferential in administrative law, many of these attorneys pointed to the number of appellate decisions where the federal courts chastised the agency adjudication for poor reasoning, irrational conclusions and failure to adequately consider evidence in the record.\textsuperscript{62}

The circuit courts have also openly criticized individual IJs for inappropriate

\textsuperscript{58.} See, \textit{e.g.}, Kalaw v. INS, 133 F.3d 1147 (9th Cir. 1997). For a discussion of the effects of administrative foreclosure of discretionary judicial review of administrative determinations after the REAL ID Act, see Daniel Kanstroom, \textit{The Better Part of Valor: The REAL ID Act, Discretion, and "Rule" of Immigration Law}, 51 N.Y.L. SCH. L. REV. 161 (2006).
\textsuperscript{59.} See Palmer, \textit{et al.}, supra note 19, at 71–72.
\textsuperscript{60.} See \textsc{Dorsey \\& Whitney, LLP}, \textit{supra} note 19.
\textsuperscript{61.} Attorney Interviews conducted August, September, and October of 2005 (notes on file with author). \textit{See infra} note 105. Based on my informal interviews of several private and government attorneys, a large number of the petition for review cases are “settled” by the parties in the sense that the case is remanded to the BIA. One of the main reasons for these settlements is the government counsel’s opinion that the record reflects errors that would weaken the government’s support of the BIA/IJ decision.
comments on the testimony of asylum applicants. In rare cases, the court has awarded attorney's fees to the respondent's counsel. The Attorney General, in response to increasing media scrutiny, recently issued a memorandum expressing great concern at the growing number of low quality decisions and lack of respect shown by some of the IJs.

Attorneys increasingly believe that petitions for review are worthwhile. Even if the court does not reverse every case, the attorneys believe they are educating the court and the agency below that some behavior will not be tolerated. One attorney told me that more than 50% of his cases were remanded. While some of these cases were the result of formal opinions, more often, the remands were as a result of stipulated settlements. In his view, the petition for review was often the first time that a government attorney who exercised real thought and discretion reviewed the case. This ability to get the attorney's review was a prime motivator in seeking review.

Finally, the increased use of detention has raised the incentive to litigate and created new litigation forms. Parties now litigate not only the predicate allegations that render them subject to detention, but also the length of detention. The use of detention in civil proceedings will always trigger constitutional inquiries into the liberty of the detained people. Thus, as long as the


64. See Johnson v. Gonzales, No. 03-1931 (3d Cir. 2005) (finding that the asylum petitioner was entitled to attorneys' fees of $10,000 because the agency's decision was not supported by substantial evidence where it failed to consider the petitioner's testimony and awarding attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, which allows a private party to recover attorneys' fees if he or she is the prevailing party).


66. The remands after mediation or settlement are also discussed in the report of the Committee on Federal Courts Association of the Bar of the City of New York, supra note 32.

67. See Attorney Interviews, supra note 61.

68. See Demore v. Kim, 538 U.S. 510 (2003) (upholding detention of a lawful permanent resident pending removal proceedings); see also Clark v. Martinez, 543 U.S. 371 (2005) (rejecting indefinite detention of inadmissible aliens who were not able to return to their country and the government had ceased efforts to return them); Zadvydas v. Davis, 533 U.S. 678 (2001) (requiring periodic review of the detention of those subject to an order of removal but for whom the government cannot secure cooperation from the receiving country).
agencies increase the use of detention or Congress mandates it, they can expect litigation.69

The agencies’ particular patterns of detention also contribute to an increase in litigation. The government has a pattern of relocating non-citizens to large detention centers, often far from the family and attorneys of the non-citizen.70 For example, an individual arrested at the airport in New York is sent to detention centers in New Jersey or in York, Pennsylvania.71 An individual apprehended in Nevada may be interned in Eloy, Arizona.72 Many of these detained individuals do not have counsel and the “jail house” lawyers share information about seeking habeas or petitions for review. Some may file these applications in

69. In June 2003, the ICE Office of Detention and Removal released “Endgame,” its ten-year removal strategy, which demonstrates the intent of the agency to increase its efforts to detain and remove aliens who have received a final order of removal from an IJ. The actual strategy can be found at http://www.ice.gov/doclib/pi/dro/endgame.pdf (last visited Oct. 16, 2006). ICE has focused the Endgame in several ways, the most expansive being Operation: Compliance, a pilot program launched in Hartford, Denver, Atlanta, and now Miami, where ICE agents are positioned at the back of IJ courtrooms, awaiting the issuance of removal orders. Once those orders are issued, the agents take the unsuspecting alien into custody, where he or she remains pending appeal and ultimate removal. See Ricardo Alonso-Zaldívar, Foreigners Fighting Orders to Leave U.S. May Face Jail, L.A. TIMES, Apr. 25, 2004, at A28; Alfonso Chardy, New Program Raises Stakes for Foreign Nationals, MIAMI HERALD, Oct. 9, 2004, at B3.

70. See, e.g., Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1251, 1256 (4th Cir. 1995) (“there is nothing inherently irregular . . . about the . . . transfer from Virginia to Louisiana.”); Sasso v. Milhollan, 735 F. Supp. 1045, 1047 n.6 (S.D. Fla. 1990) (describing transfer of thirty-five to forty non-citizen felons three or four times each month from Miami to Oakdale, Louisiana or Laredo, Texas); Committee of Cent. Am. Refugees v. INS, 682 F. Supp. 1055, 1060 (N.D. Cal. 1988) (describing regular transfers from San Francisco district to El Centro, California or Florence, Arizona); Louis v. Nelson, 544 F. Supp. 973, 983–84 n.27 (S.D. Fla. 1982) (describing transfer of hundreds of Haitian refugees from a detention facility outside of Miami to remote locations across the country, including Fort Allen, Puerto Rico and Brooklyn, New York, and to the Bureau of Prisons’s facilities in places such as Otisville and Raybrook, New York; Latuna and Big Springs, Texas; Lexington, Kentucky; Morgantown and Alderson, West Virginia). See generally Arias-Agramonte v. Comm’t of INS, 2000 U.S. Dist. LEXIS 15716, *27 (S.D.N.Y. Oct. 30, 2000) (“Detained aliens are routinely transferred to facilities in other INS districts, often a great distance away, under the Attorney General’s authority.”).

71. The Legal Aid Society of New York provides a guide for detainees and their families and offers instructions that reflect the great distances over which detainees may be transported:

Some facilities, such as the Global Enforcement Outsourcing facility in Queens, New York (formerly known as Wackenhut) or the Elizabeth New Jersey facility, are used exclusively for people seeking political asylum. Others are just for immigration detainees such as the facilities in Oakdale in Louisiana and Krome in Florida. Most detainees are held in local jails that are paid a fee by the government for holding detainees. At this time, there is no facility for holding detainees in New York City. Detainees from New York are first taken to the immigration detention center at Varick Street in Manhattan. From Varick Street, detainees are most often sent either to Oakdale, Louisiana, or the Passaic County Jail in Paterson, New Jersey.


