2006

Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar

Erick Rivero

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol34/iss4/7

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
NOTE

ASYLUM AND ORAL ARGUMENT: THE JUDICIARY IN IMMIGRATION AND THE SECOND CIRCUIT NON-ARGUMENT CALENDAR

However, in the steady beat of progress, which in some of its forms greatly aids appellate courts in the performance of their duties, it is of some concern that certain procedures and values, developed over time, not be sacrificed on the altar of efficiency.¹

I. INTRODUCTION

Saidou Dia, a native of the Republic of Guinea, and Marwan Youssef Albathani, a Lebanese national, have likely never met. Both men were born in their native countries in the 1970s, both men were politically active in their native countries, and the lives of both of these men have sourced a major turning point in United States asylum law.

In 1998, Dia joined the Rassemblement du Peuple de Guinee ("Rally of the People of Guinea" or "RPG") a nationalist movement opposed to the government in power at the time in his home country.² In November 2000, a leader in his village approached him, seeking his membership in the military to fight Liberian and Sierra Leonean dissenters in Guinea.³ Only three years earlier, this military killed Dia’s father. Fearing a fate in his father’s footsteps, Dia refused to associate himself with this military. Because the leaders of his village associated the RPG with the foreign rebels, they viewed his refusal to join the military as tantamount to a refusal to help his own government. Unsure of how to remedy the conflict with the village leaders, Dia left his

². Dia v. Ashcroft, 353 F.3d 228, 245 (3d Cir. 2003) (en banc). A prominent goal of the RPG at the time was the release from prison of Alpha Conde, the leader of the RPG, a parliament member and a former presidential candidate. Id.
³. Id. at 246.
village to seek the advice of an elder in another village. In his absence, twenty-five members of the military questioned his wife, beat her, raped her and set fire to his home. Fearing for his life, Dia left Guinea for the United States.

Similarly, in 1999, Albathani fled Lebanon and sought entry into the United States. A Maronite Christian, his life in Lebanon was marked by over a decade of civil war—a political power struggle between the Christian Lebanese Forces (“CLF”) and the Shia Muslim Hezbollah. As the CLF began to dissolve in 1995, the Hezbollah set out to occupy the CLF territories. In 1996, while driving home, Albathani was stopped by a Hezbollah gang, his car was stolen, and he was blindfolded and beaten unconscious. Apprehensive of another beating, he did not leave his house for two years. Finally, in 1998, he traveled with his brother to his parents’ home in Syria. Upon returning to Lebanon, the Hezbollah again stopped him, and again his car was stolen and he was beaten unconscious. He regained consciousness two weeks later—waking up in a hospital. Fearing further violence by the Hezbollah, Albathani fled Lebanon.

The consequences of immigration proceedings are uniquely significant. Removal proceedings are especially weighty because “[t]he alien’s stake in the proceeding is enormous (sometimes life or death in the asylum context).” Because of the gravity of determinations made in asylum proceedings, the system of adjudication must be one that is both procedurally fair and substantively protective of the lives that are at stake. To ensure fairness in the asylum scheme, the available system of appellate review must be designed to correct the errors in the proceedings below through a process that is meaningful. The effectiveness of the current system’s ability to insulate the rights of non-citizens is, as will be demonstrated, volatile at best.

This Note will assess the adequacy of the Non-Argument Calendar instituted by the United States Court of Appeals for the Second Circuit for petitions for review of denied asylum petitions. Part II will begin by reviewing the current state of asylum law in the United States as shaped by the significant statutory enactments and promulgated rules and

4. Id.
5. See id. at 246-47.
6. Albathani v. INS, 318 F.3d 365, 367 (1st Cir. 2003).
7. Id. at 368.
8. See id. at 370.
9. Id.
10. Id.
regulations of the last decade. Part III of this Note will detail the initial judicial acceptance of summary affirmance without opinion procedures of the Board of Immigration Appeals, and Part IV will present the subsequent judicial scrutiny thereof. Part V will then set out the motivations and the mechanics of the Non-Argument Calendar of the Second Circuit. Relevant to an analysis of the Non-Argument Calendar will be a discussion of the unique roles of the United States Courts of Appeals within the framework of the federal judiciary, the significance of oral argument in appellate practice and the Second Circuit’s historical and traditional position as advocate of oral argument. Part VI will continue by outlining the inadequacy of the Non-Argument Calendar within these parameters. Part VII then suggests a more judicially active role for the Second Circuit as both an exercise of its duties and a remedy to the greater asylum scheme.

II. A BEGINNING OF SORTS

On the heels of the one-year anniversary of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Congress made fledgling efforts to fortify the power of the Immigration and Naturalization Service ("INS") and effectively limited the scope of judicial review of actions in the immigration agencies. Congress significantly restructured the immigration terrain by enacting the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Prior to these enactments, Article III courts were granted statutory jurisdiction to review the actions of the INS under section 106 of the Immigration Nationality Act ("INA"). While the AEDPA amended section 106 subject matter jurisdiction, abrogating judicial review of removal orders issued pursuant to a conviction for an aggravated felony, it did not affect judicial review of denied asylum applications.

Congress subsequently repealed section 106 jurisdiction entirely through the IIRIRA.\textsuperscript{17} Asylum claims, by an express exception in the statute, were the sole exemption to this jurisdiction-stripping.\textsuperscript{18} However, IIRIRA provided more stringent asylum eligibility requirements, the bulk of which the courts lacked jurisdiction to review. Under subsection (2)(A), an alien is ineligible for asylum if it is determined that the alien "may be removed, pursuant to a bilateral or multilateral agreement, to a country... in which the alien’s life or freedom would not be threatened..."\textsuperscript{19} Subsection (2)(B) requires that an application for asylum be filed within one year of the aliens’ arrival in the United States.\textsuperscript{20} An alien whose previous asylum application was denied cannot qualify for refugee status.\textsuperscript{21} Prior to 2005, the federal district courts received petitions for habeas corpus from immigration proceedings, while the circuit courts received petitions for review.\textsuperscript{22} In 2005, Congress enacted the REAL ID Act, which stripped the district courts of their habeas power and established the court of appeals as the sole court with jurisdiction to review claims originating in immigration proceedings.\textsuperscript{23}

\textbf{A. The Asylum Process}

Under INA section 208, the Attorney General may grant asylum to an alien who qualifies as a refugee under INA section 101(a)(42).\textsuperscript{24} Under the INA, a refugee is one:

\begin{quote}
[W]ho is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...
\end{quote}

\begin{thebibliography}{9}
\bibitem{footnote18} § 1252(a)(2)(B)(ii).
\bibitem{footnote19} § 1158(a)(2)(A).
\bibitem{footnote20} § 1158(a)(2)(B).
\bibitem{footnote21} § 1158(a)(2)(C).
\bibitem{footnote22} Disagreements regarding habeas jurisdiction in the wake of the 1996 legislations were settled by the Supreme Court in \textit{INS v. St. Cyr}, 533 U.S. 289 (2001).
\end{thebibliography}
An alien, if credible, can meet the burden of a well-founded fear of persecution by testimony alone. Credibility determinations are within the ambit of an immigration judge's ("IJ") discretion. An alien can thus present the IJ with either "[s]pecific, detailed, and credible testimony, or a combination of detailed testimony and corroborative background evidence . . . necessary to prove a case for asylum." In making an adverse credibility finding, the IJ must provide "specific, cogent" reasons for the finding and those reasons must "bear a legitimate nexus to the finding." If an alien is dissatisfied with the disposition of his or her application in the IJ proceeding, he or she may then seek review of an adverse judgment with the Board of Immigration Appeals ("BIA" or "Board").

