

DORSEY & WHITNEY LLP

STUDY CONDUCTED FOR:

THE AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION POLICY,
PRACTICE AND PRO BONO

RE:

BOARD OF IMMIGRATION APPEALS:
PROCEDURAL REFORMS
TO IMPROVE CASE MANAGEMENT

This Study was submitted to the American Bar Association
Commission on Immigration Policy, Practice and Pro Bono
on July 22, 2003.

This Study has not been considered or approved
by the House of Delegates or the Board of Governors of the American Bar Association.
It does not purport to state the policy or views of the Association.

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SOURCES AND METHODOLOGY

The American Bar Association's Commission on Immigration Policy, Practice and Pro Bono requested Dorsey & Whitney LLP to research, investigate, and prepare this Study concerning the 2002 "Procedural Reforms" at the BIA.

The American Bar Association ("ABA") is a voluntary, national membership organization of the legal profession. Its more than 410,000 members, from each state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of non-lawyer associates in allied fields.

The ABA's Commission on Immigration Policy, Practice and Pro Bono ("the Commission") directs the efforts of the ABA to ensure fair treatment, and full due process rights, for immigrants, refugees and other newcomers in the United States. The Commission monitors and analyzes legislative and regulatory proposals, and advocates for improvements; provides continuing education and information to members of the legal community and the public; and develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide legal representation for individuals in immigration proceedings.

Dorsey & Whitney LLP ("Dorsey") is a large, multi-specialty law firm with offices in the United States, Canada, Europe, and Asia. It represents some of the largest corporations in the world, and, through its pro bono program, some of the poorest individuals. Very few of Dorsey's 750 lawyers practice immigration law. In fact, Dorsey's immigration practice generates less than one-half of one percent of Dorsey's revenues.

Approximately 50 Dorsey lawyers and paralegals participated in the research, investigation, and preparation of this Study. All Dorsey lawyers and paralegals participated pro bono. As the ABA directed, they approached the project without preconceived notions or conclusions, and they sought information from all sources and sides.

Dorsey lawyers conducted or sought scores of interviews with past and present officials of the Department of Justice, the Executive Office of Immigration Review ("EOIR"), and the BIA; with all members of the United States Senate's Subcommittee on Immigration, Border Security, and Citizenship and their staffs; with all members of the United States House of Representatives' Subcommittee on Immigration, Border Security, and Claims and their staffs; with court clerk's offices in all federal circuits; with individual immigration lawyers and groups, especially the American Immigration Law Foundation ("AILF") and the Federation for American Immigration Reform ("FAIR"); and with academic experts. Several persons who were interviewed are not named in this Study, at their request. Several persons, including all current employees of EOIR, were instructed not to speak to Dorsey lawyers. *See* Appendix 2. Some did anyway. We thank all of those who spoke with us, whether for attribution or not, whether Republican or Democrat, whether AILF or FAIR.

Dorsey lawyers and paralegals also collected and reviewed many hundreds of documents in preparing this Study — including Congressional hearing transcripts, court opinions, legal briefs, Immigration Judge and BIA rulings, and law review articles. We appreciate the donation

of free Westlaw time we received for this study from West, a Thomson business. We also reviewed internal memoranda produced pursuant to our requests under the Freedom of Information Act. Several of those documents, or the data derived from them, are attached to this Study as appendices.

Near the end of this Study, we highlight five individual cases illustrating the problems created by too-rapid BIA “affirmances without opinion,” which are now encouraged or required by the “Procedural Reforms.” In each case, a non-citizen was ordered expelled from the United States by an Immigration Judge, who made a patently obvious mistake. The BIA failed to catch and correct the mistakes; instead, in each case, the BIA summarily affirmed the erroneous decision without opinion or explanation. The non-citizens appealed the BIA summary affirmances to the federal circuit courts. The federal circuit courts dug back to the Immigration Judge opinions, saw the obvious errors, reversed, and remanded back to the BIA to do “what the BIA should have done” in the first place:

