"STREAMLINING" THE RULE OF LAW: HOW THE DEPARTMENT OF JUSTICE IS UNDERMINING JUDICIAL REVIEW OF AGENCY ACTION

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Judicial review of administrative decision making is an essential institutional check on agency power. Recently, however, the Department of Justice dramatically revised its regulations, greatly insulating its decision making in the immigration arena from public and federal court scrutiny. These "streamlining" rules, carried out in the name of national security and immigration reform, have led to a breakdown in the rule of law in our system of immigration review.

While much attention has been focused on the Department of Justice's recent attempts to shield executive power from the reach of Congress, its efforts to undermine judicial review have so far escaped such scrutiny. Yet the streamlining rules have had far-reaching doctrinal and practical consequences. They have led to chaos at the agency, where the emphasis in immigration adjudication has explicitly shifted away from reliance on standards and precedents towards increased reliance on discretionary, and often arbitrary, decision making. Immigration appeals have flooded the federal courts, nearly doubling the size of some circuit caseloads, while trapping the courts in a doctrinal quandary between competing duties of judicial review and agency deference.

This Article argues that, if left unchecked, the Department of Justice's streamlining reforms will undermine judicial review, turning it in some cases into an illusory exercise incapable of restraining agency action. This weakening of judicial review is unwarranted and

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unwise. To help stem this erosion, this Article proposes more nuanced interpretations of deference and judicial review principles that can resolve the dilemmas facing the federal courts and help preserve the vitality of judicial review over agency decisions.

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INTRODUCTION

"The Attorney General . . . cannot shelter himself behind the appearance of legal procedure—a system of administrative law—and yet infuse it with a denial of what is basic to such a system."[1]

The Department of Justice (DOJ, or the Department) has recently come under fire for its efforts to elevate executive power to a realm "above the law."[2] Much attention has been focused on the DOJ's attempts to render executive power free from congressional oversight.[3] Little attention, however, has been paid to the Department's attempts to dismantle another critical institutional check in our system of separation of powers—judicial review.

1. Jay v. Boyd, 351 U.S. 345, 372 (1956) (Frankfurter, J., dissenting).

2. *Oversight of the U.S. Department of Justice with Attorney General Mukasey: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 13, 17 (2008) (statement of Sen. Patrick Leahy, Chairman of the S. Comm. on the Judiciary), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3069&wit_id=2629 (discussing the reasons Congress began oversight hearings over the DOJ, including its handling of "demands for immunity and unaccountability among those in the administration").

3. *Id*.

In its role as an administrative agency, the DOJ is responsible for the "fair and impartial administration of justice" in the nation's immigration courts.[4] Through its recent efforts to insulate its immigration decisions from public and federal court scrutiny, the DOJ is transforming agency discretion into a form of absolute executive authority free from the traditional restraint of judicial review. This has led to a breakdown in the rule of law in the agency's system of immigration adjudication, and, on a broader level, is threatening the principle of judicial review in the federal courts.

In 2002, citing national security concerns in the wake of September 11, and the need to combat the burgeoning backlog of cases at the agency's Board of Immigration Appeals (Board), the Attorney General announced sweeping "streamlining" reforms to immigration procedures at the agency.[5] At the time, most deportation cases were adjudicated by immigration judges, whose decisions could be appealed to the Board. The Board generally heard appeals from immigration judges' decisions in three-member panels, which issued written decisions and opinions.[6] The Board's decisions became the final agency actions that could be appealed directly to federal circuit courts.[7] The streamlining rules controversially, and dramatically, altered this system of review.

Under the most controversial and drastic of the new streamlining procedures—the "affirmance without opinion" procedure—individual Board members were given the power to affirm immigration judges' decisions without issuing any Board opinion or explanation.[8] Indeed, the affirmance without opinion rules explicitly prohibited Board members from providing any explanation or reasoning for their decisions.[9] The Attorney General went so far as to authorize individual Board members to dispose of cases through the affirmance without opinion procedure even if there were errors in the immigration judge's decision below, and even if the Board member did not agree with the reasoning of the decision below.[10] The streamlining rules expressly specified that an affirmance without opinion by a Board member only affirmed the results, not

4. *Id.*; *see also* Ekasinta v. Gonzales, 415 F.3d 1188, 1192 (10th Cir. 2005); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 206 (2006).

5. *See* John D. Ashcroft, Att'y Gen. of the United States, News Conference: Administrative Change to Board of Immigration Appeals (Feb. 6, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/020602transcriptadministrativechangetobia.htm [hereinafter Ashcroft, News Conference]; *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280).

6. John R.B. Palmer et al., *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, 19 (2005); *see also* Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655 (proposed June 18, 2008) (to be codified at 8 C.F.R. pt. 1003).

7. Palmer et al., *supra* note 6, at 19.

8. 8 C.F.R. § 1003.1(e)(4)(i) (2008).

9. *Id.* § 1003.1(e)(4)(ii).

10. *Id.*

necessarily the reasoning, of the immigration judge's decision.[11] The "results" that were affirmed were almost invariably deportation orders, as decisions ordering deportation constituted the vast majority of the immigration judge decisions appealed to the Board.[12] Moreover, whatever the Board member's reasons for affirmance may have been, and even if the immigration judge's decision contained errors, the immigration judge's decision was now designated as the final agency decision sent to the federal courts on appeal.[13]

In contrast, in order to overturn an immigration judge's decision and grant an immigrant relief from deportation, Board members were required to write a reasoned opinion.[14] Yet a Board member who wished to overturn an immigration judge's decision would have to expend increasingly limited time and resources to do so.[15] At the time he announced the new streamlining rules, the Attorney General also imposed strict deadlines on the Board, requiring each Board member to review and decide nearly 4,000 appeals a year.[16]

Taken together, these changes meant that many cases could be decided by single Board members instead of three-member panels, that these Board decisions could be rendered without any opinion or explanation, and that to comply with the numerical deadlines, Board members could spend no more than a few minutes on each case.[17]

The results of streamlining were swift: within seven months, affirmances without opinions constituted the majority of the Board's decisions, and Board decisions ruling in favor of immigrants dropped dramatically.[18] The effect on the federal courts was immediate and immense, as

11. *Id.* ("An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the service were harmless or nonmaterial.").

12. *See* Palmer et al., *supra* note 6, at 56.

13. 8 C.F.R. § 1003.1(e)(4)(ii) ("[I]f the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore the final agency determination.'").

14. *Id.* § 1003.1(e)(5).

15. *Id.* § 1003.1(e)(6).

16. *Id.* § 1003.1(e)(8); *see also Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (testimony of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit) [hereinafter *Immigration Litigation Reduction Hearing*]; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 353 (2007) (noting that after the 2002 streamlining reforms, the Attorney General required Board members to clear the 55,000 case backlog within 180 days, which worked out to thirty-two cases per day, or one case every fifteen minutes).

17. *See* sources cited *supra* notes 8–16 and accompanying text; *see also Oversight Hearing on the Executive Office for Immigration Review: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 110th Cong. 4 (2008) (written statement of Stephen H. Legomsky, Professor Washington University School of Law), http://judiciary.house.gov/hearings/pdf/Legomsky080923.pdf.

18. A number of published studies have found that the number of Board decisions granting immigrants' appeals dropped significantly after the streamlining reforms were implemented; it is only the

immigrants increasingly turned to the federal courts for relief.[19] By 2006, immigration appeals made up nearly a fifth of the total federal appellate caseload and approximately 90 percent of the administrative appeals in the federal courts.[20] As immigration appeals flooded their courts, federal courts in every circuit began issuing scathing critiques of the quality of the agency's decision making and its lack of adherence to basic principles of the rule of law. In particular, the courts singled out the agency's repeated failures to provide reasoned explanations—or indeed any explanations—for its decisions, in violation of the basic principles of administrative law; and at the other extreme, courts chastised the agency for basing its decisions on bias, speculations, or other non-legal grounds.[21]

precise extent of the drop that is the subject of debate. In the months following the implementation of the streamlining reforms, two studies found large drops in the success rates of immigrants' appeals before the Board. The *Los Angeles Times* reported that the Board rejected 86 percent of its appeals in October of 2003, compared with 59 percent the previous October. Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1. A 2003 study of the impact of the streamlining regulations conducted on behalf of the American Bar Association found that "[b]efore the spring of 2002, approximately one in four appeals was granted; since then, approximately one in ten appeals is granted." DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 40 (2003), http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf [hereinafter DORSEY & WHITNEY REPORT]. These studies prompted a swift reaction from the DOJ which criticized the *Los Angeles Times* for "unfairly characteriz[ing]" the Department's streamlining efforts, and claimed that the Dorsey & Whitney study relied on "flawed data." *See* Letter from Lori Scialabba, BIA Chairman, to the Editor of the L.A. Times (Jan. 9, 2003), http://www.usdoj.gov/eoir/press/03/getter.pdf; Letter from Lori Scialabba, BIA Chairman, to the American Bar Association Commission on Immigration Policy Practice and Pro Bono (Dec. 22, 2003), http://www.usdoj.gov/eoir/press/03/ABA.pdf. Still, subsequent studies also found that immigrants' appeals were far less likely to be granted after the streamlining reforms were implemented. One study showed that, while in 2001 the Board granted approximately 24 percent of asylum appeals in expedited removal cases, after the 2002 streamlining provisions were implemented the number of these appeals granted by the Board dropped to 2–4 percent. Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1386 (2005); *see also* Palmer et al., *supra* note 6, at 56–57 (citing the above studies and further supporting the proposition that Board denials of appeals increased markedly after the streamlining reforms were implemented). Most recently, a 2007 empirical study reiterated these findings, showing that "the success rate for all asylum applicants fell from 37% in FY 2001 to 11% in FY 2005, a drop of 70%." Ramji-Nogales et al., *supra* note 16, at 358.

19. *Immigration Litigation Reduction Hearing*, *supra* note 16, at 61–62 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. DOJ); *see also* Palmer et al., *supra* note 6, at 4 (noting that after the 2002 streamlining reforms the rate at which aliens appealed Board decisions rose and discussing possible reasons for this rise).

20. *See* Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1002 (2006); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 47, 49 n.43 (2006–2007) (noting that of the 12,255 administrative appeals filed in the federal courts in 2004, 10,812 of them, or 88.2 percent, were immigration appeals from Board decisions); Palmer et al., *supra* note 6, at 47.

21. For example, in a famous 2005 case, Judge Posner of the Seventh Circuit described the agency's repeated failures to adhere to the rule of law and wrote that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005); *see also* Fiadjoe v. Att'y Gen., 411 F.3d 135, 154–55 (3d Cir. 2005) (criticizing an immigration judge's "hostile" and "extraordinarily abusive" conduct toward the petitioner); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) ("[The immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture."); Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2003) ("The elementary principles of adminis-

The courts also began criticizing the agency for repeatedly violating its streamlining rules, finding that in many cases the Board had improperly streamlined and affirmed without opinion error-filled decisions by immigration judges.[22]

Stymied in the federal courts, and facing mounting criticisms of its streamlining reforms, the DOJ has repeatedly attempted to strip the federal courts of jurisdiction to review its streamlining decisions. In every circuit, the agency has argued that its decision to streamline and summarily affirm a case should be viewed as a purely discretionary resource-allocation decision, and that this "resource-allocation decision" falls into a narrow exception to the traditional presumption that agency decisions are subject to judicial review.[23] When federal courts began rejecting these arguments, the DOJ announced that it intended to revise its regulations to ensure that its decision making would be beyond the scope of federal court review. To do so, it proposed modifying the streamlining rules to explicitly authorize Board members to decide whether to affirm or reverse a case based at least in part on the Board's discretionary determination as to the amount of resources to allocate to a particular case.[24] Thus, in both the courts and its rulemaking activities, the agency

trative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000))).

22. *See Benslimane*, 430 F.3d at 829 (collecting cases criticizing errors made by the Board and immigration judges).

23. *See, e.g.*, Kambolli v. Gonzales, 449 F.3d 454, 458–60 (2d Cir. 2006); Smriko v. Ashcroft, 387 F.3d 279, 292–95 (3d Cir. 2004); Tsegay v. Ashcroft, 386 F.3d 1347, 1353–58 (10th Cir. 2004); Zhu v. Ashcroft, 382 F.3d 521, 526–29 (5th Cir. 2004); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087–88 (9th Cir. 2004); Ngure v. Ashcroft, 367 F.3d 975, 980–88 (8th Cir. 2004); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 278–80 (4th Cir. 2004); Denko v. INS, 351 F.3d 717, 725–30 (6th Cir. 2003); Haoud v. Ashcroft, 350 F.3d 201, 204–05 (1st Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 966–67 (7th Cir. 2003); Gonzalez-Oropeza v. U.S. Att'y Gen., 321 F.3d 1331, 1332–34 (11th Cir. 2003).

24. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,656 (proposed June 18, 2008) (to be codified at 8 C.F.R. pt. 1003); *see also id.* at 34,657 (in section entitled "Reviewability," citing a split in the circuits over their jurisdiction to review the Board's decision to issue an affirmance without opinion and explaining that this "inconsistency in the circuit courts has prompted the Department to propose a revision to the regulatory language . . . [that] clarifies that the decision to issue an [Affirmance Without Opinion] is discretionary and is based on an internal agency directive created for the purpose of efficient case management that does not create any substantive or procedural rights"); *id.* at 34,659 (stating that under the proposed revisions, "the Board may consider available resources and the best use of those resources" in exercising its discretion to refer a case to a three-member panel). As of the date of publication of this Article, the ultimate fate of this proposed regulation further modifying the streamlining rules is uncertain, as it has been withdrawn from OMB Office of Information and Regulatory Affairs (OIRA) review, see OIRA Conclusion of EO 12866 Regulatory Review, (Dec. 30, 2008), http://www.reginfo.gov/public/do/eoDetails?rrid=116581, but the agency has not formally withdrawn or ended the proposed rulemaking.

Under both the current and proposed versions of the streamlining regulations, once a case is streamlined, it is sent to a single Board member, who may reverse an immigration judge's decision only in certain specified situations. *See* 8 C.F.R. § 1003.1(e)(5) (2008). Only three-member panels (or the Board en banc) may hear oral argument, and in contrast to single members, they have broad authority to reverse cases. *See id.* § 1003.1(e)(6)–(7). "Under the current regulations, the Board's decisions are published as precedents upon a majority vote of the permanent Board members." Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. at 34,661. The proposed change will "allow three-member pa-

has attempted to invoke resource-allocation considerations in its streamlining determinations.

Under such a system, the agency could decide to deny an immigrant's claim, rather than grant relief, on the grounds that the Board simply lacked the time or inclination to spend its resources writing a reasoned, public opinion for that particular case. This system strains even the most minimal conception of the rule of law.[25] It contradicts the very idea that "individual cases should be disposed of by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators."[26] It violates the essential rule of law principles that government officials "are bound by and act consistent with the law,"[27] and that the law must be clear, public, and certain, and be applied to everyone equally and consistently according to its terms."[28] In sum, "[i]f the rule of law means anything, it surely means at a minimum that those charged with interpreting the law must do so on the merits, not on the basis of factors so clearly extraneous to the adjudicative function."[29]

Legal scholars have argued that an instrumentalist approach to the law—the idea that the law is a means to an end—harbors a powerful potential to damage the rule of law, by elevating outcomes and personal preferences over adherence to standards, precedents, and legal principles.[30] The battle over judicial review of streamlining provides a con-

nels to publish precedent decisions if a majority of the permanent Board members of a panel votes to publish a decision." *Id.*

25. *See* Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, *in* RELOCATING THE RULE OF LAW 8 (Gianluigi Palombella & Neil Walker eds., 2009) ("A common worry of citizens is that government officials may be unduly influenced in their government actions by inappropriate considerations—by prejudice, whims, arbitrariness, passion, ill will or a foul disposition, or by any of the many factors that distort human decision-making and actions. The rule of law constrains these factors by insisting that government officials act pursuant to and consistent with applicable legal rules."); *see also infra* Parts I.B. and II (discussing the impact of importing resource-allocation considerations into the streamlining regulations); Hashmi v. Att'y Gen., 531 F.3d 256, 260 (3d Cir. 2008) (concluding that an immigration judge had "abused his discretion when he denied [a] motion . . . based solely on concerns about the amount of time required to resolve [the] case").

26. Ramji-Nogales et al., *supra* note 16, at 299–300.

27. Tamanaha, *supra* note 25, at 3.

28. *See id.* ("The rule of law, at its core, requires that government officials and citizens are bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.").

29. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 399 (2006) (discussing how the absence of judicial independence conflicts with the goal of respecting the rule of law); *see also Hashmi*, 531 F.3d at 261 (finding that an immigration judge abused his discretion in denying a motion based solely on concerns about the amount of time required to resolve the case and noting that "[t]o reach a decision about whether to grant or deny a motion for a continuance based solely on case-completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary").

30. *See* TAMANAHA, *supra* note 4, at 1–2 (explaining that people adhering to an instrumentalist view of the law "view law as an instrument of power to advance their personal interests or the interests or policies of the individuals or groups they support"); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U.

crete example of this very process, where the damage has spread to legal principles themselves.

This Article argues that the DOJ's recent streamlining of immigration appeals, though carried out in the name of law reform, represents an instrumentalist manipulation of the law that is corroding the rule of law in our judicial system.[31] At the agency level, our system of adjudication of immigration claims—which may involve life-or-death stakes—is quite simply "becoming less of a system of law," that is, a rule-governed system tied to principles such as fairness, equality, and consistency.[32] Instead, it is fast becoming a results-driven system where such claims are subject to arbitrary, inconsistent, and ideological exercises of discretionary power.

This corrosion has spread to the federal courts, where the reforms now threaten to undermine the vitality of judicial review of agency action. The DOJ's pursuit of absolute discretionary authority via streamlining has spawned untenable conflicts between the principles of judicial review and agency deference in the federal courts. This Article argues that if left unchecked, the Department's streamlining "reforms" threaten to undermine judicial review, turning it into an illusory exercise incapable of restraining agency action. If this occurs, significant spheres of agency action—by *any* agency—may be rendered immune from judicial review, further eroding the rule of law in our judicial system.

This Article further argues that this weakening of judicial review is unwarranted and improper, but not inevitable. It proposes alternative interpretations of deference and judicial review principles which can resolve the dilemmas facing the federal courts and preserve the vitality of judicial review over agency decisions. Specifically, it demonstrates how and why judicial review can be preserved by recognizing and strengthening judicial review over the agency's streamlining decisions, and argues that agency decisions on the merits of a case and the form of decision a case receives must be explicitly separated, not intertwined, to preserve doctrinal coherence.

In addressing the conflicts over streamlining, this Article seeks to fill a gap in the existing literature on agency power, judicial review, and the consequences of administrative breakdown. Administrative law scholars and practitioners have so far paid little attention to develop-

PA. J. CONST. L. 155, 167 (2006) (noting that instrumentalism is the idea that legal decision making is influenced by extralegal considerations of policy and principle such that judges are indifferent to the tangible effects that they cause with their rulings not only on the public in general, but more importantly, on the specific parties in front of them); Keith Swisher, *The Unethical Judicial Ethics of Instrumentalism and Detachment in American Legal Thought*, 43 WILLIAMETTE L. REV. 577, 578 (2007).

31. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."); TAMANAHA, *supra* note 4, at 130 (noting that while the precise definition of the rule of law is a contested concept, the rule of law is the "preeminent political ideal of contemporary Western liberal democracies" and instrumental approaches to the law have a powerful potential to weaken the rule of law, diminishing the rule and standard-based integrity of the rule of law until it is no longer a true system of law).

