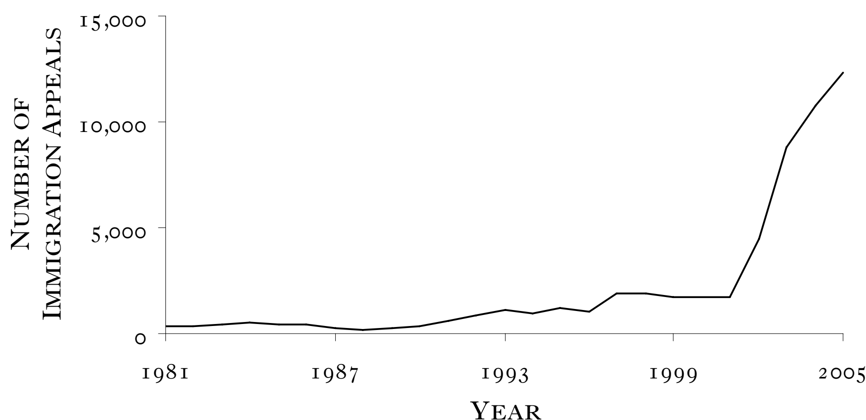
RECENT CASES

IMMIGRATION LAW — ADMINISTRATIVE ADJUDICATION — THIRD AND SEVENTH CIRCUITS CONDEMN PATTERN OF ERROR IN IMMIGRATION COURTS. — *Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

U.S. immigration courts are in crisis. As the most visible sign of the emergency, appeals of immigration decisions have swollen in the past five years from three percent to eighteen percent of all federal appeals.[1] Figure 1 shows the dramatic increase after decades of stability.

FIGURE 1. NUMBER OF IMMIGRATION APPEALS IN THE CIRCUIT COURTS, 1981–2005[2]



Recently, courts of appeals have declared that this surge in quantity has been driven by a crisis in the quality of immigration courts. In *Benslimane v. Gonzales*,[3] Judge Posner calculated that the Seventh Circuit reversed the immigration courts' decisions forty percent of the

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[1] *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2005 ANNUAL REPORT OF THE DIRECTOR 114 tbl.B-3 (2006) [hereinafter JUDICIAL BUSINESS 2005], *available at* http://www.uscourts.gov/judbus2005/contents.html; *see also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (reporting that, in the Second and Ninth Circuits, immigration cases consume forty percent of all appeals).

[2] Data for this figure are drawn from the tables entitled "Sources of Appeals and Original Proceedings Commenced, by Circuit," in the federal judiciary's annual *Judicial Business of the United States* reports. *See, e.g.*, JUDICIAL BUSINESS 2005, *supra* note 1, at 114 tbl.B-3.

[3] 430 F.3d 828 (7th Cir. 2005).

time.[4] He concluded that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."[5] In *Wang v. Attorney General*,[6] Judge Fuentes of the Third Circuit similarly condemned "[a] disturbing pattern of [immigration judge] misconduct"[7] in which, for example, an "extraordinarily abusive" judge ordered an asylum seeker deported to a country where she had been held as a sex slave and faced the possibility of continued slavery and rape.[8] In January 2006, Attorney General Alberto Gonzales responded to the controversy by ordering "a comprehensive review" of America's immigration courts.[9]

The courts' condemnation and the Attorney General's review raise the important question of what can be done to repair the system. The problem of bad immigration decisions was created by conditions among immigration judges; was magnified by changes to the Board of Immigration Appeals (BIA), which oversees those judges; and may be further exacerbated by measures to limit circuit court review. Because U.S. law commits immigration decisions to the political branches, the solution to these problems must be political. The political will for change can best be realized by a national campaign to expose the worst immigration judges and use their abuses to motivate reform.