- Yong Tang, a leader of the Tiananmen Square protest beaten senseless during interrogations by Chinese police before he fled to the United States, was ordered expelled because an Immigration Judge did not believe his testimony “in a few respects.” Also, the Immigration Judge concluded, because Mr. Tang was working in the United States for a company run by persons of Chinese extraction, he would not reasonably fear persecution upon his return to China. The entire basis of this remarkable conclusion, the Immigration Judge admitted, was “a feeling.” The BIA summarily affirmed and never issued a written opinion. The United States Court of Appeals for the Third Circuit had to review the original Immigration Judge’s opinion “as though it were that of the BIA.” The Third Circuit reversed and remanded, finding the Immigration Judge’s decision to be based on “inferences, assumptions, and feelings that range from overreaching to sheer speculation.”¹
- Azim Tuhin, a political activist, fled his native Bangladesh after being beaten many times by the police. He was ordered expelled because, according to the Immigration Judge, he had fled “prosecution, not persecution.” The BIA summarily affirmed. The United States Court of Appeals for the Seventh Circuit reversed and remanded, noting that the Immigration Judge never even mentioned Tuhin’s multiple beatings, and concluding that the Immigration Judge’s view that prosecution and persecution are mutually exclusive “seems to be based on a fundamental misunderstanding of the law.”²
- Diland Herbert, a citizen of Trinidad and Tobago, was ordered expelled by an Immigration Judge who proceeded in absentia, even though Herbert’s lawyer had filed a motion for continuance, even though Herbert’s family was present, and even though Herbert was on the way (delayed by traffic in a heavy rainstorm). The BIA summarily affirmed. The United States Court of Appeals for the First Circuit reversed and remanded, finding that proceeding in

¹ See *Tang v. Ashcroft*, 2003 WL 1860549 (3d Cir. April 4, 2003) (unpublished opinion).

² See *Tuhin v. Ashcroft*, 2003 WL 1342995 (7th Cir. Feb. 11, 2003) (unpublished opinion).

absentia under such exceptional circumstances was “arbitrary and capricious.”³

- Zebenwork Haile Georgis, a citizen of Ethiopia, was ordered expelled by an Immigration Judge, despite the many arrests, beatings, and rapes by police in Ethiopia of her family members and others involved with her in a political group opposed to the Ethiopian government. The Immigration Judge based his expulsion order largely on discrepancies of dates in Ms. Georgis’s testimony as to when her family members and colleagues were arrested, beaten, or imprisoned. The BIA summarily affirmed the expulsion order. On appeal, the United States Court of Appeals for the Seventh Circuit pointed out that Georgis was referring to the Julian calendar used in Ethiopia, which is more than seven years different from the Gregorian calendar used in the United States, and that “everyone, and not just Georgis, seemed unclear about converting the dates from Ethiopian to Gregorian.” The Seventh Circuit vacated the expulsion order, remanded to the BIA, and “strongly urge[d] the BIA to assign a different judge to Georgis’s case on remand.”⁴
- Adel Nagi El Moraghy, a Coptic Christian Egyptian national, sought asylum in the United States because of fears of persecution by Islamic fundamentalists if he were returned to Egypt. Mr. El Moraghy described a series of beatings he had suffered in Egypt and testified that he would be a “marked man” if he returned because, while in Egypt, he had been a friend of a Muslim woman. The Immigration Judge did not make any finding as to Mr. El Moraghy’s credibility and did not address his past persecution at all. However, the Immigration Judge ordered Mr. El Moraghy deported. The basis for the Immigration Judge’s decision, to the extent it could be discerned, was that the United States Department of State “country reports,” which described a history of violent assaults against Coptic Christians in Egypt, did not mention Mr. El Moraghy by name. The BIA summarily affirmed. The United States Court of Appeals for the First Circuit reviewed the Immigration Judge’s opinion directly, found an “absence of reasoned discussion,” and remanded to the BIA. In remanding, the First Circuit observed that the BIA’s “affirmance without opinion” procedure had inflicted a cost “that will be borne mostly by the courts, which have done what the BIA should have done.”⁵

In highlighting these five illustrative cases, we do not wish to suggest that these are the only errors that have been committed. They are illustrative only. Indeed, the “Procedural Reforms” clearly make such mistakes, sometimes fatal mistakes, more likely to happen and more difficult to detect.

³ See *Herbert v. Ashcroft*, 325 F.3d 68 (1st Cir. 2003).

⁴ See *Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003).