72. Agyeman v. INS, 296 F.3d 871, 875 (9th Cir. 2002) (individual detained in Carson City, Nevada and transported to a detention facility in Eloy, Arizona).
the hope of also winning a stay of removal and others may simply not know what the effect of seeking judicial review may be and file because they have a belief that it means that someone outside the detention center and the immigration service will hear their cases.\textsuperscript{73}

Helping to animate the entire field is the growth in the number of attorneys in the area. There has been a remarkable growth in immigration practice not only among those attorneys who specialize in the field, but also in the pro bono and non-profit services available to aid the non-citizens. In 1983, the American Immigration Lawyers Association ("AILA") had approximately 800 members.\textsuperscript{74} In January of 1995, AILA had approximately 3800 members.\textsuperscript{75} In 2000, there were approximately 6300, and in 2005, there were over 9200 members.\textsuperscript{76}

While there are not enough pro bono attorneys or non-profit organizations serving the immigrant communities, there has been growth in the area. The New York Immigration Coalition represents approximately 150 organizations dedicated to immigration law, policy and representation.\textsuperscript{77} Studies have shown that legal representation can actually expedite the administrative process and reduce litigation.\textsuperscript{78} The growth in immigration cases in the federal courts may be attributable to the larger number of attorneys or it may be that a relatively few number of attorneys are filing a significant number of the cases.\textsuperscript{79} This is an

\textsuperscript{73} See Attorney Interviews \textit{supra} note 61.

\textsuperscript{74} I joined the organization in 1984 and remember the membership numbers.

\textsuperscript{75} \textit{AM. IMMIGR. LAWYER'S ASS'N} (AILA), 2005 \textit{MEMBERSHIP REPORT} (on file with AILA and the \textit{New York Law School Law Review}).

\textsuperscript{76} \textit{Id.} The numbers may be larger. It is common in law firms to have only one or two members of the firm pay dues in AILA while the entire firm benefits from this association's resources. Of course, some of these attorneys only handle business and family immigration cases and in no way participate in the litigation of removal cases. However, these attorneys refer cases to litigators and refer clients to other sources of support when they are in removal proceedings.


\textsuperscript{79} See Palmer, et al., \textit{supra} note 19, at 89. The authors find that of that 87% of the petitions for review pending on the Second Circuit's docket on April 21, 2005 were represented by counsel. Of those petitions, 46% were represented by just 20 law offices, with many of these offices handling over 100 petitions each. \textit{Id.; see also Margaret H. Taylor, Behind the Scenes of St. Cyr and Zadvydas: Making Policy In the Midst of Litigation}, 16 \textit{GEO. IMMIGR. L.J.} 271 (2002).
area where further study is needed to fully understand the motivation and strategic position of the parties.\textsuperscript{80}

\textbf{V. CONGRESS TRIES TAILORING THE CUTS}

The agency is producing more raw product — the paper. The dolls have multiplied and are animated. The litigants are motivated to fight harder and longer. Moreover, Congress has passed jurisdictional statutes that fold and multiply the forms of judicial review, albeit inadvertently. While it is true that the bulk of the court’s workload increase is from the new output of cases by the BIA, some portion is due to appeals from habeas petitions. But the rebirth of habeas led to an increase in the workload of the federal district courts as well. As I explained previously, people who were expressly prohibited from filing a petition for review of the administrative order of removal instead sought judicial review using the writ of habeas corpus.\textsuperscript{81} Further, as the statute requires the petition for review to be filed within thirty days of the order of removal,\textsuperscript{82} some non-citizens sought habeas review because the petition for review would have been dismissed as untimely.\textsuperscript{83} It is not possible to absolutely identify how many immigration-related habeas petitions were filed since the 1996 court stripping legislation because the Administrative Office of the United States Courts does not publish statistics that distinguish between the types of habeas petitions.\textsuperscript{84} Nevertheless, it appears that the total volume of immigration-related habeas petitions was perceived as increasing. Still, the total percentage of all immigration-related matters in the district courts was less than .2% of the total volume of all civil matters.\textsuperscript{85} The government was frustrated by the habeas filings as they were more difficult to handle administratively through the Office of Immigration Litigation, which is largely based in Washington, D.C., and local district court mat-

\begin{footnotesize}
\textsuperscript{80}See infra Part VI.A.2 (discussing the need for further evaluation before conclusions about the sources of the increase in immigration litigation can be fully developed).

\textsuperscript{81}See supra text accompanying note 13.

\textsuperscript{82}See INA § 242(b)(1); 8 U.S.C. § 1252(b)(1) (2000).

\textsuperscript{83}Other articles in this symposium will discuss whether habeas corpus could still be used if a petition for review were foreclosed. See generally Gerald L. Neuman, \textit{On the Adequacy of Direct Review After the REAL ID Act of 2005}, 51 N.Y.L. SCH. L. REV. 133 (2006); Nancy Morawetz, \textit{Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review}, 51 N.Y.L. SCH. L. REV. 113 (2006).

\textsuperscript{84}The Administrative Office does keep statistics identifying original proceedings in the district courts related to deportation cases, which I presume to be immigration-related habeas. See MECHAM, supra note 3, at Table C-2. A former research assistant conducted several telephone interviews with the Administrative Office between the spring of 2005 and the fall of 2006 during which the Administrative Office indicated that it could not release more detailed data.

\textsuperscript{85}MECHAM, supra note 3, at Table C-2. This figure was arrived at by dividing the number of "deportation" actions (316) by the total number of civil actions under statutes (19,017) commenced in district courts in 2004.
\end{footnotesize}
ters were increasing at the same time as the enormous, explosive increases in the petitions for review filed in the courts of appeals.

The lack of clear data about immigration-related habeas petitions and whether there was actually an increase in these filings may have contributed to the congressional perception that habeas filings were interfering with the orderly administration of the expulsion of people; it appears that courts granted relief in a significant number of the habeas cases. Despite procedural hurdles and the narrow scope of habeas review, one study showed that nearly 17% of the habeas petitions filed in the Southern District of New York secured some form of procedural or substantive relief for the non-citizen facing removal.\(^6\) While 17% may not seem like a very large number, these are the cases that at least, in theory, Congress sought to insulate from judicial review because Congress trusted the administrative process to be sufficient.