32. TAMANAHA, *supra* note 4, at 227.

ments in immigration administration, despite the increasing number of immigration appeals clogging the courts and the growing threats they pose to administrative law doctrine.[33] Moreover, immigration law scholars and practitioners have tended to focus on constitutional implications of immigration decisions, rather than their effects on the rule of law from an administrative law perspective.[34] Finally, while attention has recently been focused on the practical consequences of the breakdown in the administrative system of immigration review, the broader doctrinal implications of these failures have not yet been deeply studied.[35] Even less attention has been paid to agency, rather than congressional, attacks on judicial review in the immigration or administrative context.[36] Viewed in this light, the questions raised in this Article take on added significance.

Part I of this Article examines the history of the streamlining reforms, and argues that the streamlining reforms constitute an effort by the DOJ to seize and wield the law instrumentally, which has eroded the rule of law in the immigration system.

Part II argues that the streamlining reforms have led to an even more fundamental threat to the rule of law in the federal courts. It analyzes the conflicts between judicial review and deference principles reflected in a circuit split over judicial review of streamlining. This Part argues that the DOJ's "streamlining" of the rule of law, if left unchecked, will undermine judicial review principles to the extent that a federal court will be unable to reverse or restrain the agency through the mechanism of judicial review. As recent cases demonstrate, the agency's discretionary power over immigration decisions will thus be rendered untouchable by the federal courts, and judicial review of streamlined decisions will become a meaningless exercise.

Part III argues that to resolve the conflict in the federal courts, and help stem the erosion of the rule of law in the immigration system, judicial review of streamlining must be preserved and strengthened. It reevaluates the roles of agency discretion and deference in the streamlining context and proposes doctrinal, regulatory, and practical approaches to resolving the debate over judicial review of the streamlining process, ap-

33. *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 477–80 (2007) (noting that scholars and policymakers in the field of administrative law usually do not look to immigration administration, and those in the immigration field do not often look to administrative law theory and practice).

34. *Id.*; *see also* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 618 (2006) (noting that while the application of constitutional principles to immigration law "is a repetitive trope of modern scholarship," less attention has been paid to the application of administrative law principles to immigration law).

35. *See, e.g.*, Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006).

36. *See id.*; *see also* Brian G. Slocum, *Courts vs. The Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law*, 5 GEO. J.L. & PUB. POL'Y 509, 513 (2007) (noting the lack of attention to the role of judicial review and the courts as opposed to congressional attempts to reform immigration law).

proaches which are more consistent with the rule of law than the agency's pursuit of unbounded discretion.

I. RESULTS OVER RULES: THE ROOTS OF THE CONFLICT OVER JUDICIAL REVIEW OF STREAMLINING

Judicial review has traditionally acted as a check against arbitrary and unrestrained government action, allowing federal courts to monitor the exercise and legal boundaries of executive power.[37] Traditionally, federal courts review the decisions of administrative agencies through their judicial review power.[38] This review has customarily served the critical function of ensuring that an agency is complying with its own regulations while carrying out congressional intent.[39] It has been argued that even the "mere prospect of judicial review" by a federal court serves such interests, adding an incentive for administrative adjudicators to ensure that they have a defensible reason for a contemplated conclusion.[40] To further serve these ends, there is a presumption that all agency action is subject to judicial review, except for the rare agency action which is deemed entirely committed to the agency's discretion.[41] For these reasons, judicial review has been viewed as a cornerstone of the rule of law in the administrative context, as "the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[42]

These interests are particularly relevant to the DOJ in light of the high stakes involved in immigration appeals—for example, if the agency fails to follow its own regulations and improperly streamlines a case an immigrant could be sent back to persecution, torture, or even death; U.S. citizens could be separated from their families or means of support; and public perceptions of the integrity of our justice system could be harmed.[43] Improperly streamlined cases also promote—rather than pre-

37. *See, e.g.*, Alexander III, *supra* note 35, at 13; Slocum, *supra* note 36, at 512–13 (discussing the role of judicial review in serving as a check on arbitrary government action).

38. Smriko v. Ashcroft, 387 F.3d 279, 290–91 (3d Cir. 2004).

39. *Id.* at 295 (citing the "Supreme Court's long-standing requirement . . . that an agency comply with its own regulations").

40. *See* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1631 (2000) (emphasis omitted).

41. *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985) (stating that administrative actions are generally reviewable unless they fall under the narrow category of acts committed entirely to agency discretion); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (same); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (same); *Smriko*, 387 F.3d at 292 (same).

42. Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 165 (2006–2007) (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965)).

43. *See* Legomsky, *supra* note 40, at 1631 (noting fair process serves a public relations function in the immigration context, as the "immigrant who is removed unjustly brings home a constellation of memories and stories"); *see also* John Lantigua, *In Asylum Cases, Immigration Judges Under a Lot of Pressure*, PALM BEACH POST, May 10, 2008, http://www.palmbeachpost.com/search/content/state/epaper/2008/05/10/m1a_judges_0511.html (quoting Judge Dana Marks, President of the National As-

vent—inefficiency by further burdening the courts, which must conduct additional reviews for these cases, and drawing resources away from other pressing cases.[44] Through its streamlining reforms, however, the DOJ has deliberately and persistently weakened judicial review over its decision making, severely impacting the functioning and integrity of our system of immigration review.

This Part argues that the streamlining reforms, culminating in the agency's attack on judicial review of streamlining, are both a reflection of and a critical instrument in the agency's pursuit of unfettered discretionary power over immigration decisions. Furthermore, these attempts to impede judicial review have significantly damaged the rule of law in our immigration system. Section A traces the history and impact of the streamlining reforms from the agency to the federal courts. It seeks to demonstrate that the streamlining reforms were implemented as an integral part of the DOJ's pursuit of an unfettered agency authority to expel noncitizens from the United States. Section B argues the streamlining reforms have led to a deterioration of the rule of law in the immigration system.

A. The Streamlining Reforms

1. The Justice Department's Efforts to Reshape the Administrative System Through Streamlining

a. Background

The DOJ has long argued that its authority over immigration decisions should be left unfettered and immune from judicial or other scrutiny.[45] Moreover, as many scholars have noted, the history of

sociation of Immigration judges, who noted that asylum cases can be like "death penalty cases" since some people may face death if asylum is denied); Howard Mintz, *Appeals Board Widens Barrier to Immigration*, CONTRA COSTA TIMES, Oct. 2, 2005, at Q4 (noting that "[e]xperts say it is doubly important for the board to explain its reasoning when dealing with the life-or-death concerns of refugees" and quoting the former general counsel for the Immigration and Naturalization Service as stating that "[b]y and large, asylum cases would tend to merit more thorough review").

44. *See* Anna Gorman, *Too Many Cases, Too Few Judges*, L.A. TIMES, July 21, 2008, at B1 (discussing the delays and strains on immigration courts created when immigration judges are not able to spend enough time on individual cases, leading appellate courts to send the cases back for the more thorough review they should have received in the first place); *see also* Palmer et al., *supra* note 6, at 32; ("In terms of actual cost to the Government, good Board decisions are a bargain. More opinions can be ground out, of course, in less time and with an even more inadequate staff; but the resulting dilution in quality, while not only unfair to the parties involved, would also cost much more in the long run. Economies of this sort only result in passing the buck to those with less expertise. The slack would have to be taken up elsewhere in the Department; if not, the already overburdened courts will have to confront the task, for dilution in quality of Board decisions can only cause greater recourse to the courts for redress. If [INS] errors are to be screened out and corrected, it is more efficient in the long run that this be done by the Board.") (quoting Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 38 (1977))).

45. *See* Kanstroom, *supra* note 42, at 171 (discussing a recent Supreme Court case, *INS v. St. Cyr*, 553 U.S. 289 (2001), where the government, "in its brief in a companion case, . . . prominently cited a

immigration law has been marked by a high level of "constitutional deference to Congress and the Executive."[46] Until recently, however, the exercise of this authority over immigration matters, and the agency's interpretation of the scope of this authority, was subject to review (and often resistance) in the federal courts.[47]

This began to change in the mid-1990s, when Congress dramatically restructured the immigration system.[48] Fueled by a wave of anti-immigrant sentiment and the perception that immigrants were filing appeals to delay deportation, Congress passed two far-reaching pieces of jurisdiction-stripping legislation in 1996,[49] the Antiterrorism and Effective Death Penalty Act (AEDPA)[50] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[51] These Acts amended immigration statutes by eliminating federal court jurisdiction to hear certain appeals by noncitizens with criminal convictions, as well as appeals from many types of discretionary decisions.[52]

Congress expressly preserved judicial review of political asylum determinations, however.[53] Moreover, the AEDPA and IIRIRA jurisdiction-stripping provisions were somewhat tempered by the courts, which responded to AEDPA and IIRIRA by demarcating certain areas where judicial review could not constitutionally be eliminated.[54] Congress was then forced to roll back some of the restrictions it had attempted to impose on judicial review; in particular, Congress rescinded restrictions on judicial review over questions of law and eligibility for certain (though not all) forms of discretionary relief.[55] Nonetheless, it is important to note that the existing jurisdictional bars block most non-asylum cases from reaching the federal courts. Thus, the immigration appeals now reaching the federal courts may represent only the tip of the iceberg in light of the significant categories of cases where judicial review is entirely barred.[56]

1903 case to assert, in effect, that *all of immigration law* is discretionary and may be rendered immune even from judicial scrutiny for constitutional defects").

46. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 707 (1997).

47. *See* Slocum, *supra* note 36, at 512–13 (discussing the judiciary's role in limiting the efforts of the political branch with respect to immigration reform and policy choices).

48. *See* Kanstroom, *supra* note 42, at 162–63; Kanstroom, *supra* note 46, at 704–05; Neuman, *supra* note 34, at 626–27.

49. Kanstroom, *supra* note 42, at 162.

50. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C. (2006)).

51. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8, 18 U.S.C. (2006)).

52. Neuman, *supra* note 34, at 626.

53. *Id*. at 626 n.47 (also noting that agency asylum determinations may be reviewed for an abuse of discretion).

54. *Id*. at 626.

55. *Id.*

56. *See* Palmer et al., *supra* note 6, at 17–20; *see also* Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 240–41 (1998).

In the wake of these changes, much attention has been focused on the propriety and potential effects of congressional attempts to restrict judicial review.[57] And after the streamlining changes were implemented, much attention has been focused on the ways in which the streamlining reforms weaken administrative review at the agency level.[58]

But little attention has been paid to the ways in which the *agency*, rather than Congress, is attempting, through the streamlining reforms, to reduce appellate review in the federal courts as well as at the agency level. As will be described below, the streamlining reforms represent, and are a key part of, agency attempts to weaken the restraint of judicial review. This is particularly problematic because the DOJ's current attempts to undermine judicial review over its decision making are playing out in the areas where Congress deliberately left judicial review available, such as asylum cases.[59] They also potentially impair judicial review in the areas where the Supreme Court has held that judicial review is constitutionally mandated and untouchable.[60]

b. The Push for Reform

The agency's push for expanded discretionary authority through streamlining began at the Board of Immigration Appeals. The Board is the nation's chief administrative body for immigration law, located since 1940 within the DOJ.[61] It is "wholly a creature of regulation," existing only by virtue of the regulations established by the Attorney General.[62] The Board has jurisdiction to review appeals from decisions of immigration judges.[63] There are approximately 215 immigration judges around the country[64] who receive testimony and issue decisions. These judges handle approximately 300,000 cases per year.[65] Decisions of immigration judges may be appealed to the Board either by the immigrant or the government,[66] though nearly all appeals to the Board are filed by immigrants.[67]

57. Slocum, *supra* note 36, at 510–17.

58. *See* Neuman, *supra* note 34, at 631–33 (discussing how the streamlining reforms reduced the utility of administrative appellate review as an oversight mechanism).

59. *See* Kanstroom, *supra* note 42, at 162.

60. *See id.* at 162–64 (analyzing the types of immigration decisions which are still judicially reviewable in the wake of congressional enactments barring judicial review and Supreme Court cases delineating circumstances where judicial review is mandatory).

61. DORSEY & WHITNEY REPORT, *supra* note 18, at 8.

62. Ekasinta v. Gonzales, 415 F.3d 1188, 1192 (10th Cir. 2005).

63. *See* 8 C.F.R. § 1003.1 (2008); 23 Fed. Reg. 9115, 9117–19 (Nov. 26, 1958).

64. *See Immigration Litigation Reduction Hearing*, *supra* note 16, at 5–6 (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit).

65. *Id.* at 6; *see also* Margaret Graham Tebo, *Asylum Ordeals,* A.B.A. J., Nov. 2006, at 39 ("About 200 immigration judges nationwide handle more than 250,000 immigration cases annually . . . .").

66. John W. Geundelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 612 (2004).

67. Palmer et al., *supra* note 6, at 56.

The Board's responsibilities are exclusively appellate, and focus on two main functions: "[D]eciding appeals of individual cases and issuing precedential decisions" which guide the DOJ and immigration judges, and which interpret questions of immigration law delegated to the Attorney General.[68] The Board reviews the record below, which includes transcripts of testimony, exhibits, briefs submitted by the parties, and the written decision of the immigration judge.[69] The Board's decisions are binding on immigration judges, and precedential decisions are binding on the DOJ and immigration judges in all proceedings involving the same issue.[70] Absent intervention by the Attorney General or other mechanism, the decision of the Board becomes the final agency determination.[71] Appeals from Board decisions go directly to the federal courts, which have been statutorily granted jurisdiction over petitions for review challenging final agency decisions in deportation proceedings.[72]

Until 1999, the Board traditionally sat in panels of three members that reviewed appeals and issued written decisions.[73] That year, the Attorney General first instituted limited "streamlining" reforms to the appellate review procedures of the Board.[74] These changes were intended as a response to the "crushing backlog" of immigration appeals, which had increased nearly nine-fold since 1984.[75]

68. DORSEY & WHITNEY REPORT, *supra* note 18, at 9; *see also* 8 C.F.R. § 1003.1(d)(1) (2008) (noting that the Board issues precedential decisions in order to provide "clear and uniform guidance to the [Department], the immigration judges, and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations"); Palmer et al., *supra* note 6, at 18–19. Most Board decisions simply resolve individual appeals and are unpublished and non-precedential. *Id.* Each year, the Board, by majority vote, selects a small number of Board decisions and designates them as precedential. 8 C.F.R. § 1003.1(g); Palmer et al., *supra* note 6, at 19. In fiscal year 2006, for example, the Board published twenty-five precedential decisions, and in fiscal year 2007 it published forty precedential decisions. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 43,654, 34,659 (proposed June 18, 2008) (to be codified at 8 C.F.R. pt. 1003).

69. 8 C.F.R. § 1003.3.

70. *Id*. § 1003.1(g).

71. *See id.* § 1003.1.

72. *See* 8 U.S.C. § 1252(b)(2) (2006); *see also* Hobbs Act, Pub. L. No. 87-301, § 106, 75 Stat. 650, 651–53 (1961) (providing the federal circuit courts with jurisdiction to review certain final administrative orders, bypassing the district courts).

73. *See* Palmer et al., *supra* note 6, at 18–19 (explaining how the makeup of the Board has changed over time); *see also* Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 156 (2d Cir. 2004) ("Until 1999, [Board] practice was to review all appeals from [immigration judge] decisions in three-member panels."); Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. at 34,655 ("Historically . . . the Board adjudicated . . . cases in panels of three Board members. . . . Those three-member panels generally issued full written decisions explaining the order in each case.").

74. *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999) (to be codified at 8 C.F.R. pt. 3).

75. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions and Precedents, 73 Fed. Reg. at 34,656. "In 1984, the Board received fewer than 3,000 new appeals and motions." Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,136. Appeals to the Board more than doubled from 1992 to 2000 (from 12,823 to 29,972) and during this time the Board's backlog of pending appeals rose by 253 percent, from 18,054 to 63,763. DORSEY & WHITNEY REPORT, *supra* note 18, at 13.

Under these regulations, single Board members were empowered to dispose of procedural issues, and single Board members were allowed to affirm limited categories of cases without opinion.[76] Notably, these procedures, later described as a "pilot project,"[77] were intended to apply only to the most "routine" cases where there was no "reasonable possibility of reversible error in the result reached below."[78] Asylum and other complex cases were specifically exempted from these streamlining rules.[79] These limited measures were apparently successful in reducing much of the backlog: by 2001, the Board was already deciding and disposing of more appeals than it was receiving and had greatly cut its backlog.[80]

Though the Board's backlog was already shrinking, and the Board had already increased its productivity by 65 percent since 1998,[81] in 2002 the Attorney General dramatically expanded the streamlining provisions, effectively restricting review for nearly all appeals to the Board.[82] The system of appellate review was essentially reversed: under the new streamlining reforms, streamlining became the default mechanism of review, and only the rare case would receive three-member review and an opinion from the Board.[83] The Attorney General again cited the Board's backlog as a reason for the reforms (though in a seemingly contradictory move, he simultaneously announced that he intended to cut the number of Board members from twenty-three to eleven).[84]

This time, however, the Attorney General also sought to justify the drastic limitations on review by citing heightened national security concerns stemming from September 11, explaining that this "reorganization" was part of his plan for "protecting America from terrorist attack."[85] He

76. DORSEY & WHITNEY REPORT, *supra* note 18, at 16–17.

77. Ashcroft, News Conference, *supra* note 5.

78. Board of Immigration Appeals, 64 Fed. Reg. at 56,137; *see also* Archive of Memoranda from Chairman of the Board of Immigration Appeals, http://www.usdoj.gov/eoir/vll/genifo/stream.htm (collecting memoranda sent by the Chairman of the Board to Board members between 2000 to 2002 specifying the types of cases subject to streamlining) (last visited Mar. 11, 2009).

79. Ramji-Nogales et al., *supra* note 16, at 351.

80. *See id.*; *see also* Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1154 (2004). One additional measure of the Board's increased productivity is the fact that between 1998 and 2002 the Board increased the number of decisions it reviewed by 65 percent (the Board reviewed 28,689 cases in 1998 and 47,311 cases in 2002). DORSEY & WHITNEY REPORT, *supra* note 18, at app. 9.

81. *See* sources cited *supra* note 80.

82. *See* sources cited *supra* notes 8–16 and accompanying text.

83. Neuman, *supra* note 34, at 632; Ramji-Nogales et al., *supra* note 16, at 351.

84. Ashcroft, News Conference, *supra* note 5; *see also* Denko v. INS, 351 F.3d 717, 729 n.9 (6th Cir. 2003) (noting that the Attorney General's "seemingly contradictory proposal . . . to reduce the Board's backlog and the amount of time spent on each case while limiting the number of persons authorized to review rulings from the immigration judges").