⁵ *El Moraghy v. Ashcroft*, 2003WL 21355904, ___ F.3d ___, (1st Cir. June 12, 2003).

The “Procedural Reforms” were officially effective on September 25, 2002, so, at the time this Study was released, less than one year had passed. This Study, therefore, can only provide a snapshot—an early snapshot—of the adverse impacts the “Procedural Reforms” are having. The data suggest that the adverse impacts, particularly on aliens and on the federal courts, will worsen, not improve, as additional time passes.

THE BOARD OF IMMIGRATION APPEALS

History

Systematic federal regulation of immigration and naturalization began in 1891, when Congress established the office of Superintendent of Immigration in the Treasury Department.⁶ Immigration functions resided in the Treasury Department until 1903 and then in the Department of Commerce and Labor until 1906. The Bureau of Immigration and Naturalization was established in 1906 and transferred to the new and separate Department of Labor.⁷

The origins of what was to become the BIA date from 1922, when the Secretary of Labor established a board to review immigration cases and to make recommendations to the Secretary for their disposition. This Board of Review provided an opportunity for oral argument, submission of briefs, and more thoughtful consideration of the cases. It was a unit of the Department of Labor from 1922 to 1940.

In 1940, Congress moved the regulation of immigration from the Department of Labor to the Department of Justice. Under the authority of the Attorney General, the Board of Review became the BIA. The BIA was delegated the authority to make final decisions in immigration cases, subject only to possible review by the Attorney General. In 1983, a Justice Department reorganization created the EOIR and placed the BIA under the umbrella of that office.

As a practical matter, the BIA is the chief administrative law body for immigration law. However, the BIA is not – and has never been – a statutory body. It exists only by virtue of the Attorney General’s regulations.⁸ As the Attorney General’s creation, the Attorney General defines and modifies the BIA’s powers. Some have criticized the BIA’s uncertainty of status and have urged that it be given statutory recognition and certainty.⁹ To date, Congress has not acted on such proposals.

⁶ Act of March 3, 1891, § 7, 26 Stat. 1084.

⁷ Act of March 4, 1913, § 3, 34 Stat. 596.

⁸ 8 C.F.R., Part 3; Dep’t of Justice Order No. 174-59, § 19, 25 Fed. Reg. 2460 (Mar. 28, 1960).

⁹ For a discussion of history regarding proposals to establish an Article I immigration court, see 1 CHARLES GORDON, STANLEY MAILMAN, STEVEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05 (2003) [hereinafter IMMIGRATION LAW AND PROCEDURE].

The BIA has nationwide jurisdiction to hear appeals from certain decisions rendered by Immigration Judges or by District Directors of the legacy Immigration and Naturalization Service (“INS”) ¹⁰

Duties and Responsibilities

The BIA is a quasi-judicial body with exclusively appellate functions. It historically has served two purposes: deciding appeals of individual cases and issuing precedential decisions for guidance to the Service and the Immigration Judges.¹¹

BIA decisions were historically made by three-member panels, because the BIA itself considered “the deliberative process available through three-Member review” to be essential.¹² These BIA panels had appellate jurisdiction in the following cases:¹³

- (1) Decisions of Immigration Judges in most exclusion cases;
- (2) Decisions of Immigration Judges in most deportation cases;
- (3) Decisions of Immigration Judges in most removal cases;
- (4) Decisions of Immigration Judges on applications for the exercise of discretion in waiving excludability or deportability for certain residents returning to an unrelinquished domicile of at least seven years;
- (5) Decisions involving administrative fines and penalties;
- (6) Decisions on petitions for approval of preferred immigration status by reason of relationship to a citizen or resident alien, or decisions revoking the approval of such petitions;
- (7) Decisions on applications for waiver of inadmissibility for temporary entrants;
- (8) Determinations relating to detention, bond, or parole of a respondent;
- (9) Decisions of Immigration Judges in proceedings for discipline of attorneys or accredited representatives;

¹⁰ On March 1, 2003, the INS was eliminated when the Department of Homeland Security (“DHS”) was created. Most of the INS’s functions were taken over by three new DHS Bureaus: the Bureau of Citizenship and Immigration Services (“BCIS”), the Bureau of Immigration and Custom Enforcement (“BICE”), and the Bureau of Customs and Border Protection (“BCBP”). Unless the context requires specificity, throughout this Study the INS and the successor DHS Bureaus will be referred to collectively as “the Service.” The BIA itself continues to be a part of the Department of Justice.

