

Even Aliens are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reform

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EVEN ALIENS ARE ENTITLED TO DUE PROCESS: EXTENDING *MATHEWS v. ELDRIDGE* BALANCING TO BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS*

This Note argues that recent reforms to the Board of Immigration Appeals must conform to the constitutional due process requirements set forth in Mathews v. Eldridge. The Author applies the Mathews v. Eldridge balancing test to the reforms and concludes that expanded single-member review, elimination of de novo factual review, and reduction of the size of the Board meet the minimum constitutional due process requirements. However, the Author also argues that two elements of the proposed reforms, the Attorney General's discretion over which Board members will survive the reduction in size, and time limits for Board Members' decisions, fail to withstand Mathews' due-process analysis. The Author concludes these reforms should be eliminated to preserve the constitutionality of the reform package and the long-term legitimacy of the Board as an appellate review body.

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*Procedural fairness and regularity are of the indispensable essence of liberty Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice*¹

Justice Robert Jackson

INTRODUCTION

The Board of Immigration Appeals (BIA) is the primary appellate body for reviewing immigration judges' orders to exclude or deport aliens from the United States, and is the highest administrative tribunal that interprets the United States immigration laws and regulations.² Attorney General John Ashcroft recently noted that the BIA "has allowed the accumulation of a massive backlog of more than 56,000 pending cases"³ and that this "bottleneck in the immigration court system

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¹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–25 (1953) (Jackson, J., dissenting).

² Francesco Isgro, *Attorney General Proposes Reorganization of the Board of Immigration Appeals*, *MIGRATION WORLD MAGAZINE*, Jan. 2002, at 35.

³ *Id.* at 34 (quoting comments made by Attorney General Ashcroft at a press conference held on Feb. 6, 2002).

gravely undermines the enforcement of our country's immigration laws."⁴ As a result, Attorney General Ashcroft implemented an administrative Final Rule reforming the BIA in an effort to improve efficiency.⁵

The Final Rule mandated major changes to BIA structure and procedure. First, single board-member review replaced three-member review for all cases that do not require interpretation of the law or the correction of clear errors of fact.⁶ Second, a "clearly erroneous" standard of review replaced the "de novo" standard for the factual review of immigration judges' findings.⁷ Third, the Final Rule established a time limit of 90 days for single-member adjudications and a time limit of 180 days for three-member adjudications.⁸ Fourth, the board was reduced in size from twenty-three members to eleven members following a six-month transition period to reduce backlog.⁹

In a press conference to introduce the Final Rule reforms, Attorney General Ashcroft noted that "justice delayed is justice denied."¹⁰ The BIA reforms will most likely hasten something. The question is: *will it be justice?* The Department of Justice contended that the Final Rule reforms will improve efficiency and remove backlog by allocating more resources to cases that present difficult or controversial legal questions and that require the BIA to issue precedent-setting decisions, without adversely affecting the due process rights of aliens.¹¹ Conversely, opponents of the Final Rule claimed that the reforms will reduce the quality and care of the BIA's decision-making process, will result in "rubber-stamping," and will thereby threaten aliens' due process rights.¹²

In *Mathews v. Eldridge*, the United States Supreme Court set forth a balancing test to determine whether administrative procedures conform to procedural due process laws.¹³ In order to determine what process is due, the Court called for a balancing of private interests, the probable value of additional safe guards, and the government interest, including the cost of the procedure.¹⁴ The Court noted that due

⁴ *Id.*

⁵ Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3) [hereinafter *Immigration Procedural Reforms*].

⁶ *Id.* at 54,880.

⁷ *Id.* at 54,880–81.

⁸ *Id.* at 54,895.

⁹ *Id.* at 54,881.

¹⁰ Isgro, *supra* note 2, at 34 (quoting William Gladstone).

¹¹ EXEC. OFFICE OF IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: BOARD OF IMMIGR. APPEALS: FINAL RULE (Aug. 23, 2002), available at <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf>.

¹² Emily Heller, *Clash Over Plan for Immigrant Appeals, Critics: DOJ Plan a Due Process Threat*, 24 NAT'L L.J., Jul. 15, 2002, at A1.

¹³ 424 U.S. 319 (1976).

¹⁴ *Id.* at 335.

process is “flexible” and dependant upon attendant circumstances.¹⁵ The Department of Justice questioned whether the *Mathews v. Eldridge* test was applicable to the Final Rule reforms, arguing that the BIA’s status as an appellate administrative agency gave the Attorney General the authority to determine what process was due.¹⁶ The Attorney General also contended that most BIA decisions do not weigh substantively on aliens’ rights.¹⁷

Section I of this note provides a brief history of the Board of Immigration Appeals and introduces the Final Rule reforms. Section II discusses the historic limits on aliens’ constitutional due process rights, and argues that *Mathews v. Eldridge* is the proper test for modern due process jurisprudence in the immigration arena. Section II further posits that the Constitution, case law, and common sense dictate that BIA reforms must conform to constitutional due process requirements. Section III weighs the government’s interest in efficient administration of BIA appellate review against aliens’ interests in fair adjudication of their cases, and concludes that the interests of the two parties are evenly weighted in the majority of cases under *Mathews v. Eldridge*. Section IV applies the final prong of the *Mathews* balancing test to the Final Rule procedural reforms and concludes that expanded single-member review, elimination of de novo factual review, and reduction of the size of the Board meet the minimum constitutional due process requirements. These reforms provide a flexible and reasonable system for balancing aliens’ rights to meaningful appellate review with the government’s interest in efficient and cost-effective resolution of immigration appeals. Two elements of the proposed reforms, the Attorney General’s discretion over which Board members will survive the reduction in size, and time limits for Board members’ decisions, fail to withstand *Mathews*’s due process analysis. These reforms threaten the political independence of the Board and pressure Board members to decide cases hastily and at the expense of accuracy and fairness. The Attorney General’s control over Board composition and time limits for Board decisions should be eliminated to preserve the constitutionality of the reforms and the long-term legitimacy of the Board as an appellate review body.

I. BACKGROUND AND OVERVIEW

The BIA is the creation of Attorney General regulations and has never been statutorily authorized.¹⁸ The Board traces its heritage to 1921 when the Secretary

¹⁵ *Id.* at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹⁶ See *Immigration Procedural Reforms*, *supra* note 5, at 54,881–82 (codified at 8 C.F.R. pt.3).

¹⁷ *Id.*

¹⁸ 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 3.05, at 3-34 (2002). See Immigration and Naturalization Service, Order No. 3888, 5 Fed. Reg. 2,454 (Jul. 1, 1940) (creating the Board of Immigration Appeals).

of Labor created a board to assist in performing quasi-judicial functions under the immigration and naturalization laws.¹⁹ In 1940, the Attorney General officially created the BIA, which for more than fifty years existed as part of the Immigration and Naturalization Service (INS), and consisted of only a chairman and four members.²⁰ The BIA separated from the INS in 1983 and became part of the independent Executive Office of Immigration Review.²¹ Within the Executive Office of Immigration Review, the BIA is under direct line of supervision by the Attorney General and has authority to act on the Attorney General's behalf.²² Thus, when the immigration laws confer a decision to the discretion of the Attorney General, the BIA has authority to administer that discretion.²³ The BIA has grown rapidly over the last decade to twenty-three members and more than one hundred staff attorneys in order to keep up with a heavy caseload and expanding functions.²⁴

The BIA's primary responsibility is to consider appeals from decisions of immigration judges in removal proceedings.²⁵ Observers note that the BIA has handled this responsibility with skill and expertise.²⁶ The Board, however, has been swamped with a burgeoning case load over the past few years. For example, in fiscal year 1984, fewer than 3,000 new cases were filed with the BIA, while in fiscal year 2000, nearly 30,000 new cases were filed.²⁷ Attorney General John Ashcroft indicated that backlog and inefficiencies mandated a reform to BIA procedures:

The Board of Immigration Appeals needed a complete overhaul. . . . The Board had become a bottleneck in the system, undermining the enforcement of our country's immigration laws. Aliens' cases were in limbo for years, and the Board did not provide effective guidance on complex issues to the immigration judges, the Immigration and

¹⁹ GORDON, *supra* note 18, § 3.04, at 3-34.

²⁰ Isgro, *supra* note 2, at 35.

²¹ GORDON, *supra* note 18, § 3.04, at 3-32 to 3-33.

²² GORDON, *supra* note 18, § 3.05, at 3-35.

²³ *Id.* at 3-42 to 3-43.

²⁴ *Operations of the Executive Office for Immigration Review (EOIR): Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 107th Cong. 27 (2002) (statement of Stephen Yale-Loher, American Immigration Lawyers Association).

²⁵ GORDON, *supra* note 18, at 3-35.

