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Relief from Deportation: An Unnecessary Battle

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RELIEF FROM DEPORTATION: AN UNNECESSARY BATTLE

*Christen Chapman**

A removal hearing in immigration court focuses on two predominant issues—whether the noncitizen is deportable and whether the noncitizen should be granted relief from a deportation order. Because it is relatively easy for the government to prove deportability, most removal hearings turn on the noncitizen's application for relief. Currently, an Immigration and Customs Enforcement (ICE) attorney serves as a relentless adversary throughout the removal process, even though few noncitizens are represented by counsel. Although the entire removal hearing lacks the elements that are essential to a fair adversarial proceeding, the ICE attorney's participation in initially establishing a noncitizen's removability is arguably justified by the government's immigration-enforcement objectives. This justification does not, however, extend to the application-for-relief stage, where the focus is on granting mercy, not on whether immigration laws have been violated. Allowing noncitizens to apply for relief from a deportation order reflects Congress's acknowledgment that deportation is too harsh a sanction to be imposed in every situation. These twin deficiencies—lack of procedural safeguards and lack of a legitimate governmental interest—combine to produce a relief hearing that violates noncitizens' procedural due process rights. This Article argues that immigration courts should shift to a nonadversarial model at the relief stage of removal hearings. In a nonadversarial relief stage, the ICE attorney would withdraw and the immigration judge would adopt an inquisitorial role. Such a shift would provide noncitizens with an opportunity to present their applications for relief under procedures

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that comport with the Due Process Clause, accommodate the government's immigration enforcement goals, and impose insubstantial administrative costs on the immigration court system.

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> *Whoever baptized the continental system as "inquisitorial" did a disservice to American legal thought. Call it "investigatory" and the pejorative connotation fades away. Use of the investigatory system should not be viewed as a lessening of protection to the individual; if properly applied, it could well result in more.*
>
> —Judge Henry J. Friendly[1]

I. INTRODUCTION

Judge Friendly aptly identified America's distaste for the inquisitorial system. Americans tend to equate inquisitorial systems with coercive interrogation, torture, unbridled search, secrecy, unduly efficient crime control, and dictatorial government.[2] Even our Supreme Court justices have defined our own adversarial criminal-adjudication system in terms of anti-inquisitorial norms.[3] Yet the adversarial model of justice is not always the best-suited forum for fair and efficient adjudications. The adversarial system is particularly ill suited to adjudicate a noncitizen's application for relief from a deportation order in immigration court.[4]

Acknowledging that deportation is too harsh a sanction to impose in every situation, Congress has provided noncitizens with the ability to apply for relief from a deportation order. For instance, a

1. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290 (1975).

2. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1053 (1975); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018 (1974).

3. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009).

4. This Article uses the term "noncitizen" to serve as the functional equivalent of the term "alien" as defined by the Immigration and Nationality Act. The term "alien" means "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006). Advocates for immigration reform argue against using the terms alien or illegal because those terms allow the American society to distance the noncitizen from the citizen and thus justify the disparaging treatment of noncitizens. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 273 (1997) ("The term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering."); *see also* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2583 (2010) (writing for the majority, Justice Stevens uses the term noncitizen in place of alien when discussing immigration statutes); *NAHJ Urges News Media to Stop Using Dehumanizing Terms When Covering Immigration*, NAT'L ASS'N OF HISPANIC JOURNALISTS, http://www.nahj.org/nahjnews/articles/2006/March/immigrationcoverage.shtml (last visited Mar. 18, 2011) (calling on American news media to "use accurate terminology in its coverage of immigration and to stop dehumanizing undocumented immigrants").

noncitizen may obtain such relief by establishing that he or she faces persecution in his or her home country or has created sufficient community ties in the United States that deportation would result in exceptional and extremely unusual hardship. However, in order to obtain this relief, the noncitizen must face a powerful and often relentless adversary: the Immigration and Customs Enforcement (ICE) attorney.

In the immigration court system, removal hearings are used to determine both whether the noncitizen is deportable and whether the noncitizen should be granted relief. As these hearings have become increasingly adversarial, the immigration court system has failed to adopt all of the elements that are essential in creating a successful adversarial model. Although the entire removal hearing lacks the elements essential to a fair adversarial proceeding, the ICE attorney's role in establishing the noncitizen's initial removability is arguably justified by the government's enforcement objectives. Yet, this justification does not stretch to the relief stage of the removal hearing. These twin deficiencies—lack of procedural safeguards and lack of a legitimate governmental interest—combine to produce a relief-stage hearing that violates noncitizens' procedural due process rights by depriving noncitizens of the opportunity to effectively present their applications for relief in a meaningful manner.

Rather than reform the current adversarial structure by adding the missing adversarial elements, the government should shift the relief stage of the removal hearing to a nonadversarial-investigatory model. A nonadversarial hearing is a preferable alternative because it would better address the type of determination that is the subject of the relief stage—whether discretion should be exercised in the noncitizen's favor—and it would create less financial strain on the government than would a corps of government-subsidized attorneys for noncitizens. A nonadversarial hearing—where the ICE attorney is absent and the immigration judge embraces the role of an inquisitorial judge—would provide noncitizens with an opportunity to present their applications for relief under procedures that comport with the Due Process Clause, while it would still accommodate the cross-purposes of the immigration enforcement goals and the immigration relief goals of the immigration court system.

Part II provides an overview of the adversarial-inquisitorial dichotomy, the immigration court system's progression to an

adversarial structure, and the current adversarial immigration court system, with a focus on two predominant types of relief from deportation—asylum and cancellation of removal. Part III argues that the current adversarial structure of the relief stage of the removal hearing is fundamentally flawed because it lacks essential procedural and evidentiary safeguards, and it violates noncitizens' procedural due process rights. Part IV articulates what a nonadversarial relief hearing would look like, explains how shifting to a nonadversarial relief hearing could be achieved without undue burden on the government, and addresses possible criticisms of encouraging immigration judges to fully embrace an inquisitorial role.