B. The Board of Immigration Appeals

The BIA is an agency under the direction of the Attorney General that serves as the avenue of administrative exhaustion, acting as an appellate body with a model similar to that of federal circuit courts. In 1999, faced with a growing backlog of pending cases, the BIA "instituted a mechanism for streamlining cases." The process allows cases formerly heard by three-member panels to be heard by a single panel member and disposed of by summary affirmance without opinion ("AWO"). Initiated as a pilot procedure in 1999, the AWO was expanded to encompass the majority of BIA adjudications by final rule in 2001. A single board member reviewing a denied asylum claim is required to affirm without opinion if he or she:

26. See 8 C.F.R. § 208.13(a).
28. Aguilera-Cota v. INS, 914 F.2d 1375, 1381 (9th Cir. 1990); accord Xia J. Lin v. Ashcroft, 385 F.3d 748, 751 (7th Cir. 2004) (requiring, in the same language, the same rationale of the IJ); Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003) (requiring the same standard from the IJ).
29. See 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999) (codified at 8 C.F.R. pt. 3). The reviewing bodies were panels consisting of three Board members. See id.
30. See 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3). In 1992, the BIA reported a 91.5 percent disposition rate (11,720 matters disposed, 12,823 matters received) while in 1997 the BIA reported a 77.2 percent disposition rate (23,099 matters disposed, 29,913 matters received). See id. at 54,878. By 2001 the pending caseload in the BIA was at 57,597 cases. Id.
31. 64 Fed. Reg. at 56,136-137.
[D]etermines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or non-material; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.33

Upon the finding of an appeal as subject to AWO, the Board will issue the following order: “The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.”34

III. UPHOLDING THE BIA PROCEDURES

The ensuing litigation challenged the validity of these streamlining procedures on a myriad of grounds. Pertinent to the discourse of this Note are the challenges to the AWO as violative of due process of the law in the United States Court of Appeals for the Second Circuit. Because the Second Circuit did not test the validity of the AWO until 2004—three years after the BIA final rule—the Second Circuit’s reasoning must be understood within the analytical framework set forth in the similar corollary determinations of its sister circuits.

A. The Second Circuit

Yu Sheng Zhang, a native of China, fled his home country in 1993 and sought asylum in the United States based on his fear of China’s one-child birth control policy.35 The IJ found Zhang’s testimony incredible and denied his application. The BIA affirmed the IJ’s decision through the AWO. Zhang raised a due process challenge of the AWO in the Second Circuit.36

In reviewing Zhang’s petition, the Second Circuit rejected the due process arguments.37 It adopted the First Circuit’s analysis in Albathani v. INS,38 with its preliminary observation “that an alien’s right to an

33. Id. § 1003.1(e)(4)(i)(A)-(B).
34. Id. § 1003.1(e)(4)(ii) (citation omitted).
35. See Yu Sheng Zhang v. U.S. Dep’t of Justice, 362 F.3d 155, 156 (2d Cir. 2004).
36. See id.
37. Id. at 156-57.
38. 318 F.3d 365 (1st Cir. 2003).
administrative appeal from an adverse asylum decision derives from statute rather than from the Constitution." The court then recognized that the BIA may dictate the rules through which it will discharge its duty and that the AWO was not unconstitutional, not contrary to the INA and administratively sound.

The court’s focus then shifted to its own ability to administer meaningful review. Significantly, the Second Circuit stated that its conclusion that the AWO is valid was “supported by the fact that the challenged procedures are followed by further appellate process, namely, judicial review . . . ” The court cited the Eleventh Circuit’s opinion in *Mendoza v. U.S. Attorney General*, noting that the threat to meaningful review is obviated by the existence of the IJ decision upon which the courts can review the proceedings. The Second Circuit then observed that the AWO survived the three-part test for due process under *Mathews v. Eldridge*. In adjudicating a due process challenge a court must consider:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,
3. the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Second Circuit joined the Sixth and Ninth Circuits in their determinations that the risk of erroneous deprivation was ameliorated “in light of the hearing process that precedes [the BIA proceedings] and the judicial review that follows.” Between 2001 and 2004, similar due process challenges were brought in each of its sister circuits and each respective petitioner was denied relief. The Second Circuit’s holding came at the heels of these decisions.

39. *Zhang*, 362 F.3d at 157 (citing *Dia v. Ashcroft*, 353 F.3d 228, 242 (3d Cir. 2003) (en banc) and *Albathani*, 318 F.3d at 376).
40. *See id.* at 157-58.
41. *Id.* at 158 (emphasis added).
42. 327 F.3d 1283 (11th Cir. 2003).
43. *See Zhang*, 362 F.3d at 158 (citing *Mendoza*, 327 F.3d at 1289).
44. 424 U.S. 319 (1976).
46. *Zhang*, 362 F.3d at 159 (citing *Denko v. INS*, 351 F.3d 717 (6th Cir. 2003) and *Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003)).
47. *See Hang Kanna Yuk v. Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Loulou v. Ashcroft*, 354 F.3d 706 (8th Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Denko*, 351
B. The First Circuit: Returning to Albathani’s Story

In 1999, the first federal due process challenge of the AWO came before the First Circuit. After arriving in the United States, Marwan Albathani, introduced in the opening of this Note, was placed into immigration proceedings. The IJ denied Albathani’s asylum application, finding him incredible. The BIA affirmed the IJ’s decision through its AWO procedure.48 The foundations of Albathani’s claim were that in affirming without opinion, the BIA did not provide a reasoned basis upon which the courts may review, and that the courts were deprived of any process by which to “police the BIA to see that it is actually doing its job according to the regulations it has promulgated.”49

The court rejected Albathani’s first argument and held that the BIA streamlining did not deprive the court of a basis upon which it could conduct its review.50 The First Circuit predicated its analysis on the critical fact that “[a]n alien has no constitutional right to any administrative appeal at all.”51 The right to an administrative appeal is contingent on the rules promulgated by the agency creating those appellate procedures.52 That is, though the alien does not have a constitutional right to an administrative appeal, he has a statutory right to such appeal. Since “administrative agencies should be free to fashion their own rules of procedure,” the BIA had the authority to promulgate the AWO.53 The regulation itself states that the decision of the IJ would be the basis for judicial review in the case of an AWO disposition.54 Further, the court recognized that the AWO procedure is an affirmation of result alone.55 The BIA may reject the reasoning of the IJ but still affirm without providing the alternative basis for the determination.56 Although the court agreed that the AWO scheme created problems, it

48. See Albathani, 318 F.3d at 376.
49. Id. at 377. Albathani claimed that the AWO procedure violated the basic tenet of administrative law that “administrative action is to be tested by the basis upon which it purports to rest.” Id. (quoting SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1946)).
50. See Albathani, 318 F.3d at 379.
51. Id. at 376 (citing Guentchev v. INS, 77 F.3d 1036, 1037 (7th Cir. 1996)).
52. See Albathani, 318 F.3d at 376.
54. See id. at 377 (holding that “Chenery does not require that this statement come from the BIA rather than the IJ”); 8 C.F.R. § 1003.1(e)(4)(i).
55. See Albathani, 318 F.3d at 377.
56. 8 C.F.R. § 1003.1(e)(4)(i).
concluded that these problems did "not render the scheme a violation of due process or render judicial review impossible" or "violate any statute." 57

The court then rejected Albathani's argument that the AWO was indicative of the BIA's failure to perform its essential review function. Curiously, this section of the opinion begins by emphasizing the dire consequences of asylum decisions. 58 The opinion then recognizes a statistic introduced by amici that "the Board member who denied Albathani's appeal is recorded as having decided over 50 cases on October 31, 2002, a rate of one every ten minutes over the course of a nine-hour day." 59 The court then reasoned, based on its own experience in reviewing Albathani's petition, that ten minutes was not a sufficient time span within which the record could be reviewed. 60 Nevertheless, the court remained reluctant to further inquire into the adequacy of the AWO, assuring that any failure of the BIA to discharge its duties resulted in only harmless error since the court itself could infer from the record a reasonable basis for denial. 61 The court stated that it would take on this line of questioning only upon the presentation of "evidence of a systemic violation by the BIA of its regulations." 62