85. Ashcroft, News Conference, *supra* note 5 ("On November the 8th, I pledged that the Department of Justice would undertake a series of reorganizations to serve better our mission of protecting America from terrorist attack, our mission of enforcing our nation's laws and safeguarding our civil liberties. A critical part of our mission is enforcing our immigration laws—enforcing them fairly, deliberately, and without delay. Today, to accomplish that objective, I am announcing a reorganization of the Board of Immigration Appeals.").

announced that he intended to use the previous streamlining rules as a blueprint, citing the Department's statistics and an "independent audit" completed by Arthur Andersen & Co. (Andersen), which found that the previous streamlining procedures had helped reduce the backlog.[86] He neglected to mention that Andersen acknowledged in its report that the "streamlining [regulations] had not been in place long enough to provide an objective evaluation of [their] effects on the quality of decisions rendered."[87] Moreover, Andersen had based its preliminary conclusion that the streamlining mechanisms produced fair and legally correct decisions primarily on a survey of forty-eight DOJ staff members, of whom twenty-nine had agreed with such a conclusion.[88] Andersen recommended further evaluation of the effects of streamlining, but such an evaluation was apparently never completed.[89] With these somewhat flimsy underpinnings, the streamlining reforms became a part of the Attorney General's war on terror—and the Attorney General saw unrestrained authority over immigration as a critical weapon in this war.[90]

Through the streamlining reforms, the Attorney General was able to greatly expand his authority over immigration matters. This authority allowed him to begin implementing the well-documented "strategic decision by the administration to use [immigration] cases to detain or deport terrorism-related suspects when there was not enough evidence of other crimes."[91] First, the streamlining reforms themselves, by severely weakening the rules and procedural safeguards in the agency's system of adjudication, allowed the DOJ to ensure that the Board would not "present an obstacle to any of its objectives, which include swift and scanty reviews of the deportation of immigrants."[92] Second, with procedural obstacles to deportation minimized, the Attorney General began to fill the Board and immigration judge positions with people who were more likely to rule against immigrants.[93] Third, as discussed in Part I.A.2 below, when the "streamlining" of the administrative process was complete, the

86. The Board retained Andersen to evaluate the effectiveness of the 1999 streamlining regulations. Andersen found that the initial streamlining regulations had increased by 53 percent the number of Board cases completed, and had also reduced the average number of days it took the Board to process a case. *See* DORSEY & WHITNEY REPORT, *supra* note 18, at 18.

87. Palmer et al., *supra* note 6, at 26.

88. *Id*.

89. *Id.* at 26–27.

90. *See, e.g.*, Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties: Law Forbids Practice; Courts Being Reshaped*, WASH. POST, June 11, 2007, at A1 (citing administration's goal of "employing the nation's 54 immigration courts, with 226 judges, as a central tool of its anti-terrorism policies, using them to deport hundreds of noncitizens who were detained as terrorism suspects but were not charged with crimes").

91. *See* Dan Eggen & John Solomon, *Justice Dept.'s Focus Has Shifted: Terror, Immigration Are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1 (citing David Laufman, a former senior DOJ official).

92. Deirdre Davidson, *In the Line of Fire*, LEGAL TIMES, Sept. 2, 2002, at 1 (quoting Elisa Massimino, director of the Washington, D.C. office of the Lawyers Committee for Human Rights); *see also* Mintz, *supra* note 43.

93. *See* Legomsky, *supra* note 40, at 376; *see also infra* Part I.A.d.

Department turned to the remaining obstacle to swift deportation—judicial review.

c. The New Streamlining Procedures

The new, expanded streamlining procedures essentially flipped the nature of administrative appellate review. Now, streamlining became mandatory when certain criteria were met, and since virtually all appeals from immigration judges' decisions could now be streamlined, single-member adjudication effectively became "the default procedure, with three-member panels the exception."[94] Under the new streamlining regulations, single Board members were required to issue affirmances without opinion whenever that Board member decided that the result reached by the immigration judge was correct, that any errors by the immigration judge were harmless, and that the issues in the case were "squarely controlled" by existing precedent or not substantial enough to receive an opinion, as set forth in 8 C.F.R. § 1003.1(e)(4)(i)–(ii):

> (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.
>
> (ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. Section 3.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.[95]

Only cases that met certain additional criteria could be sent to three-member panels, which still had the authority to reverse cases and render opinions. Specifically, the Board was authorized to issue opinions only in the limited situations where: (1) there were inconsistent rulings

94. Palmer et al., *supra* note 6, at 28.
95. 8 C.F.R. § 1003.1(e)(4) (2008).

among immigration judges, (2) a precedential decision was needed, (3) the case presented a need to review a decision not in conformity with the law, (4) the case had a "major national import," (5) there was a need to reverse a clearly erroneous factual decision by the immigration judge, or (6) the Board member felt that the immigration judge's decision needed to be reversed.[96]

Thus, whether a case was streamlined had a significant impact on the nature of the review a case received (one-member or three-member review); on the form of the review (whether an opinion or any explanation of the Board's reasoning could be issued for the case); and ultimately, could determine the outcome of a case, because, with limited exceptions, only non-streamlined cases could be reversed by the Board.[97]

For any of these reasons, the agency's decision to streamline could have a critical impact on the outcome of a case. First, the losses stemming from a move away from review by a three-member panel to single member review can be significant. A single member by definition cannot provide the deliberative process, and corresponding check on ill-considered or biased decisions, that three-member panels must engage in and which often leads to greater consistency in decision making. The loss of a panel decision may therefore mean the loss of moderating or corrective influences that may mean the difference between success or failure of an appeal.[98] The loss of a written opinion also carries significant costs. Written, reasoned decisions promote accuracy and consistency in decision making, as adjudicators must sufficiently and publicly justify their conclusions. They provide assurance to litigants, their counsel, and the public that the arguments raised were heard and considered, and facilitate further review by revealing and clarifying the reasoning behind the decisions.[99]

Yet the impact of streamlining is not limited to the form or type of review a case receives, or the quality of the explanation issued. Ultimately, the combined effect of the streamlining rules meant that an immigrant whose appeal to the Board was streamlined had lost much more than a Board opinion—the immigrant had lost virtually all opportunity

96. *See id.* § 1003.1(e)(6)(i)–(vi) (allowing cases to go to three-member panels only where they exhibited "(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 § 1003.1(e)(5)").

97. *Id.* § 1003.1(e)(4).

98. *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 431 (2007) (discussing the costs of moving from three-member to single-member decisions).

99. *Id.* at 455–57.

for a Board reversal of the immigration judge's decision,[100] and therefore, had lost the opportunity for a grant of relief from deportation by the Board.

To clarify, it is important to note that the decision to streamline a case does not rest only on factors influencing the utility of a written opinion or three-member review, such as the complexity of the case or whether the case was squarely controlled by precedent (although those are factors to be considered). Rather, the decision to streamline a case explicitly involves a decision on the merits of a case. Again, under the express language of the regulations, a case can be streamlined—and "shall" be streamlined and affirmed without opinion—whenever a Board member decides, applying the criteria in 8 C.F.R. § 1003.1(e), that the result reached in the immigration judge's decision was correct (again, this result was usually a deportation order), and that any errors in that decision were harmless or nonmaterial.[101]

In effect, the streamlining regulations intertwine decisions on the merits and resolution of cases with decisions on the form of written decisions the Board members will issue for that case. Moreover, by making affirmances without opinion the default mechanism, and thereby tilting the scales towards such affirmances by making it harder for a case to qualify for a reasoned, written opinion, the streamlining rules arguably also tilted the scales toward affirmances on the merits of a case, that is, towards affirming the deportation orders and against grants of asylum.

The streamlining rules tilted the scales towards deportation through other procedural mechanisms as well. The streamlining rules not only required the Board members to spend additional time drafting a written decision if they chose to reverse, rather than affirm, a deportation order, they also placed Board members under severe time and output pressures. Again, under the new deadlines, each Board member was required to review and rule upon approximately four thousand appeals a year—which works out to up to thirty-two cases per day.[102] Furthermore, the streamlining rules allowed Board adjudicators to decide cases with the knowledge that their actions would not be reviewed, and indeed could not be reviewed, since their reasoning was concealed from the public and federal courts.

Thus, the streamlining rules removed or weakened factors generally viewed as critical to the integrity of our legal system—reasoned, public

100. *See* Ramji-Nogales et al., *supra* note 16, at 351 (explaining how streamlining, and summary affirmance, became the dominant method of adjudication at the Board); Acer, *supra* note 18, at 1386 (noting that after streamlining, only 2–4 percent of asylum claims were granted by the Board).

101. 8 C.F.R. § 1003.1(e)(4)(i).

102. *See Immigration Litigation Reduction Hearing*, *supra* note 16, at 6 (testimony of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit); Ramji-Nogales et al., *supra* note 16, at 353; *see also* Getter & Peterson, *supra* note 18 (noting that "two Board members each signed more than fifty cases in one day, which equates to 'a decision nearly every 10 minutes if [one] worked a nine-hour day without a break'").

decisions; panel deliberations; and time and resources.[103] At the same time, the rules incentivized affirmance of deportation orders over reversals.

In this light, the availability of judicial review takes on added importance as one of the few remaining checks and balances on the agency's exercise of discretion over deportation decisions. The value of considered federal court review is even more apparent in light of the tight deadlines the Attorney General imposed on Board members to dispose of the cases they reviewed.[104] Federal court review of the agency's decision to streamline a case thus operates as an essential check to ensure that the agency is correctly applying the legal criteria in the streamlining regulations and is not abusing its discretion when streamlining, and affirming without opinion, cases appealed to the Board.

The new streamlining regulations, however, constrained federal courts' ability to conduct their review in several ways. These changes meant that federal courts would no longer receive appellate decisions from the Board when Board decisions were appealed. Instead, the regulations directed that the underlying immigration judge's decision would go straight to the federal courts.[105] For all intents and purposes, withholding the Board's decision from the federal courts meant that the Board no longer performed as an error-correction mechanism nor promoted consistency in the decisions of immigration judges before such decisions were bumped up to the federal courts.[106] For streamlined cases, the Board also no longer provided an agency interpretation which the federal courts had relied on in according *Chevron* deference to the agency.[107] Thus, the streamlining rules interfered with federal courts' ability to conduct a review of the agency's decisions at the very time judicial review became more important.

In these ways, the streamlining reforms explicitly elevated results—quick decisions, the majority of them affirming immigration judges' denials of immigrants' claims—over reasoning, transparency, and consistency.[108]

103. *See generally supra* notes 25–31 (discussing the core requirements of the rule of law in the U.S. legal system).

104. 8 C.F.R. § 1003.1(e)(8).

105. *Id.* § 1003.1(e)(4)(ii).

106. Neuman, *supra* note 34, at 633; *see also* Mintz, *supra* note 43 (noting that the Board "was considered the check against uneven rulings from immigration judges who have been found to have wildly divergent approaches to asylum claims throughout the country," and citing the concern of the President of the National Association of Immigration Judges that after streamlining her decisions no longer receive the "polishing" they used to get from the Board).

107. *See* Mintz, *supra* note 43 (quoting a Ninth Circuit judge who stated, "We used to receive thoughtful decisions from the [Board]. Now, because of streamlining, we're not getting the [Board's] point of view."). The Supreme Court held that the Board's precedential decisions should be accorded *Chevron* deference in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Still, the level of *Chevron* deference, if any, that a summarily affirmed immigration judge decision should be accorded is open to question. *See* Smriko v. Ashcroft, 387 F.3d 279, 289 n.6 (3d Cir. 2004).

108. *See* 8 C.F.R. § 1003.1(e).

d. The Decisionmakers

After weakening the Board's review procedures, the Attorney General also made another streamlining change to the Board that further supports an instrumentalist interpretation of the streamlining reforms. Although he had increased each Board member's workload, and cited the need to eliminate the Board's backlog as a motivation for the streamlining reforms, the Attorney General slashed the number of Board members, from twenty-three to eleven members.[109] It has been repeatedly pointed out that "the axe fell entirely on the most 'liberal' members of the [Board], as measured by the percentages of their rulings in favor of noncitizens."[110] It has also been argued that the manner in which the Attorney General conducted this "purge" reflected a highly politicized and dramatic assault on the decisional independence of Board members.[111]

When he announced the cuts to the Board, but before he decided which Board members would be removed, the Attorney General emphasized his view that his decision-making process on whom to remove should not be "limited" by guidelines or adherence to specific standards.[112] He did, however, announce that Board members' "adjudicatory temperament" would play a part in determining who would stay and who would go.[113] The Attorney General also made another change that arguably "reflected his broader philosophy regarding the role of the [Board] members":[114] he modified the text of the regulations governing the Board in a manner which de-emphasized Board members' duty of independent judgment and highlighted their duty "to act as the Attorney General's delegates," subject to his removal authority.[115]

These changes appeared to have the desired effect on Board decisions: during the year that elapsed between the Attorney General's announcement of the reduction of the Board, and the actual announcement

109. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7,309, 7,309–13 (Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280). In response to widespread criticism of the decision to reduce the number of Board members, Attorney General Gonzales announced that he would increase the number of Board members. *See* Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html [hereinafter Gonzales Press Release]. On May 30, 2008, the Attorney General appointed five new Board members, bringing the total to thirteen. Press Release, Dep't of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2008), http://www.usdoj.gov/eoir/press/08/AG-BIAAppointments.pdf.

110. *See* Legomsky, *supra* note 29, at 376; *see also* Michelle Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 477–78 (2008). A former Board member noted that "[i]t was a purge. They brought in people who have all worked from one side of the issue, the government perspective." *Id.* at 477 n.65.

111. *See, e.g.*, Benedetto, *supra* note 110, at 478; Legomsky, *supra* note 29, at 376–77.

112. *See* Levinson, *supra* note 80, at 1156 (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002)).

113. *See id.* (citing 67 Fed. Reg. at 54,893).

114. Legomsky, *supra* note 29, at 379.

115. *Id.* (quoting Levinson, *supra* note 80, at 1161).

of which Board members would be removed, studies showed that several of the more immigrant-friendly Board members began to rule more frequently in favor of the government, as opposed to the immigrant.[116] The ones who did not do so were removed.[117]

But the DOJ's efforts to reshape immigration adjudication did not stop there. The process for choosing immigration judges, who made the underlying decisions that were appealed to the Board, was politicized as well. In what has been described as a "power grab,"[118] the DOJ began illegally side stepping the civil service process for choosing immigration judges in favor of one that "increasingly emphasized partisan political ties over expertise . . . despite laws that preclude such considerations."[119] DOJ employee Monica Goodling testified that candidates for immigration judge positions had been among those she had improperly "evaluated . . . based on her perception of their political loyalties."[120] A Department investigative report later found that Goodling and other DOJ employees had systematically violated Department policy and federal law by considering political and ideological affiliations, such as candidates' "loyalty to the Bush Administration"[121] and willingness to be "tough on immigration enforcement"[122] in soliciting and evaluating candidates for immigration judgeships, which were supposed to be merit-based, non-partisan civil service positions.[123]

The initial evidence indicates that the Department's politicized hiring procedures have had a significant and lasting effect. An analysis of asylum statistics conducted shortly after the release of the DOJ investigative report showed that "[i]mmigrants seeking asylum in the United States have been disproportionately rejected by judges whom the Bush

116. *Id.* at 377.

117. *Id*.

118. Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 28, 2007, at 12, *available at* http://www.law.com/jsp/article.jsp?id=1180429527384.

119. Goldstein & Eggen, *supra* note 90.

120. Schwartz & McLure, *supra* note 118, at 12.

121. OFFICE OF PROF'L RESPONSIBILITY AND OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 108 (2008), http://www.usdoj.gov/oig/special/s0807/final.pdf [hereinafter DOJ INVESTIGATIVE REPORT].

122. *Id.* at 95.

123. *Id.* at 115. The report collected evidence showing that the political and ideological views considered included whether the candidates were "conservative" and "tough on immigration enforcement," among other partisan criteria. *Id*. at 95, 108–09. The Report concluded that from 2003 to 2006 "the Attorney General's Office controlled the process for selecting [immigration judges], soliciting candidates, and informing EOIR [the office which hired immigration judges] who was to be hired for each position." *Id*. at 116. The report also noted that Goodling selected candidates for vacant Board positions based on political or ideological considerations, though ultimately only one of those candidates was appointed to the Board (and was appointed after the illegal politicized process had been halted). *Id*. at 110, 112; *see also* Bennedetto, *supra* note 110, at 490 (noting that all of the immigration judges "with immigration law backgrounds appointed by the Bush administration since 2001 had prosecutorial experience"). Immigration judges with prosecutorial experience in the immigration field had been found to be 24 percent more likely to reject asylum claims than those without such prosecutorial experience. *See id*; *see also* Ramji-Nogales et al., *supra* note 16, at 345–46.

administration chose using a conservative political litmus test."[124] Moreover, the politicized process for selecting immigration judges actually increased, rather than decreased, the backlog of immigration cases at the agency. The Department's investigative report concluded that the political and ideological screening process led to a hiring bottleneck, as the hiring office was not able to fill immigration judge positions until they were provided with the names of approved candidates, and that this bottleneck in turn "caused delays in appointing [immigration judges], which increased the burden on the immigration courts that were already experiencing an increased workload."[125]

In short, the evidence indicates that while weakening the review procedures for immigration claims, thus giving more authority to immigration judges and Board members, the DOJ simultaneously sought to install immigration adjudicators who were less likely to wield their authority independently, and instead would loyally support the aims of the Attorney General.[126]

2. The Streamlining Reforms as an Instrumentalist Manipulation of Immigration Law

Viewing the streamlining reforms through the lens of instrumentalism helps clarify their significance for the rule of law in the immigration system. Under this analysis, the DOJ's two-pronged assault on the system of immigration review described above can be seen as an instrumental approach to the law which emphasized outcomes and politics over reasoning and standards.

First, the streamlining reforms were used as a means to an end—a method of turning the system of immigration adjudication into a tool in the war against terror. This goal was publicly acknowledged; after "Sept. 11, 2001, the Bush administration [said it was] employing the nation's 54 immigration courts, with 226 judges, as a central tool of its anti-terrorism policies, using them to deport hundreds of noncitizens who were detained as terrorism suspects but were not charged with crimes."[127] This

124. *See* Charlie Savage, *Vetted Judges More Likely to Reject Bids for Asylum*, N.Y. TIMES, Aug. 24, 2008, at A17, *available at* http://www.nytimes.com/2008/08/24/washington/24judges.html.

125. DOJ INVESTIGATIVE REPORT, *supra* note 121, at 91–92 ("The fact that so many slots have remained vacant for so long is beginning to have a measurable impact on the Immigration Courts because the pending case backlog is beginning to grow." (quoting a departmental official)).

126. *See* Goldstein & Eggen, *supra* note 90 (describing the impact of the streamlining reforms in the immigration system, noting that "[t]he infusion of politics into the selection of [immigration] judges began in the midst of this transformation of the court system," and concluding that "[t]hese appointments, all made by the attorney general, have begun to reshape a system of courts in which judges, ruling alone, exercise broad powers—deporting each year nearly a quarter-million immigrants, who have limited rights to appeal and no right to an attorney").

127. *See* Goldstein & Eggen, *supra* note 90; *see also* DOJ INVESTIGATIVE REPORT, *supra* note 121, at 97 (quoting an email from a DOJ official stating that immigration judge positions needed to be filled quickly to facilitate "the Administration's effort to ensure that illegal aliens who pose a danger to us are deported in an expeditious manner"); Kevin R. Johnson & Bernard Trujillo, *Immigration*

end required a shift away from the rules and standards embedded in the system, since the immigration system had not been designed to be a quick deportation mechanism for people who had not committed crimes or were in the country legally.[128] Rather, it was designed as a rule-based system intended to provide procedural due process protections during deportation proceedings.[129] The DOJ's emphasis on results over rules played out through the streamlining reforms, which weakened the procedural safeguards that could have moderated personal or political biases in the administrative system, just when they were most needed.