II. BACKGROUND

Few legal systems are purely adversarial or inquisitorial,[5] but removal hearings, including applications for relief from removal, fall on the adversarial side of the spectrum. To appreciate the benefits of an alternative approach, both a familiarity with the complete removal scheme and a basic understanding of the differences between the adversarial and inquisitorial models of justice are necessary.

A. Adversarial Versus Inquisitorial

In appreciating the foundation of each model, it is helpful to look at the adversarial and inquisitorial systems as distinct models of justice, despite the fact that, in practice, they do not operate in isolation of one another. The adversarial and inquisitorial models have different loci of control. In an adversarial model, the opposing parties control the case. The parties zealously advocate for their respective positions through the evidence that they present, the witnesses that they examine, and the legal issues that they shape.[6] The judge plays a neutral role—resolving legal issues that the parties identify, ruling on the admissibility of evidence that the parties present, and, when there is no jury, deciding the outcome of the

5. Frankel, *supra* note 2, at 1053; *see also* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 & n.23 (2005) (noting that even largely adversarial legal systems provide for judicial involvement in assisting parties in gathering evidence, and, as a result, they contain at least some inquisitorial elements).

6. Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 472–73 (2009); Goldstein, *supra* note 2, at 1016–17.

factual contest between the parties.[7] The rationale behind party control is that zealous competition between two opposing parties will provide the adjudicator with the most persuasive evidence and arguments from each side of a case.[8]

In contrast, the judiciary, rather than opposing parties, controls the inquisitorial system.[9] The judiciary, whether through the presiding judge or investigating magistrate, is charged with conducting investigations, initiating cases, determining the issues, and controlling the presentation of evidence.[10] Thus, the inquisitorial model is not dependent on the parties' presentation of evidence or on their strategic decisions. Rather, the judiciary guides the process, and the parties assist the judge along the path to final resolution.[11]

Because the adversarial model is a contest between two zealous opponents, there is heavy emphasis on strict compliance with procedural rules.[12] For example, in American adversarial criminal proceedings where the power and resources of the government greatly outweigh those of criminal defendants, procedural safeguards, such as strict rules of evidence and a high burden of proof on the government, exist to level the contest between the two

7. Goldstein, *supra* note 2, at 1016–17; Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970–71 (2004). When a jury is present, the role of the judge remains the same, resolving legal issues and ruling on evidence admissibility; however, instead of deciding the factual contest of the case, the judge advises the jury on the applicable law, and the jury is charged with deciding the factual contest. Goldstein, *supra* note 2, at 1016–17.

8. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988); Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 309 (1997).

9. Goldstein, *supra* note 2, at 1018–19.

10. Pearce, *supra* note 7, at 971; *see also* Goldstein, *supra* note 2, at 1018 (discussing how different countries delegate authority of the inquisitorial role). For example, the Soviet Union employed a public prosecutor to fill much of the inquisitorial role, while in French criminal proceedings, the investigating and presiding judge are the central inquisitorial figures. Goldstein, *supra* note 2, at 1018.

11. Pearce, *supra* note 7, at 970–71; Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 424 (2010). The party-control nature of the adversarial model has been characterized as reflecting a more laissez-faire and reactive state. Roach, *supra* at 398. In contrast, the inquisitorial model reflects a more proactive and hierarchical vision of the state. *Id.*

12. Finegan, *supra* note 6, at 493.

parties.[13] In contrast, since the outcome in an inquisitorial model is not dependent on the competitiveness of the opposing parties, there is not the same need for the rigid structure of the adversarial model.[14] To illustrate, in the French inquisitorial system, the judge is not inhibited by strict evidentiary rules, and the state has no explicit burden of proof or persuasion.[15] In the French system, gathered evidence is compiled into a file, or "dossier," and given to the presiding judge at the start of the trial process.[16] Providing the judge with information at the start of trial is different from what occurs in the American adversarial system, where the judge usually begins the trial process as a blank slate, and the parties, including the government, must first overcome procedural and evidentiary hurdles to present evidence to the judge.[17]

Inquisitorial justice is not just confined to Europe. The United States employs the inquisitorial model in some administrative contexts, the most prominent being Social Security disability appeals.[18] When the Social Security Administration (SSA) denies a person's application for disability benefits, the applicant is entitled to a hearing before an administrative law judge (ALJ).[19] The hearing is nonadversarial.[20] The applicant may be represented by counsel and there is no government representative contesting the applicant's appeal.[21]

13. Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 23–24 (1995).

14. Finegan, *supra* note 6, at 467–68.

15. *Id.* at 468.

16. Goldstein, *supra* note 2, at 1018–19.

17. Doran et al., *supra* note 13, at 21; *see also* Frankel, *supra* note 2, at 1053 (raising the question of "whether the virginally ignorant judge is always to be preferred to one with an investigative file").

18. The disability benefits system of the Department of Veterans Affairs is also nonadversarial. *See* Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (describing "the historically nonadversarial system of awarding benefits to veterans").

19. 20 C.F.R. § 404.900(a) (2010) (providing an explanation of the administrative review process).

20. *Id.* § 404.900(b) (describing the nature of the administrative review process—the SSA "conduct[s] the administrative review process in an informal, nonadversary manner"). *But see* Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with the Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (2007) (speculating whether it is actually a nonadversarial proceeding).

21. Rains, *supra* note 20, at 364.

The Supreme Court has characterized the ALJ who presides over the hearing as wearing three hats—claimant representative, government representative, and neutral decider.[22] The ALJ's role emulates that of the inquisitorial judge in continental countries.[23] The Supreme Court approved the hearing's inquisitorial procedures, which include relaxed rules of evidence along with the inquisitorial ALJ, "so long as the procedures are fundamentally fair."[24] The Court also concluded that the procedures appropriately fulfilled Congress's intent to keep the hearing informal and understandable to the layman.[25] Keeping the procedures informal and accessible to claimants who are not represented by counsel reflects the nature of the SSA as a social agent charged with ensuring that the SSA's program goals are fulfilled.[26]

B. History of the Removal Hearing: A Shift from Inquisitorial to Adversarial

Similar to the ALJs in the SSA disability appeals process, the predecessors to removal hearings were nonadversarial at their inception.[27] During the first part of the twentieth century, in simple cases, a single immigration officer would play the role of investigator, government representative, and adjudicator.[28] As cases became more complicated, sometimes one immigration officer would present the government's case while a different immigration officer served as the adjudicator.[29] But the roles of government investigator and adjudicator were not formally separate—one day an immigration officer would investigate a case, and the next day that same officer

22. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 286 (1978) (referring to the Supreme Court case Richardson v. Perales, 402 U.S. 389 (1971)).