The crisis identified by circuit judges is that immigration courts are getting too many decisions wrong. The cases depict a system handicapped by both error and abuse, failing in its responsibility to apply the law. The Third Circuit recently reviewed a case in which two immigrants petitioned for asylum, claiming that they feared persecution after their family businesses were twice burned down by groups trying to kill Chinese and Christian people in Indonesia.[10] While one asylum seeker was being cross-examined, the immigration judge interjected:

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[4] *See id.* at 829 (reviewing 136 appeals decided during the previous year). The court in *Benslimane* overturned a deportation order because the paperwork submitted by the alien had been misplaced by the government. *See id.* at 830–33.

[5] *Id.* at 830. At oral argument, Judge Posner warned the government attorney: "Do you have any idea of what we are doing to these appeals? Does the Justice Department have any idea of what is happening to your cases in this court? . . . There is a complete breakdown of this immigration adjudication business." Recording of Oral Argument, *Benslimane* (No. 04-1339), http://www.ca7.uscourts.gov (follow "Oral Arguments" hyperlink and enter docket number). These remarks begin approximately fifteen minutes into the recording.

[6] 423 F.3d 260 (3d Cir. 2005).

[7] *Id.* at 268. In *Wang*, the court reversed a deportation order in which the immigration judge had humiliated an asylum seeker whose wife had been forcibly sterilized in China. *Id.*

[8] *Id.* at 267 (quoting Fiadjoe v. Attorney Gen., 411 F.3d 135, 154 (3d Cir. 2005)) (internal quotation marks omitted).

[9] Memorandum from Attorney Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006), *available at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf.

[10] Sukwanputra v. Gonzales, 434 F.3d 627, 630 (3d Cir. 2006).

> You have no right to be here. All of the applicants that are applying for asylum have no right to be here. . . . You have to understand, the whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the United States better than they enjoy living in Indonesia.[11]

The immigration judge ordered the asylum seekers deported.[12] When they protested that the judge's biased conduct violated their right to due process, the BIA affirmed.[13] The court of appeals vacated these decisions, holding that the immigration judge had derogated his "responsibility to appear neutral and impartial."[14]

Three months earlier, the Third Circuit reversed a decision by the same immigration judge.[15] In that case, a woman from Ghana sought asylum, claiming that she had fled to the United States to escape years of brutal sex slavery.[16] As she tried to describe the experience of being raped as a seven-year-old, the judge became impatient:

> I don't like it when someone beats around the bush, okay, when they don't answer me. Another thing I don't like is when somebody makes sounds as if their [sic] crying and their eyes stay dry, all right. It's a form of histrionics, stage (indiscernible), I don't like that. I want straight answers and I want straight answers right now. You said, your father beat you and raped you at age seven, how long did that go on . . . ?[17]

The judge found that the woman's testimony was not credible and ordered her deported, and again the BIA affirmed.[18] Reversing, the court of appeals pointed to a State Department report that documented in detail the type of slavery described by the immigrant.[19] The court requested that the case be assigned to a different immigration judge on remand, finding that this judge's conduct had been "hostile" and "extraordinarily abusive," as he engaged in "bullying" and "extreme insensitivity," such that "[n]o adverse credibility assessment derived from [the] hearing . . . could survive review."[20]

One year earlier, the same judge prompted a suit by the ACLU when he ordered a Jordanian college student deported without allowing the student to testify or submit evidence in his defense.[21] The stu-

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[11] *Id.* at 638 (quoting the immigration judge).
[12] *Id.* at 631.
[13] *Id.* at 637–38.
[14] *Id.*
[15] *See* Fiadjoe v. Attorney Gen., 411 F.3d 135, 136 (3d Cir. 2005).
[16] *See id.* at 137–40.
[17] *Id.* at 143 (quoting the immigration judge).
[18] *Id.* at 149–50.
[19] *Id.* at 138.
[20] *Id.* at 154, 155, 157.
[21] *See* Bill Schackner, *Deported Without a Hearing*, PITTSBURGH POST-GAZETTE, Oct. 10, 2004, at C-1.

dent, who had failed to register as a man from a Muslim country after September 11, eventually gave up his case and left the United States.[22]