C. The Third Circuit: Dia's Story Continued

Having successfully departed Guinea, in 2001, Saidou Dia was served with a notice to appear for illegal entry into the United States. 63 The IJ found Dia's testimony incredible and denied relief. The BIA affirmed the IJ's determination through the AWO procedure. Dia then filed a petition for review in the Third Circuit, 64 arguing that the AWO violated his right to due process in removal proceedings under the Fifth Amendment. 65 The court, construing Dia's argument as a facial challenge of the BIA streamlining procedures, rejected Dia's position. 66

57. Albathani, 318 F.3d at 377.
58. See id. at 378.
60. Id.
61. See id.
62. Id. The court would then be inclined to consider "the INS's claim that the decision to streamline an immigration appeal is not reviewable by the courts because these are matters committed to agency discretion." Id.
63. See Dia v. Ashcroft, 353 F.3d 228, 233 (3d Cir. 2003) (en banc).
64. Id. at 234.
65. Id.
66. Id. at 238 & n.6.
Like the First Circuit, the Third Circuit began with the premise that the Constitution does not guarantee non-citizens a right to due process per se, but rather guarantees due process within the scope defined by Congress. The court’s primary concern rested in determining whether the AWO procedure “fits with the notion that ‘[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner’” in the spirit of Mathews. Dia grounded his argument on the Third Circuit’s decision in Abdulai v. Ashcroft, adjudicated two years earlier, which enumerated an alien’s due process entitlements in the context of immigration proceedings. The Abdulai court, adopting language of the Tenth Circuit, set out three requirements for a procedure to hold muster under a due process challenge. “An alien: (1) is entitled to ‘factfinding based on a record produced before the decisionmaker and disclosed to’ him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to ‘an individualized determination of his [or her] interests.’”

Dia argued that the AWO denied him the requisite “individualized determination” under Abdulai. The Third Circuit distinguished Dia’s case from Abdulai’s, finding that in Abdulai the BIA actually issued an opinion, the adequacy of which was the heart of Abdulai’s argument. The court pointed to the analytical difference between reviewing a brief, unsupported opinion by the BIA and reviewing an AWO order adopting the decision of the IJ. The Dia court ostensibly concluded that the Abdulai requirements are reserved for “situation[s] in which the BIA ha[s] chosen to speak.” The court did not address the application of the Abdulai requirements when, through the AWO, it was required to review IJ decisions as final agency determinations.

Dia next argued that the AWO deprived him of a right to “meaningful review” under Mathews. The Third Circuit found this argument unpersuasive since Mathews meaningfulness pertains to the time of review and the manner of review by the judiciary, not the


68. See Dia, 353 F.3d at 239 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

69. 239 F.3d 542 (3d Cir. 2001).

70. See Dia, 353 F.3d at 239.

71. Id. at 239 (quoting de la Llana-Castellon v. INS, 16 F.3d 1093, 1096 (10th Cir. 1994)).

72. Id.

73. Id. at 240.
meaningfulness of review by an administrative body as advocated by Dia. The court continued, stating that "any recognized right to meaningful review ... has been confined to the context of review by federal courts, and not extended to review by an administrative appellate body." Dia further argued that the AWO violated the fairness requirement of due process. While the Supreme Court has clearly dichotomized the applied standards of fairness between a citizen and a non-citizen, with a higher level of protection afforded to citizens, it has recognized some minimum of constitutional fairness for non-citizens. The Third Circuit, in accord with the Seventh Circuit, agreed that the fairness requirement is satisfied by a full and fair opportunity to be heard by the IJ, an opportunity for review with the BIA and an opportunity for review by the court of appeals. The court concluded that a procedure less desirable to the petitioner does not necessitate a finding that the procedure is unfair.

D. The Ninth Circuit

In the same vein, the Ninth Circuit upheld the AWO when the petitions of Gerardo, Theresa and Christian Falcon Carriche came before it in 2003. In the proceedings before the IJ, petitioners sought discretionary relief in the form of cancellation of removal. The IJ denied relief and petitioners appealed to the BIA. The BIA affirmed without opinion and petitioners sought review in the Ninth Circuit.

The Carriches argued that the AWO deprived them of due process under the Fifth Amendment. The Ninth Circuit, adopting Althani, rejected the argument. It began by finding that a constitutional basis for

74. Id. at 241-42.
75. Id. at 242 (internal quotations omitted).
76. See id. at 243 (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945)).
78. Dia, 353 F.3d at 243. The Seventh Circuit determined that "[t]he combination of a reasoned decision by an administrative law judge plus review in a United States Court of Appeals satisfies constitutional requirements." Guentchev v. INS, 77 F.3d 1036, 1038 (7th Cir. 1996).
79. See Dia, 353 F.3d at 243-44.
80. See Falcon Carriche v. Ashcroft, 350 F.3d 845, 848 (9th Cir. 2003).
81. See id.
82. See id. at 850.
an administrative appeal does not exist. Especially pertinent to the
court's reasoning was the "full hearing before the IJ, a detailed and
reasoned opinion from the IJ, the opportunity to present their arguments
to the BIA, and a decision from a member of the BIA." The court
further reasoned that three-member review in the BIA is not the type of
procedural safeguard intended by the Fifth Amendment—review by a
single member satisfies due process so long as that single member
conducted herself to provide the "required review." The Carriches then argued that the AWO failed the Mathews due
process test. In examining the erroneous deprivation prong, the court
stated that the existence of an additional level of review at the federal
circuit court level mitigates the possibility that an alien will be
erroneously deprived of his rights. The court also pointed to the third
prong of the Mathews test—the government's interest in the scheme.
The AWO was designed to clear the backlog of immigration matters in
the BIA. This burden was not insubstantial and the scheme indeed
furthered this goal.

The Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have
all similarly adopted the Albathani analysis, rejecting due process
challenges to the AWO. Part IV of this Note will argue that the
challenges are now ripe for reconsideration.

IV. REEVALUATING THE AWO

While each of the United States Courts of Appeals have upheld the
validity of the AWO, the judges have also expressed a deep-set concern
regarding the propriety of the AWO in light of the actions and behaviors
of the adjudicating members of the BIA and the inadequacy of IJ
proceedings. In evaluating the constitutionality and fairness of the
AWO, the courts have not accepted it with open arms as a model of
procedural integrity. In fact, the opinions concerning the AWO have
excoriated members of the BIA, criticized the AWO and pointed to the
aspects of the AWO that could evolve into the species of rights-
impairment for which the courts may grant relief. The Courts of Appeals

83. Id.
84. Id.
85. Id. at 851.
86. Id. at 852.
87. Id. "In fact, the streamlining regulations have proven effective at reducing the BIA's
backlog and the cost of administrative appeals." Id. (citing 67 Fed. Reg. at 54,879 (Aug. 26, 2002))
(emphasis added).
88. See supra note 47.
have focused on two aspects of adjudication particularly: the competence of administration and the bias of the administrative officials.

In a recent Seventh Circuit opinion, Judge Richard Posner highlighted the severe criticisms given by his colleagues, targeting the competence of the BIA and the IJ. In *Ssali v. Gonzales*, the petitioner sought asylum to escape political persecution in his native Uganda. The BIA decision erroneously identified Ssali's home as eastern Uganda, when in fact Ssali was from southern Uganda. The court stated that "[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case and deprives its ruling of a rational basis." Another Seventh Circuit panel berated the IJ's decision as "so inadequate as to raise questions of adjudicative competence" and the conduct of the BIA was so aberrant that "[t]he elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." Seventh Circuit opinions have further scolded that the IJ's unexplained statements are "hard to take seriously," that "[t]here is a gaping hole in the reasoning of the board," and that "[t]he procedure . . . employed in this case is an affront to [petitioner]'s right to be heard." Moreover, Judge Posner presents an astonishing statistic:

In the year ending [September 23, 2005], different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent.