Facing the increased volume of immigration cases, Congress once again picked up its shears. In May of 2005, Congress took the dramatic step of explicitly barring district courts from habeas corpus review of removal orders.\(^7\) On the surface this cut makes sense, for it appears to answer the Supreme Court directly in St. Cyr and other cases where the Court says that Congress has not explicitly indicated its unambiguous intention to preclude habeas.\(^8\) At the same time that Congress removed some forms of habeas, it repealed the express prohibition on judicial review of deportation orders based on certain crimes.\(^9\) In a sense, this cut was a restoration of jurisdiction. Further, if the statute is not found to be a restoration of review, the suspension of habeas may be unconstitu-

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\(^6\) Rebecca Rossel, A Call for Reform: The Current State of Habeas Corpus in the Southern District of New York 10 (May 2005) (unpublished paper, on file with the New York Law School Review). This paper was prepared as part of a year-long empirical assessment of all immigration-related habeas petitions filed between June 25, 2001 and December 21, 2004 in the Southern District of New York. In another excellent honors paper, Howard Zakai prepared a pro se habeas manual examining the complex doctrinal issues presented in immigration habeas. His analysis was completed days before the passage of the REAL ID Act limitation on immigration habeas. See Howard Zakai, Habeas Corpus: A Manual for Aliens within the Second Circuit Seeking Review of Final Orders of Deportation (May 2005) (unpublished paper, on file with the New York Law School Law Review). Both of these papers illuminate some of the very real problems presented by the administrative adjudications and the complex set of practical hurdles facing many of the non-citizens such as lack of access to counsel or the harm caused by incompetent counsel.

\(^7\) REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, Div. B, Title I, § 106(c) (May 11, 2005). The REAL ID Act creates INA § 242(a)(5), 8 U.S.C. § 1252(a)(5), making the courts of appeals the exclusive means of review, excluding habeas challenges to orders of removal. The district courts have recognized that "all habeas corpus petitions brought by aliens that were pending in the district courts on the date the REAL ID Act became effective (May 11, 2005) are to be converted to petitions for review and transferred to the appropriate courts of appeals." Bonhomme v. Gonzalez, 414 F.3d 442, 446 (3d Cir. 2005). District courts have now begun the tedious task of transferring cases that have already been partially adjudicated to the court of appeals for new proceedings. For an extensive discussion of the concerns of the district courts raised by the REAL ID Act, see Enwonwu v. Chertoff, No. 05-10511-WGY, 2005 U.S.Dist. LEXIS 13890 (D. Mass. July 12, 2005).

\(^8\) See INS v. St. Cyr, 533 U.S. 289 (2003); see also Neuman, supra note 83; Morawetz, supra note 83.

\(^9\) This express prohibition was in former INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (repealed).
tional. At least in theory, the petition for review should provide the adequate and sufficient substitute for the habeas review now precluded.90 In other words, Congress recognized that some form of judicial review would continue and chose to limit that review to the circuit courts of appeals rather than have some litigation continue in the federal district courts. As I explain below, however, these changes are unlikely to result in a more efficient or limited judicial review of immigration cases.

VI. ANIMATING JURISDICTION: DESIGN FOR A DYNAMIC REALITY

This paper has established that Congress hoped to reduce the volume and length of judicial review of immigration removal orders and that the statutory means it selected were not only unsuccessful but, in combination with the other factors, the statutory restrictions increased the total volume of cases. Perhaps that critique is sufficient to convince a few observers or policy-makers that court stripping is not going to reduce the amount of judicial review or even produce compliant paper dolls moving in lock-step down an efficient assembly line. Yet, the critique does not answer what might be done to achieve the goals of efficient and certain methods of judicial review that would produce finality in the system while at the same time ensuring accuracy and fairness.91

David Martin provided a thoughtful assessment of the administrative process used to assess claims of asylum.92 At the time he wrote, the asylum system was growing exponentially and there was significant empirical evidence of political and/or racial bias in the adjudication system. As part of his framing introduction he noted the problem with trying to design legislation or administrative systems when there is a great deal of variation in the problems and people within the system, and government seeks to create an overarching process to handle the problem without recognizing the degree to which variation and complexity would frustrate the designer's best intentions. He quoted the analyst Walter Lippmann who noted that in such policy formulations the analysts tried to impose their world view or perceived need and thus formulated a map or solution

90. See Heikkila v. Barber, 345 U.S. 229, 235 (1953) (limits on judicial review are permitted, provided that the core of habeas review remains); see also Neuman, supra note 83; Morawetz, supra note 83.

91. While a just adjudication system must preserve values other than efficiency, the main focus of this paper is to examine those factors and dynamic interactions that frustrate the actions taken primarily as a means of achieving efficiency. As will be seen later, some of my reform suggestions touch on ways of reducing the workload of the removal system by taking some people out of it all together. Obviously another reason for making these suggestions beyond the goal of efficiency is the promotion of a more just or tailored immigration policy.

that included a sketch of the nonexistent “Coast of Bohemia.” As Martin noted, the “Coast of Bohemia” problem requires patient study and design of an adjudication system with incentives that deter problems and increase the trust in the adjudication system.

But even as we attempt that better design, I am haunted by the imagery of Lippmann — he tells us that policymakers need maps to guide them to the solutions. He worries about the imperfections of the map. But assuming we avoid creating a map with mythical coastlines, will our system avoid the other limitations of maps — their inherent lack of the experiences of dimension, context and reality? Map is not territory.

We can show members of Congress that the stripping of judicial review in the courts of appeals for certain classes of non-citizens led to a revival of litigation in the federal district courts. The members see that and read the case decisions and respond, “Okay, strip habeas in the federal district courts and to forestall a constitutional attack, we’ll create a narrow form of review in the courts of appeals.” Congress may have believed they saw the territory and made the map — the statutory scheme — fit. The administrators of the EOIR show that the backlog is growing and too many panels are taking too long to issue individualized decisions and the administrators respond, let’s find a “short cut” for the cases that do not present new issues and streamlined summary affirmances are born.