In 1995, the same judge denied asylum to a young woman from Togo, finding that genital mutilation was not persecution because it was done to many African women.[23] The woman's asylum claim, the judge stated, "just doesn't make sense."[24] The *Washington Post* responded to the judge's 1995 decision with a tragically prescient column entitled "When Judges Fail":

> People aren't aware of the attitudes and the ignorance some of these judges display in making decisions about people's lives. . . . It's an appalling decision, but it is not unusual. There are some very good judges, but side by side there are some that are incredibly irresponsible in how they deal with these life-and-death matters.[25]

The BIA reversed, quoting INS guidelines listing genital mutilation as a harm that can justify asylum.[26] The INS itself issued a public statement praising the reversal.[27]

Several failures have combined to produce the immigration court system responsible for these decisions. The core of the crisis is the work of the 215 immigration judges whom the Attorney General employs to adjudicate deportations.[28] During fiscal year 2005, they decided 352,287 cases,[29] averaging more than six cases per judge per workday. The aliens appearing before these judges spoke 227 different languages; only twelve percent spoke English.[30] Two-thirds of the aliens lacked the assistance of an attorney to research and present their cases.[31] In addition to these obstacles, important evidence is often out of reach in foreign countries, and aliens facing deportation may have little incentive to be honest with the judge. Immigration judges face too many challenges with too few resources, and so they are bound to make mistakes.

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[22] *See* Bill Schackner, *ACLU Appeals Deportation Ruling*, PITTSBURGH POST-GAZETTE, Oct. 16, 2004, at A-15.

[23] *See* Marie McCullough, *Fleeing from Horror*, TAMPA TRIB., Apr. 28, 1996, Nation/World, at 6.

[24] Judy Mann, *When Judges Fail*, WASH. POST, Jan. 19, 1996, at E3.

[25] *Id.* (quoting Professor Karen Musalo) (internal quotation marks omitted).

[26] *See* Kasinga, 21 I. & N. Dec. 357, 362 (1996).

[27] *See* Robert L. Jackson, *Togo Woman Granted U.S. Asylum, To Seek Citizenship*, L.A. TIMES, June 15, 1996, at A18.

[28] *See* Liptak, *supra* note 1. *See generally* 8 U.S.C.A. § 1101(b)(4) (West 2005) (stating that immigration judges are "subject to such supervision and shall perform such duties as the Attorney General shall prescribe"), *amended by* Pub. L. No. 109-162, tit. VIII, 119 Stat. 2960, 3053 (2006), *and* Pub. L. No. 109-90, § 536, 119 Stat. 2064, 2087 (2005).

[29] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK, at A1 (2005), *available at* http://www.usdoj.gov/eoir/statspub/fy05syb.pdf.

[30] *Id.* at F1 (noting further that sixty-five percent spoke Spanish).

[31] *Id.* at A1.

In 2002, a major cutback in the review of immigration decisions within the Department of Justice increased both the likelihood and the harm of error by immigration judges. Until that year, the Attorney General employed the BIA to hear appeals of immigration judge decisions, and the BIA often sat in three-member panels and issued written opinions in the style of courts of appeals. But in 2002, the Attorney General sought to hasten the resolution of immigration cases by eliminating twelve of the twenty-three BIA members and ordering the remaining eleven to dispose of most appeals in single-member hearings without opinions.[32] The eleven remaining members decided 46,355 appeals in fiscal year 2005,[33] averaging more than sixteen per member per workday. The First Circuit confronted a case that was one among more than fifty appeals decided by a BSA member in a single day.[34]

Commentators observe that the 2002 changes weakened review in the immigration court system.[35] In keeping with the Attorney General's objective of a speedier process, summary affirmances inside the Department increased from 3% of the BIA's decisions to 60%.[36] Board decisions in favor of aliens fell from 25% to 10%.[37] The combination of these changes at the BIA exerts a powerful influence on the courts below and above. Immigration judges now face a greatly reduced chance that the BIA will catch their errors or abuses. Circuit courts, which review BIA decisions, receive a flood of appeals.