These statistics underlie the court's conclusion that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."
The Seventh Circuit is not alone in administering sharp attacks on the administrative bodies. The Third Circuit has joined the fray, attacking both IJ behavior and IJ bias. In *Wang v. Attorney General*, the court found itself "sorely disappointed" that "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding." The court's disappointment was further reflected in its statement that "the IJ's opinion in this case was highly improper for both its contemptuous tone and its consideration of personal issues irrelevant to the merits of Wang's asylum claim."

The Third Circuit's disdain for IJ conduct again came to a head in another 2005 decision. Prior to entering the United States, Lorraine Fiadjoe, at age seven, was forced into Trokosi servitude by her father, a Trokosi priest, in her native Ghana. She became the victim of ritual servitude, forced labor, intense beatings, sexual abuse and rape. Fiadjoe not only experienced abuse, but also the murder of her fiancé by her father. The IJ proceedings were lead by an antagonistic IJ, the disposition of whom marked the entire hearing. The Third Circuit criticized the IJ's courtroom behavior—troublesome in light of the sensitivity of the petitioner's experiences—as "hostile," "extraordinarily abusive," "bullying" and "reduc[ing] Ms. Fiadjoe to an inability to respond...." The IJ found Fiadjoe incredible and the BIA affirmed, opting to not use AWO, in a short opinion. The BIA, having here chosen to speak, ignored the behavior of the IJ in the immigration proceedings.

In yet another Third Circuit decision, *Korytnyuk v. Ashcroft*, the court attacks not the behavior of the IJ, but the reasoning. Reversing an adverse credibility finding, the court rebukes the IJ's reasoning...

100. 423 F.3d 260 (3d Cir. 2005).
101.  *Id.* at 269.
102.  *Id.* at 270.
104.  *Id.* at 138. In Trokosi practice, when an individual commits a crime, a young girl from the individual's family is offered to a priest in a fetish shrine as penance. This practice is the manifestation of a belief that members of the wrongdoer's family will begin dying in large numbers as punishment for the crime. To prevent these tragedies, the sacrifice of a young girl is made. The life of the girl then becomes one of bondage, domestic violence and rape. The girl often becomes psychologically dependent on the priest and is unable to leave the priest even after the period of servitude has expired. The girls are outcast by society and at times are unable to return to their families. With no skills or means of survival, the girls often spend their entire, short-lived lives as sexual slaves to the fetish shrines. *Id.* at 139.
105.  See *id.* at 140.
106.  *Id.* at 154-55.
107.  396 F.3d 272 (3d Cir. 2005).
saying, "it is the IJ’s conclusion, not [petitioner]'s testimony, that strains credulity" because the IJ "transformed an unsupported finding of adverse credibility into a positive finding that [petitioner] participated in criminal activity."  

The Second and Ninth Circuits have also fired the missiles of criticism, highlighting the presence of bias in the immigration courtroom. In 2003, the Ninth Circuit held that the IJ had detoured from her role as a neutral factfinder and therefore violated the due process rights of the alien. In 2005, the Ninth Circuit reversed an adverse credibility determination, finding "the IJ’s assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture; and his refusal to allow Petitioner to challenge those views . . . violated Petitioner’s right to due process."  

Though repeatedly remanding cases to the BIA for conclusions based purely on speculation and conjecture, the Second Circuit still repeatedly receives IJ decisions based on "speculation and conjecture," affirmed via AWO, which require remand.

The courts' continual excoriation of the IJ and BIA is not a result of geographically isolated anomalies. The patterns of reversal expose problems far greater—approaching the systemic inadequacies that the courts have cited as necessary for invalidating the AWO. The dockets of the courts have become burdened by IJ decisions riddled with errors, which the BIA should be outwardly correcting.

V. THE SECOND CIRCUIT NON-ARGUMENT CALENDAR

In his keynote address at the New York Law School Symposium: Seeking Review: Immigration Law and Federal Court Jurisdiction, Chief Judge John Walker of the United States Court of Appeals for the Second Circuit gave the following statistics regarding administrative appeals in the circuit courts: In 2001, 5.7% of all federal appeals nationwide were

108. Id. at 292 (quotation omitted).
109. See Reyes-Melendez v. INS, 342 F.3d 1001, 1007 (9th Cir. 2003) (reversing the IJ’s adverse credibility finding because of, inter alia, the IJ’s hostility toward petitioner and the IJ’s observable bias).
110. Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005).
111. See, e.g., Jin Chen v. U.S. Dep’t of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (remanding the denial of a claim of persecution under China’s birth control policy on the grounds that the IJ’s rejection of the authenticity of petitioner’s birth control certificates was based “solely on speculation and conjecture”); Secaida-Rosales v. INS, 331 F.3d 297, 312 (2d Cir. 2003) (remanding an adverse credibility determination because “the IJ relied on a number of inappropriate standards with regard to [petitioner]’s testimony and corroboratio, and erroneously resorted to speculation and conjecture when assessing the evidence in support of his claim . . . ”).
of administrative matters. In the Second Circuit, 5.8% (262 matters) of all appeals were administrative appeals. In the Ninth Circuit, 11% of all appeals were administrative. By 2002, these numbers rose to 10%, 12% (603 matters) and 25%, respectively. In 2003, 16% of all appeals were administrative nationwide. In the Second and Ninth Circuits, administrative appeals constituted 34% (2166 matters) and 33.9% of their respective dockets. In 2004, these numbers reached an unprecedented 19.5% nationwide, 39.2% (2747 matters) in the Second Circuit and 39.6% in the Ninth Circuit.\textsuperscript{112} To put these numbers into perspective, the Second Circuit receives roughly 4800 cases a year and calendars between 2800 and 3000 of these cases for disposition.\textsuperscript{113}

By August 2005, the backlog of petitions for review of denied asylum applications in the Second Circuit was "at just under 5,000 cases."\textsuperscript{114} Motivated by the goals of managing this backlog and preventing delays in the determination of the rights of aliens, the Second Circuit implemented a Non-Argument Calendar ("NAC") system through which asylum petitions would be reviewed.\textsuperscript{115} The NAC was to begin on October 3, 2005—the commencement of its October Term.\textsuperscript{116} The Second Circuit promulgated new local rules through which it would implement the NAC.\textsuperscript{117}

Local Rule § 0.29 Non-Argument Calendar
(a) Any appeal or petition for review in which a party seeks review of a denial of a claim for asylum will be initially placed on the Non-Argument Calendar. A case on the Non-Argument Calendar will be disposed of by a three-judge panel without oral argument unless the Court transfers it to the Regular Argument Calendar.

(b) . . . Any party to a proceeding on the Non-Argument Calendar may request to have the proceeding transferred to the Regular Argument Calendar. Such a request shall not be made by motion but must be included in the party’s brief, identified by a separate heading, and

\begin{footnotesize}
\begin{itemize}
  \item[113.] \textit{See} id.
  \item[116.] \textit{Id.}
  \item[117.] Order of the U.S. Court of Appeals for the Second Circuit (Aug. 25, 2005) (on file with author).
\end{itemize}
\end{footnotesize}
will be adjudicated in conformity with Federal Rules of Appellate Procedure 34(a)(2) and Local Rule 34(d)(1)....

(c) The Civil Appeals Management Plan shall not apply mandatorily to proceedings on the Non-Argument Calendar. However, any party to a proceeding on the Non-Argument Calendar may request a conference under the Civil Appeals Management Plan, which will promptly be provided. . . .

Any requests for Civil Appeals Management Plan mediation conferences or removal to the Regular Argument Calendar ("RAC") must be made in the brief—not as a separate motion.

A. The Role of the Courts of Appeals

The burgeoning caseloads in the courts of appeals and the solutions, both proposed and adopted, for management of these caseloads has been a point of contention in the academy. While both sides concede the need for change in order to prevent the depletion of judicial resources, differing conceptions regarding the function of the judiciary and the correlative priorities dictated by these functions have cast the lens of reform over the practice of oral argument.

The threshold issue in evaluating the favorability of oral argument is defining the contours of the role of the circuit courts within the federal judiciary.