If you have ever relied solely on a map to prepare for travel in a new place, you have learned that maps do not accurately reflect the experience of being in the place. Maps do not tell you which neighborhoods are clogged with traffic or whether the residents of a neighborhood welcome strangers. Maps rarely reveal whether you can travel between one spot and another unless there is some obvious geophysical limitation such as an ocean. It is unfortunate that Congress and the agency resorts to cutting process and limiting access to review rather than thinking through the varied forces that shape the caseload and also examining the interrelationship of those forces. You simply can’t solve this problem by conceiving it as a piece of paper that can be folded and cut. While the litigants attacking the agency decisions may bear some responsibility for using the judicial review process in cases where delay is the essential goal, the attorneys and self-repre-


94. JONATHAN Z. SMITH, MAP IS NOT TERRITORY: STUDIES IN THE HISTORY OF RELIGION (1978) (quoting ALFRED KORZYBSKI, SCIENCE AND SANITY 58 (1958)); see also Lenni B. Benson, Breaking Bureaucratic Borders: A Necessary Step Towards Immigration Law Reform, 54 ADMIN. L. REV. 203 (2002) (providing a lengthy exploration of this concept and a warning that policy makers should live the experiences of the territory before trying to formulate a plan based on a statute or "map" alone).
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Presented non-citizens may have had few immediate choices given the lengthy, if not permanent, barriers to return.95

Congress and policy analysts need to see the animated people in the process and reflect on the incentives to seek judicial review. I do not have a detailed map or topographical plan to set the proper boundaries because the exact nature and extent of the problems are not yet understood. However, I would urge Congress, the courts and the agencies to focus on a framework that evaluates the incentives, the remedies, and the adaptability of the system. In this final section of the article, I suggest some ways to improve the entire adjudication process. Some of the reforms focus on the quality of the process and others on the substantive issues that create incentives to fight or litigate. While some of the suggestions below may appear to be aimed at reforming substantive immigration law, my goal is to illustrate that the system designers must understand the dynamics of the immigration law. Whether the goal of the system is increased efficiency or prioritizing thorough case-by-case adjudication, the system design must anticipate how adjudication interacts with the larger immigration context.

A. Enhance the Process

1. Recognize the Value of Thorough and Fair Adjudications to the Process.

Under current case law, due process may not require review by an Article III court.96 Setting aside the possibility of an Article I tribunal, the current path

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95. If appeals are frivolous both the BIA and the courts of appeals have the ability to address that problem directly via existing rules and sanctions. But based on some of the reversal rates found in limited empirical studies, I do not believe that the main source of this problem is people mounting frivolous challenges. The rate or remand or reversal in the Second Circuit is 20%, and has reached as high as 40% in the Seventh Circuit. See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of John M. Walker, Jr., Chief Judge, United States Court of Appeals for the Second Circuit); Letter from Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit, to Richard J. Durbin, United States Senator (Mar. 15, 2006) (citing Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005) (on file with author)); see, e.g., Rossel, supra note 86, at 10 (finding a 17% rate of remand to the agency in habeas cases).

of the EOIR destroys trust in the system. Too many of the decisions reveal an agency that is non-responsive, prone to error, and lack too many of the basic hallmarks of fair forum adjudication. The entire EOIR process should be examined with the goal of increasing professionalism and improving the BIA's ability to adapt to the workload before it.

Critics of the BIA have focused both on the poor quality of the decisions and also on the people selected to be the decision-makers. Although the Department of Justice indicated that one of the factors that would be used for evaluating the quality of Board members would be broad experience in immigration and administrative law, as well as comprehensive knowledge of the field of immigration laws, the government has instead continued to staff the board with members with extensive law enforcement and prosecutorial experience rather than a more varied range of expertise. An ABA study also found that members whose opinions have proved to be too progressive or pro-alien have been removed or have retired with little explanation.

It is no stretch of the imagination to assume that a combination of inexperience in a specialized field like immigration law and an emphasis on prosecution and law enforcement have been partially to blame for the adverse results of BIA decision-making. To foster trust in the administrative system, Congress must first improve the quality of the main decision-making agency. Congress could either create experience requirements or create an independent board that would recommend nominations of both IJs and BIA Members to the administration. Certainly, Congress must agree that the BIA does not meet the goals of an efficient removal system when a record number of its decisions are being challenged

97. One student study calculated that the BIA was producing a remarkable number of cases after it reduced its membership from 23 to 11. Goldenberg, supra note 96, at 7 & n.24 (“These eleven members reviewed a total of 41,907 cases in 2003, or approximately 114 cases per day if the members work 365 days a year or 4.75 cases per hour if they work 24 hours a day.” She based these estimates on the workload report produced by EOIR. The report was once published on the EOIR website (http://www.usdoj.gov/eoir/statspub/fy03syb.pdf (last visited September 11, 2005)), but is no longer available at that address. Similar data can be found in the EOIR Statistical Yearbook, available at http://www.usdoj.gov/eoir/statspub/syb2000.main.htm (last visited Oct. 16, 2006).

98. DORSEY & WHITNEY, LLP, supra note 19, at 11.

99. Id. at 12. This report further informs that in 2001, the EOIR appointed three members to the BIA who had accumulated a combined six decades of service within the Department of Justice Criminal Division, but had no prior immigration law experience or background.

100. See id.

in the courts and a high number are remanded either by stipulation or formal court order.  

EOIR reforms must go further than trying to put the best adjudicators into the system. The agency needs better funding and increased support to accomplish the large adjudication task before it. Putting pressure on the individual IJs to hear cases too quickly or simply to move a docket along too often results in simply moving problems onto the BIA and then to the courts. While there will still be those who seek judicial review of administrative orders, the increased quality of the orders will gradually help the body of law to develop more clearly and will allow reviewing courts to avoid remands for clarification of findings.

The courts of appeals have grown increasingly frustrated not only by the increase in appeals, but with the failure of the BIA to recognize mistakes in IJ decisions. The result of this frustration has been, in some cases, for the courts to generate complex jurisdictional questions from simple factual disputes. In a recent memorandum to IJs within the Department of Justice, Attorney General Alberto Gonzales echoed the frustration of the courts of appeals. In his memo the Attorney General criticized the work of many of the Department’s IJs as “intemperate or even abusive” and failing to “produce the quality of work that I expect from employees of [the Department].”

The BIA may need internal institutional reforms to re-train particular IJs or to provide more support so that an IJ does not have to issue a decision without time for reflection. In his memorandum, the Attorney General announced that the Deputy and Associate Attorneys General would conduct a “comprehensive review” of the immigration courts. It is unclear whether this review will address the more glaring problems addressed in this article. Administrative rules might be adopted to require more detailed citation to the hearing record. As the current procedures are to use tape recordings, rather than typed transcripts, the EOIR might evaluate whether in some contested cases it is wiser to use standard court reporter transcription. As technology improves and may one day provide accurate written transcriptions to be produced from audio recordings, the EOIR should consider adopting these improvements. Today, speech software would allow an IJ to dictate the decisions while a fairly accurate transcription is produced. At a minimum, the procedures ought to be modified to require an IJ to

102. See Comm. on Fed. Courts, Ass’n of the Bar of the City of N.Y., supra note 32, at 11–12 (discussing experience in the Second Circuit Court of Appeals and noting a high rate of disposition by settlement which included agreement to remand).