²⁶ AM. IMMIGRATION LAWYERS ASS'N, AILA'S FINAL COMMENTS ON THE PROPOSED BIA REFORM RULE (Mar. 20, 2002) (posted on AILA InfoNet at Doc. No. 02032031), available at <http://www.aila.org/contentViewer.aspx?bc=9,576,598> (last visited Oct. 28, 2002) [hereinafter AILA, FINAL COMMENT] ("The Board of Immigration Appeals has a long and successful history of adjudicating a high volume of cases in a competent and efficient manner.").

²⁷ *Id.*

Naturalization Service or the noncitizens. Such delays encouraged unscrupulous lawyers to file frivolous appeals. Even though they could not win, such lawyers could exploit the system to guarantee their clients additional years within the United States.²⁸

Thus, the Attorney General published a proposed rule on BIA reform in the Federal Register on February 19, 2002, and solicited comments from interested parties.²⁹ Despite numerous submissions from nongovernmental organizations opposing the rule, the Department of Justice left the proposed rule almost entirely intact, publishing the Final Rule on August 26, 2002.³⁰ The Final Rule mandated four major changes to BIA procedure: expanded single-member review, elimination of de novo factual review for most cases, time limits for case adjudication, and reduction of the Board in size from twenty-three to eleven members.³¹ Opponents fear the reforms will "tilt the balance in favor of expeditiousness, instead of fostering careful and just adjudications, thereby impairing the due process rights of individuals while undermining the Board's capacity to provide meaningful appellate review."³² As the next section discusses, the Department of Justice has been too quick to dismiss these due process concerns as inapplicable to the BIA.

II. IS THE BIA SUBJECT TO DUE PROCESS RESTRAINTS?

In material released with the Final Rule, the Department of Justice questioned the applicability of the *Mathews v. Eldridge* balancing test to the BIA reforms, effectively arguing that the reforms were exempt from due process requirements.³³

²⁸ News Release, Department of Justice Executive Office for Immigration Review, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), available at 2002 WL 1943761.

²⁹ Proposed Rules, Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7,309 (Feb. 19, 2002).

³⁰ The Capital Area Immigrant's Rights Coalition and the American Immigration Lawyers Association filed suit on October 25, 2002, in Federal District Court for the District of Columbia, challenging that the Final Rule was implemented without "appropriate consideration for the views of the interested public, including nongovernmental organizations." American Immigration Lawyers Association, 6 WASHINGTON UPDATE NO. 16 (Nov. 8, 2002) (posted on AILA InfoNet at Doc. No. 021108410, available at <http://www.aila.org/contentViewer.aspx?bc=13,958> (last visited Mar. 24, 2003)). The Department of Justice contends that it complied with the thirty-day notice period required by the Administrative Procedure Act. *Immigration Procedural Reforms*, *supra* note 5, at 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. pt.3).

³¹ *Immigration Procedural Reforms*, *supra* note 5, at 54,880–81.

³² AILA, FINAL COMMENT, *supra* note 26.

³³ See *Immigration Procedural Reforms*, *supra* note 5, at 54,882 ("[T]he Department questions whether *Mathews* is the appropriate touchstone in light of the unique nature of the act as the tool for managing the intersection of foreign and domestic interests regarding aliens.").

The Department of Justice argued that the majority of BIA appeals involve relief from removal and, therefore, do not substantively implicate aliens' rights.³⁴ The Department further contended that the due process clause does not confer a right to appeal, even in criminal prosecutions, and therefore, any procedure employed by the BIA, an appellate body, exceeds constitutionally required due process.³⁵ Finally, the Department argued that because the BIA is an administrative body within the Department of Justice, it was "well within the Attorney General's discretion to develop the management and procedural reforms provided in this rule."³⁶

The Department's arguments may be legalistically persuasive; however, they ignore the nature of due process. Due process is the simple notion that the Constitution requires governmental procedures to be fundamentally fair before a person may be deprived of liberty or property.³⁷ Most importantly, due process is a "flexible" concept, dependant upon the attendant circumstances.³⁸ Thus, some circumstances require more stringent procedural safeguards than others. The Department of Justice correctly argued that administrative burdens and weight of constitutional rights in immigration proceedings are different from other governmental proceedings.³⁹ Those differences, however, affect the type of procedures that constitute due process, not the fact that the government owes due process at all. Thus, the first step in assessing whether the BIA reforms impinge on aliens' due process rights is to explore the nature and extent of the aliens' due process rights. The second is to evaluate the impact BIA decisions have on those rights. Ultimately, this section concludes that *Mathews v. Eldridge* due process balancing applies to BIA procedures.

A. An Overview of Aliens' Due Process Rights in Immigration Proceedings

Courts have long held that aliens are entitled to due process protection in immigration proceedings.⁴⁰ The extent of that due process protection, however, has been extremely narrow.⁴¹ For example, in *Yamataya v. Fisher*, the Supreme Court

³⁴ *Id.* at 54,881-82.

³⁵ *Id.* at 54,881 (citing *Ross v. Moffit*, 417 U.S. 600, 611 (1974) ("[W]hile no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.")).

³⁶ *Id.* at 54,883 (footnote omitted).

³⁷ See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 470 (1985) (stating that fundamental fairness is the touchstone of due process).

³⁸ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

³⁹ *Immigration Procedural Reforms*, *supra* note 5, at 54,881-82.

⁴⁰ See, e.g., *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).

⁴¹ See *id.*

held that due process of law applied to a deportation hearing, and that an alien must be given "all opportunity to be heard upon the questions involving his right to be and remain in the United States."⁴² Nonetheless, the Court upheld the alien's exclusion despite the fact that she had no formal hearing, could neither speak nor understand English, and claimed that she was unaware she was being questioned regarding deportation.⁴³

Historically, the extent of an alien's due process protection turned upon whether the alien was classified as excludable or deportable.⁴⁴ Until 1996, an alien already physically present in the United States was subject to a deportation proceeding, and an alien outside the United States seeking admission was subject to an exclusion hearing.⁴⁵ Aliens in exclusion proceedings were entitled to very little due process protection, while aliens in deportation proceedings were entitled to substantially higher protection.

1. Alien's Rights in Exclusion Proceedings: The Irony of Judicial Deference

Two cases, *Knauff* and *Mezei*, are enigmatic of the exclusion doctrine and the extreme dearth of due process protection it provided. In *Knauff* (1950), the Supreme Court held "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁴⁶ In *Mezei*, the Supreme Court affirmed *Knauff*, emphasizing that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government."⁴⁷ Professor Charles Weisselberg has stated *Knauff* and *Mezei* "represent the modern zenith of the plenary power doctrine in the Supreme Court. In these decisions, the Court reinforced the notions that the Constitution stops at the

⁴² *Id.*

⁴³ THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 796 (4th ed. 1998).

⁴⁴ *Id.* at 797.

⁴⁵ *Landon v. Plasencia*, 459 U.S. 21, 25 (1982) ("The deportation hearing [was] the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing [was] the usual means of proceeding against an alien outside the United States seeking admission.").

Prior to 1996, aliens physically present in the United States were entitled to the heightened due process protection of a deportation proceeding, irrespective of whether they entered the United States legally. As a result, aliens who successfully entered the U.S. illegally were entitled to greater due process protection than aliens who were seeking to enter the U.S. legally. The 1996 Act shifted the line between inadmissible and deportable aliens; aliens who enter United States illegally are now subject to a determination of inadmissibility under the Immigration and Nationality Act, 16 C.F.R. § 212 (1996).

⁴⁶ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

⁴⁷ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

border and that the government has absolute and unreviewable authority in exclusion matters."⁴⁸

The underlying facts of *Knauff* and *Mezei* reveal the potentially harsh results that the plenary power doctrine creates and the irony inherent in too much judicial deference. Ellen Knauff, the petitioner in the *Knauff* case, escaped Nazi Germany and fled to England as a refugee.⁴⁹ While in England, Ellen served honorably in the Royal Air Force.⁵⁰ Later, she held a civil position with the U.S. War Department in Germany, and married a naturalized U.S. citizen and veteran of World War II.⁵¹ When the Knauffs attempted to enter the United States in 1948, Ellen was detained on Ellis Island and was permanently excluded without a trial on the grounds that "her admission would be prejudicial to the interests of the United States."⁵²

The Supreme Court upheld her exclusion, deferring to Congress's plenary power in immigration affairs.⁵³ Justice Jackson, writing for the three-member dissent stated, "I do not question the constitutional power of Congress to authorize immigration authorities to turn back from our gates any alien or class of aliens. But I do not find that Congress has authorized an abrupt and brutal exclusion of the wife of an American citizen without a hearing."⁵⁴ The popular media echoed Justice Jackson's sentiment, calling for Ellen's release.⁵⁵ Because of this publicity, Congress joined the campaign. Ellen testified before a congressional subcommittee explaining that she had never received an exclusion hearing or officially been made aware of the reasons for her exclusion.⁵⁶ The Senate and House both introduced private bills calling for her release.⁵⁷

The congressional and media attention, combined with her husband's visit to the Attorney General, convinced Attorney General McGrath to reopen Ellen's case.⁵⁸ Ultimately, the BIA reversed Knauff's exclusion, holding that there was "no substantial evidence" that she engaged in espionage or would pose a future threat to the United States.⁵⁹ The BIA stated, "Uncorroborated hearsay . . . does not

⁴⁸ Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 954 (1995).