1. The Traditional Role of the Courts of Appeals

The courts of appeals occupy the space of two functional bodies—serving the function of a norm-enforcer and the function of a policy-maker. Some scholars have identified the same roles, labeling the

118. Id.
119. Walker, Keynote Address, supra note 112.
120. See generally Lawrence W. Pierce, Essay, Appellate Advocacy: Some Reflections From the Bench, 61 FORDHAM L. REV. 829 (1993) (outlining the historical development of appellate advocacy, the problems facing the modern American appellate system and the division surrounding the effects of decreased oral argument in the modern system).
123. See Donald R. Songer, The Circuit Courts of Appeals, in THE AMERICAN COURTS, supra note 122, at 35. Songer finds a third function of the circuit courts, namely, that of hearing what amounts to meritless appeals of "prisoners or others who have nothing to lose" as a means of "legitimizing the [appellate] process and reinforcing beliefs in the fairness and justice of the legal
functions as "error-correction" and "law-making." The error-correction or norm-enforcing role of the circuit courts is recognized as the "traditional role," a duty of the courts since their inception in the 1890s. The circuit court's duty is to "ensure that an appropriate and just outcome has been reached in each individual case brought before them." The court operates from a backward-looking frame of reference, that is, the court looks at the proceedings below to adjudicate the adequacy of the administration of justice. Thus, the role of error-corrector exists irrespective of any externality except for the existence of a proceeding below. However, the policy-making role of the court of appeals pre-dates its traditional role and came into being as a collateral effect of the structural changes in the judiciary.

2. The Functional Role of the Courts of Appeals

At the time of their establishment, the obligations of the courts of appeals more accurately reflected their conception as intermediary courts. The experience of the federal judiciary has been characterized by an increase in the number of judgeships at the district court level, an increase in the number administrative agencies, increased jurisdiction over administrative courts and an overall increase in litigation. These expansions have been met with relatively little increase in the number of writs of certiorari granted by the Supreme Court. The effect of the increases in both the size and the number of sources feeding the dockets of the circuit courts, with little correlative expansion at the level of review above the circuits, has been to render the nominally intermediate courts as, functionally, courts of last resort. Further, the Supreme


125. Songer, supra note 123, at 35.
126. Cooper & Berman, supra note 124, at 712.
127. Id.
128. See Songer, supra note 123, at 35.
129. See id.
130. See id.; Cooper & Berman, supra note 124, at 716-18.
131. See Cooper & Berman, supra note 124, at 718.
132. See id.; Songer, supra note 123, at 35 ("[T]he number of cases litigated in the federal courts grows both quantitatively and in complexity while the number of cases reviewed by the Supreme Court remains static . . . "). Songer also contends that another policy motivation underlies the shift of the circuit courts from intermediary courts to courts of last resort: Their traditional role of supervising federal regulatory agencies grows in importance as federal regulation of the economy continues to become ever more pervasive and as cases with major economic impact are no longer framed exclusively as constitutional issues

http://scholarlycommons.law.hofstra.edu/hlr/vol34/iss4/7
Court's jurisdiction is wholly discretionary under the certiorari system while the circuit courts retain discretionary jurisdiction only in appeals from interlocutory orders—final judgments impose mandatory jurisdiction on the courts of appeals. It is this position, as a functional court of last resort, from which the second, policy-making duty of the circuit courts stems.

While the error-correction function of the courts requires looking backward, the policy-making function of the court requires a prospective view. In execution of this function, the circuit court "looks forward with a concern for effectively and justly governing the future behavior of the actors and courts." Whereas the traditional function of the courts of appeals exists independent of externalities, their law-making function is entirely dependent on those attributes that render them functional courts of last resort. If the right to appeal to the Supreme Court was, in practice, "more than a paper right," and a large percentage of litigants were granted certiorari in the Supreme Court, the function of the circuit courts as policy-makers would be diluted. The circuit courts would then more genuinely embody their ostensible position as intermediary courts. In the way that the federal district courts are limited in their law-making capacity by the possibility of reversal in the courts of appeals, the courts of appeals would find corresponding limits on their law-making function.

Moreover, the development of the circuit courts into functional courts of last resort has been accompanied by the development of a rigid adherence to the doctrine of stare decisis in the circuit courts. This custom is given teeth by the generally observed practice that the determinations of a panel can only be overturned by a re-hearing en banc. This convention seems more aptly suited to a court of last resort than an intermediate court. Compare this to the binding effect of a

but increasingly as issues of regulatory detail which are not at the center of the Supreme Court's agenda.

Id. See SONGER ET AL., supra note 123, at 4-11, for a more robust discussion of the factors contributing to this functional shift.

133. 28 U.S.C. §§ 1291-92 (2000); Cooper & Berman, supra note 124, at 715-16.
134. See Cooper & Berman, supra note 124, at 718.
135. Id. at 712.
136. Id.
137. Id. at 717-18.
139. See, e.g., Abdulai v. Ashcroft, 239 F.3d 542, 553 (3d Cir. 2001); United States v. Nicholas, 133 F.3d 133, 136 (1st Cir. 1998); Roundy v. Comm'r, 122 F.3d 835, 837 (9th Cir. 1997); Woodling v. Garrett Corp., 813 F.2d 543, 557 (2d Cir. 1987).
district court decision. Generally, district court holdings are not binding on any other federal judge. The implications of this are twofold: first, there are no courts inferior to the district courts, which the district courts may bind, and second, district court determinations are not self-binding. The Supreme Court, on the other hand, binds all federal courts and binds itself. The court of appeals, with respect to these two implications, binds the courts inferior to it, is also self-binding and seems to take on characteristics more like the Supreme Court’s. Again, we see the circuit court as a functional court of last resort.

The functional role of the court did not develop at the peril of the traditional role of the court. Both roles, in fact, have developed alongside each other and “taken together, will sometimes pull an appellate court in different directions . . . .” Each case coming before a judge requires that judge to either yield to her role as error-corrector and give high-priority to the search for a remedy of the proceedings below or to acquiesce to the inevitable future consequences of her decision and shape the policy that will bind future litigants and, more obliquely, herself. Whether one subscribes to the advantages of either choice, the removal of oral argument from appellate proceedings limits the circuit courts’ ability to perform either function.

B. The Role of Oral Argument

Before the value of oral argument in the context of appellate practice can be discussed, two ideas must first be presented. The first is a control model—the ideal model of appellate procedure. Second, there must be a measurement of adequacy for any deviation from this standard. The ideal model of appellate procedure has been coined the “Learned Hand Model” by Professors William Richman and William Reynolds. Professors Jeffrey Cooper and Douglas Berman reduce this model to at least seven essential steps. Judges must:

1. review briefs submitted by the parties,
2. hear oral argument,
3. conference following oral argument,
4. personally assess the case in a memorandum to be circulated before or soon after argument and conference,

---

141. See id.
142. See Cooper & Berman, supra note 124, at 721-22.
143. Id. at 713. For an illustration, see id. at 713-15.
(5) draft an opinion or opinions,
(6) circulate the draft(s) for comment and modification, and
(7) finalize the opinion(s) for publication.\textsuperscript{145}

And while this model "may have reflected reality during the years when Judge Learned Hand was a member of the Court of Appeals for the Second Circuit," the realities of the caseload burgeon render this model impractical, if not impossible.\textsuperscript{146}

Having outlined the ideal model, the next consideration is how to measure the adequacy of diversions from this model. One tool of measurement is the Constitution. The test questions whether the chosen method of appellate reform offends a provision of the Constitution. The second tools of measurement are the notions of fairness and justice. If the constitutional test is satisfied, does the chosen method of reform create too great a hazard to these ends in the name of efficiency?