¹¹ 8 C.F.R. § 3.1 (1999).

¹² Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members 3 (Aug. 28, 2000) [hereinafter *Schmidt Memorandum*] (copy produced by EOIR to Dorsey & Whitney pursuant to Freedom of Information Act request and attached as Appendix 3).

¹³ 8 C.F.R. § 3.1(b) (1999).

- (10) Decisions of Immigration Judges in rescission of adjustment of status cases;
- (11) Decisions of Immigration Judges in asylum cases;
- (12) Decisions of Immigration Judges relating to temporary protected status; and
- (13) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals from that list.

The Attorney General conferred on the BIA the authority and discretion to the extent necessary and appropriate for the disposition of cases.¹⁴ The BIA conducted de novo review of factual issues, though it did not hear testimony and would ordinarily limit its review to matters developed on the record, remanding cases when further fact-finding was deemed necessary.¹⁵ As stated by former BIA Chairman Thomas Finucane:

Unlike appellate courts, on questions of fact the Board is not limited to a determination if there was substantial evidence upon which the finding of the Special Inquiry Officer was based. The Board has the power and authority to review the record and make its own conclusions as to facts. . . . In a word the Board may make a de novo review of the record and make its own conclusions and findings irrespective of those made by the Special Inquiry Officer.¹⁶

Thus, before 2002, the BIA could make its own independent determination on questions of fact and law and on whether discretionary relief should be granted. The BIA also had discretion to grant oral argument if requested. It could confirm or alter the Immigration Judge's rulings on discretionary relief and award discretionary relief. The BIA issued a written decision that was supposed to discuss the evidence and the reasons for the BIA's determination sufficiently so that a reviewing court would know its basis.¹⁷

BIA decisions bind all DHS employees and officers and all Immigration Judges who administer the Immigration and Naturalization Act.¹⁸ Selected decisions may be designated by a

¹⁴ 8 C.F.R. § 3.1(d)(1) (1999).

¹⁵ IMMIGRATION LAW AND PROCEDURE, *supra* note 9, at § 3.05[5](b).

¹⁶ *Id.* at § 3.5[5](b) (citing Thomas Finucane, *Procedure Before the Board of Immigration Appeals*, 31 Interpreter Releases 30 (1954)); see also *Woodby v. INS*, 385 U.S. 276, 278 n.2 (1966); *Cordoba-Chaves v. INS*, 946 F.2d 1244, 1249 (7th Cir. 1991) (BIA can reverse Immigration Judge's grant of § 212(c) relief and make its own assessment of the facts and conclusions regarding the grant or denial of discretionary relief).

¹⁷ See discussion of judicial review in IMMIGRATION LAW AND PROCEDURE, *supra* note 9, at § 104.

¹⁸ 8 C.F.R. § 3.1(g) (1999).

majority vote of the permanent BIA members as precedents to be followed in future proceedings.¹⁹

The BIA's decision closed the case administratively unless the case was further reviewed by the Attorney General—a very rare occurrence.²⁰ BIA decisions can be modified or overruled by subsequent BIA decisions, by the Attorney General, or by the federal courts.

Members of the Board of Immigration Appeals

Each of the board members of the BIA is rated for title, series, and grade in the Federal Service as a “Board Member, SL-905.”²¹ As such, each member of the BIA is required to have at least a J.D. law degree and be an active member of a state bar or the bar of the District of Columbia with a minimum of seven years of professional legal experience, at least one of which would be equivalent to the GS-15 level in the federal civil service.²² When selecting from the field of qualified applicants as recently as 2000, the Justice Department indicated that the following four factors would be used for quality ranking:

- (1) Comprehensive knowledge of the field of immigration laws, including the Immigration and Nationality Act regulations, and administrative and judicial case law;
- (2) Excellent analytical, decision making, and writing ability;
- (3) Proven ability to manage cases; [and]
- (4) Proven ability or potential to function effectively in high-volume collegial decision-making environment.²³