23. *Id.*

24. *Richardson*, 402 U.S. at 400–01.

25. *Id.*; *see also* Verkuil, *supra* note 22, at 270 (discussing a 1940 statement issued by the Social Security Board that "discussed the values to be achieved in an administrative hearing in terms of 'simplicity and informality' as well as 'accuracy and fairness'").

26. *Richardson*, 402 U.S. at 400–01.

27. *See* Dory M. Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 661–63 (2006) (discussing the way immigration cases were adjudicated under the Immigration Acts of 1907 and 1917).

28. *Id.* at 663–64.

29. *Id.* at 664.

might adjudicate the case that he or she was investigating.[30] In 1952, when Congress passed the Immigration and Nationality Act (INA),[31] the roles of investigating officer and adjudicator became distinct, but the INA did not—and still does not—mandate that an investigating officer be present during deportation proceedings.[32] The original version of the INA assigned separate duties to "immigration officers" and "special inquiry officers."[33] The special inquiry officer occupied the position that has become the modern immigration judge.[34] The INA does not define the position of immigration officer with any particularity,[35] and the immigration officer responsible for presenting the government's case against the noncitizen has evolved through department regulation and practice.[36]

In 1956, the Immigration and Naturalization Service (INS)—the former governmental agency charged with enforcing immigration laws—implemented a departmental policy to have another immigration officer, aside from the adjudicating officer, present to introduce the government's case against the noncitizen and carry out cross-examination in every case in which the noncitizen contested his or her deportability.[37] In 1962, the INS developed a specialized staff of trial attorneys to perform this function.[38] This specialized staff carried over to the Department of Homeland Security (DHS)

30. During this same period, however, there was an Immigration and Naturalization Service (INS) policy in place that provided that the same officer who investigated the noncitizen's case could only adjudicate the case if the noncitizen consented. *Id.* at 663–64. However, Professor Durham notes that it was doubtful that a noncitizen ever refused to consent given the existence of natural human eagerness to please the person who was about to decide his or her fate. *Id.* at 664 n.38.

31. The Immigration and Nationality Act of 1952 was a comprehensive statute passed by Congress governing immigration. *Id.* at 667. When the INA was passed, it repealed all previous immigration statutes; the INA, as amended, continues to govern immigration today. *Id.* at 667 n.57.

32. *See* THOMAS A. ALEINIKOFF ET AL., IMMIGRATION PROCESS AND POLICY 278 (6th ed. 2008) (explaining that the INA provided the Attorney General with the *option* of having another immigration officer present during deportation proceedings).

33. Durham, *supra* note 27, at 668.

34. *Id.*

35. *See* 8 U.S.C. § 1101(a)(18) (2006) (defining the term "immigration officer" as "any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title").

36. Durham, *supra* note 27, at 673.

37. ALEINIKOFF ET AL., *supra* note 32, at 278–79.

38. *Id*. at 279.

when it replaced INS,[39] and the staff is now housed within ICE's Office of the Principal Legal Advisor (OPLA).[40] Today, ICE attorneys appear on behalf of the government in all proceedings before immigration judges, even hearings where deportability and inadmissibility are not contested.[41]

In conclusion, a prosecuting government attorney was not originally required and still is not statutorily required during removal hearings, including during the relief stage. Nonetheless, the ICE attorney remains a staple of the immigration court system, which has evolved into a largely adversarial system.

C. The Path to Deportation or Relief Through the Immigration Courts

A noncitizen's path through the immigration court system begins with a Notice to Appear (NTA).[42] After the noncitizen is served with an NTA, the noncitizen is placed in removal proceedings, which consist of hearings—sometimes one, sometimes several—in front of an immigration judge, where the noncitizen is opposed by an ICE attorney "with [his or her] awesome power, extensive institutional experience, and sophisticated understanding of the law."[43] While two levels of appellate review may follow the immigration judge's ruling on the noncitizen's deportability or

39. In response to the September 11th attacks, Congress passed the Homeland Security Act, which abolished the INS and transferred its functions to the newly created DHS. *Id.* at 269. In transferring INS's functions to DHS, then-President George W. Bush restructured the way that immigration functions were carried out and created three DHS units with immigration responsibilities—Customs and Border Patrol (CBP), ICE, and Citizenship and Immigration Services (USCIS). *Id.* at 269–70.

40. *About ICE: Office of the Principal Legal Advisor*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/leadership/opla/ (last visited Mar. 25, 2011). Prosecuting removal hearings is just one of many divisions of OPLA; other areas of practice include serving as a legal advisor to other DHS branches and assisting the United States Attorney's office in criminal immigration cases. *Id.*

41. ALEINIKOFF ET AL., *supra* note 32, at 279.

42. The formal removal system through the immigration courts is just one of many ways in which the government may deport noncitizens. *See generally* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611–47 (2009) (providing a detailed analysis of the methods, aside from removal hearings, that the government uses to remove noncitizens).

43. Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 464 (2009).

inadmissibility, there is generally no review available for denials of relief.[44]

1. The NTA

An officer from any division of DHS may issue an NTA to a person if the officer believes that the person is inadmissible[45] or deportable[46] as defined by the INA. Noncitizens come into contact with DHS officers in a variety of ways—at a point of entry into the country, through referral to the DHS by local law enforcement after an arrest or criminal conviction, during a worksite raid, or during the process of applying for certain immigration benefits with DHS.[47]

An NTA states the noncitizen's alleged immigration violation (overstaying a visa, for example), the time and place of the noncitizen's first hearing, the noncitizen's right to hire counsel, and the consequences for failing to appear.[48] After serving the NTA, the DHS officer has the authority to either cancel it or file it with the immigration court.[49] If the DHS officer files the NTA, the noncitizen must appear before an immigration judge at a removal hearing.