1. The Argument Against Oral Argument

The school of thought criticizing the decline in the value of oral argument rests its conclusion on two principles. The premier justification for a departure from oral argument is that the process is overly time-consuming.\textsuperscript{147} Oral argument, even when reduced to only ten or fifteen minutes per party, requires that judges and their staff travel to the court and sit through the oral arguments.\textsuperscript{148} These critics also contend that the administrative details of arranging and calendaring oral argument are wasteful of the courts' similarly scarce administrative resources.\textsuperscript{149} Oral argument also requires the full attention of the judges and their staff to the cases being argued. The criticism is that the judges and staff are then left without opportunity to attend to any other matters during the course of an oral argument day.\textsuperscript{150}

The second criticism of oral argument is that it contributes little, if anything, to the judges' understanding of the case, acquired from the brief alone.\textsuperscript{151} The brief plays the central role in the appeals process and accordingly, the criticism of oral argument relies on the assumption that complicated issues are better explained in an organized, well-thought-

\textsuperscript{145} Cooper & Berman, \textit{supra} note 124, at 690.
\textsuperscript{146} Id. at 692.
\textsuperscript{148} Id. at 21.
\textsuperscript{149} Id. at 21-22.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 22.
out writing. 152 Further, oral argument begins to resemble an empty ritual, what some may call "going through the motions," when the brief is poorly written. To be more precise, a poorly written brief, a reflection of counsel, will likely be poorly argued at oral argument. 153 Thus, the critics contend that the "value of oral argument . . . is largely illusory." 154

2. The Argument For Oral Argument

Attacking the notion that oral argument has evolved into nothing but an empty ritual, the proponents of oral argument contend that it is an indispensable part of appellate procedure. 155 Although critical of the value of oral argument, Professor Robert Martineau identified four interests at stake over the value of oral argument. The first interest is the institution of the judiciary itself. As the most politically isolated branch of the government, the functions of the judiciary "should, to the extent possible, be conducted in public, to assure the public and the participants in the process that decisions are based on publicly acknowledged considerations and interests." 156 Oral argument necessarily provides "some semblance of public visibility and accountability" of the mechanics of circuit court proceedings. 157

The second interest championed in the oral argument debate is that of the judge. 158 In the appellate process, oral argument often represents the sole occasion for one judge to interact with his colleagues on the bench. 159 The relationship between the judges is often referred to as collegiality. 160 Judge Cardamone's foremost concern in appellate reform is the deterioration of collegiality. The significance of collegiality is that it acts "as the lubricant that keeps the diverse parts of an appellate court functioning smoothly." 161 Without the required interaction with other judges, with their differing views, opinions and politics, the appellate judge becomes isolated from the inquiries of his colleagues, "whose questions may reveal their thoughts about the case in ways that
conference alone could not." Justice Scalia has noted the importance of the interaction of the judges in the decision making process:

You hear the questions of the others and see how their minds are working, and that stimulates your own thinking. I use it, he added, to give counsel his or her best shot at meeting my major difficulty with that side of the case. "Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me."

The collaboration of a panel in the courtroom, both physically and mentally, impacts the quality of the decision rendered by that panel. To wit, the "marked decrease in argument, therefore, necessarily reduces the quality of decision making." Oral argument is also significant to judges because it "assist[s] judges in understanding [the] issues, facts, and arguments of the parties . . . ." As Chief Justice Rehnquist has observed:

You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process.

Oral argument is the opportunity to clarify issues that are too difficult to present in a brief or those ideas that can be better presented orally. Justice Brennan has also remarked on the value of oral argument to the decision making process, intimating: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument." Judges attribute value to the ability to

162. Cooper & Berman, supra note 124, at 701.
164. Richman & Reynolds, supra note 144, at 280.
165. Id.
166. See Martineau, supra note 147, at 13.
167. Bright, supra note 154, at 36-37 (citing a transcription of a discussion given by the author and Justice Rehnquist).
168. Martineau, supra note 147, at 13.
ask questions during oral argument. Judge Myron Bright, of the Illinois Supreme Court, contends that the most influential support of the significance of oral argument comes from the testimonies of appellate judges themselves.

To empirically test the significance of oral argument, Professor Thomas Marvell conducted a study of over 200 appellate judges in the United States. Of the test samples, eighty percent indicated they "strongly believe that [oral] arguments are a major help" in the decision-making process.

The notion of the judge's personal interaction with counsel coincides with the final two interests recognized in the debate over oral argument: litigants and counsel. Counsel, at oral argument, has the opportunity to make a live contribution to the decision in the case, to raise the issues they feel are most critical and to actively engage in the appellate process. As Professors Richman and Reynolds contend, oral argument "is most useful in those cases least likely to receive it, e.g., those in which the briefing is pro se, bad, or non-existent." Oral argument gives the litigant an essential and important opportunity to convey "the sense of urgency under which a party may be operating." The administration of justice should not be discharged in the abstract. The consequences of litigation are personally experienced by the litigants, and oral argument prevents the judges from the insular effect of reading a brief in chambers without "face-to-face confrontations."

The necessity of oral argument in appellate procedure cannot rest alone on its inherent value. In practice, oral argument must have a demonstrable affect on proceedings. Marvell's study indicated that eighty percent of his sample found oral argument to have a significant impact on judicial determinations. Significantly, "cases not argued are affirmed at a greater rate than cases in which argument occurs . . . ."

The critics of oral argument rest their assumptions on the fact that oral

171. See Bright, supra note 154, at 39.
172. MARVELL, supra note 170, at 306 n.7. The study was based on a collection of statements made by judges in scholarly works, colloquia, responses to questionnaires and interviews. Id. For more on the methodology used, see id. at 5-14.
173. Id. at 75.
174. Martineau, supra note 147, at 17-20.
175. Richman & Reynolds, supra note 144, at 280.
176. Bright, supra note 154, at 37.
177. Id.
178. See MARVELL, supra note 170, at 306 n.7.
argument is not useful in every single appeal.\textsuperscript{180} This assumption is a bit of a red herring. Oral argument remains valuable so long as it is "helpful in a substantial number of appeals."\textsuperscript{181}

\section{VI. The Shortcomings of the Non-Argument Calendar}

The Second Circuit is traditionally held in high regard as the greatest defender and benefactor of oral argument in the appellate process.\textsuperscript{182} It is from this perspective that the NAC should be evaluated. The removal of asylum petitions from the RAC to the NAC may meet the constitutional test of due process, but it offends the notions of fairness that govern the Second Circuit in both its appellate functions. The NAC renders the Second Circuit in dereliction of its duties both as error-corrector and policy-maker. Moreover, by removing oral argument from a single class of cases, the Second Circuit not only fails the fairness test but also toes the line of constitutionality.

\textbf{A. The Second Circuit's Error-Correction Role}

The judiciary affords an agency deference in the entire spectrum of agency actions. From rule promulgation to statute interpretation to fashioning procedures, agency power can often evade judicial intervention.\textsuperscript{183} The agency's authority, however, does have limits. The

\\textsuperscript{180} See Bright, supra note 154, at 36.
\textsuperscript{181} Id.
\textsuperscript{182} See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 22 (1998). In fiscal year 1997, the Second Circuit reported that sixty-five percent of cases were disposed of with the benefit of oral argument. Id. at 22 tbl.2-6. Of those cases in which the parties were represented by counsel, eighty-five percent of cases were disposed of with oral argument. Among the several circuits, these numbers represented the highest oral argument-to-disposition ratios. The second-highest oral argument-to-disposition ratio overall was in the First Circuit, totaling sixty-one percent. Id. The second-highest ratio among counseled cases was in the Seventh Circuit, with seventy-eight percent of cases being heard at oral argument. Id. See also Thomas E. Baker, Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves, 22 FLA. ST. U. L. REV. 913, 916 (1995) (citing ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 75 (1990)) (noting the Second Circuit as having the lowest percentage of cases, less than twenty-five percent, decided without the benefit of oral argument in 1990); Cooper & Berman, supra note 124, at 700 (observing that oral argument in the Second Circuit "remains the norm rather than the exception") (footnote omitted); Pierce, supra note 120, at 832 (noting that as a matter of course, "[t]he Second Circuit allows oral argument in almost every appeal").
\textsuperscript{183} See generally Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that agency rulemaking power is limited by the scope of statute granting power); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that the court will defer to an agency's interpretation of a statute when there is ambiguity in the statute and the interpretation was promulgated within the scope of authority carved out by Congress); Skidmore
initial due process challenges of the AWO procedures were rejected by the several circuit courts.\textsuperscript{184} The rationales of the courts in refusing to invalidate the AWO seem to be the product of both a hesitance to interfere in the BIA’s execution of the INA and the legal terrain at the time of those litigations. The REAL ID Act changed the relationship dynamic between the DHS and the courts while simultaneously rendering the topography of immigration law a more precarious environment through which the courts must cautiously tread. It is in this new legal environment and with this changed relationship that the NAC becomes especially problematic.