Second, once such restrictions on the agency's actions were loosened, these ends were further served by the installation of adjudicators who would use the increased decision-making authority they had been given to promote the desired end. As the Board was itself streamlined, politics began to displace procedure in the process of selecting the judges whose decision making was increasingly unfettered.[130] Proponents of the idea that instrumentalism can threaten the rule of law argue that when the significance of legal rules and procedures is diminished in the pursuit of certain ends, the battle between instrumentalism and the rule of law

> must culminate in an ideological battle over who gets to become a judge. If a judge has substantial scope to inject personal views into legal decisions, and if judges wield inordinate power to shape social life, then it is imperative to populate the judiciary with individuals who share your ideological views.[131]

This is precisely what happened here—once procedural restraints on agency adjudicators' decision making had been weakened, pursuit of the Attorney General's goals required populating the courts with adjudicators who supported his aims, and the evidence shows that the Department attempted to do so.[132] In this manner, the streamlining reforms became a key component of "an effort to seize and wield the law instrumentally" through which immigration law increasingly became an "instrument of power" used to advance the aims of the DOJ.[133]

Reform, National Security After September 11, and the Future of North American Integration, 91 MINN. L. REV. 1369, 1396–1403 (2007) (contending that the "war on terror" came to dominate the national discussion of immigration reform after Sept. 11, 2001, and that the Bush administration repeatedly invoked the plenary power doctrine to justify its border control policies). Johnson and Trujillo also note that "[t]here is no evidence that any actual terrorists have been deported." *Id.* at 1394.

128. *See* Neuman, *supra* note 34, at 620 (discussing the rule-bound nature of the deportation system and explaining that the agency's interpretation of deportation grounds was traditionally subject to judicial review).

129. *Id*.

130. *See* DOJ INVESTIGATIVE REPORT, *supra* note 121, at 121–22.

131. *See* Brian Z. Tamanaha, *The Perils of Pervasive Legal Instrumentalism* 59 (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 05-11, 2005), *available at* http://ssrn.com/abstract=725582.

132. *See generally* DOJ INVESTIGATIVE REPORT, *supra* note 121 (noting that although neither Ashcroft nor Gonzales were personally involved in selecting candidates, members of both Attorney Generals' staff were directly involved).

133. TAMANAHA, *supra* note 4, at 1.

The streamlining reforms' procedural assaults on the Board's decision making and transparency, and the politicization of the agency immigration adjudicators achieved via streamlining, has had significant implications for the rule of law in the immigration system. The evidence to date shows that the ideals of accuracy, efficiency, acceptability, and consistency in decision making—key components of a properly functioning administrative and judicial system[134]—have been undermined in the immigration arena.[135]

B. The Streamlining Reforms' Impact on the Rule of Law in the Immigration System

When the streamlining reforms were implemented, one commentator predicted that they would "insure litigation, more appeals and generally detract from the public perception of impartiality necessary to maintain the integrity of the removal process,"[136] and this is precisely what has happened.

1. Breakdown of the Administrative System

The most immediate result of streamlining was a massive six-fold increase in the number of agency decisions appealed to the federal courts.[137] But as appeals rose, the federal courts, through their review of the decisions issued by the DOJ, began to shed some light on the level of dysfunction at the agency level. It became clear that the ideals of efficiency, accuracy, acceptability, and consistency were all deteriorating in the agency adjudication system, as the rate of reversal of Board decisions climbed and critiques of the agency rose.

134. *See* Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313–14 (1986) (discussing the four goals of administrative and judicial review procedures as accuracy, efficiency, acceptability, and consistency; and describing the accuracy goal as reflecting "the need to ascertain the truth," the efficiency goal as reflecting "a desire to minimize not only the monetary costs to the parties and to the public, but also the costs of the waiting time and the decisionmakers' time," the acceptability goal as recognizing "the importance of having a procedure that the litigants and the general public perceive as fair," and the consistency goal as assuring "equal treatment of similarly situated litigants" (internal citations omitted)).

135. Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 68–90 (2004).

136. Letter from the Am. Immigration Lawyers Assoc. to Charles K. Adkins-Blanch, Gen. Counsel, Executive Office for Immigration Review (Mar. 20, 2002), *available at* http://www.aila.org/Content/default.aspx?docid=2093 (commenting on Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7310 (Feb. 19, 2002)).

137. *Immigration Litigation Reduction Hearing*, *supra* note 16, at 27 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Dep't of Justice). For instance, shortly after the streamlining reforms were implemented, the number of immigration appeals filed in the federal circuit courts increased by 294 percent (from 1642 cases in 2001 to 6465 cases in 2002). COMM. ON THE FED. COURTS, ASS'N OF THE BAR OF THE CITY OF N.Y., THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS 4 (2004), http://www.abcny.org/pdf/report/AppealSurgeReport.pdf. This trend continued in 2003, with appeals filed in the federal courts increasing an additional 35 percent (from 6465 to 8750). *Id.*

First, despite the streamlining reforms' stated goal of increasing efficiency, the massive Board backlog has simply been shifted to the federal courts, which are now flooded with nearly twelve thousand immigration appeals a year.[138] The Second Circuit saw a 1400 percent increase in the number of Board appeals filed in its court,[139] while the Ninth Circuit saw a nearly 600 percent increase in Board appeals.[140] Both circuits have had to institute separate procedures and calendars to deal with the onslaught of immigration cases.[141]

Accuracy and acceptability also declined, at least as measured by the reversal rate and federal court critiques of the DOJ's decision making. For example, the Seventh Circuit noted that in the year from September 2004 to September 2005, "different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."[142] The media and federal courts are increasingly pointing out the inconsistencies and mistakes rendered by immigration judges in their initial decisions, which are then compounded when such cases are (often improperly) summarily affirmed.[143] The Ninth Circuit, for example, described receiving a "literally incomprehensible opinion by an immigration judge" that it could not "substantively review without violating basic principles of judicial review";[144] and the Seventh Circuit decried the "disturbing" trend of receiving Board affirmances with no opinion, or "a very short, unhelpful, boilerplate opinion, even when . . . the immigration judge's opinion contains manifest errors of fact and logic."[145]

138. *See Immigration Litigation Reduction Hearing*, *supra* note 16, at 16 (testimony of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit); *see also* Mintz, *supra* note 43 (describing the claims of critics who argue that the streamlining reforms have undermined the ability of the Board to catch mistakes by overworked immigration judges and shifted that role to the federal judges, and stating that "[s]ince the appeals board downsized its chief mechanism for catching its own mistakes, immigrant rights advocates say they've had no choice but to go above the board to the next level—the federal courts of appeal").

139. *Immigration Litigation Reduction Hearing*, *supra* note 16, at 62 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Dep't of Justice).

140. *Id.* at 8 (statement of Carlos T. Bea, C.J., U.S. Court of Appeals for the Ninth Circuit).

141. *See id.* at 5 (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit); *id.* at 9 (statement of Carlos T. Bea, C.J., U.S. Court of Appeals for the Ninth Circuit); *see also* John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 966–67 (2006).

142. Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005).

143. For example, the *New York Times* recently reported that one immigration judge mixed up the records of an asylum seeker, confusing the deaths of her father and husband. Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, § 1, at 1. The judge then "cited his own mistake as evidence that [the claimant's] account was inconsistent." *Id.* at 39.

144. Recinos De Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005).

145. Neuman, *supra* note 34, at 633 (quoting Iao v. Gonzales, 400 F.3d 530, 533–35 (7th Cir. 2005)). The subsequent outcry over the quality of decisions and adjudicators was so strong that the Attorney General was forced to carry out an investigation into the conduct of immigration judges. *See* Gonzales Press Release, *supra* note 109.

The drops in efficiency, accuracy, and acceptability were mirrored by drops in consistency, which in turn increased the level of arbitrariness in the system. A recent empirical study demonstrated the scope of the problem by measuring just how inconsistent and arbitrary the immigration system has become.[146] It found stunning disparities in the adjudication of asylum claims; for example, at the agency level, one judge was 1820 percent more likely to grant an application for relief than another judge in the same courthouse.[147] After the streamlining reforms were implemented, the determinative factors for asylum claims appear to be the location of the court and the official assigned to the case, prompting the authors of the study to comment that "we believe that the outcome of a refugee's quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official."[148] By multiple measures, then, as the Seventh Circuit put it, "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[149]

In short, the immigration system has become "less of a system of law" based on fairness, equality, and consistency; and more of a results-driven system where cases are determined decreasingly on the basis of "standardized norms" and increasingly "by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators."[150]

With this disarray at the administrative level, the battle over streamlining has now shifted to the federal courts, the last obstacle preventing the DOJ from asserting unfettered authority over the immigration arena. The agency itself cannot rewrite federal judicial procedures or stack the federal judiciary; however, in that arena, the DOJ has begun to undermine the vitality of judicial review.

2. The Attempts to Undermine Judicial Review

As streamlined cases began to percolate up to the federal courts, the DOJ prevailed in the first constitutional and administrative law challenges to streamlining.[151] These developments have further diminished the procedural safeguards available to immigrants and increased the discretionary power of the Attorney General, "creat[ing] opportunities for discretionary executive action highly threatening to aliens' constitutional rights."[152] As discussed below, however, a key element in the federal courts' decisions rejecting the initial challenges to streamlining was the

146. *See* Ramji-Nogales et al., *supra* note 16, at 299–302.
147. *Id.* at 301.
148. *Id.* at 305.
149. Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).
150. Ramji-Nogales et al., *supra* note 16, at 299–300.
151. *See* Neumann, *supra* note 34, at 626–27.
152. *Id.* at 625.

continued availability of judicial review in the federal courts, which the courts felt would mitigate deficiencies in the administrative system.

First, the federal courts found that the affirmance without opinion procedure did not deprive aliens of a constitutional right to due process because, in essence, an "alien has no constitutional right to any administrative appeal at all."[153] Significantly, the availability of federal court review was critical to their reasoning—the courts found that due process rights were satisfied by the immigration system as a whole, since an opportunity for agency review, combined with the availability of federal appellate review, sufficiently protected any rights to appeal that aliens did have.[154] The courts also adhered to a presumption of administrative regularity, declining to overturn the streamlining regulations on due process grounds absent specific evidence that the Board was systemically flouting the streamlining rules and failing to actually substantively review appeals.[155]

Petitioners also raised administrative law challenges to the streamlining provisions, claiming that the streamlining provisions violated the "fundamental rule of administrative law" that an administrative agency must provide a reasoned basis for its action under *SEC v. Chenery Corp*.[156] These arguments too were rejected by the courts, based on the presumed availability and utility of judicial review. The courts noted that the "terse [Board] summary affirmances authorized by the streamlining regulations do not themselves satisfy" *Chenery*'s requirements.[157] Again looking at the appellate process as a whole, however, the courts found *Chenery*'s requirements met. They found that meaningful review of deportation was not precluded by the "brevity of the [Board]'s summary affirmance decision" because the federal court would "continue to have the [immigration judge's] decision and the record upon which it was based available for [judicial] review."[158]

Thus, the federal courts' willingness to uphold the streamlining reforms against constitutional and administrative challenges was based at least in part on the assumption that judicial review would continue to be both available and effective in the federal courts. And, indeed, judicial review has brought to light and corrected some of the agency's most

153. Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003). For cases rejecting due process claims, see, for example, *Yuk v. Ashcroft*, 355 F.3d 1222, 1229–32 (10th Cir. 2004); *Loulou v. Ashcroft*, 354 F.3d 706, 708–09 (8th Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228, 238–45 (3d Cir. 2003); *Denko v. INS*, 351 F.3d 717, 725–30 (6th Cir. 2003); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849–52 (9th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 966–67 (7th Cir. 2003); *Mendoza v. United States Attorney General*, 327 F.3d 1283, 1288–89 (11th Cir. 2003); *Soadjede v. Ashcroft*, 324 F.3d 830, 831–33 (5th Cir. 2003); *Albathani*, 318 F.3d at 375–79.

154. *See* Zhang v. DOJ, 362 F.3d 155, 157 (2d Cir. 2004).

155. *See Albathani*, 318 F.3d at 378; Neuman, *supra* note 34, at 632.

156. 332 U.S. 194, 196–97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive."); *see also Albathani*, 318 F.3d at 375.

157. *Zhang*, 362 F.3d at 158.

158. *Id.* (quoting *Mendoza*, 327 F.3d at 1289).

egregious excesses; for example, federal court decisions which singled out the worst offenders among the immigration judges resulted in the firing of at least one of these judges.[159] But the one remaining live challenge to the streamlining reforms has revealed both that the agency has not always followed its streamlining regulations, and that the streamlining regulations can impair or block judicial review.

This remaining avenue is a challenge to the streamlining regulations as applied. That is, immigrants appealing agency decisions have asked the federal courts to review whether the Board is properly applying the criteria set forth in the streamlining rules when it decides whether to streamline a case, as described above in Part I.A.1.c. In contrast to their uniform rejection of due process and *Chenery* arguments, the circuits have split on whether federal courts may review the agency's decision to streamline a case.[160] Part II analyzes this split, and its implications for judicial review.

The significance for this Section of the Article, however, lies in the DOJ's response to the circuit split, coming against the backdrop of the deterioration of the administrative system described above. The breakdown at the administrative level has only increased the need for judicial review over the agency's decisions. Beyond its impact on individual cases, judicial review over streamlining decisions allows federal courts to monitor whether the agency is complying with its own regulations, is fulfilling congressional intent, and is exercising its power through an administrative system that adheres to the basic values of our legal system.[161]

Yet, as the agency's excesses come to light in the circuits, and its summarily affirmed decisions are remanded for the failure to comply with the streamlining regulations, the DOJ has continued to fight for ends over rules. In every circuit, the DOJ has strenuously argued that the federal courts cannot review the agency's streamlining decision because, it claims, streamlining decisions should be characterized as involving resource-allocation considerations, and judicial review of such decisions would improperly impinge on the agency's discretionary authority.[162]

Moreover, after many of the circuits rejected these arguments, the DOJ turned to another route to achieve its desired ends. The Department recently announced that it intends to modify its regulations to "clarif[y]" that the federal courts do not have the jurisdiction to review its streamlining decisions.[163] In doing so, it proposes to eliminate judicial review over streamlining in a manner that itself flouts the rule of law.

159. *See, e.g.*, Alexander III, *supra* note 35, at 30–31.

160. *Compare* Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004), *with* Tsegay v. Ashcroft, 386 F.3d 1347 (10th Cir. 2004).

161. *See* Palmer et al., *supra* note 6, at 30.

162. *See infra* Part II.A.1.

163. Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,657 (June 18, 2008) (to be codified

When the DOJ announced the 2002 streamlining regulations, it explicitly stated that the streamlining reforms would not affect "fundamental fairness" concerns because "freedom to decide cases under the law and regulations should not be confused with managing the caseload."[164] Yet the agency now plans to eliminate judicial review by doing just that—expressly incorporating caseload management considerations into the criteria used to determine how cases should be streamlined and decided. Specifically, it proposes to revise its regulations to make clear that "the Board's decision to introduce an AWO ["affirmance without opinion" or "summary affirmance"], or any other type of decision, depends on the Board's internal judgment regarding its resources" and adds (though agencies do not have the authority to dictate federal jurisdiction) that these decisions will no longer be "independently reviewable."[165]

If the agency succeeds in modifying its regulations as proposed, either through the avenue of rulemaking or the courts, the revised regulations will further erode the rule of law. It is not possible to turn a decision on the merits into an unreviewable resource-allocation decision without creating an arbitrary, lawless system. Under almost any theory of law, "an adjudicator who is encouraged to base a decision on legally irrelevant factors (especially irrelevant *and secret* factors) is unacceptably likely to reach an outcome that differs substantively from the one that the legislature prescribed on the true facts" and thereby violates the rule of law.[166] Here, the agency intends to explicitly link a decision on the legal merits of a case to discretionary resource considerations that are legally irrelevant to the merits of a case. Moreover, because of the streamlining regulations already in place, this decision making by the Board will be secret as well. And if judicial review over such decisions is eliminated, as the agency seeks, such decisions will go forever unseen and uncorrected.

II. THE ILLUSION OF JUDICIAL REVIEW: HOW STREAMLINING CAN CRIPPLE FEDERAL COURT REVIEW

> [The] right to review in the courts of appeal is not something to be taken lightly or easily disregarded. The liberty interests involved in removal proceedings are of the highest order. Removal visits a great hardship on the individual and deprives him or her of the right to stay and live and work in this land of freedom. It is a drastic

at 8 C.F.R. pt. 1003). As noted in note 24, *supra*, the fate of this proposal remains uncertain as of the publication date of this Article.

164. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,883 (Aug. 26, 2002).

165. Board of Immigration Appeals: Affirmance without Opinion, Referral for Three-Board Member Review, and Publication of Decisions as Precedents, 72 Fed. Reg. 22,810, 22,810 (Apr. 30, 2007) (codified at 8 C.F.R. § 1003.1).

166. *See* Legomsky, *supra* note 29, at 400.

> measure and for some the equivalent of banishment or exile. The concern behind an alien's right to petition this Court for relief is a familiar one—that personal freedom can only be preserved when there are institutional checks on arbitrary government action.[167]

As the battles over streamlining escalate, a deeper challenge to the rule of law is beginning to emerge in the federal courts. It is increasingly apparent that by concealing critical agency action, the streamlining reforms have surreptitiously expanded the zone of untouchable agency decision making. Most courts and commentators have failed to recognize both how this expansion came about and the critical impact this has had on judicial review.

Yet the stakes are high. In the streamlining context, both the end result—elimination of judicial review—and the means used to reach that end—deterioration of the standards governing agency decision making—have profound implications for the rule of law and the vitality of judicial review as an institutional check on arbitrary agency action. The previous Section illustrates how the agency's desire for absolute discretionary authority has led to a disintegration of the standards governing agency decision making, and ultimately the rule of law in the administrative system.

This Section focuses on the DOJ's attempts to eliminate judicial review over streamlining at the federal court level. It assesses the impact that elimination of judicial review over streamlining decisions will have on the federal courts' ability to conduct judicial review over immigration appeals generally. It further analyzes the implications of this elimination for judicial review of agency decision making overall.

Section A introduces the conflicts over judicial review of streamlining that are dividing the federal courts and creating untenable conflicts between judicial review and deference. Section B analyzes the circuit split over streamlining to explain why judicial review over streamlining decisions is necessary to preserve the availability and utility of judicial review over immigration appeals as a whole. Section C argues that without preservation of this oversight mechanism, the agency's instrumental quest for unrestrained discretion in the immigration context will be largely complete—a victory achieved at the expense of the rule of law.