2. The Removal Hearing

The Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ), manages the immigration courts. Removal hearings[50] are civil administrative

44. *See id.*

45. 8 U.S.C. § 1182(a) (2006) (defining the classes of noncitizens ineligible for visas or admission).

46. *Id.* § 1227(a) (2006) (defining the classes of deportable noncitizens).

47. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 4 (2007) (discussing ways that noncitizens come into contact with DHS officers). For instance, a man was served with an NTA and arrested while he was in an immigration office translating for a friend because an official in the office suspected that the man was not legally in the United States. *Marine's Immigrant Father Faces Deportation*, THE SEATTLE TIMES (Dec. 30, 2010, 8:54 AM), http://seattletimes.nwsource.com/html/nationworld/2013803933_apusdeportationappeal.html.

48. 8 U.S.C. § 1229(a)(1)(A)–(G) (2006).

49. *See* ALEINIKOFF ET AL., *supra* note 32, at 776 (discussing that the government may decide to forgo removal proceedings against a noncitizen whom it has identified, possibly due to resource limitations or judgments about the seriousness of the immigration violations); *see also* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 298 (2010) (discussing how the decision to exercise discretion places the noncitizen in limbo, vulnerable to future removal proceedings and usually unable to travel or work).

50. Before 1996, noncitizens were removed from the United States in two different types of proceedings—exclusion hearings and deportation hearings. Stephen H. Legomsky, *Restructuring*

proceedings over which an immigration judge presides. In conducting the removal proceedings, the immigration judge has the authority to interrogate, examine, and cross-examine the noncitizen and any witnesses.[51] During removal hearings, the ICE attorney represents the government. Noncitizens have the right to be represented during removal hearings, but since removal hearings are civil proceedings, noncitizens do not have the right to government-appointed counsel under the Sixth Amendment.[52] Removal hearings concentrate on two issues—whether the noncitizen is removable and, if so, whether the noncitizen should be granted relief from removal.[53]

a. Establishing removability

Removal hearings may consist of a single hearing that resolves the noncitizen's case,[54] but they are usually divided into two separate stages: a master calendar hearing and an individual merits hearing.[55] The master calendar hearing is similar to a criminal arraignment; during the master calendar hearing, the immigration judge will

Immigration Adjudication, 59 DUKE L.J. 1635, 1641 (2009). Exclusion hearings were conducted to determine whether a noncitizen should be removed from the United States on seeking admission, while deportation hearings were conducted to determine whether a noncitizen should be removed from the United States after having already entered the country. *Id.* The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 combined these two hearings into a unitary removal hearing. *Id.*

51. 8 U.S.C. § 1229a(b)(1). The immigration judge also has a duty to develop a full record, especially in the cases where a noncitizen is not represented by counsel. Al Khouri v. Ashcroft, 362 F.3d 461, 464–65 (8th Cir. 2004).

52. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 516 n.229 (2007); Peter L. Markowitz, *Deportation is Different*, CARDOZO LEGAL STUDIES RESEARCH PAPER NO. 308, 1, 16 n.65 (Aug. 2010), *available at* http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=74&contentid=17090&folderid=2184. *But see* Aguilera-Enriquez v. I.N.S., 516 F.2d 565, 568 n.3 (6th Cir. 1975) (holding that there may be a right to counsel at the government's expense under the Fifth Amendment). However, there is no published opinion that has provided a noncitizen with government appointed counsel under the test articulated in *Aguilera-Enriquez*. ALEINIKOFF ET AL., *supra* note 32, at 1034.

53. ALEINIKOFF ET AL., *supra* note 32, at 775, 1028.

54. A noncitizen's case may be disposed of summarily at the master calendar hearing if deportability is clearly shown and there is no relief available to the noncitizen or the noncitizen admits the truth of the allegations and seeks voluntary departure. Voluntary departure allows a noncitizen to depart from the country at his or her own expense, rather than being removed by a formal court order. 8 U.S.C. § 1229c(a)(1). A noncitizen may choose to voluntarily depart because a voluntary departure order does not pose the same obstacles to a noncitizen's return to the United States through lawful avenues as does a removal order, which may bar a person from returning to the United States for ten years after the removal order. *See* ALEINIKOFF ET AL., *supra* note 32, at 820–26 (discussing voluntary departure in more detail).

55. ALEINIKOFF ET AL., *supra* note 32, at 1028.

inform the noncitizen of his or her alleged immigration violations.[56] If the noncitizen is not represented by counsel, the immigration judge will explain the proceedings to the noncitizen and inform the noncitizen of his or her right to employ counsel.[57] If the noncitizen expresses a desire to obtain counsel, the immigration judge will set a second master calendar hearing.[58] If the noncitizen decides to proceed without counsel or has counsel present, the immigration judge will then ask the noncitizen to either admit or deny the alleged immigration violations.[59]

If the noncitizen contests the government's allegations, then the immigration judge will set a date for an individual merits hearing to adjudicate the government's allegations.[60] If the noncitizen concedes the government's allegations, the focus will shift to whether the noncitizen is eligible for a form of relief. In either situation, the immigration judge has a duty to inform the noncitizen of the option to apply for relief if the record raises a reasonable possibility that the noncitizen is eligible for such relief.[61] The immigration judge must notify the noncitizen of the type of relief that the noncitizen might qualify for and provide the noncitizen an opportunity to develop the

56. *Id.*; *Interactive Benchbook for Immigration Judges: Introduction to the Master Calendar*, EXEC. OFFICE OF IMMIGRATION REVIEW, http://www.justice.gov/eoir/vll/benchbook/tools/Purpose%20and%20History%20of%20MC.htm (last visited Feb. 21, 2010) [hereinafter *Master Calendar*]. At this time, the immigration judge will also address any deficiencies in the NTA, which the ICE attorney can usually easily correct by lodging the factual allegations in a DHS form. *Master Calendar*, *supra*.