The premier purpose of the NAC is to clear the backlog of pending administrative appeals in the Second Circuit.\textsuperscript{185} The judiciary, however, is failing to look past the shortsighted goal of clearing its docket. The NAC is a suture sewn to remedy a wound far more extensive than the Second Circuit backlog. Though efficiency is the NAC’s goal, it may become the impetus for greater and more extensive litigation of petitions for review. The NAC’s strict filing rules attempt to remove motions practice from the appellate scheme. Briefs must be submitted within thirty days of filing a petition for review—a schedule from which extensions will not be granted.\textsuperscript{186} While upon first blush this rule seems draconian, this rule is purely administrative. The rule does not deprive a petitioner of any of the appellate steps he was afforded before the implementation of the NAC. The strictness of the deadline is an efficiency measure that does not sacrifice an element of the Learned Hand Model. From the perspective of fairness, the closer to the Learned Hand Model appellate practice is, the more fair it will be to the litigants exercising their right to appeal. This rule does not affect the error-correcting or law-making function of the Second Circuit.

In hearing petitions for review, the several circuits have maximized the utility of their error-correction function. In remanding case after case to the BIA, the courts of appeals have identified the flaws in the proceedings below and have demonstrated their commitment to overseeing the fair administration of justice in the agencies.\textsuperscript{187} In excoriating the BIA, the circuit courts have revealed and restated their

v. Swift & Co., 323 U.S. 134 (1944) (holding that an agency interpretation is accorded judicial deference when the interpretation is persuasive in light of the author’s expertise, thoroughness, consistency and legal reasoning).

\textsuperscript{184} See supra Part III.

\textsuperscript{185} See supra Part II.B.

\textsuperscript{186} Walker, Keynote Address, supra note 112.

\textsuperscript{187} See supra Part IV.
frustration with the inadequacies of the proceedings below. The continuous burgeoning of the Second Circuit docket with petitions for review indicates that the error-correcting function of the court is not an adequate device by which justice can be administrated.

The NAC will be deleterious to the Second Circuit’s error-correcting function. Without oral argument, litigants will be deprived of the face-to-face contact that keeps judges accountable. As stated, the ramifications of immigration petitions are severe—even fatal. Facing removal, the value of the litigant’s ability to express this heightened severity in oral argument is essential to meaningful review. To remove oral argument from the proceedings of petitions for review is to decrease the likelihood of detection of error in the proceedings below and consequently decrease the Second Circuit’s fulfillment of its traditional function. Moreover, the NAC ignores the Second Circuit’s functional role as a court of last resort.

B. The Policy-Making Function of the Second Circuit

The REAL ID Act established the circuit courts as the sole arena of direct review of immigration matters. At a time when there is a significant change in the law, the courts should take on the burden of more vigorously testing the adequacy of protections. The NAC is not apposite to this goal. In light of the REAL ID Act, the alien’s rights have become more unclear because the precedents established after St. Cyr have become diluted. Issues of diluted precedent also rise in the vein of Zhang and its validation of the AWO procedure. While the preliminary observation that the alien has no right to an administrative appeal still exists, the change in the appellate scheme changes the analysis of what constitutes meaningful review. The Second Circuit should now look prospectively and act to preserve the integrity of the appellate system for the non-citizen seeking asylum.

In upholding the AWO, the First Circuit was guided by a reluctance to identify defects in the AWO. At the time of Albathani, however, the AWO was relatively new—with too little a sample size of dispositions from which a pattern of impropriety could be construed. Five years later, the same is no longer true. The continuous criticism of the BIA by the federal courts upholding the AWO has grown stronger and more severe.

188. See supra Part IV.
189. See supra notes 12-23 and accompanying text.
190. See supra note 22.
The deferential character of the courts during the first constitutional tests of the AWO governed their rationales.

As a reform measure, the NAC addresses the efficiency problem it faces, but at the peril of its functional role. By removing the essential element of oral argument, the Second Circuit is either choosing to forgo this responsibility solely in asylum petitions, offending the fairness test, or has chosen the policy that non-citizens are second-class litigants, offending the fairness test and perhaps the constitutional test. Since obtaining oral argument "really amounts to a petitioning process...litigants who can afford expert advocates get the lion's share of the scarce judicial resources available."191 Either choice is undesirable, especially in light of an alternative that can preserve the oral tradition that is so strongly championed by the Second Circuit and also alleviate the burgeoning caseload dilemma at the source. To exercise its law-making function, the Second Circuit should now re-evaluate the AWO.

VII. REVISITING MATHEWS V. ELDRIDGE

Although the Third Circuit rejected Dia's "meaningful review" argument, it did state that there are still Constitutional requirements of "meaningful time" and "meaningful manner."192 Furthermore, it expressed a reservation of the meaningful review analysis to review in federal courts—not administrative boards.193 The Second Circuit adopted this concern in Zhang.194 While the AWO concerned administrative proceedings, the NAC effectively changes the face of the federal proceedings the Second Circuit is so concerned with preserving. Because of the changed topography of the immigration landscape, courts should employ a higher level of scrutiny to challenges of AWO on due process grounds. Now, half a decade in the wake of the final rule of the AWO, the balancing of the Mathews factors has become more troublesome.

A. The Private Interest

The first Mathews inquiry concerns the private interest that will be affected by the official action.195 The interest of aliens seeking asylum in

191. Richman & Reynolds, supra note 144, at 281.
192. Dia v. Ashcroft, 353 F.3d 228, 242 (3d Cir. 2003) (en banc).
193. Id.
the United States has remained the same—an interest in fleeing an oppressive circumstance in one’s native country. The contours of this interest are reflected in the social groupings that Congress provided—the oppression for which gives rise to eligibility for asylum. The interest represents a core of American democracy. Freedom of political identification, freedom of social organization, freedom of or from religion, freedom of ethnic or national identification and freedom from racial discrimination are cornerstones of contemporary American life.

B. The Risk of Erroneous Deprivation

The second Mathews consideration is the risk of an erroneous deprivation of the private interest through the procedures used and the value of additional or substitute safeguards. Because a non-citizen has only a single chance to be heard, and removal from the United States will likely lead to an inability to return, “the ‘costs’ of an erroneous denial are very high.” The finality of asylum dispositions, the life-or-death circumstances surrounding asylum proceedings and the limitations on an alien’s avenues of relief must be considered in the risk analysis. The costs of erroneous deprivation are very high and therefore the risk of erroneous deprivation must be given substantial weight in the Mathews analysis.

Remand of a single petition for review by an alien from a final order of deportation is not a priori a cause for concern. A pattern of remands in a single judicial circuit or by a single judge would indicate isolated abuses in the immigration system, traceable to a single source and remediable at that source. The risk of erroneous deprivation is less of a significant factor in these situations. Here, it is not the system—the procedure—that threatens to deprive the alien of his interest, but actors within that system that pose this threat. Because of the scale of organization across the nation of the immigration system, a goal of perfection, while exemplary as an ideal, is unattainable. Geographic

197. Id. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
198. Mathews, 424 U.S. at 335.
199. Cruz, supra note 196, at 487.
200. In fact, lack of a single remand would actually seem to be an elevated cause for concern. A history of unwavering affirmance would source the hypothesis that either the federal court level of review was unnecessary or that the federal court was not adequately attending to its error-correcting duties.
differences and political atmospheres are likely factors in the equation and can underlie aberrations in the scheme.