A. The Battle in the Federal Courts over Judicial Review of Streamlining

1. Background: Streamlining Quandaries for the Courts

By concealing the Board's decision making during the critical step of appellate review at the agency level, the streamlining reforms impair federal courts' ability to conduct their judicial review, as well as their ability to comply with deference principles. The following examples illu-

167. Lanza v. Ashcroft, 389 F.3d 917, 927–28 (9th Cir. 2004) (internal citations omitted).

strate the judicial review and deference dilemmas that have emerged when streamlined cases hit the federal courts.

a. The Jurisdictional Conundrum

In one oft-repeated scenario, the "jurisdictional conundrum," the Board's use of an affirmance without opinion conceals from federal courts whether they even have jurisdiction to review the case before them.[168] This situation arises when an immigration judge decides a case on two alternative grounds, one that federal courts may review, and one that federal courts cannot review because of a jurisdiction-stripping statute such as AEDPA or IIRIRA.[169] When the Board summarily affirms such a decision—only affirming the results of the decision, without providing any explanation for the Board's affirmance—the federal court cannot tell if the Board affirmed on the reviewable ground, thus providing the federal court with jurisdiction to hear the claim, or on the unreviewable ground, which the federal court has no jurisdiction to review. Some circuits have argued that judicial review of such a decision is technically impossible and remanded these cases to the agency, ordering the agency to specify its grounds for affirmance.[170] Others have chosen to simply review the immigration judge's decision on the grounds over which they have jurisdiction, despite acknowledging that in doing so they are simply speculating as to the agency's reasons for affirmance and may well be rendering an advisory opinion by reviewing a decision that may or may not have contained the agency's actual reasons for affirmance.[171]

b. Intervening or Controlling Precedent

In another scenario, federal courts have been confronted with streamlined cases in which the immigrant raised an apparently controlling precedent, or an apparently controlling intervening precedent issued after the immigration judge's decision, on appeal from the immigration judge's decision to the Board. When the Board summarily affirms such cases—again providing no explanation of why, for example, a controlling or intervening precedent was deemed inapplicable—the federal courts are confronted with another dilemma. Do they come up with their own interpretation of Board precedent, or speculate as to what the Board's interpretation of its precedent might have been, thereby potentially interfering with the rules of deference to agency interpretations? Or do they attempt to come up with an argument as to why the agency's (unknown) interpretation should receive no deference so that they can remand the case back to the agency? Or do they simply ignore the stream-

168. *See, e.g.*, *id.* at 924.
169. *See, e.g.*, *id.* at 923.
170. *See, e.g.*, Tsegay v. Ashcroft, 386 F.3d 1347, 1358 (10th Cir. 2004).
171. *See, e.g.*, *Lanza*, 389 F.3d at 932; *Tsegay*, 386 F.3d at 1353.

lining decision and proceed to a review of the underlying immigration judge's decision, ignoring the deference dilemmas that may arise? The federal courts have deeply split on this issue as well, creating both inter- and intra-circuit conflicts.[172]

In these ways, streamlined cases can trap federal courts in an uncomfortable bind between competing duties of judicial review and deference. The following Sections explain how these dilemmas have divided the circuits and how these dilemmas ultimately threaten judicial review.

2. The Conflict in the Circuits

As their caseloads rise, federal courts have struggled to review streamlined decisions such as those described above. As a threshold matter, they have sharply split on the question of whether they have jurisdiction to review the Board's decision to streamline a case, as opposed to simply reviewing the merits of the underlying immigration judge's decision.[173] That is, can a federal court review whether the Board complied with the criteria in the streamlining regulations when it decided to streamline and summarily affirm a case? This question is critical to understanding how streamlining impacts judicial review and deference. Several circuits have deemed the Board's decision to streamline a case an internal discretionary decision of the agency that they do not have the power to review under traditional administrative law principles.[174] In contrast, other circuits have held that they do have the power to review the agency's decision to streamline, finding that this decision is not committed to the agency's unfettered discretion and is therefore subject to judicial review, not deference.[175]

Indeed, the divide between the circuits is only growing. The Second Circuit recently weighed in on the conflict, summarizing the split as follows:

> Our sister circuits have split, however, on the question of whether Courts of Appeals are vested with jurisdiction to review the Board's decision to have a particular case decided by a single member rather than by a three-member [Board] panel. *Compare Ngure v. Ashcroft* (decision to streamline "a particular case is committed to agency discretion and not subject to judicial review"), and *Tsegay v. Ashcroft* (concluding that appellate review is precluded because [Board] summary affirmances provide no rationale, the regulations were not intended to grant aliens substantive rights, and review would be impractical and would defeat the "streamlining" purpose), with *Smriko v. Ashcroft* (remanding case to [Board] for three-

172. *See infra* Part II.A.2.

173. *See* cases cited *infra* notes 174–78.

174. *See, e.g.*, *Tsegay*, 386 F. 3d 1347; Ngure v. Ashcroft, 367 F.3d 975 (8th Cir. 2004).

175. *See, e.g.*, Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); Chong Shin Chen v. Ashcroft, 378 F.3d 1081 (9th Cir. 2004); Haoud v. Ashcroft, 350 F.3d 201 (1st Cir. 2003).

> member panel review), and *Haoud v. Ashcroft* . . . and *Chong Shin Chen v. Ashcroft* (remanding a one-member decision without opinion to the [Board] for determination of a "novel legal issue" by a three-member panel of the [Board]).[176]

With the decision reached in this case, the Second Circuit joined the Eighth and Tenth Circuits in holding that the federal courts lacked jurisdiction to review the decision to streamline.[177]

These decisions squarely conflict with those of the First, Third, and Ninth Circuits, which hold that the Board's decision to streamline is judicially reviewable.[178] Interestingly, the two circuits facing the largest flood of immigration decisions—the Second and the Ninth[179]—are now directly arrayed against each other on this issue.[180]

There is yet another dimension to the conflict among the circuits, however. Though confronted directly with the question of whether they could review the streamlining decision, three circuits, the Fourth, Sixth, and Seventh, attempted to evade the jurisdictional question entirely.[181] They did so by claiming judicial review of the decision to streamline was not necessary, because they believed federal courts could remedy any error in the Board's decision to streamline by proceeding directly to judicial review of the merits of the immigration judge's decision before them.[182]

These decisions add another important layer to the circuit split. Specifically, the circuits that found they had no jurisdiction or no need to review the decision to streamline, all sought to justify their positions by explaining that their refusal to review the streamlining decision was of no practical consequence.[183] Instead, they concluded federal courts could

176. Kambolli v. Gonzales, 449 F.3d 454, 459–60 (2d Cir. 2006) (footnotes and citations partially omitted).

177. *Id*. at 463.

178. *See Smriko*, 387 F.3d 279; *Chong Shin Chen*, 378 F.3d 1081; *Haoud*, 350 F.3d 201. One of the judges sitting on the Third Circuit *Smriko* panel concurred specially to note that although he had participated in two Eighth Circuit cases that followed *Ngure's* contrary holding, he had become convinced that the reasoning supporting judicial review in *Smriko* was "the correct analysis." *Smriko*, 387 F.3d at 297. The judge later stated that the "Eighth Circuit precedent holding [that judicial review is unavailable] is ill-reasoned and should be overturned." Begna v. Ashcroft, 392 F.3d 301, 305 (8th Cir. 2004).

179. *See Immigration Appeals Surge in Courts*, THE THIRD BRANCH (Newsletter of the Fed. Courts, Washington, D.C.), Sept. 2003, *available at* http://www.uscourts.gov/ttb/sep03ttb/immigration/index.html.

180. *Compare Chong Shin Chen*, 378 F.3d 1081, *with Kambolli*, 449 F.3d 454.

181. *See* Blanco de Belbruno v. Ashcroft, 362 F.3d 272 (4th Cir. 2004); Denko v. INS, 351 F.3d 717 (6th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962 (7th Cir. 2003).

182. *See Blanco de Belbruno*, 362 F.3d at 281 ("If the [Board]'s practices result in a decision that allows a non-harmless error to slip through, there is always the avenue of an appeal to the courts to correct the error."); *Denko*, 351 F.3d at 732 (same); *Georgis*, 328 F.3d at 967 (same). Interestingly, the two remaining circuits with jurisdiction to review immigration claims, the Fifth and the Eleventh, simply reviewed the decision to streamline without first considering whether they had jurisdiction to do so. *See* Zhu v. Ashcroft, 382 F.3d 521 (5th Cir. 2004); Gonzalez-Oropeza v. Att'y Gen., 321 F.3d 1331 (11th Cir. 2003).

183. *See Georgis*, 328 F.3d at 967 ("[I]t makes no practical difference whether the [Board] properly or improperly streamlined review."); Denko, 351 F.3d at 732 (quoting *Georgis*); *Blanco de Belbru-*

remedy an improper streamlining decision simply through judicial review of the underlying immigration judge's decision.[184]

But this Article argues that courts refusing to review the streamlining decision make two fundamental errors that lead them to first improperly expand the zone of unreviewable agency action and then weaken judicial review. First, as described in Part II.B.1 below, they err in holding that the streamlining decision is not subject to specific, judicially reviewable criteria.

Second, as discussed in Part II.B.2 below, they err in finding that the failure to review the streamlining decision is harmless and can be remedied simply through judicial review of the merits of the underlying decision. They claim—despite their earlier argument that there are no discernible standards governing the streamlining decision—that the streamlining decision need not be separately reviewed because review of the decision to streamline simply merges with the federal court's review of the merits of the immigration judge's decision. Yet in doing so they fail to recognize how streamlining impairs their ability to judicially review the immigration judge's decision.

Together, these errors direct these courts to a conclusion that is both internally incoherent and premised on misconceptions of judicial review and deference principles. This conclusion further leads to a deeper doctrinal threat to judicial review that the courts and commentators have largely failed to recognize. The next Section examines these misconceptions, and explains why the federal courts do have the power to review streamlining decisions and why the federal courts' power to review the agency's decision to streamline a case must be preserved.

B. Escaping the Trap Between Judicial Review and Deference: Why Federal Courts Must Review the Agency's Decision to Streamline

This Section makes two central claims. First, it argues that federal courts do have the power to review the agency's decision to streamline a case. Despite the agency's claims, this decision is not one committed to the realm of unfettered agency discretion. Rather, it is a decision governed by specific criteria that are judicially reviewable.

Second, this Section demonstrates that this power of judicial review is very important and must be undertaken to preserve the vitality of judi-

no, 362 F.3d at 281 (finding that streamlining did not alter the court's ability to scrutinize Board decisions).

184. *See* Ngure v. Ashcroft, 367 F.3d 975, 986 (8th Cir. 2004) ("[A]n appeal to determine whether the [Board] was correct to find that the [immigration judge's] decision was correct serves 'no purpose whatsoever' when the court can directly review the [immigration judge's] decision."); *see also Kamboli*, 449 F.3d at 462 (analysis of whether streamlining was proper "will hew closely to a reviewing court's examination of the underlying . . . claims," as "[a]ny reviewing court holding, for example, that the [immigration judge] was wrong to deny asylum will of course reach the conclusion that the [Board] member erred in affirming unilaterally the erroneous decision of an [immigration judge]"); Tsegay v. Ashcroft, 386 F.3d 1347, 1357 (10th Cir. 2004).

cial review over agency decisions in general. Streamlining errors cannot be adequately addressed through judicial review of the merits. For one thing, the standards that govern judicial review of the decision to streamline are separate and distinct from the standards that govern judicial review of the merits.[185] Furthermore, when streamlining impairs a federal court's ability to review the merits and correct errors in an immigration judge's decision, a federal court must review the decision to streamline. A court's failure to exercise this power may greatly prejudice the immigrant, the agency, and judicial review.

1. The Decision to Streamline Is Judicially Reviewable Because It Is Not Committed to Agency Discretion

The conflict between the circuits stems first from their contrasting views as to whether the decision to streamline is committed to agency discretion, and thereby exempt from judicial review.[186] Each side's arguments turn on the interpretation of an exception to the "basic presumption of judicial review"[187] of agency decision making provided under the Administrative Procedure Act (APA).[188] As discussed below, this exception poses no bar to judicial review of streamlining.

a. Streamlining Is Not a Purely Discretionary Resource-Allocation Decision

Under § 702 of the APA, any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof" in the federal courts.[189] But there are two exceptions to this rule: judicial review is unavailable where it is either precluded by statute[190] or where action is committed to agency discretion by law.[191] The circuits are in general agreement that no statute expressly bars judicial review of the Board's decision to streamline, but have taken sharply different approaches to the determination of whether the decision to streamline is committed to agency discretion by law.[192]

185. *See infra* Part II.B.2.a.

186. *Compare Kambolli*, 449 F.3d at 465 ("[The court lacks] jurisdiction to review decisions by single [Board] members to affirm without referral to three-member [Board] panels. . . ."), *with* Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087–88 (9th Cir. 2004) (finding jurisdiction because Board's summary affirmance was a nondiscretionary agency determination).

187. Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).

188. 5 U.S.C. § 702 (2006).

189. *Id.* A decision of the Board is an agency action under the APA, *id.* § 701, and the Board's decision to streamline is a "final agency action" which may be reviewed under the APA. *See Tsegay*, 386 F.3d at 1354.

190. *See* 5 U.S.C. § 701(a)(1).

191. *See id.* § 701(a)(2).

192. *See* Smriko v. Ashcroft, 387 F.3d 279, 291 (3d Cir. 2004); *Tsegay*, 386 F.3d at 1354–55.

Under the second exception to the judicial review provided by the APA, decisions are "committed to agency discretion by law,"[193] and are therefore judicially unreviewable, in those "rare instances" where the relevant law is drawn so broadly that a court would have no meaningful legal standard against which to judge the agency's exercise of discretion.[194] In these circumstances, the law "can be taken to have 'committed' the decision making to the agency's judgment absolutely."[195] In *Heckler v. Chaney*, the Supreme Court interpreted this exception and found that the FDA's decision not to prosecute some violations of its statute was just such a decision.[196] The agency did not have the resources to prosecute every technical violation of its statute, and there were no statutory guidelines circumscribing the agency's choice of which violations to prosecute.[197] The Court felt that the agency was "far better equipped than the courts to deal with the many variables involved in the proper ordering of its [prosecution] priorities," including, for example, whether the agency's resources were better spent prosecuting one violation instead of another.[198] Therefore, it felt that the agency's decision not to act, by failing to prosecute a statutory violation, should be left to the unfettered discretion of the agency, and therefore receive deference by the federal courts.[199]

Nonetheless, this exception to judicial review is a narrow one, to be applied only in situations where the courts are left with "no law to apply."[200] The *Heckler* Court noted that it "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its . . . powers."[201] That is, where an agency's decision making is not completely unfettered, but is guided by specific criteria by which its judgment may be evaluated, a court may exercise judicial review over the agency's decision making.[202] Moreover, it distinguished between situations when the agency refuses to take action, and when the agency does take action by exercising its coercive power over individual liberty or property rights: when an agency exercises coercive power, "that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[203]

193. 5 U.S.C. § 702(a)(2).

194. Heckler v. Chaney, 470 U.S. 821, 830 (1985).

195. *Id.* at 830. At issue in *Heckler* was the FDA's decision not to institute enforcement proceedings for drugs used in administering lethal injections. The Court there found that the FDA did not provide sufficient law for a reviewing court to judge the agency's decision not to bring enforcement proceedings. *Id*. at 831, 837–38.

196. *Id.* at 831.

197. *Id*. at 831–32.

198. *Id*.

199. *Id*. (citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978); Train v. Natural Res. Def. Council, 421 U.S. 60, 87 (1975)).

200. *Id*. at 826, 830–31.

201. *Id.* at 833, 852.

202. *Id.* at 831.

203. *Id.* at 832.

In every circuit, the DOJ has strenuously argued that the Board's decision to streamline is insulated from judicial review under the "committed to agency discretion" exception.[204] It has argued that the streamlining decision should be characterized as a decision not to provide an opinion, which, like the decision not to prosecute, is not subject to legal criteria but involves "a complicated balancing of a number of factors which are peculiarly within the expertise of the agency,"[205] and that are "not amenable to judicial consideration."[206] In particular, the DOJ claims that the decision to streamline a case involves an evaluation of the Board's resources—that is, whether, "against the backdrop of an extraordinarily large caseload, the case involves such novel or complex issues that a full Board decision is required."[207] Invoking deference principles, the DOJ has claimed that judicial review of such a decision would improperly interfere with its ability to prioritize its resources.[208] Yet these arguments ignore the text of the regulations, which set forth legal criteria governing the decision to streamline and say nothing about resource considerations.[209] These claims also ignore how closely the decision to streamline is intertwined with the decision on the merits of case, a legal decision that should not be impacted by resource-allocation considerations.

But the circuits finding no jurisdiction to review streamlining have agreed with, and built upon, the Department's arguments regarding discretion and deference. First, they assert that there exists no meaningful legal standard by which they can judge the Board's decision to streamline because they agree that this decision turns on the resources of the Board at a particular time,[210] and "the views of members of [the Board] as to whether those limited resources should be dedicated to writing an opinion in a given case."[211] They complain that the regulations offer no guidance on what would make a factual or legal issue "substantial" enough to warrant a written opinion,[212] and further claim that they "would sorely lack the expertise necessary to evaluate whether a particular case warranted a hearing before a three-member [Board] panel."[213]

After characterizing the streamlining regulations as case management procedures, these courts invoke the tradition of deference, allowing

204. *See, e.g.*, Denko v. INS, 351 F.3d 717, 731 (6th Cir. 2003); *see also* Batalova v. Ashcroft, 355 F.3d 1246, 1252 (10th Cir. 2004).

205. *Denko*, 351 F.3d at 731.

206. Ngure v. Ashcroft, 367 F.3d 975, 985 (8th Cir. 2004).

207. *Batalova*, 355 F.3d at 1252 (quoting Respondent's Brief).

208. *See Ngure*, 367 F.3d at 984.

209. *See* 8 C.F.R. § 1003.1(e)(4)(ii) (2008).

210. *See, e.g.*, *Ngure*, 367 F.3d at 986.

211. *Id.*

212. *See id.* at 987.

213. Kambolli v. Gonzales, 449 F.3d 454, 464 (2d Cir. 2006). These cases cite the section of the streamlining regulations allowing the issuance of a summary affirmance where "[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." 8 C.F.R. § 1003.1(e)(4)(i)(B).

an administrative agency to decide "how to allocate its scarce resources . . . free from judicial supervision."[214] They argue that "administrative agencies should be free to fashion their own rules of procedure" and are better positioned than federal courts or Congress "to design procedural rules adapted to the peculiarities of [their] industry" and responsibilities.[215] These courts forecast that assuming jurisdiction to review the Board's decision to streamline would "cripple the streamlining process" and burden the federal courts with another decision to review, and therefore decline to exercise judicial review over the decision to streamline.[216]

By characterizing the entirety of the streamlining decision as a discretionary resource-allocation decision, however, these courts ignore the legal criteria set forth in the streamlining regulation itself. These criteria provide ample guidance for judicial review and do not (and should not) involve a consideration of the Board's caseload. Moreover, by focusing on case management issues, the courts that find judicial review unavailable improperly focus their deference analysis on the agency's resource-allocation decisions, which led to the creation of the streamlining regulations, rather than the agency's decisions in interpreting applicable law and deciding the legal merits of a case, which is what it does when it applies the regulations to a particular case. Furthermore, by characterizing the primary effect of the streamlining decision as whether a case will be reviewed by one Board member or a three-member panel, these courts gloss over the critical impact the streamlining decision can have on the ultimate outcome of the case. As Part I.A.1 explains, because the regulations commingle the decision on the merits with form of review and opinion a case will receive, the streamlining decision can determine whether a case will be affirmed or reversed.

In short, these courts fail to recognize that because of the ways in which the DOJ has, through the streamlining regulations, intertwined its decisions on the legal merits of a case with its decision to streamline and issue an affirmance without opinion for a case, reading resource-allocation considerations into the regulations as currently written would improperly infuse decisions on legal merits with arbitrary or legally irrelevant considerations. As discussed in Part I.A.2 above, such reasoning is the first step in a dangerous path towards a less standard-based, more arbitrary system that fails to fulfill the core principles of the rule of law.[217] And, as Section C discusses below, this reasoning also leads to a deeper doctrinal threat to the principle of judicial review.