The circuit courts, which now bear the weight of correcting and deterring error in immigration cases, are also under threat. Leaders in Congress have responded to the quantity of immigration appeals, and ignored the quality of those claims, by proposing cutbacks in circuit court review. Late last year, the House of Representatives passed a bill that, if enacted into law, would restrict review of immigration decisions to cases in which a circuit judge certifies the case for appeal.[38] This change would single out the error-ridden category of immigration cases for less judicial review. As a different means to the same end, the Chairman of the Senate Judiciary Committee, Republican Arlen Specter, has introduced a bill to reassign all immigration appeals from the

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[32] Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,880–81 (Aug. 26, 2002).

[33] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 29, at S2.

[34] *See* Albathani v. INS, 318 F.3d 365, 378 (1st Cir. 2003).

[35] *See, e.g.*, Comm. on Fed. Courts, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS'N B. CITY N.Y. 243, 245 (2005); John R.B. Palmer, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005).

[36] Comm. on Fed. Courts, *supra* note 35, at 245.

[37] *Id.*

[38] *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. tit. VIII (as passed by House of Representatives, Dec. 16, 2005).

general circuit courts to the Court of Appeals for the Federal Circuit.[39] If enacted, the bill would shift approximately 10,000 cases per year to the Federal Circuit, which currently hears about 1500 cases annually and specializes in patent and trademark law.[40] Senator Specter's proposal is perhaps best understood as an attempt to bury the immigration court crisis by denying immigrants the opportunity for review.

The immigration courts remain broken because legal arguments for reform are unavailing and because critics have not yet found a way to move forward through politics. The lack of a legal solution begins with the constitutional context in which the political branches possess plenary power over immigration: deportation decisions are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[41] Within this framework, Congress and the Executive have further enhanced their freedom from judicial constraint through the tools of administrative law: the main structures of the immigration court system are regulations made, interpreted, and enforced by the Attorney General. As a result, lawsuits challenging the severe consequences of the 2002 BIA streamlining have failed.[42] It may be the case that U.S. law does not guarantee a better immigration court system, even if it should.

Given the legal realities, the imperative for those seeking to repair the immigration courts is to attack the system on its own terms, by accepting the premise that immigration decisions are overseen by politics and by creating a political strategy potent enough to force needed change. Scholars have explained the powerful dynamic by which savvy political actors use salient examples of injustice to force systemic change.[43] Citizens and policymakers rely on an "availability heuristic" to infer "the probability of an event on the basis of how easily instances of it can be brought to mind."[44] In the political system, the availability of salient examples can be greatly amplified, as politicians and the media repeat the examples in a self-reinforcing "availability cascade."[45] Through this cycle, stories of poisoning at Love Canal mo-

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[39] *See* S. 2454, 109th Cong. tit. V (2006); *see also* Bob Egelko, *Plan To Unify Immigration Appeals*, S.F. CHRON., Mar. 13, 2006, at A1.

[40] *See* Egelko, *supra* note 39.

[41] Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

[42] *See, e.g.*, Georgis v. Ashcroft, 328 F.3d 962, 966–67 (7th Cir. 2003) (upholding post-streamlining procedures against a due process claim); Capital Area Immigrants' Rights Coal. v. Dep't of Justice, 264 F. Supp. 2d 14, 39 (D.D.C. 2003) (upholding the streamlining against a challenge under the Administrative Procedure Act).

[43] *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1518–22 (1998); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 687–89, 713–14, 733–36 (1999).

[44] Kuran & Sunstein, *supra* note 43, at 706.

[45] *See id.* at 683.

tivated broad environmental legislation,[46] the murder of seven-year-old Megan Kanka prompted national registration of sex offenders,[47] and photos from Abu Ghraib led the United States to ban torture.[48]

To change the politics of immigration courts, critics should single out the worst immigration judges as the examples motivating reform. A strategy focused on the worst judges provides the right starting point for both policy and politics. In practical terms, bad decisions by immigration judges are the core failure of the system. All of the other policy failures — severe immigration court docket pressure, rubber-stamp BIA review, cuts to circuit court review — are significant because they either cause or fail to correct bad decisions by immigration judges. If this complex crisis contains a harm raw enough to fuel effective politics, it is not the aggregate rate of reversal but the abuse of individual immigrants by individual judges. A political, rather than legal, response takes advantage of the fact that immigration judges are employees of the Attorney General, a political appointee.