Although “comprehensive knowledge of the field of immigration laws” is set forth as the first qualification of a BIA judge, recently the Justice Department has selected members for the BIA who have had no prior immigration law or administrative law background. In February 2002, before the House Judiciary Committee's Subcommittee on Immigration and Claims, the Honorable Lauren R. Mathon, a member of the BIA from 1995-2001 and, before that, an Immigration Judge and an INS trial attorney, testified:

[A]lthough the number of [BIA] Board Members greatly expanded over the past few years, four of the Board Members appointed in

¹⁹ *Id.* Only a very small percentage of decisions that the BIA issues in any given year are deemed of precedential value. In 2002, 25 decisions were selected as precedential; in 2001, 19 were so designated; and, in 2000, only 18 received that status. *Operations of the Executive Office for Immigration Review (EOIR): Hearing Before the Subcommittee on Immigration and Claims of the Committee of the Judiciary*, 107th Cong. 57 (2002) [hereinafter *EOIR Hearing*] (statement of the Honorable Michael Heilman, former member of the Board of Immigration Appeals); Attorney General and Board of Immigration Appeals Precedent Decisions, available at <http://www.usdoj.gov/eoir/eoia/bia/biaindx.htm>.

²⁰ 8 C.F.R. § 3.1(d)(2) (1999)

²¹ *See, e.g.*, Office of Immigration Review Vacancy Announcement No. 00-02-15001, available at <http://www.aifa.org>.

²² *Id.*

²³ *Id.*

the last two years had no immigration background or expertise. It took them time to learn a new body of law and become proficient at their work, and during this time the number of cases which could otherwise be reviewed and adjudicated decreased.²⁴

In the Justice Department's Public Affairs Office press release of September 25, 2001, the EOIR announced the professional backgrounds of three appointments to the BIA (Kevin A. Ohlson, Frederick D. Hess, and Roger Pauley). The two common denominators for these three appointments seem to have been a significant period of service on law enforcement and prosecutorial functions within the Department of Justice Criminal Division combined with the absence of any prior immigration law experience or background. Mr. Pauley had served more than 27 years, Mr. Hess had served more than 19 years, and Mr. Ohlson had served more than a decade in the Criminal Division before their respective appointments to the BIA. None appears to have previously held any other administrative or immigration law functions in the federal government.

On the other hand, during 2003, five experienced BIA members with immigration expertise have "left" or shortly will "leave" the BIA. The circumstances of their departures were not disclosed. Paul Schmidt had a long career in the INS general counsel's office, then eight years experience on the BIA, including six years as chairman. Gustavo Villageliu, a Cuban immigrant himself, had been practicing immigration law since 1978, as a BIA staff attorney, then an Immigration Judge, then a BIA Member. Cecilia Espenoza, before joining the BIA, had been a professor of immigration law and legal services attorney. Noel Brennan, prior to being appointed to the BIA, had been a deputy assistant attorney general in the Department of Justice, responsible for community justice programs, and a longtime pro bono and legal services lawyer. John W. Guendelsberger was also a professor of immigration law and legal services lawyer before his appointment to the BIA.

THE BOARD OF IMMIGRATION APPEALS BACKLOG

Historical Data

During the 1990s, the United States had record immigration: 9,095,417 people immigrated, more than any decade in American history.²⁵ Also during the 1990s, the number of aliens expelled from the United States more than quadrupled.²⁶ Most of these aliens were expelled because they entered the United States illegally, were unauthorized to stay in the United

²⁴ *EOIR Hearing, supra* note 19, at 9-10 (2002) (statement of the Honorable Lauren R. Mathon).

²⁵ *See* Appendix 4.

²⁶ *See* Appendix 5, 6.

States, or committed criminal acts while in the United States.²⁷ In any event, the numbers of expulsion proceedings skyrocketed, from 30,039 in 1990 to 185,731 in 2000.²⁸

At the BIA, the number of appeals filed per year more than doubled (from 12,823 in 1992 to 29,972 in 2000).²⁹ The number of appeals decided per year increased as well, but did not double (from 11,720 in 1992 to 21,498 in 2000).³⁰ The backlog, as a result, grew significantly during the 1990s (from 18,054 in 1992 to 63,763 in 2000).³¹

Causes of the Backlog

The backlog was caused by a number of factors, principally: (1) the increased case load at the BIA; (2) the frequent, significant changes in United States immigration laws; and (3) the number of members and other staffing issues at the BIA. While each of these will be addressed here in turn, and independently, it is likely that they worked in combination to create the backlog.