57. ALEINIKOFF ET AL., *supra* note 32, at 1029; *Master Calendar*, *supra* note 56. The immigration judge is also required to provide the noncitizen with a list of pro-bono attorneys in the area. 8 U.S.C. § 1229(b)(2). Unfortunately, many of the pro-bono offices and attorneys listed do not have enough resources to handle all of the requests that they receive. Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 494 (2005); *see also* Bill Ong Hing, *Systemic Failure: Mental Illness, Detention, and Deportation*, 16 U.C. DAVIS J. INT'L L. & POL'Y 341, 380–81 (2010) (discussing how the problem of not enough pro-bono representation is amplified when the noncitizen is detained, which is especially worrisome when almost 40 percent of the detainees have possible meritorious claims for relief). Also, noncitizens may be represented by persons other than certified attorneys. *See* 8 C.F.R. § 292.1 (2010) (listing the classifications of persons who may represent noncitizens in immigration court proceedings).

58. *Master Calendar*, *supra* note 56.

59. *Id.*

60. *Id.*

61. 8 C.F.R. § 1240.11(a)(2) (2010) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing . . . .").

issue.[62] At the conclusion of the master calendar hearing, the immigration judge sets a date for an individual merits hearing on the contested allegations, the noncitizen's application for relief, or both.[63]

The individual merits hearing is the trial stage of the removal hearing. If the noncitizen contests the government's allegations, the ICE attorney bears the initial burden to prove the noncitizen's inadmissibility or deportability.[64] The ICE attorney typically relies on documentation that is contained in a noncitizen's government-maintained Alien File ("A-file") to establish inadmissibility or deportability.[65] For instance, an ICE attorney may prove that a noncitizen has overstayed a visa by presenting issuing documents containing the visa expiration from the noncitizen's A-file. Or the ICE attorney may establish a noncitizen's inadmissibility by presenting a birth certificate from a foreign country and arguing that it belongs to the noncitizen because it bears an age and a name that match or closely match those of the noncitizen.[66]

Once the ICE attorney and the noncitizen finish presenting their evidence and arguments, the immigration judge will deliver a decision, either orally or in writing, regarding the noncitizen's inadmissibility or deportability.[67] If the immigration judge finds that the immigration violations are true, but the noncitizen is eligible for relief, the immigration judge may adjudicate the application for relief at the same hearing or at another individual merits hearing.

62. *In re* Cordova, 22 I. & N. Dec. 966, 970 n.4 (1999).

63. *Master Calendar*, *supra* note 56.

64. 8 C.F.R. § 1240.8(a), (c) (providing the burden of proof that the ICE attorney must overcome in establishing inadmissibility and deportability).

65. *See Master Calendar*, *supra* note 56 ("If there is a denial of a factual allegation or charge, the immigration judge should then ask the Government attorney to present evidence on the matter. This usually consists of documents, such as the Form I-213 Record of Deportable/Inadmissible Alien."). The A-file is shared by all branches of DHS and contains information regarding every transaction involving an individual as he or she passes through the U.S. immigration and inspection process. Dent v. Holder, 627 F.3d 365, 368 n.4 (9th Cir. 2010). While USCIS is the custodian of the A-file, all three components of DHS create and use A-files. *Id.* at 368. The A-file "contains all the individual's official record material such as naturalization certificates; various forms (and attachments, e.g., photographs), applications and petitions for benefits under the immigration and nationality laws, reports of investigations; statements; reports; correspondence; and memoranda on each individual for whom INS has created a record under the Immigration and Nationality Act." *Id.* at 372 (internal citation omitted).

66. Corona-Palomera v. I.N.S., 661 F.2d 814, 815–16 (9th Cir. 1981).

67. 8 C.F.R. § 1240.13.

b. Applying for relief

Because it is relatively easy for the government to prove the alleged immigration violations, most removal hearings turn on noncitizens' application for relief.[68] Allowing a noncitizen to apply for relief from removal reflects a decision by Congress that there should be some flexibility built into the otherwise strict immigration laws.[69] The two most commonly requested forms of discretionary relief are asylum[70] and cancellation of removal.[71] Asylum and cancellation of removal are both statutorily established and have a long history in the United States' immigration context.[72]

68. ALEINIKOFF ET AL., *supra* note 32, at 775; *see also Fact Sheet: EOIR at a Glance*, EXEC. OFFICE OF IMMIGRATION REVIEW 2 (Dec. 14, 2009), http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf ("In most removal proceedings, individuals admit that they are removable, but then apply for one or more forms of relief.").

69. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, 558–59 (University of Pennsylvania Press, Philadelphia 1981) ("It would appear that Congress has been aware that strict application of the law could work undue hardship in some cases, and thus has inserted certain provisions that can be used to soften the rigor of the law in deserving cases.").

70. 8 U.S.C. § 1158 (2006).

71. *Id.* § 1229b (2006). Other types of discretionary relief from a formal removal order include restriction on removal, a waiver of a removal ground, adjustment of status, deferred enforced departure, temporary protected status, voluntary departure, parole, stay of removal, and private bills. *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1694–98 (2009) (presenting a concise discussion of these forms of relief); *see also* ALEINIKOFF ET AL., *supra* note 32, at 775–827 (providing a more thorough discussion of the different types of relief from removal). Two other forms of relief that are not discretionary are withholding of removal under the Refugee Act of 1980 and the Convention Against Torture. Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 133 n.216 (2007).

72. Although the current asylum statute did not come into effect until Congress passed the Refugee Act of 1980, exempting refugees from the categories of noncitizens that would otherwise be inadmissible or deportable has been a consistent part of history dating back to the first federal immigration laws. *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1257–66 (1990) (providing a brief history of American refugee provisions leading to the Refugee Act of 1980). Cancellation of removal, in one form or another, has been a part of United States immigration policy dating as far back as 1798. *See* HUTCHINSON, *supra* note 69, at 568–71 (discussing the Congressional policies that lead to the suspension-of-deportation provision). Suspension of deportation is the most recent predecessor to the current cancellation-of-removal statute. *See* Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1035–37 (2010) (explaining the shift from suspension of deportation to the implementation of the cancellation of removal statute).

i. Asylum

Asylum is the most common form of relief that noncitizens request.[73] Asylum allows a noncitizen to remain in the United States if the noncitizen can establish that he or she is a refugee—in other words, if he or she suffers from past persecution or a well-founded fear of future persecution in his or her home country on account of race, religion, nationality, political opinion, or membership in a particular social group.[74] Asylum does not confer permanent status on the noncitizen, but it enables the noncitizen to work in the United States and apply for permanent residence.[75]