⁴⁹ *Knauff*, 338 U.S. at 539.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 539-40.

⁵³ *Id.* at 544; see *supra* note 48, and accompanying text.

⁵⁴ *Id.* at 550 (Jackson, J., dissenting).

⁵⁵ Weisselberg, *supra* note 48, at 958.

⁵⁶ *Id.* at 959-60. The Justice Department opposed the bill and wrote a letter to Congress affirming that the Attorney General was correct to exclude Knauff without a hearing. The letter did not disclose any of the "confidential" reasons for Knauff's exclusion. *Id.*

⁵⁷ *Id.* at 958.

⁵⁸ *Id.* at 961.

⁵⁹ *Id.* at 963.

amount to substantial evidence to support an exclusion decision.’⁶⁰ Charles Weisselberg summarized the constitutional implications of the *Knauff* case: “The rule of *Knauff* is that the Attorney General has the unchallengeable power to exclude an alien. But the full story of Ellen Knauff shows a populace and a Congress unwilling to accept the exercise of this sort of raw power.’⁶¹ Indeed, Congress intervened to force the immigration authorities to grant Knauff minimum due process in the form of a hearing. Weisselberg notes that the *Knauff* case further illustrates the value of due process in that “[o]nce the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States.’⁶² Another lesson is that the BIA, the body that was ultimately responsible for overturning *Knauff*’s exclusion, provides a review of immigration decisions that is critical to fair adjudication of aliens’ due process rights.⁶³

The *Mezei* case further illustrates the extreme absence of due process protection afforded under the plenary power doctrine. Ignatz Mezei was a legal permanent resident who had lived in the United States for twenty-five years.⁶⁴ In May of 1948, he attempted to visit his dying mother in Romania.⁶⁵ He was denied an entry permit to Romania and spent nineteen months in Hungary due to “difficulty in securing an exit permit.”⁶⁶ Upon attempting to return to the United States, he was temporarily excluded because of passport difficulties.⁶⁷ After reviewing his case, the Attorney General ordered that Mezei be permanently excluded without a hearing on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”⁶⁸ Critics feared that Mezei’s exclusion would amount to a life sentence on Ellis Island without a hearing.⁶⁹ Mezei had applied for admission to twelve Latin American countries, none of which were willing to accept him, undoubtedly nervous about the information that the United States government knew but was unwilling to disclose.⁷⁰ The government responded that indefinite detainment was not a necessary result of its stance, noting that Mezei was free to leave Ellis Island despite not being able to enter the United States. Justice Jackson

⁶⁰ *Id.* at 963–64. The Department of Justice’s evidence against Knauff consisted of “‘gossip’ that Knauff had previously furnished secrets to Czechoslovakian officials.” *Id.* at 960.

⁶¹ *Id.* at 964.

⁶² Weisselberg, *supra* note 48, at 964.

⁶³ See *infra* notes 111–25 and accompanying text.

⁶⁴ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Weisselberg, *supra* note 48, at 983.

⁷⁰ *Mezei*, 345 U.S. at 209.

retorted, "[t]hat might mean freedom, if only [Mezei] were an amphibian!"⁷¹ Like Ellen Knauff, Ignatz Mezei was paroled into the United States due to media and Congressional pressure,⁷² but not before he had spent over four years detained on Ellis Island without a hearing.⁷³

Together, *Knauff* and *Mezei* illustrate a great irony in immigration law. The Supreme Court, in deferring blindly to Congress's plenary power, abdicated its "permanent and indispensable" duty of constitutional review.⁷⁴ Ironically, in the very cases in which the Supreme Court solidified this doctrine of extreme deference, Congress ultimately intervened, passing *private* bills, to stop unjust and merciless enforcement of the laws.⁷⁵ If the Court had enforced reasonable constitutional due process requirements from the outset, congressional intervention would have been unnecessary.

2. Due Process in Deportation Hearings

Courts have required a higher standard of due process for aliens in deportation proceedings. In *Landon v. Plasencia*, the Supreme Court noted, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. . . . [A] continuously present resident alien is entitled to a fair hearing when threatened with deportation."⁷⁶ Essential elements to a fair hearing include the right to be informed of rights and charges,⁷⁷ the right to counsel at no cost to the government,⁷⁸ the right to a translator for aliens with little or no understanding of English,⁷⁹ and the right

⁷¹ *Id.* at 220 (Jackson, J., dissenting).

⁷² Weisselberg, *supra* note 48, at 970-71.

⁷³ *See id.* at 984.

⁷⁴ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

It is emphatically the province and duty of the judicial department to say what the law is. . . . [*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.

⁷⁵ *See supra* notes 56-57, 72-73.

⁷⁶ 459 U.S. 21, 32 (1982) (citation omitted).

⁷⁷ *Hirsch v. INS*, 308 F.2d 562, 566-67 (9th Cir. 1962) (holding that an alien in deportation proceedings was entitled to a hearing even before statute was passed creating the right).

⁷⁸ *Handlovits v. Adcock*, 80 F. Supp. 425 (E.D. Mich. 1948) (holding that an immigrant was not provided a fair deportation hearing where she did not understandingly waive her right to representation by counsel or a friend).

⁷⁹ *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982) (holding that an immigration judge abused his discretion in denying an alien translation of the proceedings when a translator was present and willing to translate).

to examine the evidence against an alien and opportunity to rebut, including the right to cross-examine an adverse witness.⁸⁰ The trial must be held before an unbiased adjudicator who bases the decision solely on the record;⁸¹ the hearing must take into account all evidence of record; and the adjudicator must articulate the basis for the decision.⁸² Perhaps most importantly, the government must prove deportability by clear and convincing evidence.⁸³

3. Modern Due Process: Statutory Developments and the Introduction of *Mathews* Balancing

The stark historical difference between deportation and exclusion has been somewhat blurred by two significant developments. First, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996⁸⁴ softens the distinction between deportability and inadmissibility by making both groups of aliens subject to a single removal proceeding under 8 U.S. Code § 1229a. Moreover, under § 1229a(b)(4), all aliens, regardless of whether they are charged with deportation or exclusion, are granted the right to counsel at no expense to the government, the right to examine the evidence presented against them, and the right to have a record made of the proceedings.⁸⁵ Other sections of the statutory scheme protect aliens' rights to notice of charges,⁸⁶ notice of rights,⁸⁷ and the right to a fair trial before an unbiased adjudicator.⁸⁸ The Code preserves the distinction between excludable and deportable aliens, however, because under § 1229a, an alien is either charged with exclusion under § 1182 or deportation under § 1227.⁸⁹ The most important distinction between the two sections is that under § 1182, an alien bears the burden

⁸⁰ See 8 U.S.C. § 1229a(b)(4) (2000) (requiring that alien be given a "reasonable opportunity" to cross-examine government witnesses).

⁸¹ *Perez v. INS*, 643 F.2d 640 (9th Cir. 1981), *cert. dismissed*, 459 U.S. 983 (1982) (vacating decision where BIA failed to indicate factors it considered in determining why petitioner in removal proceeding failed to establish prima facie case of extreme hardship).

⁸² *Id.*

⁸³ *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) (holding that "deportation is a drastic sanction, one which can destroy lives and disrupt families," and deportation on ground of Communist Party Membership "must therefore be premised upon evidence of 'meaningful association'").

⁸⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

⁸⁵ 8 U.S.C. § 1229a(b)(4) (2000).

⁸⁶ 8 U.S.C. § 1229 (1996) (requiring the INS to issue a notice to appear to initiate removal proceedings).

⁸⁷ *Id.*

⁸⁸ 8 U.S.C. § 1229a(c)(1)(A) (2000) ("The determination of the immigration judge shall be based only on the evidence produced at the hearing.").