The Increased Caseload at the BIA

One factor commonly mentioned as leading to the backlog is the increasing number of new appeals that the BIA receives. The BIA case load has increased significantly over the past ten years. A large part of this increase appears due to the increase in the number of Immigration Judges from 75 Judges in 1987 to over 225 Judges in 2003.³²

The number of judges whose work is reviewed by the BIA, therefore, has tripled. By FY 2001, the larger cadre of Immigration Judges was able to handle more than 284,000 matters.³³

The rate at which Immigration Judge decisions were being appealed to the BIA has also increased: from 10.9% in FY 1996 to 15.7% in FY 2001.³⁴

Both factors (a 300% increase in the number of Immigration Judges and a 50% increase in the rate at which their decisions are being appealed) have led to a steep increase in cases being handled by the BIA.

Changes in United States Immigration Law

²⁷ See Appendix 7.

²⁸ See Appendix 6.

²⁹ See Appendix 8.

³⁰ See Appendix 9, 10.

³¹ See Appendix 11, 12, 13.

³² *EOIR Hearing, supra* note 19, at 9 (statement of the Honorable Lauren Mathon).

³³ See *id.* at 21 (statement of Kevin Rooney).

³⁴ See *id.* at 22 (statement of Kevin Rooney, Director, Executive Office of Immigration Appeals).

The second factor commonly mentioned for the increase in the backlog at the BIA is the changing legal landscape. There have been a number of new statutes relating to immigration, some of which complicated matters. Recent changes in U.S. immigration law have included:

- Immigration Reform and Control Act of 1986 (IRCA);
- Immigration Act of 1990 (IMMACT 90);
- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA);
- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA);
- Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA);
- Haitian Refugee Immigration Fairness Act of 1998 (HRIFA);
- Victims of Trafficking and Violence Protection Act of 2000 (VTVPA);
- Legal Immigration and Family Equity Act of 2000 (LIFE); and
- Patriot Act of 2001.³⁵

Number of Members and Other Staffing Issues

Another factor mentioned with respect to the increase in the BIA backlog is the number of BIA members and other staff personnel. One expert has stated that the “existing backlogs are not necessarily the result of inefficiency, but rather reflect a lack of resources. . . . [and that] [e]liminating board members will not resolve backlog problems. It’s like saying that the way to reduce traffic on Interstate 95 is to eliminate two lanes of the four-lane highway each way.”³⁶

Some, however, have testified before Congress or otherwise expressed their belief that there have in fact been too many members on the BIA.³⁷ One former BIA member stated before

³⁵ Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified in scattered sections of 7, 8, 18, 20, 29 and 42 U.S.C.); Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (codified in scattered sections of 8, 18, 22, 26, 29 and 42 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 15, 18, 19, 21, 28, 42, 49 and 50 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48 and 50 U.S.C.); Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. 105-100, § 201, 111 Stat. 2160-2193 (codified in scattered sections of 8 U.S.C.); Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, div. A, § 101(h), tit. IX, 112 Stat. 2681-480, 2681-538 (codified in scattered sections of 8 U.S.C.); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 22, 27, 28 and 42 U.S.C.); Legal Immigration Family Equity Act of 2000, Pub. L. 106-553, § 1(a)(2), tit. XI, 114 Stat. 2762, 2672A-142 (codified in scattered sections of 8 U.S.C.); Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272 (codified in scattered sections of 5, 8, 10, 12, 15, 18, 20, 21, 22, 28, 31, 42, 47, 49 and 50 U.S.C.).

³⁶ See *EOIR Hearing*, *supra* note 19, at 24 (statement of Stephen Yale-Loehr, co-author of *IMMIGRATION LAW AND PROCEDURE*, *supra* note 9).

³⁷ See *id.* at 13 (statement of the Honorable Michael Heilman) (“I think it is clear at this point that the [BIA] has too many members.”); see also Letter from Federation for American Immigration Reform to Mr. Charles Adkins-Blanch, General Counsel, EOIR, U.S. DOJ 4 (Mar. 20, 2002) [hereinafter *FAIR Comments*] (“Currently, the 400% increase in members since 1995 has resulted in conflicting opinions, delays