214. *See Ngure*, 367 F.3d at 983.

215. *Id*. (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543, 525 (1978)).

216. *Kambolli*, 449 F.3d at 463 & n.15, 464.

217. *See supra* Part I.A.2; *see also* Legomsky, *supra* note 29, at 400.

b. The Agency's Streamlining Decision Is Not Unfettered and Is Reviewable

An analysis of the decisions where the courts did find jurisdiction over the decision to streamline illustrates the errors underlying the "no jurisdiction" claims. It also highlights how maintaining judicial review in its traditional role as an institutional check on agency power minimizes the tensions between judicial review and agency deference and ultimately helps support the rule of law.

In finding that they had the power to review the decision to streamline, the First, Third, and Ninth Circuits found specifically articulated criteria set forth in the streamlining regulations.[218] In doing so, they were able to distinguish between the agency's decision to promulgate the streamlining regulations and the agency's decisions in applying the criteria set forth in those regulations.[219] They also recognized how critical the streamlining decision could be to the ultimate decision on the merits of a case, with a legal impact extending far beyond that of a mere "case management" procedure.[220]

These courts relied on a narrower view of agency power. First, they noted that the governing immigration statute provides federal courts with the authority to "review . . . all questions of law and fact" arising in deportation proceedings, including procedural actions or legal errors at any stage of the proceedings.[221] They also noted that *Heckler* distinguished between an agency's refusal to act and an agency's exercise of coercive power over liberty or property rights.[222] In addition, they stated that when the agency issues or upholds a deportation decision, the agency has exercised its coercive power to act; it is not simply refusing to exercise its prosecution powers.[223]

Finally, these courts argued that even if the agency's discretion was initially unfettered, once it articulated streamlining criteria, the agency's discretion was no longer entirely unfettered.[224] This view of agency power was articulated in *INS v. Yueh-Shaio Yang*,[225] where the Supreme Court stated:

> Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as

218. *See* Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); Chong Shin Chen v. Ashcroft, 378 F.3d 1081 (9th Cir. 2004); Haoud v. Ashcroft, 350 F.3d 201 (1st Cir. 2003).

219. *See, e.g.*, *Smriko*, 387 F.3d at 292–94; *Haoud*, 350 F.3d at 206.

220. *See, e.g.*, *Smriko*, 387 F.3d at 292–95.

221. *Id.* at 291 (quoting 8 U.S.C. § 1252(b)(9) (2000)).

222. *Id*. at 292 n.8.

223. *Id.*

224. *See id.* at 291.

225. 519 U.S. 26 (1996).

> "arbitrary, capricious, [or] an abuse of discretion" within the meaning of the Administrative Procedure Act . . . .[226]

In contrast to the circumstances in *Heckler*—where the agency's refusal to begin a prosecution was not governed by rules but left to the agency's discretion[227]—these courts found that several specific criteria had to be met before a case could be streamlined. According to the language of the regulations, in order to affirm without opinion, the Board member was required to find that the following criteria were met:

> (1) the "result reached in the decision under review [must be] correct," (2) any "errors in the decision under review [must be] harmless or nonmaterial;" *and* (3) "(A) [t]he issues on appeal [must be] squarely controlled by existing Board or federal court precedent and . . . not involve the application of precedent to a novel factual situation" or "(B) [t]he factual and legal issues raised on appeal [must be] not so substantial that the case warrants the issuance of a written opinion in the case."[228]

The criteria set forth in the streamlining regulations themselves "present 'the kinds of issues [courts] routinely consider in reviewing cases'" and "provide amply sufficient 'law' for courts to apply."[229] Thus, as several circuits have found, these "factors straight from the regulation itself provide the necessary guidelines for judicial review."[230]

Significantly, in finding that "judicially manageable standards [are] available to a reviewing court," these courts reject the Board's argument that the streamlining decision involves discretionary determinations regarding agency resources.[231] First, they point out that the regulations make streamlining mandatory if the criteria are met—the affirmance without opinion provision states that a Board member "shall" affirm, and shall "affirm without opinion," if the criteria listed above are met.[232]

Second, these regulations make no mention of the Board's caseload. Rather, the language the "no jurisdiction" courts found determinative to their resource-allocation characterization, regarding whether the "'issues raised upon appeal are not so substantial that the case warrants the issuance of a written opinion' . . . focuses upon the lack of importance of the issues, not backlog and the availability of resources to produce an opinion."[233] As the *Smriko* court found, "[i]n short, the regulations do

226. *Id.* at 32.

227. Heckler v. Chaney, 470 U.S. 821, 835 (1985).

228. *Smriko*, 387 F.3d at 290 (citing 8 C.F.R. § 1003.1(e)(4)(i) (2008)).

229. *Id.* at 292–93.

230. *E.g.*, Denko v. INS, 351 F.3d 717, 732 (6th Cir. 2003).

231. *Id.* at 731; *see also Smriko*, 387 F.3d at 292 ("We agree with the Tenth Circuit Court of Appeals that [the streamlining criteria] have 'nothing to do with the [Board's] caseload or other internal circumstances.'" (quoting Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004))).

232. *Smriko*, 387 F.3d at 293; *see also* 8 C.F.R. § 1003.1(e)(4)(i) (2008); Falcon Carriche v. Ashcroft, 350 F.3d 845, 857 (9th Cir. 2003) (Nelson, J., concurring in part and dissenting in part) ("[T]he streamlining criteria are mandatory, qualifying criteria. A case must meet those criteria before a [Board] member may streamline.").

233. *Smriko*, 387 F.3d at 293.

not call upon single [Board] members to evaluate the resources available at a particular time. Rather, the regulations themselves allocate whatever decision-making resources the agency has, calling upon single [Board] members to follow the criteria contained in the regulations for allocating those resources."[234]

Thus, under this analysis the Board's decision to streamline does not fall under the "committed to agency discretion" exception to the judicial review provisions of the APA. Rather, the streamlining regulations contain specific criteria for agency action that may be meaningfully reviewed by a federal court. These criteria themselves do not involve consideration of the agency's caseload or resources, but instead focus on legal and factual determinations that the federal courts are well equipped to handle.[235]

Under this view, directly following the current language of the regulations, the decision to streamline a case is properly focused on a legal evaluation of a case and whether the case meets the qualifying criteria for streamlining. Significantly, this view keeps legal determinations separate from legally irrelevant considerations which may motivate purely discretionary decisions.

Furthermore, the determination that the decision to streamline is governed by judicially reviewable standards leads to an important conclusion on deference principles. Rather than allowing the agency to exercise its discretion unchecked, review of streamlining allows the courts to enforce "the Supreme Court's long-standing requirement . . . that an agency comply with its own regulations."[236] Once it has set forth specific criteria governing its actions and exercise of discretion, the agency, including the Board as its organ of appellate review, "'has the duty to follow its own [streamlining] regulations.'"[237] In this light, judicial review of the decision to streamline would serve an important purpose in allowing federal courts to monitor the DOJ's compliance with its regulations and help ensure that the agency does not streamline cases in an arbitrary manner or allow legally irrelevant considerations to seep into its legal analysis.

These functions are particularly important given the implicit and explicit pressures Board members face to review and dispose of cases rapidly, and the similar pressures they face to refrain from placing ob-

234. *Id.*

235. *See* Haoud v. Ashcroft, 350 F.3d 201, 206 (1st Cir. 2003) ("[T]he Board's own regulation provides more than enough 'law' by which a court could review the Board's decision to streamline. . . . Especially when the Board's review of an [immigration judge's] decision often hinges on Circuit court precedent, we are well-equipped, both statutorily and practically, to review a decision to streamline."); *see also Batalova* 355 F.3d at 1253 (stating the issues raised in the streamlining criteria "are the kinds of issues we routinely consider in reviewing cases"); *Falcon Carriche*, 350 F.3d at 858 (Nelson, J., concurring in part and dissenting in part) (stating that generally "review of the streamlining criteria requires nothing more than the application of law to facts").

236. *Smriko*, 387 F.3d at 295.

237. *Haoud*, 350 F.3d at 205 (quoting Nelson v. INS, 232 F.3d 258, 262 (1st Cir. 2000)).

stacles in the path of swift deportations, as described in Part I.B above. In these ways, allowing federal court review of the decision to streamline would strengthen the rule of law in the administrative system.

2. The Decision to Streamline Must Be Judicially Reviewed

The determination of whether the DOJ has complied with its own regulations in streamlining a case is highly significant to the preservation of judicial review and the rule of law. This determination must be undertaken by the federal courts for the following reasons. First, the streamlining decision itself may materially impair the court's ability to judicially review the merits of the immigration judge's decision. Second, in view of the impact on judicial review, a court's failure to first review the decision to streamline could lead it to violate deference principles by causing the court to improperly substitute its own reasoning for that of the agency. Third, the streamlining decision could eviscerate judicial review by blocking a court from correcting even egregious errors in the agency decision.

A further examination of the opinions finding that the decision to streamline is not reviewable reveals how and why "proper application of the streamlining regulations is essential"[238] and must be judicially reviewed.

a. Judicial Review of the Decision to Streamline Is Distinct from Judicial Review of the Merits of an Immigration Judge's Decision

The courts that refuse to review the decision to streamline fail to recognize streamlining's impact on judicial review, the manner in which the rules intertwine a decision on the form of opinion and review a case receives with a decision on the merits of a case, and the prejudice to the immigrant that stems from the failure to review the decision to streamline a case. These errors stem from the courts' failure to acknowledge that the decision to streamline is governed by specific criteria—separate and distinct criteria from the standards governing a court's review of the merits of the agency's decision.[239] While the agency's streamlining determinations overlap with the federal courts' judicial review of the merits of the case, they are not precisely the same determinations, and thus cannot simply replace one another.

238. *Smriko*, 387 F.3d at 297.

239. Again, the

> [s]treamlining procedures are used only when the result reached by the [immigration judge] is correct, any errors are harmless or nonmaterial, and either the issue is controlled by precedent and does not require application to novel facts or the factual and legal questions are insubstantial and do not warrant three-member review.

Denko v. INS, 351 F.3d 717, 731–32 (6th Cir. 2003).

Yet that is precisely what the courts that reject judicial review of streamlining then attempt to do—replace judicial review of the streamlining decision with judicial review of the merits of the underlying decision, by conflating review of the streamlining decision with their review of the merits. Indeed, the Second Circuit in *Kambolli* explicitly described this conflation, stating:

> Because the categories in [the streamlining provisions] turn on the merits of the claims presented to an [immigration judge], analysis of whether a [Board] member "abused his or her discretion" in unilaterally affirming without referral to a three-member [Board] panel will hew closely to a reviewing court's examination of the underlying asylum and withholding claims.[240]

As a threshold matter, the idea that review of the decision to streamline collapses into a review of the merits is inconsistent with the courts' earlier determinations that the decision to streamline involves resource-allocation issues peculiarly within the agency's expertise—the very issues that the courts previously characterized as unlike the determinations they routinely make on the merits. The courts' acknowledgement that the streamlining determination involves a decision on the merits of a case also conflicts with their attempt to characterize the import of the streamlining decision as one that merely affects whether a case receives review by one Board member or three, that is, as merely a decision regarding the form of opinion and review a case receives, as opposed to a decision that affects the outcome of a case.[241]

More importantly, this conflation leads the courts to compound their error on the reviewability of the streamlining decision by causing them to find that they can remedy an improper streamlining decision through their review of the merits.[242] In doing so, these courts make a critical error that ultimately weakens judicial review.

In emphasizing that a court that finds error in and reverses the merits of an immigration judge's decision will also implicitly find error in and reverse an improper streamlining decision, these courts fail to recognize that the *converse* is not true. That is, in many situations, the Board may have erred in streamlining a case, but the federal courts cannot reach, and therefore cannot reverse, the error in the merits. In these sit-

240. Kambolli v. Gonzales, 449 F.3d 454, 462 n.13 (2d Cir. 2006); *see also* Ngure v. Ashcroft, 367 F.3d 975, 986 (8th Cir. 2004) ("[A]n appeal to determine whether the [Board] was correct to find that the [immigration judge's] decision was correct serves 'no purpose whatever' when the court can directly review the [immigration judge's] decision."); *Falcon Carriche*, 350 F.3d at 855 ("The decision to streamline becomes indistinguishable from the merits.").

241. *See Kambolli*, 449 F.3d at 460 (characterizing the "threshold question" as "what recourse a petitioner has, if any, upon a Board member's decision to resolve an appeal himself and not to refer the case to a three-member panel").

242. *See id.* at 462 n.13 ("Any reviewing court holding, for example, that the [immigration judge] was wrong to deny asylum will of course reach the conclusion that the [Board] member erred in affirming unilaterally the erroneous decision of an [immigration judge] pursuant to subsection (e)(4) or (e)(5).").

uations, where the federal courts are constrained either by deference principles or the affirmance without opinion itself, federal courts would have to uphold improper streamlining decisions *unless* they separately review the decision to streamline. This has a significant impact on individual cases and judicial review as a whole.

b. The Failure to Judicially Review a Decision to Streamline Is Not Harmless and Could Lead to a Violation of Deference Principles

A federal court's affirmance of an improper streamlining decision is not harmless. Most obviously, judicial affirmance of an improper streamlining decision can prejudice the immigrant who is denied the opportunity for full and unconstrained review by the Board and the federal courts. The immigrant may lose either, or both, an opportunity for reversal of an incorrect decision, or the benefit of the Board's agency expertise or explanation regarding the claims presented.[243]

At a doctrinal level, the failure to separately review the decision to streamline could lead a federal court to overstep the bounds of deference and improperly substitute its own reasoning for that of the agency. For example, as the court in *Smriko* pointed out,

> If . . . an individual Board member arbitrarily and capriciously streamlines a case where no Board or binding precedent accepts or rejects an alien's plausible interpretation of an ambiguous statute, we are then left to interpret the statute without the [Board] having provided its *Chevron* deference-entitled "concrete meaning" to an ambiguous statute.[244]

In *INS v. Ventura*,[245] the Supreme Court cautioned against that very act, reaffirming the rule that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."[246] In *Ventura*, the Court reversed a decision by the Ninth Circuit where the court of appeals had taken it upon itself to evaluate, and reject, an alternative argument that the government had made before the immigration judge that, critically, had not yet been considered by the Board.[247] The Court found that in doing so, the court of appeals had "seriously disregarded the agency's legally mandated role."[248] It explained that "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question."[249] Citing *SEC v. Chenery*

243. *See, e.g.*, *id.* at 462.

244. Smriko v. Ashcroft, 387 F.3d 279, 297 (3d Cir. 2004); *see also supra* note 107 (discussing *Chevron* deference to Board and immigration judge decisions).

245. 537 U.S. 12 (2002).

246. *Id.* at 16.

247. *Id.* at 13–14.

248. *Id*. at 17.

249. *Id*. at 16.

Corp. for the proposition that "[i]n such circumstances a 'judicial judgment cannot be made to do service for an administrative judgment,'"[250] it continued that an appellate court could not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency."[251]

Applying these principles, the Court found that the court of appeals had committed clear error by independently creating far-reaching precedent "without giving the [Board] the opportunity to address the matter in the first instance in light of its own expertise."[252] It explained that where the Board has not yet considered an issue, the court of appeals should remand to the agency for consideration of the issue in the first instance.[253] Upon remand, "[t]he agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."[254]

These concerns are particularly relevant where the Board has chosen to streamline and affirm an immigration judge's decision without opinion, and this is then designated as the final agency decision. In situations where the immigration judge's decision does not independently provide a sufficient basis to support the Board's affirmance without opinion, or where this affirmance itself blocks the reviewing court from fully reaching the merits of the immigration judge's decision, the court of appeals must remand to the Board for consideration of the issue in the first instance, rather than substituting its own reasoning for that of the Board.[255]

The concerns articulated by the *Chenery* Court apply here in full force—that is,

> a reviewing court . . . must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis . . . . An agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself.[256]

In this light, it is important for a reviewing court to separately analyze the Board's decision to streamline, and where the decision to

250. *Id.* (quoting SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)).

251. *Id*.

252. *Id.* at 17.

253. *Id.* at 18.

254. *Id*. at 17.

255. *See* Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1088 (9th Cir. 2004) ("When confronted with a novel legal issue, we could decide the case based on application of law to the facts. However, we believe the better course in this case is to remand to the agency for its consideration of the issue in the first instance. This is particularly true where, as in the case at hand, the central question is application of the [Board]'s own precedent.").

256. Albathani v. INS, 318 F.3d 365, 378 (1st Cir. 2003) (quoting SEC v. Chenery, 332 U.S. 194, 196 (1947); *see also* Fed. Power Comm'n v. Texaco, Inc., 417 U.S. 380, 397 (1974)).

streamline is erroneous, for the court of appeals to remand the case for the Board's consideration rather than improperly substituting its own reasoning for the Board's.[257]

The doctrinal conflicts described above are not just theoretical possibilities—recent cases demonstrate just how the failure to review a decision to streamline can trap a federal court between its duties of deference and judicial review. They also demonstrate how stripping a court of the ability to review the decision to streamline can render a court helpless to do anything but uphold a legally erroneous agency decision—turning judicial review into a meaningless exercise.

c. Judicial Review of Streamlining Is Necessary to Preserve the Availability of Judicial Review over Immigration Appeals

Two recent cases dramatically illustrate how streamlining can trap federal courts between principles of agency deference and judicial review and thereby render judicial review illusory. The first case, *Gonzales v. Thomas*,[258] demonstrates how judicial review, in immigration appeals generally, can be severely weakened when the agency's decision to streamline a case is not reviewed. The second case, *Montes-Lopez v. Gonzales*,[259] demonstrates how judicial review of the decision to streamline allows federal courts to escape this trap, preserving the utility of judicial review over immigration appeals.

In *Gonzales v. Thomas*, the Supreme Court, acting per curiam, took the unusual step of summarily reversing a Ninth Circuit en banc decision.[260] The Supreme Court blasted the Ninth Circuit for usurping the agency's traditional role in violation of *Ventura*—even though the Ninth Circuit had actually remanded the Thomases' asylum case back to the Board for ultimate determination by the agency.[261] As set forth below, this seemingly odd situation has a simple explanation—the Board improperly streamlined the immigration judge's decision on the Thomases' asylum claim, but the federal court failed to review the decision to streamline and instead attempted to directly review the merits of the immigration judge's decision, thereby trapping itself between judicial review and deference.[262]

The Thomases sought political asylum before an immigration judge based on persecution they allegedly suffered due to their "membership in

257. *See, e.g.*, *id.* ("[I]f the [Board] does not independently state a correct ground for affirmance in a case in which the reasoning proffered by the [immigration judge] is faulty, the [Board] risks reversal on appeal.").

258. 547 U.S. 183 (2006).

259. 486 F.3d 1163 (9th Cir. 2007).

260. 547 U.S. at 183.

261. *Id.* at 186–87.