⁸⁹ 8 U.S.C. §§ 1182, 1227 (2000).

of proving he is admissible, while under § 1227, the government must prove deportability by clear and convincing evidence.⁹⁰

Second, while *Mezei* and *Knauff* are still good law, their potentially harsh results have been somewhat tempered by a more recent Supreme Court decision.⁹¹ In *Landon v. Plasencia*, the Court held that petitioner, a legal permanent resident who briefly left the United States, was seeking admission and therefore subject to exclusion proceedings.⁹² Nonetheless, the Court determined that the entering alien was entitled to due process protection of the laws and remanded the case to determine whether the petitioner was afforded due process in the exclusion proceeding.⁹³

The *Plasencia* decision, standing alone, did not determine the contours of aliens' rights in immigration proceedings. The Court did not overrule *Mezei* and declined to determine "its scope," electing to distinguish *Mezei* on the ground of length of absence — *Plasencia* had only left the United States for a few days, and the government had conceded her right to due process, while *Mezei* had been absent for approximately twenty months.⁹⁴ Nonetheless, the *Plasencia* Court explicitly extended the *Mathews v. Eldridge* balancing test to immigration proceedings, opening the door for due process balancing analysis.⁹⁵ The Court restated the *Mathews v. Eldridge* doctrine as follows:

In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.⁹⁶

While this decision was a major victory for aliens' due process rights, substantial hurdles remain.

⁹⁰ 8 U.S.C. §§ 1229a(c)(2) & (3) (2000).

⁹¹ *Landon v. Plasencia*, 459 U.S. 21, 21–22 (1982) (holding that a legal permanent resident was entitled to due process in exclusion proceedings under the *Mathews v. Eldridge* balancing test).

⁹² *Id.* at 32.

⁹³ *Id.* at 36–37.

⁹⁴ *Id.* at 33–34. Previous cases have made inroads on the plenary power doctrine. Compare for example *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963) (holding that "the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him"), with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214–15 (1953) (holding that an alien who had left the country for some twenty months was not entitled to due process in assessing his right to admission on his return).

⁹⁵ *Plasencia*, 459 U.S. at 34.

⁹⁶ *Id.*

Historically, courts have advanced two basic legal theories to justify tipping the foregoing due process balancing analysis decidedly in favor of the government in immigration proceedings.⁹⁷ The first is that immigration proceedings, including deportation and exclusion, are civil and do not require the provision of full criminal procedural rights in order to protect aliens' interests.⁹⁸ Second, courts have justified a lower standard of due process based on the view that immigration is of "political character and therefore subject only to narrow judicial review."⁹⁹ Under close scrutiny, these arguments are not as compelling as they might initially seem.

Admittedly, immigration proceedings are not criminal in nature.¹⁰⁰ Immigration proceedings, however, frequently result in physical detention, separation of friends and family, and forfeiture of property and livelihood.¹⁰¹ These punishments exceed those typically imposed for civil violations. In *Bridges v. Wixon*, the Supreme Court stated:

⁹⁷ An excerpt from a 1913 opinion written by Justice Holmes illustrates these two rationales:

It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want.

Bagajewitz v. Adams, 228 U.S. 585, 591 (1913).

⁹⁸ *Carlson v. Landon*, 342 U.S. 524, 537 (1952) (holding that "[d]eportation is not a criminal proceeding").

⁹⁹ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101-02 n.21 (1976) (stating that "the power over aliens is of a political character and therefore subject only to narrow judicial review"). In *Fong Yue Ting v. United States*, the Supreme Court held:

[T]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

149 U.S. 698, 713 (1893).

¹⁰⁰ See *supra* note 98.

¹⁰¹ Observers have commented that deportation is comparable to criminal punishment:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness — a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

4 ELLIOT'S DEBATES 555 (J.B. Lippincott & Co. eds., 1881).

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . That deportation is a penalty . . . cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.¹⁰²

Furthermore, aliens are often at a stark procedural disadvantage in immigration proceedings. The Supreme Court has noted that aliens are a "voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused."¹⁰³ As a result, fundamental fairness would dictate that immigrants receive more, not less, due process protection than civil petitioners.

Courts further justify a lower standard of due process for aliens in immigration proceedings based upon deference to Congress. In *Fiallo v. Bell*, the Supreme Court stated, "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"¹⁰⁴ The judiciary has, in effect, abdicated its power of judicial review and its role as the "supreme interpreter" of the Constitution¹⁰⁵ by taking the plenary power doctrine to such an extreme. Justice Murphy, in a concurring opinion in *Bridges v. Wixon*, contended that deference to Congress at the expense of constitutional liberty is inconsistent with constitutional democracy:

¹⁰² 326 U.S. 135, 154 (1945) (holding that the government failed to prove the petitioner had an affiliation with the Communist Party).

¹⁰³ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) (holding that administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act).

¹⁰⁴ 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (citations omitted)). Justice Jackson noted the constitutional injustice of providing less constitutional due process protection for aliens:

Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien.

Mezei, 345 U.S. at 225 (Jackson, J., dissenting).

¹⁰⁵ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its "plenary" power of deportation. . . . [T]he First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a "plenary" power of the Government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a "plenary" power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights.

Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.¹⁰⁶

Justice Murphy's opinion operates on the principle that while Congress and the Executive should enjoy substantial authority to create and enforce immigration laws, the Judiciary is charged under the Constitution with making the ultimate determination as to whether the laws and actions are consistent with aliens' constitutional rights.¹⁰⁷

In performing this role as expositor of the Constitution,¹⁰⁸ the Supreme Court has typically struck the wrong balance in the immigration arena, affording too much deference to Congress and the Executive and undervaluing aliens' interests in the proceedings.¹⁰⁹ Ultimately, aliens are entitled to fair, noncursory weighing of their rights under the *Mathews v. Eldridge* framework.¹¹⁰ Such an analysis is the subject of Sections III and IV of this note. First, however, we must address the Department of Justice's argument that BIA decisions do not implicate aliens' due process rights.

¹⁰⁶ 326 U.S. 135, 161–62 (1945) (Murphy, J., concurring).

¹⁰⁷ See *Cooper*, 358 U.S. at 18 (holding that "the federal judiciary is supreme in the exposition of the law of the Constitution").

¹⁰⁸ See *id.*

¹⁰⁹ See Hirsoshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) (discussing the "stunted growth of constitutional immigration law" due to Supreme Court deference to Congress).

¹¹⁰ See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *infra* notes 130–48.

B. Impact of BIA Decisions on Aliens' Due Process Rights

The Department of Justice contends that the substantive rights of aliens are not implicated in BIA review, largely due to the fact that the BIA is an appellate administrative body, and cases only reach the BIA after an immigration judge has already determined that an alien is removable.¹¹¹ Indeed, most cases before the BIA involve an alien's eligibility to apply for relief from a removal order or whether the Attorney General should exercise discretion in the respondent's favor.¹¹² The Department contends that the process due under the Constitution in determining whether to grant relief from an order of removal is substantially lower than the process required in determining whether an alien is removable.¹¹³

1. The BIA Impacts Substantive Rights

The Department's argument is overly legalistic and downplays the importance of the BIA. The American Immigration Lawyers Association (AILA) noted:

The importance of the work of the members of the BIA must not be underestimated. Board Members often make decisions that will determine whether someone who has been persecuted and tortured will live or die, whether a U.S. family will be divided, or whether a permanent resident who has lived here for decades will be returned to a country where he/she has no ties. Board Members have to make these decisions in a dynamic framework, oftentimes against a backdrop of uneducated, unrepresented, frequently traumatized foreign nationals, poor quality transcripts, and ill-trained [immigration judges]. Country and political conditions also frequently change, further affecting the decisions that Board Members must make.¹¹⁴

Jeanne Butterfield, Executive Director of the AILA added "[t]he BIA often is the court of last resort for the vast majority of people seeking review of decisions by immigration judges."¹¹⁵ BIA decisions directly and substantively impact aliens' rights to life, liberty, and property. Thus, it is "vitally important that the BIA remain a robust and vigorous review body."¹¹⁶

¹¹¹ See *Immigration Procedural Reforms*, *supra* note 5, at 54,881–82.

¹¹² *Id.* at 54,882.

¹¹³ *Id.*

¹¹⁴ AILA, FINAL COMMENT, *supra* note 26.

¹¹⁵ Press Release, American Immigration Lawyers Association, Ashcroft Changes to BIA: A Slap in the Face to Immigrants (2002), available at <http://www.aila.org/contentViewer.aspx?bc=79,594,1003,1578> (last visited Oct. 28, 2002).