103. See, e.g., supra note 58 and accompanying text.

104. See Memorandum, supra note 65.

105. Id.


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review a typed transcription of all decisions for accuracy. The time needed to produce the transcription would also create time for reflection, allowing the IJ to test his or her decision for persuasiveness and logical consistency, as well as to provide an opportunity for correction and augmentation.

A rather simple solution may be to increase the number of law clerks supporting the IJs. Judge Michael Daly Hawkins of the Ninth Circuit Court of Appeals said that some courts have one law clerk for every ten judges. This modest investment in personnel might make a significant difference in identifying gaps and errors in the administrative process.

Even in the small percentage of cases where the BIA does issue a written opinion, the opinions often contain a lack of substantive legal reasoning. These appellate administrative decisions are important both for the particular case and also for the guidance the decisions provide to the individual hearing officers. If the decisions do not fully develop lines of legal argument and explain the underlying legal rationales, they can undermine efficiency by leaving unintended issues open for future litigation. In some cases, insufficient legal reasoning may result in reversal by the courts of appeals or unnecessary splits in the circuit courts that dispute the rationales underlying the BIA decisions.

The EOIR should also establish internal database systems which allow individual staff attorneys at the BIA and the BIA members themselves to track the subsequent history of each decision. The same reporting should be given to individual IJs. Taking time to recognize the patterns of reversal and the remands on recommendation of the government would give the members of the EOIR concrete guidance in improving its performance.

2. Recognize the Value of Judicial Review to the Process.

Better review, both at the administrative level and in the federal courts, enhances the quality of our legal system and aids the agency officials administering the law. The dialogue generated in the review process is one of our legal system's methods of identifying problems in the law. Through judicial review, we find the areas where statutory reform is needed, where the system is being

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108. See supra note 58; see also COMM. ON FED. COURTS, ASS'N OF THE BAR OF THE CITY OF N.Y., supra note 32.
109. See Legomsky, supra note 96.
resisted by large groups of people and where justice may not be served by archaic rules or overly restrictive statutory provisions.

The ideal forum for judicial review needs to be further evaluated.\textsuperscript{110} Immigration cases perhaps should be shifted back to the federal district courts in order to spread the workload among a larger number of judges. Appeals beyond the district court level might be limited to the discretion of the deciding judge.\textsuperscript{111} Congress might alternatively authorize special panels within the courts of appeals to hear these cases after development of the administrative record. Another mechanism might be to allow consolidation of cases by a specialized tribunal to allow efficient resolution of large problems similar to a class action model.

While some in Congress have suggested a single, specialized Article III court for handling the review of EOIR decisions, specialized courts present their own problems and cannot necessarily handle the volume of cases.\textsuperscript{112} Whether such a specialized court would solve the workload issue of the federal courts deserves greater study; however, as this paper has demonstrated, it is not merely the nature of the federal court that contributes to the amount and quality of judicial review, but rather it is the interaction of the role of the court with the administrative adjudication process and the motivations of the litigants.

\textbf{B. Establish Reasonable Incentives}

\textit{1. Incentives to Comply With Immigration Laws.}

Under our current statutory scheme, "would-be immigrants" can fall into legal exiles very easily. The bars are complex and not easy to explain. Some affect those who are newly arrived, some subject even life-long residents to the threat of removal. So long as people do not naturalize, they remain subject to the grounds of deportation. As this paper has mentioned, in some cases even minor criminal conduct can subject a person to the threat of permanent removal. It is completely understandable that people who have spent the majority of their lives in the United States would resist leaving. Using our immigration laws as a form of civil punishment is a policy that deserves closer scrutiny and evaluation of the consequences not only for the person removed but for their families in the United States.\textsuperscript{113} While I could describe several of the legal exiles, I have selected

\begin{footnotes}
\item[110] Stephen Legomsky and David Martin have both written excellent papers evaluating many of these issues. See Legomsky, supra note 96; Martin, supra note 92. It is unfortunate that ACUS no longer exists for both of those papers were based on studies requested by ACUS.

\item[111] See Kroll-Rosenbaum, supra note 101; cf. 28 U.S.C. § 1292b (providing for permission to appeal an interlocutory decision).

\item[112] An example of a specialized Article III court is the Federal Court of International Trade. Others might suggest that an Article I court is sufficient; however, given the importance of the rights at stake, delegation of all removal power to the political branches would raise serious constitutional issues. See sources cited supra note 96.

\item[113] Another crucial bar is the ten-year bar that is triggered if a non-citizen fails to depart after an order of voluntary departure. There is a split in the circuit courts over whether judicial review tolls the deadline.
\end{footnotes}
the most common barrier as an illustration — the bars for unlawful presence created in 1996.

Once an individual has acquired more than 180 days of unlawful presence in the United States, he or she faces a three-year bar on returning but that bar is only triggered if he or she departs the United States. This odd incentive to remain in the United States after unlawfully entering or overstaying a lawful entry only gets worse because the penalty increases to a ten-year bar once someone has a more than one year of unlawful presence. Frequently people who initially entered the United States know nothing of these long-term consequences and it is only after they have established employment or personal relationships that would traditionally authorize immigration to the United States do they find out they are trapped in "illegal" status. While Congress initially created these bars in the 1996 legislation to create an incentive for individuals to avoid overstaying and to punish repeat illegal entry, there is no official notice of these barriers and many people fall into the trap unwittingly. Moreover, in the past Congress has authorized at least two short term waivers of the bars where individuals could acquire sponsorship and pay a substantial fine. This pattern of imposing a tough absolute limit followed by relaxing the barrier through temporary forgiveness has only increased the confusion among the immigrant communities and their legal advisors. The short term waivers were not universally available and resulted in situations where similarly situated people had dramatically different outcomes. A person who could find a sponsor before April of 2001 is forgiven illegal entry, a person who did not or who entered after April finds no forgiveness. These complex waivers, and I have not fully described the complexity of it here, create a perception among many non-citizens that they can access these exceptions if they have a clever lawyer or if they simply wait long enough for Congress to act. As this article goes to press, Congress is once again considering a range of legalization programs that might forgive past violations of status.

If Congress would more carefully tailor its use of deportation and consider more generous exceptions or waivers, it is likely that many of the people now litigating fiercely would either not be in the removal system or would have the

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Compare Ramsay v. INS, 14 F.3d 206 (4th Cir. 1994) (holding that voluntary departure period may be tolled) with Casteneda v. INS, 23 F.3d 1576 (10th Cir. 1994) (courts have no authority to extend departure period). See also Chelsea Walsh, Note: Voluntary Departure Stopping the Clock for Judicial Review, 73 FORDHAM L. REV. 2857 (2005). The First Circuit recently revisited this issue and overruled its prior holding that it had the authority to extend the departure period, perhaps signaling a trend away from tolling. Bocova v. Gonzales, 412 F.3d 257 (1st Cir. 2005). This is an important example of where an incentive to comply with a final order may not have been sufficiently developed by Congress. See also American Immigration Law Foundation’s Legal Action Center, Practice Advisory: Staying the Voluntary Departure Period When Filing a Motion to Reopen or Reconsider (Dec. 16, 2005), available at http://www.ailf.org/lac/lac_pa_121605.pdf.