A noncitizen may apply for asylum affirmatively by filing an application with the Citizenship and Immigration Services, or defensively as a form of relief in a removal hearing.[76] Affirmative asylum applications are reviewed in a nonadversarial manner by an asylum officer trained in human rights law and in refugee law and principles.[77] If an asylum officer denies a noncitizen's affirmative application, the asylum officer may refer the application, along with an NTA, to an immigration court to commence removal proceedings.[78]

Defensive asylum applications are adjudicated in an adversarial style during the relief stage of a removal hearing. The noncitizen bears the burden of establishing past persecution or well-founded fear of future persecution.[79] After the noncitizen presents his or her case of past or future fear of persecution, the ICE attorney has the opportunity to challenge the noncitizen's application. In applying for asylum, noncitizens are not required to present corroborating evidence,[80] and in most cases they do not have any because most

73. EXEC. OFFICE OF IMMIGRATION REVIEW STATISTICAL YEARBOOK: FY 2010, R1, *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf [hereinafter 2010 STATISTICAL YEARBOOK].

74. 8 U.S.C. § 1101(a)(42)(A) (2006) (defining refugee for purposes of the INA). The asylum statute states that "[t]he burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title." *Id.* § 1158(b)(1)(B)(i).

75. *Id.* § 1158(c) (outlining the details of asylum status); *see also id.* § 1159 (providing the criteria applied to refugees who apply for adjustment of status).

76. ALEINIKOFF ET AL., *supra* note 32, at 850–51.

77. 8 C.F.R. §§ 208.9(b), 208.1(b) (2006).

78. *Id.* § 208.14(c)(1).

79. 8 U.S.C. § 1158(b)(1)(B).

80. *Id.* § 1158(b)(1)(B)(ii). However, in practice, corroborating evidence makes the noncitizen's testimony more credible and, thus, the noncitizen is more likely to succeed. *See*

persons leave their home countries without tangible evidence of past, or the possibility of future, persecution.[81] Because of this, in an asylum application, the noncitizen's testimony is often the foundation of the asylum claim and, therefore, the noncitizen's credibility is a critical factor in the immigration judge's determination.[82] In response, the ICE attorney's main tactic in contesting a claim for asylum is to engage in vigorous cross-examination in order to impeach the noncitizen's credibility.[83]

If the noncitizen survives the ICE attorney's cross-examination and succeeds in establishing past persecution, the ICE attorney can still argue against a grant of asylum by proving by a preponderance of the evidence that conditions in the noncitizen's home country have undergone fundamental change such that the noncitizen would not face future persecution or by proving that relocation to a different part of the home country would not subject the noncitizen to future persecution.[84] In arguing that country conditions have changed, the ICE attorney may submit the State Department's report on the human rights conditions of that country[85] to the immigration judge.[86] To illustrate, a successful asylum claim might be based on sexual orientation: noncitizens may qualify for asylum by establishing that they suffered persecution in their home countries because they are

Kidane, *supra* note 71, at 133–36 (discussing the use of corroborating evidence in assessing a noncitizen's credibility in adjudicating asylum applications and the implications of the Real Id Act of 2005, which amended the credibility determination requirements).

81. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis,* WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES NO. 10–24, (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1659704; *see also* Dawoud v. Gonzales, 424 F.3d 608, 612–13 (7th Cir. 2005) (discussing the policy behind permitting reliance solely on credible testimony in asylum applications).

82. Bruce J. Einhorn, *The Gift of Understanding*, 3 ALB. GOV'T L. REV. 149, 152 (2010) ("In my experience, and in the frank and frequent conversations I have held with my colleagues from the court, the single most significant factor in an IJ's assessment of an asylum claim is credibility.").

83. Family, *supra* note 81; Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 493–94 (1992/1993); Kidane, *supra* note 71, at 136 (commenting that author once observed an ICE attorney cross-examine a noncitizen for over three hours); Martin, *supra* note 72, at 1308 (noting that ICE attorneys are not expected to develop any additional evidence when contesting a noncitizen's application for asylum).

84. 8 C.F.R. § 208.13(b)(1) (2010); *see, e.g.*, Balliu v. Gonzales, 467 F.3d 609, 612 (7th Cir. 2006).

85. The State Department is required to produce annual reports on countries' human rights conditions. *See* 22 U.S.C. § 2151n(d) (2006).

86. Martin, *supra* note 72, at 1349–50.

homosexuals and they have a well-founded fear that such persecution will continue if they are forced to return to those countries.[87]

ICE attorneys are not required to contest all asylum applications, and they can state on the record that the government has no objection to a grant of asylum; however, in practice, ICE attorneys most often argue for denial.[88]

ii. Cancellation of removal

Like asylum, cancellation of removal is a form of relief provided to noncitizens stemming from humanitarian concerns. Yet, instead of addressing human rights violations because of persecution, cancellation of removal reflects a policy determination by Congress that some noncitizens should be allowed to remain in the United States, despite being technically deportable, because they possess qualities desirable in residents and because deportation would create an exceptional and extremely unusual hardship on the persons whom the noncitizen left behind in the United States.[89] Cancellation of removal either confers or restores Legal Permanent Resident (LPR)[90] status to a noncitizen[91] and is therefore the most generous form of relief available to a noncitizen.[92] Because it is such a generous form of relief, cancellation of removal is only available in "truly

87. *See* Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES, Jan. 29, 2011, at A19. Bilefsky also addresses a hurdle facing asylum applicants whose claims of persecution are based on their homosexuality, which is that "[j]udges and immigration officials are adding a new hurdle in gay asylum cases that an applicant's homosexuality must be socially visible." *Id.*

88. *See* Anker, *supra* note 83, at 436, 492 (reporting that in a 1992 case study, out of 193 asylum hearings, the ICE attorney adopted an oppositional stance in every case but one); Philip G. Schrag, et al., *Rejecting Refugees: Homeland Security's Administration of the One-year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 661 n.24 (2010) (noting that "in the vast majority of cases, DHS attorneys challenge applicants' corroborating evidence, cross-examine applicants to elicit contradictions, argue that applicants do not meet the statutory standards for asylum, and in other ways vigorously oppose a grant of asylum, treating asylum applications in immigration court like other forms of contested civil or criminal litigation, even when applicants are unable to afford or obtain representation").