Groups concerned about immigrants and the rule of law should lead a campaign to expose the five worst immigration judges and lobby the Attorney General to remove them. A low-budget, law student–staffed campaign should draw on the model that Ralph Nader used to launch his network when he hired seven law students to criticize the Federal Trade Commission during the summer of 1968.[49] The campaigners would enjoy a powerful advantage in their ability to cherrypick the terms of the conflict, considering both the quality of certain judges and the sympathetic appeal of particular injured immigrants. The campaigners would also draw credibility from the evaluations of third parties such as circuit judges, who have labeled specific immigration court decisions as "extraordinarily abusive,"[50] "literally incomprehensible,"[51] and corrupted by "extreme hostility"[52] or "manifest errors of fact and logic."[53] Campaign tactics should aim to stimulate a cascade of salience by enlisting asylum seekers to speak to churches and talk radio shows, soliciting editorials in favor of firing

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[46] *See id.* at 691–98.

[47] *See* Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731, 2750 (2004).

[48] *See* Josh White & Charles Babington, *Bush Relents, Backs McCain's Torture Ban*, WASH. POST, Dec. 18, 2005, at A3.

[49] BARBARA HINKSON CRAIG, COURTING CHANGE: THE STORY OF THE PUBLIC CITIZEN LITIGATION GROUP 9 (2004). A contemporary campaign could take advantage of resources not available to Nader, including the Internet and the fact that many law schools fund their students' public interest work.

[50] Fiadjoe v. Attorney Gen., 411 F.3d 135, 154 (3d Cir. 2005).

[51] Recinos de Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005).

[52] Korytnyuk v. Ashcroft, 396 F.3d 272, 287 n.20 (3d Cir. 2005) (quoting Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998)).

[53] Iao v. Gonzales, 400 F.3d 530, 535 (7th Cir. 2005).

the judges, and asking elected officials to sign letters to the Attorney General.

Villains are the political resource at the center of the proposal. The existence of villains helps to organize information about injustice. If a television network learned that 200 people were killed in 200 unrelated automobile crashes, the deaths would not make the news. But when further study shows that the 200 victims all used the same brand of tires, then the availability cascade begins.

A nonvoting minority cannot easily change institutions associated with law and order, but preconceptions about "us," "them," and the system become vulnerable when a compelling villain is brought on stage. Consider Bull Connor in Birmingham in 1963.[54] The immigration judge who decided the series of cases described above, Donald Vincent Ferlise of the Philadelphia immigration court, might serve as one such change-inspiring villain. The campaign proposed here would scour the system and target the judges who make the best case for change.

These tactics can change minds and policy. When a member of the Senate Judiciary Committee remembers stories of the worst immigration judges, she is more likely to believe in the need for improved immigration courts and rigorous appellate review. If the Senator goes further and calls for congressional hearings on the egregious judges, the salience will spread and amplify. By calling attention to the worst elements of the immigration court system, the proposed campaign will create political resources for the full range of solutions — better judges, better working conditions, better appellate review — that the crisis in the immigration courts urgently requires.[55]

In the coming months, both the potential and the need for political intervention in the immigration courts will be greater than ever. Congressional debate about the future of illegal immigrants has been accompanied by nationwide demonstrations and "the largest effort by immigrants to influence public policy in recent memory."[56] If Congress passes legislation resolving the status of undocumented immigrants, the nation will likely rely on the immigration courts to enforce it. Americans would be disappointed if they knew more about the quality of those courts.

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[54] *See* TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65, at 26, 77 (1998).

[55] For a more complete presentation of the immigration court crisis and this proposed solution, see Sydenham B. Alexander III, Note, *A Political Response to Crisis in the Immigration Courts*, 20 GEO. IMMIGR. L.J. (forthcoming Summer 2006).

[56] Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1.