¹¹⁶ *Id.*

2. The BIA's Process Must Be Fair to Ensure Aliens Receive a Fair Trial under the Immigration Laws

The Department of Justice argues that the BIA owes a lower standard of due process in administering relief from removal and discretionary relief cases.¹¹⁷ In reality, BIA oversight of discretionary relief is critical to a fair hearing due to inflexible and overly harsh immigration laws and common errors at the trial level.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in an effort to control illegal immigration and counter terrorism.¹¹⁸ Unfortunately, IIRAIRA has led to substantial violations of aliens' due process rights, as the immigration bar indicates:

Under the 1996 laws, legal immigrants routinely are detained without bond, deported without consideration for discretionary relief, restricted in their access to counsel, and barred from appealing to the courts. The laws expand the grounds of deportation, subjecting long-term immigrants to mandatory detention and automatic deportation for relatively insignificant crimes. Low-level immigration officials act as judge and jury, and the federal courts have been denied the power to review most deportation decisions and INS activities. Moreover, these laws are being applied retroactively. As a result, many immigrants have been expelled from their adoptive country for one-time offenses and youthful indiscretions that occurred, in some cases, many years ago. The 1996 laws are merciless: providing for no second chances, changing the rules in the middle of the game, and denying people their day in court. The 1996 immigration laws are tearing families apart¹¹⁹

While BIA review cannot cure all of the ills inherent in IIRAIRA, it does provide a critical second chance for aliens to have their cases heard and their petitions for relief from removal reconsidered. The BIA's review function is especially important given the inflexibility of IIRAIRA. IIRAIRA obligates immigration judges to issue orders of removal in very specific circumstances, without regard to mitigating factors such as the length of time the person has lived

¹¹⁷ See *Immigration Procedural Reforms*, *supra* note 5, at 54,882.

¹¹⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

¹¹⁹ AM. IMMIGRATION LAWYERS ASS'N, RESTORE FAIRNESS AND DUE PROCESS: 1996 IMMIGRATION LAWS GO TOO FAR, (May 30, 2002), available at <http://www.aila.org/contentViewer.aspx?bc=10,911,722,838> (posted on AILA InfoNet at Doc. No. 21IP1002) (last visited Mar. 4, 2003) [hereinafter AILA, *Restore Fairness and Due Process*].

in the United States, or evidence of rehabilitation, that might excuse the alien.¹²⁰ According to the AILA, IIRARIA robs immigration judges of the "authority to consider all the facts of a case before making a decision to deport a legal resident"¹²¹ and the "discretion to grant relief in deserving cases."¹²² A grant of relief from removal allows aliens who are technically removable under the laws, but whose removal would result in an injustice, to remain in the United States. Given the inflexible nature of the immigration laws, relief from removal is critical to ensure that an alien receives justice.

The Department of Justice's argument that the BIA does not have to conform to due process protections is disingenuous. The Department can best protect the ideals and image of American democracy by adhering to notions of due process. As Justice Jackson noted more than a half-century ago, "due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice"¹²³ Perhaps the Department could learn from Justice Vinson, who noted that "power is never without responsibility."¹²⁴ Certainly, the BIA is endowed with great power to administer the immigration laws of this country, and with that power comes the responsibility to administer them fairly — fundamental *fairness* is the touchstone of due process.¹²⁵ Given the current power and authority of the BIA, including its authority to oversee discretionary relief under the Immigration and Nationality Act, its procedures must be fair under the *Mathews* balancing test if aliens are to receive due process at the hands of the American justice system.

III. WEIGHING THE GOVERNMENT'S INTEREST IN EFFICIENT BIA PROCEDURES VERSUS ALIENS' INTEREST IN A FAIR HEARING BEFORE THE BIA UNDER *MATHEWS V. ELDRIDGE*

In commenting on the Final Rule procedural reforms, the Department of Justice claimed that "[t]he interest of the government in effective and efficient adjudication of immigration matters . . . is substantially higher than an individual respondent's interest in his or her own proceeding."¹²⁶ The *Plasencia* holding, however, stands for the general proposition that an alien's interest in immigration proceedings is not

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–25 (1953) (Jackson, J., dissenting).

¹²⁴ *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (holding that labor unions endowed with government-like powers are under a duty to exercise their powers in good faith).

¹²⁵ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

¹²⁶ *Immigration Procedural Reforms*, *supra* note 5, at 54,882.

categorically overborne by the weight of the government's interest.¹²⁷ Indeed, an alien's interest in fair procedures before the BIA is roughly equal to the government's interest.

The Department of Justice bases its contention that its interests trump aliens' interests on the fact that Congress enjoys plenary power under the Constitution to administer the immigration laws.¹²⁸ This authority, the Department notes, "implicates . . . the vast external realm of foreign relations"¹²⁹ and, as such, "the Attorney General has substantially more authority to structure the administrative adjudicatory process than most administrative processes."¹³⁰ Indeed, the Department questions "whether *Mathews* is the appropriate touchstone in light of the unique nature of the [Immigration] Act as the tool for managing the intersection of foreign and domestic interests regarding aliens."¹³¹

The Department's assertions are based on an exaggeration of its interests and authority. The "vast external realm of foreign relations"¹³² is certainly important and weighty. The Department, however, makes no effort to quantify the extent to which BIA procedures implicate those interests. Would the maintenance of the BIA status quo have upset the U.S. balance of power, harmed relationships with foreign allies, or jeopardized U.S. security? The Department does not assert that it will, nor does it assert that the reforms will positively impact U.S. foreign policy. Essentially, the Department claims that because it might have a substantial foreign policy interest in any given case, its interest should be weighed as if it had a substantial interest in every single case. Such a proposition stands in stark contrast with the idea that due process is "flexible" and dependant upon the attendant circumstances.¹³³

Furthermore, the *Plasencia* holding contradicts the Department's assertion that implication of foreign relations authority places its procedures outside the scope of the judicial review under the *Mathews* balancing test. In *Plasencia*, the Supreme Court specifically noted that "control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."¹³⁴

¹²⁷ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (holding that returning alien seeking admission was entitled to due process and remanding the case to determine whether procedures used met the due process requirement); see also *infra* notes 134–40 and accompanying text.

¹²⁸ *Immigration Procedural Reforms*, *supra* note 5, at 54,882.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (citations omitted).

¹³² *Id.*

¹³³ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances.").

¹³⁴ *Id.*

Nonetheless, the Court applied the *Mathews* test to an exclusionary proceeding,¹³⁵ an area where Congress and the Department have been afforded the greatest degree of deference.¹³⁶ The Supreme Court weighed the government's interests against aliens' interests within the *Mathews v. Eldridge* framework. The Court found that "[t]he Government's interest in efficient administration of the immigration laws"¹³⁷ and sovereign prerogative in the immigration arena "must weigh heavily in the balance."¹³⁸ On the other side of the balance, the Court found that aliens have "weighty" and high-ranking rights to "stay and live and work in this land of freedom" and "to rejoin . . . immediate family."¹³⁹ The *Plasencia* Court then remanded the case for a determination of whether the specific procedures used violated *Plasencia's* rights.¹⁴⁰ Remand for a consideration of the procedures employed would have been unnecessary if the Court had determined that the government's interest "substantially outweighed" the alien's rights.

The Department of Justice has a weighty interest in the efficient and effective administration of the BIA, and the Executive is entitled to substantial judicial deference. Nonetheless, the Supreme Court's balancing analysis in *Plasencia* indicates that aliens have compelling interests at stake in immigration proceedings. Those interests at least off-set the government's interest in efficient BIA procedures. Thus, an inquiry into the specific BIA Final Rule procedures is necessary.

IV. ANALYSIS OF THE FINAL RULE REFORM PROCEDURES

The *Mathews v. Eldridge* balancing test requires analysis into whether the BIA reform procedures increase "the risk of an erroneous deprivation of the [alien's] interest"¹⁴¹ weighed against the government's interest "in using the current procedures rather than additional or different procedures."¹⁴² The analysis also requires consideration of the "probable value of additional or different procedural safeguards."¹⁴³

¹³⁵ *Id.* at 37 (remanding to determine whether *Plasencia* was accorded due process under the *Mathews* balancing test).

¹³⁶ See *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206 (1953).

¹³⁷ *Plasencia*, 459 U.S. at 34.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 37 (recognizing the "gravity of *Plasencia's* interest" and remanding the case for a determination of "the other factors relevant to due process analysis — the risk of erroneous deprivation, the efficacy of additional procedural safeguards, and the Government's interest in providing no further procedures").

¹⁴¹ *Id.* at 34.

¹⁴² *Id.*

¹⁴³ *Id.*

Opponents of the Final Rule reforms contend that the reforms fail the *Mathews* test by "significantly increasing the risk of erroneous deprivation of private interests, while doing little to decrease the government's fiscal and administrative burdens."¹⁴⁴ However, application of this final prong of the *Mathews* test to the generality of BIA cases¹⁴⁵ reveals that expanded single-member review, elimination of de novo factual review, and reduction of the size of the Board are constitutional. These measures will substantially decrease the government's burden while protecting aliens' interests in fair procedures before the BIA. Conversely, the imposition of time limits for case adjudication and the ability of the Attorney General to determine at his discretion which Board members will remain and which will be removed violate due process. These measures will increase the risk of erroneous deprivation of aliens' rights without any off-setting benefit in efficiency or cost savings. Indeed, these reforms threaten the viability of the entire reform system, undermine the legitimacy of the BIA as an appellate body, and should be eliminated from the BIA procedural reforms.