This description, however, does not fit the state of the current asylum scheme. IJ conduct and proceedings are erratic, unpredictable and inconsistent. The circuit courts have time after time criticized the actions of the IJ, and time after time they have remanded final orders of removal. And while at the individual level, the errors made by the IJ are identified by the courts, the scheme itself is not being improved—not approaching the elusive level of perfection—and it is in this situation that the risk of deprivation is from the procedure itself. The risk increases at the next level of review in the BIA because the disposition “approaches” finality and the AWO, by decreasing the attention received by each petition, renders that risk even more hazardous.

The second half of the deprivation analysis considers the value of the addition of substitute safeguards. The circuit courts, in upholding the AWO under the Mathews analysis, stressed the possibility that there may be an erroneous deprivation of a right in the procedure being questioned. The BIA, while an agent of the Attorney General and accountable to him or her, has taken on the function of an appellate body. As an appellate body, it should take on the traditional error-correction duties. The patterns of reversal in the circuits, however, indicate that the BIA is not fulfilling this role.

C. The Government’s Interest

The third prong of Mathews weighs the government’s interest in employing the established procedures. The stated purpose of the AWO was the expedition of asylum petitions in the BIA. The statistics in the circuit courts reveal a dramatic rise in the number of administrative appeals beginning in 2001. This rise coincides with the final rule promulgation of the AWO.

However, viewing these numbers from the entry-side, the number of applications for asylum saw a dramatic reduction in 1996.

201. See supra Part IV.
202. See, e.g., supra notes 59-63 and accompanying text.
203. Mathews, 424 U.S. at 335.
204. See supra Part II.B.
Asylum Applications Filed with INS:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>103,964</td>
</tr>
<tr>
<td>1993</td>
<td>144,166</td>
</tr>
<tr>
<td>1994</td>
<td>146,468</td>
</tr>
<tr>
<td>1995</td>
<td>154,464</td>
</tr>
<tr>
<td>1996</td>
<td>128,190</td>
</tr>
<tr>
<td>1997</td>
<td>85,866</td>
</tr>
<tr>
<td>1998</td>
<td>54,952</td>
</tr>
<tr>
<td>1999</td>
<td>42,207</td>
</tr>
<tr>
<td>2000</td>
<td>48,054</td>
</tr>
<tr>
<td>2001</td>
<td>64,731</td>
</tr>
</tbody>
</table>

This decrease in applications occurred after 1996, the year the AEDPA and IIRIRA were enacted. These sets of numbers, taken together, exclude the possibility of increased administrative appeals in the circuit courts as attributable to an increase in the number of administrative proceedings.205

To the extent that it sought to clear the backlog in the BIA, the goals of the AWO have been achieved. In upholding the AWO under Mathews, the reduction of the backlog was the overriding consideration of the courts in determining government interest. The goal may be better explored in two phases. First, the BIA wanted to reduce the number of appeals pending on its docket. Following this reduction, the BIA concern would seem to lie in maintaining a manageable workload by the prevention of future backlogs.

The statistics of the circuit courts and the INS evidence a successful


reduction in the backlog. The first aspect of the AWO goal has been achieved. Since the meeting of this goal, the AWO has remained in place. However, the AWO is no longer the sole means of limiting the backlog in the BIA. The 1996 enactments reduced the pool of qualified applicants for asylum and effectively reduced the number of applicants by almost fifty percent. The statutory limitations on the number of applicants reduces the number of IJ hearings and subsequently the number of BIA appeals. Combined with a mechanism that would lead to greater satisfaction at the IJ proceedings, the 1996 amendments provide a reasonable limiting device on the number of appeals reaching the BIA. The government interest, in this respect, becomes a less persuasive consideration in light of the increased risks of deprivation of interests.

While the government’s concern of a stymied administrative body has been somewhat vitiated, the government has a growing concern in the operations of the judiciary. A court system inundated with petitions ostensibly manageable by the expertise of an administrative body becomes less equipped to operate in those areas where the judiciary has expertise. More docket time to petitions for review means less docket time for civil and criminal appeals. This concern has manifested itself into the decisions of the Second Circuit to promulgate the NAC. In the alternative, the Second Circuit should have elected to take a more judicially active role and re-examine its prior approval of the AWO.

While the efforts of the court to convey their messages to the BIA are to be applauded, their effectiveness leaves much to be desired. Until now, courts have chosen to react with a whisper. Remedial efforts such as the NAC will prove to be just that—remedial efforts. The underlying systemic problems in the appellate procedure cannot be corrected at the safeguard level—the judiciary. The AWO, in the form that it has evolved toward under an evasive judicial eye, must be limited, modified or completely eliminated. With the continued existence of the AWO as a flagrant middle man, the IJ proceedings can continue in their unchecked and abusive form while the judiciary, increasingly limited by its own resources and the acts of Congress, becomes less equipped to correct the errors of those proceedings. The Second Circuit NAC prevents the court from discharging both its error-correction and policy-making duties. The eradication of oral argument from asylum proceedings deprives non-citizens of a fair right of review. The Second Circuit should revisit

207. See Barnett, supra note 205.
208. See supra notes 12-23 and accompanying text.
Mathews and re-question the validity of the AWO as a means of most effectively discharging its bifurcated roles.

Upon invalidating the AWO, the BIA may be induced to reform its procedures. The decision may also raise Congressional awareness, which would induce changes at the agency level. Sister Circuits may join the Second Circuit in its new determinations. If the other circuits maintain the validity of the AWO, the Supreme Court may become inclined to grant certiorari to the properly situated litigant to resolve the circuit split.

VIII. CONCLUSION

Faced with an overwhelming backlog of asylum petitions, the BIA instituted its AWO procedure—thereby reducing review by three-member panels authoring full opinions, to review by a single-member panel affirming without opinion the proceedings of the immigration courts. The first procedural due process challenges of the AWO were rejected by the several circuits. Because non-citizens are afforded due process by statute, not by the Constitution, the procedures need not reach the limits of the Constitution. Moreover, a full and fair hearing accompanied by a well-reasoned opinion by the IJ, coupled with the opportunity to be heard in federal proceedings, satisfied the courts that the AWO was not procedurally unfair.

In the wake of these initial decisions however, the law of asylum has been transformed by a jurisdiction-stripping of the federal courts and an increase in barriers to refugee status. Further, the courts of appeals have continually excoriated the immigration agencies for their performance in offense of the rights of non-citizens. From such dissatisfaction at the BIA level, the federal courts have experienced a surge in petitions for review of asylum petitions. The Second Circuit, facing a similar backlog to the experience by the BIA, sought to implement a similar plan with its Non-Argument Calendar.

In maximizing its error-correction role, the Second Circuit’s actions proved ineffective in correcting the greater errors of the BIA. However, as functional court of law resort, it has a duty to look prospectively and exercise its policy-making function. In lieu of the NAC, it should consider re-evaluating the AWO under Mathews. The erroneous deprivation prong of the Mathews test, in light of the government’s now decreased burden, should inform the reasoning of the court. The NAC reduces the procedural safeguard of the federal judiciary in immigration proceedings. With the consequences of asylum proceedings being matters of life or death, the risk of erroneously depriving a non-citizen of
the right to live free from persecution far outweighs a matter of administrative efficiency that is no longer relevant.

Erick Rivero*

* J.D. candidate, 2007, Hofstra University School of Law. For her advice, patience and time, I thank Professor Lauris Wren, Hofstra University School of Law, without whom this Note would not have gotten off the ground. To the Hofstra Law Review, and more specifically, to Allison E. Meyer and Stefanie Hyder, I extend my utmost gratitude. I dedicate this Note to my parents, Jose and Chong, for being models of sacrifice, wellsprings of support, beacons of love and nurturers of dreams; and to my brother, Daniel, who always keeps me laughing.