114. At a minimum, the DHS might consider providing new entrants with a written warning. This warning might be incorporated in the admission documents issued to most non-citizens entering the United States.

opportunity for fair treatment at the administrative levels. When we make the forgiveness boundaries too small, people will litigate about the boundaries of the net or the box. Of course, the administration could be part of the solution of this issue immediately. The DHS is notorious, as it was when it was part of the Department of Justice, for failing to exercise prosecutorial discretion. Rather than carefully selecting which cases should be in removal proceedings, the agencies continue to prosecute all cases notwithstanding the fact that Congress has restricted the forms of discretionary relief.

In those cases where discretion is possible, where individual adjudication is necessary to determining eligibility for forgiveness, it is essential to have an adjudication system that acts with consistency and professionalism. Unfortunately, the current system does not prioritize the adjudication of even the few existing waivers after deportation, and the process is lengthy and uncertain. Predicting eligibility for forgiveness is nearly impossible. Perhaps Congress should consider delegating these discretionary decisions to a division of the DHS that resolves benefits rather than to those who enforce the removal statutes. On the other hand, restoring greater discretion to the IJs and EOIR may also increase the quantity of litigation before the agency. A way to avoid increased litigation would be to reduce the breadth and scope of the grounds of deportability rather than relying on waivers to alleviate the harshness of the removal statutes. For example, creating a statute of limitations for long-term residents would generate broad exemptions from removal grounds, eliminating the need for both litigation and reliance waivers.

2. Reduce the Incentive to Fight by Creating Forms of Relief from Removal.

When an individual is placed in removal proceedings and learns that he or she has no legal basis to remain in the United States, the obvious incentive is to evade the entire proceeding and to live underground. This is why so many of the orders are issued in absentia and one reason why the government has increased the use of detention to ensure attendance at the removal proceedings. Congress tried to counterbalance the incentive to avoid the removal hearing by providing harsh consequences for those who receive an in absentia order. If an individual possesses the skills and qualities that make him or her eligible for immigration through our employment system or have the close relatives that qualify the individual for immigration through the family system, does it make sense to subject him or her to a permanent bar upon departure, or should the bar be one that could be waived in appropriate equitable circumstances? Alternatively, the bar

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116. To prove this assertion is difficult, for there is no transparent published information available about the government processing waivers. The government websites contain only limited information and most people would need an attorney to learn about the possibility of a waiver. See infra sources cited in note 123.
might be reduced to a shorter period of penance or punishment. A ten-year bar is simply one that creates the wrong incentive. People with strong ties to this country will be unwilling to face that punishment.117 Further, if the underlying policy is to incentivize immigration law compliance, these bars have not been successful.

For those individuals who are subject to a final order not obtained in an in absentia proceeding, statutes similarly bar them from reentry for at least ten years and that bar increases to twenty years for those who have been removed at least once before.118 For those people removed due to a conviction for an aggravated felony, the bar is permanent.119 If the individual has the ability to use the legal immigration system to reenter the United States after removal through a non-immigrant or immigrant visa, the statutes authorize a very limited waiver;120 it is available only to those who obtain the consent of the Attorney General to the person's readmission.121 This waiver is actually adjudicated by a special unit of the DHS.122 An individual who wants to obtain this waiver must wait abroad for this exercise of discretion. For some, the risk that the waiver will be denied must be weighed against the incentive to prolong their presence in the United States. One possible way to increase compliance with removal orders is to limit the waiver to those who comply within a certain time period of the finality of the order of removal. Another approach might be to make the results in past waiver applications more transparent. At the current time, the decisions on the waivers are rarely reported. The major treatise in the field only reports on a handful of such cases.123 In the past, the agency has also

117. See Singh v. INS, 295 F.3d 1037, 1039–40 (9th Cir. 2002) (discussing the reasons someone would not appear and pointing out that the petitioner should not be seen as someone merely absconding); see also Lory Diana Rosenberg, Gonna Need Somebody on Your Bond: Pre-Removal Detention Under the INA, 8 BENDER'S IMMIGR. BULL. 1409 (2003).


119. Id.

120. This waiver is called the I-212 waiver after the form used to make the application.


122. The implementing regulations for this provision delegate the authority to adjudicate these waivers to "[o]fficers in charge of overseas offices." 8 C.F.R. § 207.3(a) (2006).

123. See Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, 5-63 IMMIGR. LAW & PROCEDURE §§ 63.10(4)(b) n.115. Interestingly this footnote reports only decisions where the waiver was granted. While the CIS now publishes some of the appeals of the denial of the permission to reapply, I reviewed the five posted decisions for the year 2004 and all of the cases concerned appeals that sustained the denial of the waiver. I then reviewed several years' worth of posted decisions and found only one remand. I recently came across one unpublished, redacted opinion from December 5, 2005, where an appeal was sustained and an application to reapply was granted. There, an IJ had failed to take into account a Fifth Circuit finding that a DWI conviction failed to serve as an aggravated felony. The IJ had relied solely on the conviction and failed to weigh the applicant's seventeen-year marriage to a U.S. citizen and his eleven-year legal residency in the United States without so much as a speeding ticket. It is unclear why the librarians who are responsible for the postings did not post any cases where the decision to deny a waiver was reversed but the absence of reversals suggests that it is difficult for members of the
used a preapproval mechanism to allow certain people to depart with the approved waiver already issued.\textsuperscript{124}

I must acknowledge that forms of relief also create incentives to litigate. The statistical analysis prepared by John Palmer, Elizabeth Cronin and Stephen Yale-Loehr indicates that a very significant percentage of the cases currently pending in the Second Circuit Court of Appeals are petitions seeking review of a denial of asylum.\textsuperscript{125} This evidence at first blush appears to suggest that the availability of this relief leads to litigation, and that if there was not such relief available, these cases would not be in court. It is hard to generalize about which forms of relief will mitigate or increase litigation workloads. Providing reasonable and realistic opportunities for a person who has been found deportable to legally immigrate in the future will create an incentive for that person to “step in line” with the administrative procedures and stop litigating about the boundaries.