A. Expanded Single-Member Review under the Case Management System

At the heart of the Final Rule reforms is expanded single-member review under the Case Management System. As the following paragraphs highlight, the system effectively balances government and aliens' interests in the great majority of cases by providing varying levels of review, depending on the demands of the case. Tracing a case through the steps of the Case Management System will allow us to explore how it works.

Under the Case Management System, an appeal to the BIA comes first to a screening panel consisting of BIA board members.¹⁴⁶ Individual members of the screening panel are authorized to summarily dismiss an appeal at the screening stage if the case does not merit appellate review.¹⁴⁷ Members of the screening panel may find that a case does not merit appellate review if: A) the appellant fails to specify reason for the appeal on the proper form; B) the appellant previously

¹⁴⁴ AILA, FINAL COMMENT, *supra* note 26.

¹⁴⁵ The *Mathews*'s Court emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). The majority of BIA cases consist of alien appellants seeking relief from orders of removal. See GORDON, *supra* note 18. As discussed previously, relief from removal is often an alien's only hope to avoid unfair and overly harsh application of inflexible immigration laws. See *supra* notes 118–22 and accompanying text. As such, appellants seeking relief from removal merit substantial due process protection. See *supra* notes 132–40 and accompanying text.

¹⁴⁶ See *Immigration Procedural Reforms*, *supra* note 5, at 54,903 (codified at 8 C.F.R. § 3.1(e)(1)).

¹⁴⁷ *Id.*

conceded the factual finding or conclusion of law on which the appeal is based; C) the appellant was already granted the relief he requests; D) the Board concludes that the appeal was filed under an improper motive or lacks an arguable basis in fact or law; E) the appellant fails to file supporting documents that he states he will file; F) the appeal falls outside the Board's jurisdiction; G) the appeal is untimely or barred by an affirmative waiver of the right to appeal; or H) the appeal is barred by statute or regulation.¹⁴⁸ The summary dismissal procedure will increase efficiency by allowing the Board to devote fewer resources to meritless claims, and to dismiss those claims at an early stage.

If an appeal survives summary judgment, the member of the screening panel assigns the case to a single board member for adjudication, unless the case is eligible for three-member panel review.¹⁴⁹ The screening panel may assign a case to a three-member panel only if the case presents one of the following circumstances:

- (i) The need to settle inconsistencies among the rulings of different immigration judges;
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
- (iv) The need to resolve a case or controversy of major national import;
- (v) The need to review a clearly erroneous factual determination by an immigration judge; or
- (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 3.1(e)(5).¹⁵⁰

Opponents of the Final Rule argue that this screening procedure will "place enormous, and potentially unreviewable discretion in the hands of individual Board Members"¹⁵¹ and that case assignment decisions are likely to be inconsistent with those of other Board members.¹⁵² As a result, opponents predict that appeals to the

¹⁴⁸ 8 C.F.R. § 3.1(d)(2) (2002).

¹⁴⁹ See *Immigration Procedural Reforms*, *supra* note 5, at 54,903 (codified at 8 C.F.R. § 3.1(e)(3)).

¹⁵⁰ *Id.* (codified at 8 C.F.R. § 3.1(e)(6)). Under section 3.1(e)(5), a single board member is entitled to reverse "if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." *Id.* (codified at 8 C.F.R. § 3.1(e)(5)).

¹⁵¹ AILA, FINAL COMMENT, *supra* note 26.

¹⁵² *Id.*

federal courts and subsequent remands to the BIA will erase any gains in efficiency from single-member review.¹⁵³

The success of the Case Management System hinges on the ability of screening personnel to consistently and fairly assign cases to the proper review panel. Screening panel members may commit mistakes in assigning individual cases to the wrong type of review panel. For the majority of cases, however, individual Board members are capable of accurately, consistently, and fairly assigning cases to the proper panel under the standards outlined above.¹⁵⁴ The Department notes that the criteria used to assign appeals are similar to those federal appellate courts utilize in "deciding whether to hold oral argument or to publish an opinion."¹⁵⁵ Furthermore, the standards outlined in section 3.1(e)(6) are fair and cover the types of cases that merit additional due process protection. If a screening panel member incorrectly judges a case to warrant the lower single-member protection, the Board member to whom the case is assigned can later refer it to a three-member panel.¹⁵⁶ This extra safeguard protects against inconsistencies in decision making among screening panel members by providing a second level of review. Ultimately, if an alien is not satisfied that his case was considered by the proper body, he may move to reopen the case or appeal to federal district court.¹⁵⁷

If an appeal passes the screening panel and is assigned to a single Board member, the reviewing Board member may take any of three actions, depending on the merits of the case. First, the Board member may affirm the decision without opinion, provided that the decision was correct, and provided that any errors were harmless and immaterial.¹⁵⁸ Also, the issues on appeal must be "squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or . . . [t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case."¹⁵⁹ This procedure protects the rights of aliens by allowing summary

¹⁵³ *Id.*

¹⁵⁴ See *Immigration Procedural Reforms*, *supra* note 5, at 54,888. The Department noted: The criteria used in the final rule are similar to those used by the federal courts of appeals in deciding whether to hold oral argument or to publish an opinion. The Department believes that these criteria strike the proper balance between cases that do not present novel or complicated issues that may be decided by a single Board member, and those issues that are appropriate for review by a three-member panel.

Id.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (codified at § 3.1(e)(3)).

¹⁵⁷ 8 C.F.R. § 3.2 (2002).

¹⁵⁸ See *Immigration Procedural Reforms*, *supra* note 5, at 54,903 (codified at 8 C.F.R. § 3.1(e)(4)).

¹⁵⁹ *Id.*

affirmance "only if the Board member finds that the record is complete and legally adequate, and the Board member agrees that the decision below is legally correct" ¹⁶⁰

This same summary affirmance procedure proved to be effective at efficiently resolving cases under an earlier reform called the streamlining initiative. ¹⁶¹ The Board applied the streamlining initiative in reaching approximately one-half of its decisions in fiscal year 2001. ¹⁶² A report on the initiative indicated that "between 1999 and 2001, only 0.7% [of the summary decisions] have resulted in judicial remands or reversals" ¹⁶³ and persons involved felt that the quality of BIA decisions improved. ¹⁶⁴

If an alien's appeal is not fit for affirmance without opinion, the reviewing Board member may issue a written opinion or, if the requirements listed above for three-member panel review are met, submit the case to panel review. ¹⁶⁵ Assuming that the case qualifies for three-member panel review, the panel may, at its discretion, elect to hear oral argument either before the three-member panel, or before the entire Board sitting *en banc*. ¹⁶⁶ No oral argument is permitted before single Board members. ¹⁶⁷

The Case Management System promises to improve the efficiency of the BIA by allocating more resources to cases that merit them. Appeals are appropriately screened for procedural accuracy before they proceed to merit review. Cases that are clearly controlled by existing law and precedent will be decided by a single Board member while cases that require extension of the law, or application of the law to new facts, will be reviewed by three-member panels. Critics of the Case Management System necessarily assume that individual Board members are either incapable or unwilling to fairly review cases. This assumption is unfair, absent any supporting evidence. Indeed, evidence on the success of the streamlining initiative suggests that individual Board members are capable of making accurate and fair

¹⁶⁰ *Id.* at 54,885.

¹⁶¹ *Id.* (citing Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,137 (Oct. 18, 1999)). The streamlining initiative allowed a single board member to affirm a case without opinion in cases when "the result reached [below] . . . was correct . . . any errors in the decision under review were harmless or nonmaterial; and . . . either . . . the issue on appeal was squarely controlled by existing Board or federal court precedent . . . or . . . the factual and legal questions raised . . . were so insubstantial that three-member review was not warranted." *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Immigration Procedural Reforms*, *supra* note 5, at 54,903 (codified at 8 C.F.R. § 3.1(e)(5)).

¹⁶⁶ *Id.* (codified at 8 C.F.R. § 3.1(e)(7)).

¹⁶⁷ *Id.*

decisions on appeals.¹⁶⁸ Fundamental to the Case Management System is the fact that every appeal will be considered by at least one individual who regards it as their duty to fairly, completely, and accurately decide appeals. Thus, the Case Management System effectively balances the government's and the aliens' interests, and thereby satisfies the *Mathews* balancing test.