262. *See* Thomas v. Gonzales, 409 F.3d 1177, 1188 (9th Cir. 2005).

a social group," one of the statutory grounds for asylum.[263] But the immigration judge denied their case stating that he felt they had failed to show persecution on the grounds of race, an entirely separate statutory ground for asylum; he made no reference to the "membership in a social group" ground.[264] The Thomases appealed to the Board, again citing their membership in a particular social group as a basis for their asylum claim, but the Board streamlined their case, issuing an affirmance without any explanation.[265] But this case could not have been streamlined under the streamlining regulations—the Thomases presented a novel statutory interpretation on an issue the agency had not yet directly spoken to in its precedents: the issue of whether a family could qualify as a particular social group for the purposes of an asylum claim.[266]

When the Thomases appealed to the Ninth Circuit, the court faced a problem. The Thomases had repeatedly raised their social group claim at the agency, only to be met with complete silence on that claim.[267] The Ninth Circuit noted that notwithstanding a lack of explanation in the affirmance, the Board had a full opportunity to review all of the Thomases' claims, and therefore was presumed to have actually reviewed and decided the claims before it.[268] In this light, the logical implication of the affirmance without opinion was that the Board must have decided that either a family could not constitute a social group or that it must have decided that, although a family could constitute a social group, the Thomases' family did not qualify as a social group for the purposes of a grant of asylum. Using its de novo review authority over statutory interpretation questions, the Ninth Circuit held that under the asylum statute, a family could constitute a protected social group, and further that the Thomases' family qualified as such a group.[269] It remanded to the agency for a determination of whether the Thomases ultimately qualified for asylum.[270]

The Supreme Court strongly disagreed. It interpreted the Board's silence in its affirmance as an indication that "[t]he agency has not yet considered whether [the Thomases'] family presents the kind of 'kinship ties' that constitute a 'particular social group.'"[271] Despite itself speculating as to what the Board meant by its affirmance without opinion, the Supreme Court scolded the Ninth Circuit for speculating as to the Board's reasoning and reviewing the social group claim, deeming the Ninth Circuit's decision "legally erroneous" in a manner that "is obvious

263. *Id*. at 1181–82.
264. *Id*. at 1182.
265. *Id*. at 1183–84.
266. *Id*.
267. *Id.* at 1183.
268. *Id*. at 1184.
269. *Id.* at 1182, 1187.
270. *Id*. at 1189.
271. Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam).

in light of *Ventura*."[272] It held that the Ninth Circuit should have remanded to the agency for consideration of the social group claim in the first instance.[273]

This case precisely illustrates the traps improperly streamlined cases can present. If a court chooses to "defer" to the agency's streamlining decision by choosing not to review it, the court may then violate deference principles if it instead proceeds to directly review the underlying immigration judge's decision. This is because if a case has been improperly streamlined, a reviewing court will be forced to speculate as to the agency's reasons for upholding the immigration judge's decision and render a decision based on that speculation—a direct violation of *Ventura*.

But there is a deeper problem here as well. Suppose a court chose to both "defer" to the agency's streamlining decision by refusing to review it, and then chose to avoid violating deference principles by refusing to speculate as to the Board's decision. The court's alternative at that point would be to uphold the agency's decision—rendering its judicial review a nullity. If the court reviewed the case—but not the streamlining decision—and noted that the agency had made an egregious error, it would be unable to correct the error, or remand back to the agency, without violating deference principles.

This is the quandary the Ninth Circuit faced in *Thomas*. It found an error in the immigration judge's decision—failure to properly consider the applicants' primary claim. But because of the intervening streamlining decision, the court could not reach nor correct that error. Under applicable standards of judicial review, the Ninth Circuit could not reverse the agency decision unless it found that the agency had erred in either interpreting the asylum statute (which it could review de novo), or found that the agency had erred in applying the applicable law to the facts (which it could review under the substantial evidence standard).[274] Given the agency's silence on the family claim, the Ninth Circuit could not reach those conclusions, and remand, unless it engaged in speculation (even logical speculation) as to what the Board meant by its affirmance without opinion, and then explain why that affirmance was erroneous. But in doing so, it would have violated deference principles.

The Supreme Court failed to recognize the true nature of the dilemma caused by streamlining—that to remand, the Ninth Circuit had to speculate as to the agency's interpretation or application of the statute. After all, the Supreme Court was also speculating as to what the affirmance meant when it decided the Board must have summarily affirmed because it had not considered the family as a social group claim.

272. *Id*. at 185.
273. *Id*. at 186–87.
274. Thomas v. Gonzales, 409 F.3d 1177, 1182 (9th Cir. 2005).

The doctrinally coherent way to remand the Thomases' case would have been to find that the case had been improperly streamlined because it raised a novel statutory claim the agency had not yet spoken to, and therefore the Board had not complied with the streamlining regulations. This, in effect, was what the Supreme Court was implicitly asking the Ninth Circuit to do. But to do so, the Ninth Circuit should have separately and initially reviewed the decision to streamline—an issue the Supreme Court opinion failed to discuss.

The situation the Ninth Circuit faced in *Thomas* has troubling implications for judicial review over streamlined decisions. If a federal court does not review the streamlining decision, or is barred from doing so, then whenever a case has been improperly streamlined, the federal court cannot proceed to review the underlying immigration judge decision without violating deference principles as articulated in *Ventura*. If it does not review the streamlining decision itself, the federal court 's alternative to violating deference principles is to uphold the agency decision—even despite severe errors in the decision.

In this manner, streamlining has the potential to undermine judicial review. If, as the agency seeks, federal courts are barred from reviewing the decision to streamline, the streamlining decision can end up tying the hands of the court so that judicial review over streamlined decisions becomes merely an illusory exercise.

The proper way, then, to maintain the viability of judicial review over streamlined decisions is to allow the courts to review the decision to streamline. A subsequent Ninth Circuit case, *Montes-Lopez v. Gonzales*,[275] illustrates this conclusion. This case also involved a situation where the Board failed to address a novel claim. There, Montes-Lopez appealed the immigration judge's denial of his asylum claim, arguing that the judge had violated his statutory and constitutional right to counsel.[276] The Board streamlined his case, issuing an affirmance with no explanation or opinion.[277] The Ninth Circuit (having learned its lesson in *Thomas*) noted that it was "not permitted to decide a claim that the immigration court has not considered in the first instance," citing *Ventura*.[278] Adopting and extending the *Gonzales v. Thomas* Court's reasoning, it found that by summarily affirming Montes-Lopez's case, the Board must have ignored and denied review of Montes-Lopez's claim regarding his proceedings before the immigration judge.[279] It found that the Board had thereby erred in streamlining his case, and reversed and remanded to the Board for determination of this claim.[280] Here, by reviewing the streamlining decision, the Ninth Circuit was able to address the fundamental er-

275. 486 F.3d 1163 (9th Cir. 2007).
276. *Id*. at 1165.
277. *Id*.
278. *Id.*
279. *Id.*
280. *Id.*

ror in the agency proceedings—improper streamlining—and remand to the Board without running afoul of *Ventura*. Both judicial review and deference were preserved.

The approach of reviewing the decision to streamline is preferable even in cases where federal courts are able to find reversible error in the merits of immigration judge's decision that has been streamlined. Failure to review the decision to streamline may also alter the nature of a federal court's judicial review, as well as potentially tilt the balance between agency deference and review further towards an expanded view of agency authority.

For example, soon after its decision in *Gonzales v. Thomas*, the Supreme Court cited *Thomas* and vacated a Second Circuit decision remanding an immigration judge's decision where the immigration judge had actually addressed the social group claim, and the Board streamlined the case and issued an affirmance without opinion.[281] In that case, *Hong Yin Gao v. Gonzales*, the Second Circuit found that the immigration judge's reasons for deciding that the petitioner had failed to meet the asylum requirements at issue in *Thomas* (of demonstrating persecution on account of membership in a particular social group) were sparse, unclear, and lacked a logical nexus with the premises and facts.[282] The Second Circuit exercised its de novo review authority over the immigration judge's interpretation of the term "social group," found that the immigration judge had erred and was not entitled to deference, and reversed. In its petition for certiorari to the Supreme Court, the government argued that in doing so, the Second Circuit had overstepped its bounds under *Ventura* and *Thomas* and usurped the agency's role in interpreting the applicable statute, and should have remanded for the Board to issue an interpretation of the social group claim in the first instance.[283] The Supreme Court agreed, vacating the decision in light of *Gonzales v. Thomas*.

This case illustrates another aspect of the ways streamlining, and the Supreme Court's interpretations of federal court authority in the wake of streamlining, weakens judicial review. Constrained from exercising their de novo review powers where an immigration judge has rendered a decision and the agency has elevated it to the agency's final action via streamlining, the federal courts' judicial review role has been reduced to simply reviewing immigration judges' decisions and informing the Board when it should have rendered an opinion or explanation as opposed to streamlined a case. In this light, the federal court appears to be simply performing functions the Board should have performed itself instead of

281. Keisler v. Hong Yin Gao, 128 S. Ct. 345 (2007) (mem.) (granting certiorari and vacating and remanding case for further consideration in light of *Gonzales v. Thomas*).

282. 440 F.3d 62, 70–71 (2d Cir. 2006), *vacated and remanded sub nom.* Keisler v. Hong Yin Gao, 128 S. Ct. 345 (2007).

283. Petition for Writ of Certiorari at 3–4, 19–21, *Keisler*, 128 S. Ct. 345 (No. 06-1264), 2007 WL 835007.

streamlining a case. This highlights both the reasons why the Board is needed—to issue precedential decisions which guide the federal courts and the public, reconcile inconsistencies between the decisions of immigration judges, and to perform an error-correction function by reviewing and addressing problems with immigration judges' decisions before they reach the federal courts—as well as the ways the Board is failing to fulfill its functions because of streamlining. Furthermore, it illustrates how federal courts' review powers are weakened or impeded unless the decision to streamline is reviewed and the Board fulfills its traditional role.[284] Again, the doctrinally coherent way to resolve *Gao* would have been for the court to review the decision to streamline and reverse for failure to comply with the streamlining regulations, as opposed to the merits. This approach would also preserve both the federal courts' and agencies' traditional roles by ensuring, and pushing, the agency to comply with its own regulations.[285]

Review of the decision to streamline, then, plays a critical role in upholding the vitality of judicial review over immigration decisions as a whole. If judicial review over streamlining is eliminated, however, this could lead to a far-reaching erosion of judicial review over agency action in general, as discussed below.

C. The Broader Threat to Judicial Review

If the DOJ succeeds in barring the federal courts from reviewing the decision to streamline, the threats to judicial review described above could be extended to other agency actions and other agencies, leaving significant areas of agency action free from the oversight of judicial review.

First, as illustrated above, eliminating judicial review over the decision to streamline has the potential to lead federal courts into a doctrinal trap where the only available escape is to uphold the agency decision, however erroneous. This trap can easily be extended to other situations, as other agencies could use the streamlining example as precedent to erode judicial review of agency decision making.

Agencies could also seize on the strategy of deliberately conflating legal decisions with non-legal, discretionary determinations, to evade judicial review. For instance, if the DOJ successfully blocks judicial review of streamlining by weakening its reliance on legal criteria and standards, modifying its regulations to appear more ambiguous or less rule-based (and therefore less reviewable), or framing legal determinations as

284. The implications of the Supreme Court's decisions in *Gonzales v. Thomas* and *Keisler v. Hong Yin Gao* regarding the balance of power between agencies and courts and their respective interpretive authority bear further study.

285. Smriko v. Ashcroft, 387 F.3d 279, 295 (3d Cir. 2004) (citing "the Supreme Court's long-standing requirement . . . that an agency comply with its own regulations").

non-legal resource-allocation decisions, this would set an ominous precedent that other agencies may attempt to follow. The fears of the *Heckler* and *Smriko* courts—that agencies would simply rewrite their regulations until they were too ambiguous for federal court review—would thus be realized.[286]

The DOJ would also set a fearsome precedent if it could convince the Supreme Court that the current streamlining regulations are already infused with too much discretionary leeway for federal courts to review, despite the clear criteria in the regulations. Agencies could then point to the streamlining regulations to argue that even agency decisions which are guided by specific regulatory criteria are too discretionary for federal court review, and thereby severely limit the scope of agency decision making subject to judicial review.

An agency could also bar judicial review by concealing critical decision making from the federal courts, forcing a federal court to engage in speculation as to the agency's actions in order to conduct its judicial review. As *Thomas* shows, federal courts cannot engage in this type of speculation without violating deference principles.[287] Thus, an agency could insulate its decision making from the courts simply by concealing its interpretation of its precedents or statutes.

Finally, the streamlining precedents could be wielded directly against the federal courts themselves. In fact, there is some evidence that the Board's truncated streamlining review procedure is being used as a model for, and could spread to, the federal courts.[288] One recent congressional proposal calls for the adoption of single judge review of immigration decisions in the federal courts through the implementation of a "Certificate of Reviewability" procedure.[289] Under this procedure, a single federal judge would serve in a gate keeper role, deciding whether or not an alien could pursue an appeal in the federal courts.[290]

286. The *Heckler* Court's struggle to reconcile the tension between allowing an agency to act unfettered and allowing judicial supervision of agency action raised the possibility of whether an agency can avoid judicial review by simply failing to set forth criteria for its action by which its decision making can be judged by others. *See* Heckler v. Chaney, 470 U.S. 821, 830–31 (1985). Similarly, the decision in *Smriko* also highlights the problem raised in the reviewability cases that conclude that an agency's intent is relevant to whether judicial review of its decision making is proper. *See Smriko*, 387 F.3d at 295 ("If we routinely begin to look to an agency's intent (with respect to whether its own compliance with its regulations should be subject to judicial review) in promulgating regulations, as *Ngure* would have us do, we may well find that agencies *never* desire judicial review, and would rather be left unchecked in the exercise of their powers.").

287. *See supra* Part II.B.2.c.

288. *See Immigration Litigation Reduction Hearing*, *supra* note 16, at 193 (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit) (discussing the proposed "Certificate of Reviewability" procedure); *see also* Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEVADA L.J. 499 (2008).

289. *Immigration Litigation Reduction Hearing*, *supra* note 16, at 193 (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit).

290. *Id.* This has been compared to the issuance of a certificate of appealability under 28 U.S.C. § 2254 (habeas corpus petitions). But petitioners filing habeas claims have already had the opportunity to be heard by Article III or state judges and other opportunities for appeal. *See id.* In contrast,

As federal and agency immigration caseloads are projected to rise over the next few years,[291] it is imperative that the rising caseload is addressed in a manner that comports with the rule of law. The next Part considers how judicial review over streamlining can be strengthened and preserved, ultimately strengthening judicial review and the rule of law in the immigration system.

III. RESTORING THE RULE OF LAW BY PRESERVING AND STRENGTHENING JUDICIAL REVIEW OVER AGENCY DECISIONS

This Part examines how courts should review the decision to streamline, and proposes two approaches to combating the streamlining reforms' impact on judicial review. In Section A, using concrete examples, it discusses how the courts can apply judicial review principles in a manner which preserves the vitality of judicial review over streamlined decisions. In Section B, it presents theories of judicial review and agency discretion that offer ways to resolve the dilemmas dividing the circuits and allow for judicial review over an agency's application of standards without impinging on the agency's actual exercise of discretionary authority—ultimately strengthening judicial review over agency decision making as a whole.

A. Preserving Judicial Review over Streamlining

This Section analyzes three case studies to illustrate how federal courts can preserve their judicial review authority over streamlined decisions by separately reviewing the decision to streamline. It shows that the quandaries presented in Part II.A.1 are not confined to those specific scenarios, but arise in nearly all streamlined cases, and also shows how these quandaries can be resolved. In each example, it examines (1) how the streamlining decision itself materially impairs the court's ability to judicially review the merits of the agency decision, and (2) how judicial review of the streamlining decision enables a court to escape the trap between competing duties of review and deference, and thereby preserves the court's judicial review authority.

1. The Strongest Case: The Jurisdictional Conundrum

This scenario offers the clearest case of material harm stemming from the streamlining decision, involving a situation where the use of an

petitioners from Board decisions would have had only the opportunity for review by administrative adjudicators. *See Immigration Litigation Reduction Hearing*, *supra* note 16, at 29 (statement of David A. Martin, Professor, University of Virginia School of Law).

291. *See, e.g.*, Ernesto Londono, *U.S. Steps up Deportation of Immigrant Criminals*, WASH. POST, Feb. 27, 2008, at A1 (forecasting greatly increased caseloads in the immigration system due to new deportation policies).

affirmance without opinion invariably, and prejudicially, bars federal court review of the agency decision. As described in Part II.A., the "jurisdictional conundrum" arises when the affirmance without opinion obscures whether the federal court even has jurisdiction to review the appeal before it. The court in *Lanza v. Ashcroft* described this dilemma:

> [T]he [immigration judge] denied Lanza's application for asylum on two alternative grounds: one reviewable in federal court and the other unreviewable. The [Board] streamlined and issued an affirmance without opinion. Because the affirmance without opinion endorses only the result of the [immigration judge's] decision and not its reasoning, we do not know whether the [Board]'s decision was based on the reviewable or unreviewable ground, or both.
>
> . . . If the [Board] erred on the merits and we dismiss solely on the basis of untimeliness, Lanza will be wrongly removed to a country where she insists she will be persecuted without receiving the benefit of her statutory right to have this Court review the [Board]'s decision on the merits. Such a denial of review raises serious due process concerns, particularly, whereas here, the alien alleges that removal will threaten her life and liberty.
>
> . . . .
>
> . . . If the court reached the merits and reversed the [immigration judge], it would have to remand the case to the [Board] to adopt or reject the [immigration judge's] untimeliness finding as only the [Board] has the power to do. If the [Board] then adopted the untimeliness determination on remand, the court's decision on the merits would have no effect on the judgment. Given the constitutional ban on advisory opinions, there exists a strong judicial aversion to render potentially nondispositive rulings.[292]

Since the use of an affirmance without opinion conceals whether federal courts even have jurisdiction to review the decision before them, the decision to streamline here does not merely impact judicial review of the merits, but in fact precludes judicial review.[293] Thus, by definition, under this scenario the federal court cannot rectify an improper decision to streamline through its review of the merits. Moreover, if it attempted to do so, the federal court would have to improperly substitute its decision making for the Board's. The court would be forced to speculate as to the reason for affirmance, and uphold or deny a claim on grounds that it either does not have jurisdiction to review or that the Board did not rely on.

In this situation, the streamlining decision is always improper and must be reviewed and reversed as a threshold matter. In fact, the DOJ has conceded that an affirmance without opinion is by definition impro-

292. 389 F.3d 917, 927–29 (9th Cir. 2004) (citations omitted). For cases in other circuits, see *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003).

293. *See Haoud*, 350 F.3d at 205 ("[T]he [affirmance without opinion] cannot be used to deny our legitimate review power if we are left without a proper basis to determine our own jurisdiction . . . .").

per where the jurisdictional conundrum arises. Yet it chose to inform the public of this "policy change" via a brief filed in the Supreme Court,[294] not by modifying its regulations, and it appears that these cases are still reaching the circuits.[295] In the absence of regulatory change, courts should deem jurisdictional conundrum cases inappropriate for affirmance without opinion under the regulation barring streamlining for cases where the factual and legal issues raised on an appeal are "so substantial that the case warrants the issuance of a written opinion,"[296] and should remand to the Board for explanation of the grounds for its affirmance.