89. HUTCHINSON, *supra* note 69, at 558–59, 574.

90. 8 U.S.C. § 1101(a)(20) (2006) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.").

91. *Id.* § 1229b(a), (b).

92. Stumpf, *supra* note 71, at 1695; *see also* KANSTROOM, *supra* note 47, at 233 (stating that cancellation of removal is a classic example of ultimate discretion within removal proceedings).

exceptional" circumstances.[93] Additionally, the statutory requirements to qualify for cancellation of removal have become increasingly stringent over the years.[94]

The specific eligibility requirements for cancellation of removal depend on the noncitizen's immigration status. If the noncitizen is an LPR, the noncitizen will be eligible for relief if the noncitizen has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted in any status, and has not been convicted of an aggravated felony.[95] If the noncitizen is not an LPR, the eligibility criteria are more rigorous. Relief will only be available to a non-LPR if the noncitizen has been physically present in the United States continuously for at least ten years; has been a person of good moral character[96] during such period; has not been convicted of certain specified crimes;[97] and can establish that removal would result in exceptional and extremely unusual hardship to the noncitizen's spouse, parent, or child, if that person is a citizen of the United States or a noncitizen who was lawfully admitted for permanent residence.[98]

Even if the noncitizen meets all of the eligibility requirements, the immigration judge is under no duty to cancel removal.[99] Professor Jill E. Family characterizes this as a negative discretion that is built into a system focused on denial.[100] Additionally, the exceptional and

93. *See* Monreal-Aguinaga, 23 I. & N. Dec. 56, 62 (2001) (quoting the House Conference Report on the Illegal Immigration Reform and Immigration Responsibility Act of 1996, HR No. 104-828).

94. Mendelson, *supra* note 72, at 1037 & n.106.

95. 8 U.S.C. § 1229b(a)(1)–(3).

96. *See id.* § 1101(f) (defining good moral character). For example, a person found to be a habitual drunkard is not considered to be someone with good moral character. *Id.* § 1101(f)(1).

97. *See id.* § 1229b(b)(1)(C) (specifying that disqualifying crimes are offenses under 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3), which include crimes of moral turpitude, aggravated felonies, or crimes related to falsifying immigration documents). This provision also provides that a conviction of one of these offenses may not be a disqualifying crime if the immigration judge finds that the domestic violence waiver is applicable in the noncitizen's case. *Id.*

98. *Id.* § 1229b(b)(1)(A)–(D). The statute also provides for special eligibility criteria for battered spouses or children applying for cancellation of removal. *See id.* § 1229b(b)(2).

99. *Id.* § 1229b(a), (b); *see also* United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957) ("Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met." (footnote omitted)).

100. Family, *supra* note 81.

extremely unusual hardship criterion is a very high threshold to meet. In one case, for instance, an immigration judge found that Mr. Monreal-Aguinaga, a non-LPR, had been in the country for the requisite period of time and was of good moral character.[101] But in spite of the fact that Mr. Monreal-Aguinaga had two United States citizen children under age fifteen and parents with LPR status, the immigration judge found that Mr. Monreal-Aguinaga's deportation would not create an exceptional and extremely unusual hardship for these persons and denied his application for cancellation of removal.[102]

3. The Appeals

There are two levels of appellate review in the immigration court system. First, either the noncitizen or the ICE attorney may appeal the immigration judge's decision to the Board of Immigration Appeals (BIA),[103] the highest administrative body for interpreting and applying immigration laws.[104] At the second stage, only the noncitizen may appeal an adverse BIA decision.[105] The U.S. court of appeals for the circuit in which the removal hearing was held reviews the noncitizen's appeal.[106]

In the last fifteen years, Congress has severely limited the types of cases that are reviewable by a federal court.[107] Most importantly, Congress has pushed discretionary decisions, including relief from

101. Monreal-Aguinaga, 23 I. & N. Dec. 56, 57 (2001).

102. *Id.* at 57–58. The BIA affirmed the immigration judge's determination. *Id.* at 64–65.

103. 8 C.F.R. § 1003.1(b)(3) (2010).

104. *About: Board of Immigration Appeals*, EXEC. OFFICE OF IMMIGRATION REVIEW, http://www.justice.gov/eoir/biainfo.htm (last updated Sept. 2010). The BIA was created by the Attorney General in 1940 and continues to operate under the authority of the Attorney General. Jill E. Family, *Conflicting Signals: Understanding U.S. Immigration Reform Through the Evolution of U.S. Immigration Law*, 40 CATALAN J. PUB. L. 145, 156 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629170. In fact, the Attorney General has authority to overrule BIA decisions. *Id.* (citing 8 C.F.R. § 1003.1(h)).

105. Legomsky, *supra* note 50, at 1643.

106. 8 U.S.C. § 1252(b)(2) (2006).

107. ALEINIKOFF ET AL., *supra* note 32, at 292, 1152–53. Final removal orders based on crime-related deportation grounds and discretionary decisions, regarding certain waivers and discretionary adjustments of status, are also immune from federal review. *Id.* Congress has also largely limited the immigration cases that may come before the federal courts by way of federal habeas corpus jurisdiction—only allowing courts to review detention when it is an issue distinct from the validity of a final removal order. *Id.* at 1180.

removal, outside of the federal courts' purview.[108] This limited opportunity for review intensifies the need for fair procedures in the adjudication of a noncitizen's application for relief.

III. THE RELIEF STAGE OF REMOVAL HEARINGS: FUNDAMENTALLY FLAWED

Removal hearings are undeniably adversarial, yet the hearings are missing the core principles of a successful adversarial system. While the adversarial structure of the entire removal hearing is deficient in this respect, the ICE attorney's presence in establishing the noncitizen's removability is arguably justified because the government has an interest in enforcing its immigration laws. However, this interest diminishes once the relief stage of the hearing begins.