B. Elimination of de novo Factual Review

Historically, the BIA has had the power to review the factual findings of immigration judges de novo.¹⁶⁹ Under the reforms, the BIA reviews issues of fact under a clearly erroneous standard.¹⁷⁰ The AILA contends that elimination of de novo review will result in "cursory review of matters that often rise or fall on the particular facts of a given case."¹⁷¹ The AILA also notes that despite recording requirements, immigration judges often issue their decisions orally following a hearing, relying only on their notes or memory; as a result of this practice and the inherent difficulty in gathering facts, the immigration judge's decisions often contain factual errors.¹⁷² Factual inaccuracies are unarguably cause for concern and may necessitate reforms at the trial level. The BIA, however, is an appellate body, and as such, should not be primarily responsible for fact finding. Indeed, the purpose of standards of review is to preserve the distinct roles of trial and appellate courts.¹⁷³ The Department of Justice noted that the Final Rule focuses "on the primacy of immigration judges as factfinders and determiners of the cases before them."¹⁷⁴ The Department emphasized that the Board's role is "not to serve as a second-trier of fact,"¹⁷⁵ rather, it is "to identify clear errors of fact or errors of law in decisions under review, to provide guidance and direction to the immigration judges, and to issue precedential interpretations as an appellate body."¹⁷⁶

¹⁶⁸ See *supra* notes 162–64 and accompanying text.

¹⁶⁹ *Matter of B-*, 7 I. & N. Dec. 1 (B.I.A. 1955) (holding that BIA is entitled to de novo review of factual conclusions of special inquiry officer); *Matter of Vilanova-Gonzales*, 13 I. & N. Dec. 399, 402 (B.I.A. 1969).

¹⁷⁰ See *Immigration Procedural Reforms*, *supra* note 5, at 54,902 (codified at 8 U.S.C. § 3.1(d)(3)) (noting that the Board may continue to conduct a de novo review of decisions of service officers and questions of law, discretion, judgment, and all other issues on appeal from immigration judges).

¹⁷¹ AILA, FINAL COMMENT, *supra* note 26.

¹⁷² *Id.*

¹⁷³ Richard H. W. Maloy, "Standards of Review" — *Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 609 (2000).

¹⁷⁴ *Sweeping Changes in Store for BIA*, 79 INTERPRETER RELEASES NO. 35, 1346, 1348 (2002).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Clear division of fact-finding authority will promote efficiency by avoiding duplicative work. The Supreme Court noted that requiring an appellate body to duplicate the fact-gathering efforts of a trial court "would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."¹⁷⁷ The elimination of de novo review promotes the government's interest in due process by allowing the BIA to forgo a costly procedure that only negligibly improves the accuracy of the hearing.¹⁷⁸ The rights of aliens are protected because the reform permits Board members to review factual determinations when they have a definite and firm conviction that a mistake has been committed.¹⁷⁹ Additionally, the Board may continue to conduct a de novo review of decisions by INS officers, questions of law, discretion, judgment, and all other issues on appeal from immigration judges.¹⁸⁰

Opponents of the reform argue that gains in BIA efficiency from the higher standard of review will be frustrated due to dramatic increases in remands.¹⁸¹ A short period of remands, however, may actually improve the quality of immigration judges' decisions and improve efficiency in the long run. The BIA remanded a case for insufficient factual findings shortly following the issuance of the Final Rule, but before the effective date of the reforms.¹⁸² The BIA opinion noted: "[m]ost Immigration Judges presently issue comprehensive and thorough decisions, which are adequate under the present regulations and which should suffice under the newly promulgated rules."¹⁸³ The BIA carefully emphasized, however, that the Final Rule "adds meaningful force to an Immigration Judge's decision and heightens the need for Immigration Judges to include clear and complete findings of fact in their decisions."¹⁸⁴

¹⁷⁷ *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (holding that lower court outstepped the bounds of clearly erroneous review by taking the findings of fact and considering them de novo when the court was convinced it would have decided the cases differently). The Court also noted that requiring parties to prove their case factually at two levels is "requiring too much." *Id.*; see also *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (stating that "clearly erroneous" standard of review recognizes that an evidentiary hearing on the merits should be the "'main event' . . . rather than a 'tryout on the road'").

¹⁷⁸ See *Immigration Procedural Reforms*, *supra* note 5, at 54,889-90.

¹⁷⁹ *Id.*; see also *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

¹⁸⁰ See *Immigration Procedural Reforms*, *supra* note 5, at 54,890.

¹⁸¹ See AILA, FINAL COMMENT, *supra* note 26.

¹⁸² See *In re S-H-*, 23 I. & N. Dec. 462, 466 (B.I.A. 2002) (remanding the case for insufficient factual findings to determine whether the immigration judge correctly considered INS opposition in granting relief from removal).

¹⁸³ *Id.* at 465.

¹⁸⁴ *Id.*

The BIA's decision places Immigration Judges on notice that their cases will be remanded for insufficient factual findings. Censure by remand will likely encourage immigration judges to put more effort into fact finding at the trial level. Improved fact finding at the trial level will increase efficiency and due process protection for aliens. The burden of accurate fact finding is more appropriately and efficiently placed at the trial level. Trial courts are better equipped to make factual determinations, particularly concerning credibility of witnesses, because witnesses appear in person before them.¹⁸⁵

Ultimately, implementing a standard of clearly erroneous review brings the BIA into accord with other types of appellate courts. As the Supreme Court noted, de novo factual review at the appellate level results in huge costs in government resources without substantially improving the protection of aliens' rights.¹⁸⁶ As a result, the elimination of BIA de novo review satisfies *Mathews'* due process analysis.

C. Reduction in Size of Board

The Final Rule mandates a reduction of the Board's size from twenty-three members to eleven members, following a transition period to reduce backlog.¹⁸⁷ At first glance, it is difficult to understand how halving the already overburdened Board will promote efficiency and timely resolution of cases. Critics of the reduction in size note: "[I]t is disingenuous to expect the Board to maintain the quality of its adjudications and increase its productivity in the face of handicapping reductions in resources."¹⁸⁸ This criticism ignores the experience of the federal courts that having too many judges impedes efficient operation of courts.¹⁸⁹ Judge Irving Kaufman, former chief judge of the Second Circuit, noted:

¹⁸⁵ See *In re A-S-*, 21 I. & N. Dec. 1106 (B.I.A. 1998) (holding that the Board, despite having the authority to review cases de novo, "accords deference to an Immigration Judge's findings concerning credibility and credibility-related issues").

¹⁸⁶ See *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985); *supra* note 177 and accompanying text.

¹⁸⁷ See *Immigration Procedural Reforms*, *supra* note 5, at 54,893. Under the reforms, the Board will likely divide cases among five Board members acting individually and two three-member panels. *Id.* The Department based its decision to reduce the size of the Board and allocate decisions in this manner on "judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload." *Id.*

¹⁸⁸ AILA, FINAL COMMENT, *supra* note 26.

¹⁸⁹ See Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A. J. 70, 71 (1993) (citing the conclusion of the Federal Courts Study Committee that "advocated a cap of 1,000 Article III judges to 'enable the federal courts to maintain their high quality, cohesiveness[,] and effectiveness'").

[C]oherence and uniformity of the law are bound to decline with addition of new judges. Such instability can have a snowball effect. The judicial workload is increased because more panel hearings and en banc votes are required. And the uncertainty of outcomes resulting from a cacophony of differing opinions can act as a catalyst for new appeals as more litigants find a roll of the appellate dice worth the chance.¹⁹⁰

A decrease in Board members will likely promote collegiality and cohesiveness among Board members, increase the clarity and consistency of decisions, and, thereby, improve the efficiency of the Board. As a result, both the aliens' and the government's due process interests will be better served.¹⁹¹

A troubling element of the plan to reduce the size of the Board is the fact that the Attorney General will decide at his discretion which Board members will be removed.¹⁹² This move has drawn staunch criticism from observers who argue that the reduction exposes the Attorney General's true motives behind the reform: to solidify his control over the Board and its decisions.¹⁹³ Jeanne Butterfield, Executive Director of the AILA, called this element of the reform a "thinly veiled political threat," because the unfettered discretion will allow the Attorney General to remove judges who are inconsistent with his political philosophy.¹⁹⁴

"Equally troubling," the AILA warns, "is the potential impact of these future dismissals on the independent decision-making of all BIA Members during the six to nine month transition period."¹⁹⁵ Opponents note that Attorney General Ashcroft will consider productivity "broadly, the number of rulings each board member makes" as "one of the factors . . . in determining who stays on the board."¹⁹⁶ Thus, Board members may feel pressure to decide cases quickly to keep up with the Board member sitting next to them. The Attorney General has created a system where incentive for Board Members to act quickly (to preserve their jobs) is at odds with thorough, fair, and accurate work. Indeed, this perverse system of incentives may already be affecting the Board. Observers have commented that the mood at the Board is "somber" and noted that three Board members have recently resigned.¹⁹⁷

¹⁹⁰ *Id.*

¹⁹¹ See *Immigration Procedural Reforms*, *supra* note 5, at 54,893.

¹⁹² See *id.*

¹⁹³ See AILA, FINAL COMMENT, *supra* note 26.

¹⁹⁴ Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, available at <http://www.latimes.com/news/printedition/la-na-immig5jan05001500.story> (last visited Jan. 6, 2003).