2. The Intermediate Case: Streamlining Deprives the Federal Court of the Board's Critical Interpretation

The intermediate case arises in situations where direct judicial review of the merits of a streamlined decision is possible, but improper. As noted in Part II.A.2, cases may arise where, on appeal to the Board, the immigrant raises an intervening or controlling precedent, or a novel legal argument that the Board has not yet examined in a precedential opinion. Under the streamlining criteria, these cases should not be streamlined,[297] yet some cases were streamlined nonetheless. In such cases, as in the *Thomas v. Gonzales* case discussed above, the affirmance without opinion obscures from the federal court the Board's critical reasoning on a matter the agency should consider in the first instance.[298] Thus, absent an explanation from the Board as to why it affirmed on an issue not adequately explained by—or apparently in conflict with—applicable precedent, the affirmance without opinion leaves the court "without a proper basis . . . to evaluate the Board's own critical analysis."[299]

294. The brief stated that "the Board has altered its practices and determined that in cases where the [immigration judge's] decision rests on both reviewable and nonreviewable grounds for denying relief from removal," summary affirmance procedures should not be utilized and that the Department would consent to remand in those cases. Brief for the Respondent in Opposition to Petition for Writ of Certiorari at 20, Kebede v. Ashcroft, 97 F. App'x 454 (4th Cir. 2004), (No. 04-280), 2005 WL 438002. This concession by the government, contained in a response to a petition for a writ of certiorari filed by this author, is now being used by immigrants' advocates as a basis for remand. *See* MARY KENNEY, AM. IMMIGRATION LAW FOUND., BIA "AFFIRMANCE WITHOUT OPINION": WHAT FEDERAL COURT CHALLENGES REMAIN? PRACTICE ADVISORY 3–4 (2005), http://www.ailf.org/lac/pa/lac_pa_042705.pdf (urging attorneys handling "jurisdictional conundrum" cases to request that the government join a motion for remand based on the government's concession in *Kebede v. Gonzales*).

295. *See* Cruz v. Att'y Gen., 452 F.3d 240, 242 (3d Cir. 2006); Cuellar Lopez v. Gonzales, 427 F.3d 492, 493 (7th Cir. 2005).

296. 8 C.F.R. § 1003.1(e)(4)(i)(B) (2008).

297. *See, e.g.*, *id.* § 1003.1(e)(4)(i)(A).

298. *See, e.g.*, Thomas v. Gonzales, 409 F.3d 1177, 1182, 1184 (9th Cir. 2005); *Haoud*, 350 F.3d at 206; *see also supra* notes 260–74 and accompanying text (discussing *Thomas v. Gonzales* and the Supreme Court's disagreement with the Ninth Circuit).

299. *Haoud*, 350 F.3d at 205. The Ninth Circuit was presented with a similar scenario in *Chong Shin Chen v. Ashcroft*, 378 F.3d 1081, 1083 (9th Cir. 2004).

Thus, in these situations, the courts are confronted with a situation where, if they simply proceeded to review the merits without reviewing the decision to streamline, the courts would have to speculate as to how the Board would have distinguished or interpreted case law as to which it had not yet clearly spoken. Under *Ventura* and *Thomas*, the proper course in such situations is to review and reverse the decision to streamline under the regulation barring streamlining where novel interpretations or intervening precedents are at issue,[300] and remand to the Board for explicit consideration of the substantive claim in the first instance.

3. The Narrowest Case: The Court Is Constrained by Its Standard of Review from Reaching Factual Errors in the Agency Decision

In some cases, the material difference in the standards of review to be applied by the federal courts and the agency can lead a federal court to uphold an erroneous streamlining decision, unless streamlining is separately reviewed. This situation presents the narrowest case where streamlining impedes federal court review, but again, a federal court's failure to review a decision to streamline cannot be corrected simply through a review of the merits. In this situation as well, failure to review the decision to streamline would prejudice the immigrant, the agency and judicial review.

An example from the asylum context illustrates this issue. Under 8 U.S.C. § 1252(b)(4)(D), a federal court must uphold the agency's factual findings for asylum determinations if they are supported by substantial evidence on the record.[301] In contrast, even under the restricted standard of review implemented with the streamlining reforms, the Board is empowered to review the factual findings of the immigration judge utilizing a "clearly erroneous" standard.[302]

This material difference in the standard of review may lead to a scenario where a court cannot rectify an improper affirmance without opinion through its merits review. Again, the court is faced with the choice of either separately reviewing the decision to streamline or improperly substituting its own reasoning for that of the Board.

The court in *Sarr v. Gonzales*[303] explained how this scenario could arise:

300. 8 C.F.R. § 1003.1(e)(4)(i)(A) (allowing streamlining only if the "issues raised on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation").

301. 8 U.S.C. § 1252(b)(4)(D) (2006); *see also Thomas*, 409 F.3d at 1182 (applying the "substantial evidence" standard of review).

302. *See* 8 C.F.R. § 1003.1(d)(3)(i); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,888–91 (Aug. 26, 2002) (instituting clearly erroneous review for the Board of an immigration judge's factual findings). This is less deferential than the "substantial evidence" standard that the federal courts must use when reviewing agency factual findings. *See* Dickinson v. Zurko, 527 U.S. 150, 153–54 (1999).

303. 127 F. App'x 815 (6th Cir. 2005).

> All cases that require reversal under the "compelled to conclude to the contrary" substantial evidence standard also require reversal under the clearly erroneous standard. Most cases that require affirmance under the substantial evidence standard also require affirmance under the clearly erroneous standard. In a small subset of cases, however, a case that requires reversal under the clearly erroneous standard might still require affirmance under the "compelled to conclude to the contrary" substantial evidence standard. As a result, for that small subset of cases, an error in the streamlining process would not be corrected by a circuit court reviewing the case on the merits and such a case that should not have been streamlined under the regulations might be affirmed by the circuit court.[304]

Thus, in this situation as well, the affirmance without opinion interferes with judicial review. It prevents the federal court from learning why the Board felt that errors in the immigration judge's factual findings were not clearly erroneous or somehow rendered harmless. Therefore, a streamlining error cannot be rendered harmless through judicial review of the merits. Again, a court that fails to recognize this risks replacing the Board's reasoning with its own.

It should be noted that, though this example may focus on a doctrinally narrow slice of cases, it has particularly broad relevance in the immigration context. Immigration judges often deal with complex factual situations, including credibility and persecution decisions in asylum claims.[305] Much of the testimony and other evidence supporting credibility determinations and asylum claims may have to be presented through translators, increasing the possibility of error.[306] As one commentator noted, "It is precisely such [immigration judge] mistakes regarding the development or analysis of factual records that now often seem to trigger harsh criticism of the administrative system by federal judges."[307] Judicial review of the decision to streamline would allow the Board to correct such factual errors in the first instance. Courts could rely on § 1003.1(e)(4)(i)(B), prohibiting streamlining in the case of substantial factual or legal issues,[308] to overturn such streamlining decisions and remand to the Board.

304. *Id*. at 819 n.2.

305. *See* Palmer, *supra* note 141, at 967 (noting that "[o]ne of the most striking aspects" of the immigration cases reaching the circuits "is the degree to which they are focused on questions of evidence and credibility").

306. Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 128 (2000).

307. *Immigration Litigation Reduction Hearing*, *supra* note 16, at 106 (statement of David A. Martin, Professor, University of Virginia School of Law).

308. 8 C.F.R. § 1003.1(e)(4)(i)(B) (2008).

B. Strengthening Judicial Review

With the above examples in mind, this Section presents several approaches for strengthening judicial review over streamlining which can help stem the corrosion of the rule of law in the immigration system. Essentially, it argues that if federal courts recognize the impact that streamlining has on judicial review when reviewing streamlined decisions, or if the agency and the courts explicitly delineate and re-envision the roles of agency discretion, deference, and judicial review in the streamlining context, courts will escape the doctrinal traps described above, and arbitrary and inconsistent decision making at the agency will be reduced. In either case, judicial review will be strengthened, future courts can move towards convergence rather than divergence, and the rule of law in the immigration system will be enhanced.

1. A Standard for Judicial Review of Streamlining

Drawing on the examples discussed in Section A above, this Section sets forth a standard for federal court review of streamlined decisions that will enable courts to protect judicial review, mitigate the threats streamlining poses to the rule of law at the agency and the courts, and move towards convergence on the issues dividing the circuits.

The key to this standard, and to avoiding streamlining's threats to judicial review, is recognizing the inadequacy of judicial review of the merits for cases which have been improperly streamlined. As reflected in the examples in Section A above, where courts recognized that the Board's streamlining decision materially impacted their review of the merits—and that review of the decision to streamline therefore did not simply collapse into the review of the merits—they understood that the decision to streamline had to be reviewed separately from the merits. They further recognized that streamlining could in fact be separately reviewed from the merits, as it involved separate legal criteria. Moreover, these courts recognized that simply proceeding to a review of the merits could force them into agency terrain, leading them to speculate as to how the Board could have dealt with a scenario unresolved by existing precedent or on the existing record, and further leading them to uphold or reverse the Board's decision on the basis of such speculation without appropriate guidance from the agency.

On the other hand, the courts that have failed to separately review the decision to streamline overlook two critical arguments. First, they fail to understand that while a reversal on the merits will reverse an improper streamlining decision, an improper streamlining decision cannot always be reversed by a review of the merits.[309] Further, they fail to rec-

309. *See* Kambolli v. Gonzales, 449 F.3d 454, 464–65 (2d Cir. 2006) (immigration judge's decision supported by substantial evidence and no prejudice in reviewing merits alone in most cases); Tsegay v.

ognize that the failure to reverse an improper streamlining decision is prejudicial because of the manner in which the streamlining decision impairs judicial review. By focusing on the narrow cases before them, where the courts believed that their review of the merits allowed them to reach the streamlining error, if any, these courts adopted a rule that failed to account for the category of cases where review of the merits cannot correct improper streamlining decisions, and where improper streamlining decisions impair judicial review.

Thus, to prevent impairment of their judicial review of the merits of a streamlined decision, federal courts must review the decision to streamline as a threshold matter. The courts should only proceed to judicially review the merits of the underlying immigration judge's decision if the courts determine, after applying the legal criteria set forth in the streamlining regulations, that the case has been properly streamlined.

The second key to the standard is recognizing the true nature of the prejudice rendered by an improper streamlining decision. The DOJ, and the courts that refused to review the decision to streamline, focused on whether an immigrant was harmed by receiving one-member rather than three-member review, or by receipt of an affirmance without opinion as opposed to a reasoned opinion. Although the courts recognized the theoretical risk of harm stemming from the loss of three-member review or a full explanation of the denial of an immigrant's claim, the courts were reluctant to reverse a decision based on such a theoretical and ultimately unquantifiable risk of harm.[310] But these courts for the most part failed to recognize the ways in which the streamlining regulations intertwined legal decisions, such as whether a case should be affirmed or reversed, with decisions as to form, such as whether a case should receive a full opinion or not.[311] Therefore, these courts failed to appreciate the true harms stemming from an improper streamlining decision—the real harm lies not in the form of the opinion rendered but in the streamlining reforms' impact on the decision on the merits in a case, that is, whether the case was affirmed or reversed by the Board.

In view of the impact streamlining may have on the merits of a case, in many cases the failure to separately review the streamlining decision is not harmless—the immigrant, the agency, and the federal courts are all prejudiced by the failure to separately judicially review the decision to streamline. The immigrant is prejudiced because an improper Board affirmance without opinion will be affirmed, resulting in either the denial of a meritorious claim or the loss of the Board's interpretation of and ex-

Ashcroft, 386 F.3d 1347, 1357 (10th Cir. 2004) (review of streamlining not necessary to eliminate substantial prejudice); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 281 (4th Cir. 2004) (review of streamlining not necessary where immigration judge did not err and court could meaningfully review decision).

310. *See Kambolli*, 449 F.3d at 462 n.13; *Tsegay*, 386 F.3d at 1355–58; *Blanco de Belbruno*, 362 F.3d at 282.

311. *See* discussion *supra* Part I.A.1.c.

pertise regarding the claim. The agency is prejudiced because it is denied an opportunity to set forth its own interpretation of the law or facts at issue, and runs the risk that the federal court may usurp its role and substitute a judicial determination for the agency's. The federal court is prejudiced because its judicial review ability is impaired, severely weakening its ability to oversee and correct agency abuses of discretion. Federal courts should recognize the very real and tangible harms stemming from improper streamlining decisions to understand how to interpret and review the agency's application of the criteria set forth in the streamlining regulations.

Therefore, under this standard, when they review the Board's compliance with the legal criteria in the streamlining regulations, federal courts should recognize the existence and nature of the prejudice caused by improper streamlining. They should also recognize the differences in the standards applicable to the agency when it streamlines a case and to the federal court when it reviews the merits of an immigration judge's opinion, and the significance of these differences.

Applying this standard for reviewing streamlined cases preserves the utility of judicial review in individual cases and as an institutional check on agency action. This standard also shows how the circuit split over streamlining may be resolved. Specifically, the prejudice arguments described above should be raised before the circuits that have so far declined to assert jurisdiction over streamlining decisions. Indeed, close review of these decisions shows that a door may be open for such an argument. Each of the circuits holding judicial review was unavailable did acknowledge that in some cases, streamlining blocked judicial review of the merits of the agency decision.[312] These concessions may be used to promote convergence between the circuits.

For example, the Eighth Circuit *Ngure* court, in seeking to reconcile its conflict with the First Circuit's decision in *Haoud*, noted that it was possible that some "level of judicial review of the [Board's] streamlining decision is available, given differences in the regulatory schemes," but chose "not [to] resolve that issue here, because Ngure (unlike Haoud) points to no intervening legal developments that might have affected the decision in his case."[313] Further, in *Kambolli*, the court acknowledged that failure to separately review streamlining created a "theoretical risk of occasional prejudice" that could in theory "be dispositive in a small number of cases."[314] Making clear that those risks are concrete and numerous enough to have occurred across the circuits,[315] and can be addressed through judicial review, could pave the way for decisions approv-

312. *See Kambolli*, 449 F.3d at 462 n.13; *Tsegay*, 386 F.3d at 1358; *Blanco de Belbruno*, 362 F.3d at 282.

313. Ngure v. Ashcroft, 367 F.3d 975, 988 (8th Cir. 2004).

314. *Kambolli*, 449 F.3d at 462 n.13.

315. *See, e.g.*, Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004); Chong Shin Chen v. Ashcroft, 378 F.3d 1081 (9th Cir. 2004); Haoud v. Ashcroft, 350 F.3d 201 (1st Cir. 2003).

ing a broader review of streamlining and strengthening judicial review over immigration appeals.

2. Reconciling Theories of Judicial Review and Agency Deference

The conflict over judicial review of streamlining may also be resolved through regulatory change which reconciles the doctrinal dilemmas between judicial review and agency deference. Judicial review need not be diametrically opposed to agency discretion and deference. There is a middle ground between the arguments set forth by the DOJ that streamlining should not be reviewable and those set forth by the federal courts which found streamlining reviewable. Specifically, it is possible, and often preferable, for a federal court to review an agency's application of regulatory or statutory criteria, yet still defer to the agency's exercise of discretion over the action to take once such criteria have been met.

To do this, the agency and the courts must distinguish, not conflate, these separate actions. For example, suppose the streamlining criteria are viewed as a set of eligibility requirements.[316] If certain criteria are met, a case may be streamlined, although it does not have to be streamlined; the agency retains the discretion to streamline or not streamline a case that qualifies for streamlining. If the criteria are not met, the case cannot be streamlined under any circumstances. Here, the Board's application of the streamlining criteria is standards-based—a case must meet certain legal criteria before it can be streamlined. But once these criteria are met, the Board can exercise discretion as to whether to streamline the case and issue an affirmance without opinion, or take some other action, such as issue a brief or lengthy opinion. Under this view, the Board's application of the eligibility criteria for streamlining are legal determinations that can be judicially reviewed—these factors provide the necessary guidelines for judicial review under the APA.[317] At the same time, the Board's decision whether to streamline a case, once the case has met the eligibility criteria, involves an exercise of discretion committed to the agency to which the federal courts should defer. The Board's decision whether to streamline and summarily affirm an eligible case, or issue some other type of opinion, could be left to the Board's discretion, subject to review at the extremes for abuse of discretion, for example, clearly arbitrary exercises of discretion.

Furthermore, this approach can prevent the current deterioration in the rule of law created by the agency's attempt to intersperse legally irrelevant considerations into decisions on legal merits. To avoid tainting the decision on the legal merits of a case with legally irrelevant consider-

316. This Section draws upon the discretionary models discussed in Neuman, *supra* note 34, at 612–14.

317. *See Smriko*, 387 F.3d at 292–93; Denko v. INS, 351 F.3d 717, 731–32 (6th Cir. 2003).

ations, the legal determinations should be standards based, and should be separated from discretionary considerations regarding the form of opinion to issue. That is, the determination of whether a case should be affirmed or reversed should be characterized as a legal determination subject to legal standards that may be judicially reviewed.

The form of opinion that a case should receive (i.e., short or long, brief or with detailed reasoning) could be left to the agency's discretion. This decision should be explicitly separated from the decision as to the outcome of a case—the decision on the form or substance of an opinion should not be linked to whether a case should be affirmed or denied, but rather on criteria which correspond more closely with the complexity of the case or the utility of an opinion or both. For example, streamlining could be limited to cases which involve certain statutory provisions, similar to the 1999 streamlining provisions,[318] or certain situations (such as a failure to file briefs or proceed with a case).

The streamlining rules would have to be modified to reflect this view,[319] but such a change could eliminate the deference dilemmas and circuit divides created by streamlining. Moreover, there is precedent for such a separation between eligibility criteria and discretionary criteria in the immigration provisions.[320] This more nuanced view of agency discretion allows for judicial review over an agency's application of standards without impinging on the agency's actual exercise of discretionary authority. In doing so, it would preserve the vitality of judicial review as an institutional check on agency action, and repair some of the damage to the rule of law spreading through the immigration system.

IV. CONCLUSION

This Article has attempted to demonstrate that the DOJ's efforts to strip rules and standards from the administrative system set up to protect legal process have had severe and far-reaching consequences for the rule of law. The threats stemming from streamlining are not confined to immigrants, the administrative courts, or the immigration system; rather, they have spread throughout our judicial system. The crisis at the agency has corroded the rule of law and diminished the legitimacy of our system of administrative adjudication in an area where the world scrutinizes our treatment of people seeking haven from persecution. The onslaught of

318. Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999); *see also* List of Streamlining Categories, http://www.usdoj.gov/eoir/vll/genifo/stream.htm (listing categories of cases eligible for streamlining for various years) (last visited Mar. 13, 2009).

319. The current streamlining regulations use the word "shall," indicating that summary affirmances are currently mandatory, not discretionary, when certain legal criteria are met. 8 C.F.R. § 1003.1(e)(4) (2008). Since the current regulations intertwine the decision on the form of the opinion with the decision on the merits, the DOJ would have to modify its regulations to clearly delineate between merits decisions, eligibility criteria, and discretionary determinations.

320. *See* Neuman, *supra* note 34, at 615 & n.8.

immigration appeals in the federal courts has siphoned critical resources from the courts, which are tasked with administering justice in areas far beyond just immigration. Finally, the streamlining reforms' emphasis on results over rules has led to a deeper threat to the rule of law, one that impairs the vitality of judicial review itself.

It is imperative that the federal courts and the DOJ recognize and rectify the practical and doctrinal threats streamlining poses to judicial review and the rule of law. As Justice Frankfurter noted in the quote that began this piece, the agency cannot have it both ways—it cannot set up an administrative system, subject to rules and oversight by the courts, and then seek to infuse this system with entirely discretionary, standardless, and unreviewable action. Preserving and strengthening judicial review is critical to restoring the rule of law at the agency and the federal courts. The power to address the ways in which the streamlining reforms have led to a deterioration of the rule of law in our immigration and judicial systems lies squarely within the reach of the federal courts and the DOJ, and can and should be addressed.