3. \textit{Understand Judicial Stays of Removal and the Effect of Removal.}

It is not uncommon for opponents of judicial review to argue that non-citizens only seek judicial review of an order of removal in an effort to delay or frustrate execution of the order. Congress addressed this concern in the 1996 legislative reforms when it removed the automatic stay provisions that accompanied petitions for review and shortened the time period for seeking review from six months to thirty days.\textsuperscript{126} Previously, the statute had created an automatic stay of removal upon the filing of a petition for review and further, the statute expressly stated that removal would cancel jurisdiction.\textsuperscript{127} Today, filing a petition for review does not automatically generate a stay of removal. A review of

\textsuperscript{124} See Gordon, Mailman, Yale-Loehr, \textit{supra} note 123, at § 74.03 (discussing the defunct process of advanced arrangements for immigrant visas by aliens present in the United States).

\textsuperscript{125} Palmer, et al., \textit{supra} note 19.

\textsuperscript{126} INA \textsection 242(b)(1), 8 U.S.C. \textsection 1252(B)(1) (2000). The statute does not expressly state that jurisdiction continues after removal but that is the implicit result based on the repeal of the prior statutory provision that terminated jurisdiction. A number of courts have addressed this specific issue. \textit{See}, \textit{e.g.}, Rife v. Ashcroft, 374 F.3d 606, 615 (8th Cir. 2004) (explaining that “an alien’s removal does not moot his or her petition for judicial review”); U.S. v. Garcia-Echavarria, 374 F.3d 440, 447 (6th Cir. 2004) (explaining that “an alien’s removal while his petition for review is pending neither deprives the court of appeals of jurisdiction over that petition nor does it necessarily render moot the claims in that petition”).

\textsuperscript{127} INA \textsection 106(a)(3), 8 U.S.C. \textsection 1105a(a)(3) (1994) (repealed by Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, Title III, \textsection 306(b), 110 Stat. 3009-612 (1996)). There were a few exceptions to the rule that removal ended the court’s jurisdiction. For example, the Ninth Circuit Court of Appeals had ruled that the government must bring respondents back to the United States if their removal was in violation of a stay order or achieved in a manner that denied the respondent an opportunity to appeal. Mendez v. INS, 563 F.2d 956, 958 (9th Cir. 1977).
the practice in the circuits indicates that by and large the courts of appeals do grant stays when the petitioner makes a proper showing.\textsuperscript{128} If it is true that a stay of removal is a primary incentive to seek review, Congress and the courts could address the issue of the stay more directly. For example, the courts might require that the application for a stay clearly articulate the legal errors and an argument of why the respondent is likely to prevail. Some blanket lines might be drawn, such as stays would be available only to those people who are contesting removability itself or have sought a form of relief other than voluntary departure.

Currently, the BIA regulations use the opposite approach. Once the individual has departed the country or has been removed by the government, the BIA holds that its jurisdiction ends. Those respondents who wish to file a motion to reopen because new relief has become available or a motion to reconsider based on a change in the law must seek judicial review in an effort to preserve their ability to pursue these administrative remedies. In general, these motions are to be filed within ninety days of the final order.\textsuperscript{129} A change in the BIA regulations allowing motions to reopen and reconsider to be heard within a reasonable period of time after removal would decrease the incentive to seek judicial review solely as a method of delaying removal. The appeal of the motion to reopen/reconsider could be combined with the appeal of the underlying order of removal.\textsuperscript{130}

\textsuperscript{128} In a study of the practice in the Second Circuit Court of Appeals, the government took the position that no removal order would be processed when the petition for review was pending. This step was apparently taken to reduce the burden on the government attorneys handling the stay requests. While this is an understandable position of the government, it does of course create an incentive by the litigants to file a petition for review knowing that it will in essence produce the effect of a formal stay. \textit{See} \textit{COMM. ON FED. COURTS, ASS’N OF THE BAR OF THE CITY OF N.Y., supra} note 32, at 11.

\textsuperscript{129} 8 C.F.R. § 1003.23. There are a few necessary exceptions to this time limit such as setting aside an \textit{in absentia} order where the respondent did not receive notice of the removal proceeding. There is no time limit where the person did not receive notice as that would create a due process violation. \textit{See} \textit{Andia v. Ashcroft}, 359 F.3d 1181 (9th Cir. 2004). There is also an exception to the strict time limit if the government joins in the motion. 8 C.F.R. § 1003.23(b)(4)(iv). The period is extended to 180 days where the respondent can establish exceptional circumstances, 8 C.F.R. § 1003.23(b)(4)(ii). There is no systematic reporting of when the government will join in a joint motion to reopen but the anecdotal evidence — based on interviews with trial attorneys and reading postings on attorney list-servs discussing the criteria judges use to grant such motions — is that the government attorneys will sometimes join these motions where an individual has become eligible for legal immigration, usually because of marriage to a U.S. citizen, and is not otherwise removable as a person convicted of a crime.

\textsuperscript{130} The current statute ineffectually suggests that appeals from motions to reopen/reconsider should be combined with the underlying review of the final order of removal but in reality the timing required to complete administrative review of the motion to reopen or reconsider does not allow for combining judicial review of both aspects of the case. \textit{See} \textit{INA} § 242(d), 8 U.S.C. § 1252(d). While the current regulations require a motion to reopen within 180 days of the final order, the government should consider extending this period to one year or more given the costs and disruptions of removal and the increased complexity of preparing such a request from abroad. Moreover, any time limit should have exceptions where the respondent can demonstrate country conditions that frustrated or prevented the application. \textit{See} \textit{Stone v. INS}, 514 U.S. 386, 394 (1995) (holding that filing a motion to reopen or reconsider does not toll original time period to seek petition for review); \textit{Patel v. Ashcroft}, 123 F. App’x 72, 74 (3d Cir. 2005) (explaining
Another question that arises as a result of actual removal is what is the remedy if the respondent actually prevails in his or her appeal? Does the U.S. government bear the costs of returning the individual to the U.S.? There are no statutory or regulatory provisions addressing this issue. Certainly attorneys counseling clients about the consequences of removal cannot promise their clients that the government will issue documents necessary for their return. If our goal is to create incentives to comply with removal orders, we need to address this great area of uncertainty and give statutory rights and methods of enforcement where the government has erroneously removed an individual. The government is also notoriously slow in issuing a variety of travel documents. Ideally, the statute would specify a period when the government must issue these documents and provide authority to the Department of Homeland Security to issue a travel document if the Department of Homeland Security has failed to act within the deadline.

C. Study the Dynamics in the System

I have argued that the workload of the federal courts is not directly in the control of Congress or of any single participant in the adjudication system. Still, Congress and the federal courts are undoubtedly motivated to do something about a category of cases that are coming to dominate the federal docket. Congress cannot really begin to address the issues until it acquires more information. Congress and the agencies both should recruit excellent “cartographers” and “ethnologists.” We need people to study the context of the problems and to reflect on the incentives of varied participants. For example, the Office of Immigration Litigation (“OIL”) is a very skilled group of attorneys within the Civil Division of the Department of Justice (“DOJ”) responsible for the primary defense of the BIA in federal court. While these attorneys have a wealth of information about the types of cases being litigated and the decisions of the BIA, they may not be open minded to a proposal that opposes centralization of judicial review.