¹⁹⁵ AILA, FINAL COMMENT, *supra* note 26.

¹⁹⁶ Getter & Peterson, *supra* note 194.

¹⁹⁷ *Id.*

Allowing the Attorney General to have complete discretion in deciding which Board members will be removed calls into question the political independence and integrity of the Board and places immense pressure on Board members to decide cases hastily. This incentive system is inconsistent with due process because it limits the ability of the adjudicator to be fair.

D. Time Limits

The least defensible of the Final Rule reforms is the imposition of time limits for case adjudication. The Final Rule mandates that for normal cases, a single board member must complete review of the case within ninety days of completion of the record on appeal.¹⁹⁸ Cases assigned to three-member panels must be completed within 180 days of completion of the record on appeal.¹⁹⁹ These time limits fail the *Mathews* balancing test by substantially increasing the risk that aliens' interests will be erroneously deprived without providing an off-setting benefit in government efficiency. Furthermore, the time limits threaten the viability of the entire BIA reform, and may ultimately undermine the existence of the BIA itself by forcing Board members to rubber-stamp decisions without careful consideration.

The Department contends that the time limits provide sufficient time for the Board to rule on the "vast majority of cases," and notes that a procedure exists for extending time limits in the rare cases that it is necessary.²⁰⁰ The Department ignores the fact that even if a time limit is "sufficiently long to permit an unhurried decision in any given case,"²⁰¹ it may be "applicable to so many cases that a judge will be forced to devote less time to some of them than she otherwise would . . ."²⁰² A 1997 article on the constitutionality of statutorily-imposed time limits on federal judges concluded that "time limits . . . can unduly interfere with courts' inherent decisionmaking function by requiring judges in some instances to devote less time to cases than they otherwise would, thereby increasing the risk of arbitrary decisions."²⁰³

Indeed, Professor Alexander Aleinikoff, former INS General Counsel, indicated that time limits are already pressuring Board members to decide cases hastily at the expense of accuracy and fairness: "We are already seeing results: [m]any, many cases are decided at a speed that makes it impossible to believe they got the scrutiny

¹⁹⁸ See *Immigration Procedural Reforms*, *supra* note 5, at 54,903 (codified at 8 C.F.R. § 3.1(e)(8)).

¹⁹⁹ See *id.*

²⁰⁰ *Immigration Procedural Reforms*, *supra* note 5, at 54,896.

²⁰¹ William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 801 (1997).

²⁰² *Id.*

²⁰³ *Id.* at 765.

a person who faces removal from the United States deserves."²⁰⁴ As a result, more aliens are appealing their cases to the federal courts. The Ninth Circuit received, on average, more than 150 appeals per week following the implementation of the Final Rule reforms, prompting the courts to automatically issue temporary stays on all deportation orders.²⁰⁵ The temporary stays, and likely remands from hastily decided cases, threaten to defeat the very purpose of the reforms.²⁰⁶ It is not efficient for the Board to have to hear cases repeatedly.

The Department noted that some commentators "supported the new time limits" but did not identify whom, or provide reasons for their support.²⁰⁷ Some commentators may have supported the time limits because they believed time limits would lead to a faster resolution of aliens' appeals. A timely resolution of appeals is in everyone's interest. However, remands and temporary stays will likely off-set gains in speed. Furthermore, as the AILA noted, "[a]ccuracy and fairness in the decision-making process are as (or more) essential than speed in determining appeals where an individual's safety, liberty or life may be on the line."²⁰⁸ Finally, the Final Rule mandates that the time limits are an "internal management directive" and "do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights . . ."²⁰⁹ Thus, time limits will not benefit petitioners and will only increase the likelihood of error.

Time limits on Board member decisions deprive aliens of procedural due process by substantially increasing the risk that aliens' appeals will not be considered fully and fairly. The Department provided no evidence that speedier decisions will be more efficient or more cost-effective than decisions solely under the Case Management System. Individual Board members can be expected to competently and fairly decide cases under the Case Management System. They cannot be expected to do so if they are not provided with enough time to review the appeals and make informed, considered decisions. Forcing Board members to rubber-stamp decisions to meet a time deadline undermines the integrity and viability of the BIA as a meaningful appellate body. If Board decisions are viewed as cursory, then appeals from BIA decisions to the federal courts and remands from federal courts back to the BIA will undoubtedly increase, thereby undermining the gains in efficiency achieved by other Final Rule reforms. The time limits must be

²⁰⁴ Getter & Peterson, *supra* note 194.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing unidentified employee of the Justice Department who "expected the federal courts to ship back to the immigration appeals board some of the hastily decided cases").

²⁰⁷ Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,896.

²⁰⁸ AILA, FINAL COMMENT, *supra* note 26.

²⁰⁹ *Immigration Procedural Reforms*, *supra* note 5, at 54,904 (codified at 8 C.F.R. § 3.1(e)(8)).

stricken from Final Rule reforms to preserve the workability of the reforms as a whole, and, ultimately, the legitimacy of the BIA as an appellate review body.

V. CONCLUSION: DUE PROCESS IS IN EVERYONE'S INTEREST

The Department of Justice does a disservice to United States constitutional democracy by claiming that BIA procedural reforms are exempt from due process requirements. In the early and middle part of the twentieth century, the constitutional due process rights of aliens were indeed hollow.²¹⁰ In the same breath, the Supreme Court paid lip service to the fact that the Constitution guaranteed due process to all persons, regardless of citizenship, but upheld the removal of aliens when they were denied even the most basic due process protections.²¹¹ More recent Supreme Court holdings and statutory enactments have expanded due process protection for aliens.²¹² Under modern law, aliens' rights are no longer categorically overborne by the government's interest in efficient administration of immigration laws.²¹³ What constitutes due process is judged by the *Mathews v. Eldridge* balancing test.²¹⁴

Constitutional due process minimums should extend to procedures before the BIA; to conclude otherwise would be to deny procedural due process to a vulnerable group that the Constitution explicitly protects in a forum that is essential to a fair determination of their claims. During this time, when the power of United States is feared and resented throughout the world, the United States can ill afford to turn away would-be visitors, residents, and citizens without affording them a fair and full opportunity to make their cases for membership in the United States community. Ultimately, the BIA procedural reforms must comport with constitutional due process to be consistent with bedrock principles of American democracy.

Breaking down the procedural reforms into their constituent parts reveals that there are positive components of the reforms that will protect aliens' interests, while improving efficiency for the government. The Case Management System will allow for streamlining of BIA procedures. It assigns more resources where needed and allows for more efficient dismissal of meritless claims that clog the appellate

²¹⁰ See *supra* notes 40–75 and accompanying text.

²¹¹ See *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that an alien was afforded due process in an exclusion proceeding despite the fact that she had no formal hearing, did not realize she was being questioned regarding deportation, and could not understand English).

²¹² See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (extending *Mathews v. Eldridge* due process balancing to exclusion proceedings).

²¹³ See *id.* (noting that aliens' rights in the proceedings were weighty and remanding the case for a determination of whether the procedures employed comported with due process).

²¹⁴ *Id.*

system. The second reform, elimination of *de novo* factual review, will shift the burden of accurate fact finding more squarely upon the shoulders of the immigration judges, making the entire immigration process more efficient in the long run. Finally, the reduction of the size of the Board will increase cohesiveness, clarity, and predictability of the law. Reduction will also increase the efficiency and decrease the incentive to file frivolous appeals. These reforms meet *Mathews* due process analysis by effectively balancing the government's interest in BIA efficiency with the aliens' interest in fair procedures before the Board. These reforms promise to improve the function of the BIA.

Two components of the Final Rule reforms, however, fail to meet the constitutional due process minimums and indeed threaten the viability of the entire reform package. Allowing the Attorney General to have discretion over which Board members are removed threatens the political independence and legitimacy of the Board. It also increases the risk of erroneous deprivation of aliens' rights, because Board members are under tremendous and perverse pressure to decide cases hastily or risk their employment. Time limits, similarly, place unnecessary constraints on Board members and substantially increase the risk that they will make hurried and inaccurate decisions. Hurried and inaccurate decisions will undermine any gains in efficiency achieved by the other reforms, and will ultimately undercut the legitimacy of the BIA as an appellate body. As such, Attorney General control over Board membership and time limits should be stricken from the reforms. Limiting the BIA reforms to the Case Management System, the elimination of *de novo* review, and a neutral reduction in the size of the Board will protect the long-term viability and legitimacy of the BIA as an appellate review body.

Ultimately, it is in everyone's interest to assure that the BIA procedural reforms conform to constitutional due process requirements. Procedural due process protects the government against "those blunders which leave lasting stains on a system of justice,"²¹⁵ and insures that aliens are provided a full and fair opportunity to present their cases for entering this land of freedom.

Bradley J. Wyatt

²¹⁵ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–25 (1953).