Based in Washington, D.C., OIL may view the most efficient solution as a single federal court situated in the District of Columbia. Attorneys representing the non-citizens in proceedings may prefer the existing standards for the issuance of stays of removal rather than a system which enforces final orders more rapidly but preserves judicial review. The goals and values of the EOIR and the agency enforcing the removal orders also need to be carefully evaluated before accepting assertions that

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132. There is also a special civil division located within the U.S. Attorneys Office for the Southern District of New York. To my knowledge this is the only office outside of Washington D.C that has a group dedicated to immigration litigation. As of May 2006, OIL was asserting main responsibility for these cases. The workload of OIL has grown so rapidly that Assistant U.S. Attorneys all over the country have been assigned to immigration appeals. Interview with Patricia Buchanan, AUSA, S.D.N.Y. (April 2006).
existing procedures are sufficient or adequately protect individualized decision-making.

There are many serious empirical questions. Does the bifurcated agency divided between DHS and DOJ contribute to the administrative efficiencies? In what way? ICE Attorneys are separate from the DOJ and housed within the DHS. Is this the most efficient structure? If the DOJ attorneys in OIL ultimately must defend the administration in the federal courts, are the lessons learned in the litigation communicated through the channels of OIL to the attorneys within ICE? To develop the proper culture of prosecutorial discretion, coordination of prosecutorial priorities is essential.

In what way is the behavior of the immigration bar driving the increase in the workload? Are too many appeals frivolous? Do the current statutory prohibitions on frivolous appeals mean that the agency and the courts are reluctant to ever label an appeal frivolous because the sanction to the non-citizen is a permanent bar on relief under the immigration laws? In conducting my research for this article I learned that at least one attorney has been sanctioned for his failure to file briefs and for failure to adequately prepare the appellate briefs. While it is time-consuming for the circuit courts of appeal to bring such sanctions, it does seem like the wiser approach to deter the behavior of attorneys who may be inadequately representing the non-citizens or may be inappropriately filing petitions for review that have no reasonable basis in law. Certainly, the approach of sanctioning attorneys who abuse this system is preferable to blanket rules that try to constrain advocacy for an entire class of cases or that sanction the non-citizen asylum applicant who may not even be aware of the nature of his or her counsel’s behavior.

Similarly, the courts might more frequently consider an award of fees under the Equal Access to Justice Act. This Act authorizes attorney’s fees where the government’s position was not reasonably supported and the petitioner prevailed.

While Congress might assign some of the study to the Government Accountability Office or convene a select committee or an independent commission, there are other institutional actors who can assist in evaluating these issues. For example, the Federal Judicial Center’s Research Division provides studies on the trends in federal judicial case management as well as training and education for

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133. If the agency or court finds a claim frivolous it can bar the non-citizen from all future relief under the immigration laws. INA § 208(d)(6) renders a noncitizen who “has knowingly made a frivolous application for asylum,” and who has received proper notice, “permanently ineligible for any benefits” under the INA. INA § 208(d)(6), 8 U.S.C. § 1158(d)(6).

134. After a hearing, the Second Circuit assigned a Special Master to monitor the conduct of the attorney. See Court of Appeals Docket No. 03-4640 (2d Cir. 2005).

attorneys in complex practices. The ABA commissioned study conducted by Dorsey & Whitney, LLP demonstrates the type of study that can be completed on complex issues of immigration law. Private research institutions reflecting a range of political opinions such as the Migration Policy Institute, the Brookings and Cato Institutes, the RAND Corporation, the Institute for Policy Studies, Center for Migration Studies, the American Immigration Lawyers Foundation’s Immigration Policy Center and the National Center for Policy Analysis, conduct independent studies that focus on many of these issues. The issues are too great and too complex to be allowed to legislate in a vacuum.

VII. CONCLUSION

This article has suggested that the empirical reality of the congressional attempts to reduce federal court review of administrative immigration orders combined with the judicial and administrative response to congressional pressure have perversely increased the amount and complexity of judicial review. The real goal of this essay is not to prove an empirical assertion but rather to capture the dynamic of our governmental adjudication of immigration cases.

Immigration cases are fundamentally about people. Law can attempt to control and limit the behavior of people but where those laws are disconnected from the reality of people’s lives or where the law devalues the ties people have in the United States, any attempt to “control” people via the mechanism of immigration law is frankly, a doomed mission. People are not paper, easily manipulated, folded and reduced for convenience.

If Congress truly wants to achieve an efficient and cost effective mechanism to decide who remains and who should be removed, it must first acknowledge that summary solutions, sweeping categories and blanket denials will not achieve their goal. Reforms that acknowledge this and create incentives for individual non-citizens and their counsel to cooperate will help reduce the workload of the adjudication system. Reforms that people recognize as comporting with fairness will help courts and the agencies enforce against those who have neither insufficient equities nor serious legal claims.

The hard work for the legislative branch should be the designing of a system of incentives and tailored justice — justice that is designed to ensure individual treatment rather than a system which is so rigid that inequalities abound. Admit-

136. For a list of some of the current studies maintained by the Federal Judicial Center see http://www.fjc.gov/library/fjc_catalog.nsf. Shortly before this article went to press, the Senate passed S. 2611, which, in § 707, requires the Comptroller General of the GAO to study the appellate process for immigration appeals. The bill requires that the Comptroller General consider consolidating all BIA appeals and habeas corpus petitions in immigration cases into one U.S. Court of Appeals. Comprehensive Immigration Reform Act, S. 2611, 109th Cong. § 707 (2006).

137. See DORSEY & WHITNEY, LLP, supra note 19.

tedly, Congress usually focuses on the goal of immigration enforcement. Our system of government should be responsive enough to the concerns of sophisticated interested parties to be able to fashion a system that will respond to these concerns, yet remain flexible enough to respond to the changes necessitated by manipulation or government inefficiency. The immigration adjudication system must have the ability to respond to varied levels of agency enforcement, respond to patterns in international affairs, and acknowledge the differences in the claims of those only recently arrived and those who have spent most of their lives in the United States. The system should construct a mechanism for adapting to patterns of abuse and allow for government mechanisms to fairly respond to those abusers. Congress should spend its energy on this goal rather than spend millions on litigating the illusion of a solution through court stripping. If only the agencies would stop treating the people in the system as just so much paper to move forward. Put down your shears and paper. Recognize the humans in the “aliens” — they are not and cannot be merely paper dolls.