The current adversarial structure of the relief stage violates noncitizens' right to procedural due process. When comparing the current shortcomings of the relief stage's adversarial structure—lack of procedural safeguards and diminished government interest—to the noncitizen's substantial private interest involved in applying for relief, it becomes clear that the current structure creates an unreasonable risk of erroneous deprivation. This deprivation occurs when ICE attorneys' boundless cross-examinations thwart noncitizens' abilities to effectively present their applications for relief, resulting in hearings where immigration judges are unable to make informed decisions on whether noncitizens' applications should be granted.

A. The Entire Removal Hearing Lacks Essential Principles of a Successful Adversarial Model

The components that are indispensable to an adversarial model's proper functioning are substantially absent in removal hearings. First, a majority of noncitizens are unrepresented by legal counsel and, as a result, the hearing often lacks the contest between worthy adversaries that is the driving force behind the adversarial model. In 2010,

108. 8 U.S.C. § 1252(a)(2)(B)(i). Yet, Congress has maintained that federal courts have jurisdiction to review defensive asylum application appeals for abuse of discretion. *Id.* § 1252(a)(2)(B)(ii) (stating that relief under § 1158(a)—asylum—is exempted from the restriction on judicial review of discretionary decisions).

57 percent of noncitizens were unrepresented in removal hearings.[109] As a result, for a majority of noncitizens in removal proceedings, there is no assurance that all the pertinent facts necessary for a just outcome are brought to the immigration judge's attention.[110]

Also, the procedural mechanisms that level the playing field between the better-resourced ICE attorney and the noncitizen are completely lacking. The ICE attorney is not required to overcome an exacting burden of proof in establishing noncitizens' removability. In establishing inadmissibility, the ICE attorney needs to only establish a prima facie case of the noncitizen's alienage before the burden shifts to the noncitizen to prove that he or she was lawfully admitted.[111] In establishing deportability, the ICE attorney is required to prove the alleged immigration violations by clear and convincing evidence for the immigration judge to find that the noncitizen is deportable.[112] This stands in contrast to the American adversarial model employed in criminal proceedings, where a higher burden, proof beyond a reasonable doubt, is placed on the government to maintain a fair balance between the well-resourced government prosecutor and the defendant.[113]

Noncitizens also have less access to the documentation that they need to challenge the government's allegations and to apply for relief. Although noncitizens are statutorily entitled to documents and records pertaining to their admission or presence in the United States during removal hearings,[114] in practice their access is limited. In *Dent v. Holder*,[115] a recent Ninth Circuit case, an ICE attorney failed to disclose documents in Dent's A-file supporting his claim of

109. 2010 STATISTICAL YEARBOOK, *supra* note 73, at G1. The number of unrepresented noncitizens in 2010 did not stand in isolation—from 2005 to 2009, the percent of unrepresented noncitizens ranged from 57 percent to 65 percent. *Id.*

110. *See* Finegan, *supra* note 6, at 473 ("When one of the parties is not represented by counsel . . . it is less clear who is controlling the trial."); *see also* Colyer et al., *supra* note 43, at 464 ("An immigration judge will be presiding, who might be sympathetic to the immigrant's story, but who would benefit from an adversarial presentation. And the immigrant will often be standing all alone, unfamiliar with the complex web of laws . . . .").

111. 8 C.F.R. § 1240.8(c).

112. *Id.* § 1240.8(a).

113. Doran et al., *supra* note 13, at 23–24.

114. 8 U.S.C. § 1229a(c)(2)(B) (2006). The noncitizen, however, is not entitled to these documents and records when the Attorney General deems them to be confidential. *Id.*

115. 627 F.3d 365 (9th Cir. 2010).

American citizenship by way of adoption.[116] This information was not discovered until after the immigration judge ordered Dent deported,[117] and it only came to light after an unusual course of events during Dent's appeal process.[118]

Removal hearings are also governed by relaxed rules of evidence[119] that generally permit admission so long as the evidence is shown to be probative of a material issue and so long as its use comports with due process.[120] These lax rules of evidence benefit pro se noncitizens in that they allow noncitizens to submit evidence despite their limited legal knowledge.[121] Yet, this benefit is outweighed by the damaging impact that relaxed rules of evidence can have on noncitizens when it comes to the ICE attorney's ability to engage in largely boundless cross-examination of noncitizens and their witnesses. In federal civil and criminal proceedings, strict evidentiary rules limit the scope of cross-examination[122] and proscribe the manner in which the cross-examining attorney may impeach a witness's credibility.[123] In contrast, in removal hearings ICE attorneys are able to cross-examine noncitizens and other

116. *Id.* at 368. Dent represented himself pro se and argued that he was not removable because he was adopted by an American citizen when he was a child and was an American citizen himself. *Id.*

117. *Id.* at 369–70.

118. *Id.* at 370–72. In *Dent*, the Ninth Circuit ultimately held that the government has a duty to provide all noncitizens a copy of their A-file as a matter of course. *Id.* at 374–75. While it is too soon to know if full disclosure of a noncitizen's A-file will become the norm in removal hearings, this holding represents progress toward providing noncitizens more due process in removal hearings. *See* Melissa Crow, *Kafka Revisited: Ninth Circuit Decision Protects Due Process Rights for Noncitizens*, IMMIGR. IMPACT (Nov. 30, 2010), http://immigrationimpact.com/2010/11/30/kafka-revisited-ninth-circuit-decision-protects-due-process-rights-for-noncitizens/#more-6168 (discussing the Ninth Circuit's holding and its possible implications).

119. Kidane, *supra* note 71, at 115–18 (explaining that the evidence rules of immigration procedures are less stringent than both common law rules of evidence and the Federal Rules of Evidence).

120. ALEINIKOFF ET AL., *supra* note 32, at 1047. To illustrate, hearsay and unauthenticated documents are admissible unless their use is fundamentally unfair to a noncitizen. *Id.*

121. *See* Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 466–67 (2007) ("Indeed, even many trial judges view the strict application of the rules of evidence in hearings involving pro se litigants as impeding a judge's ability to do justice in such cases.").

122. FED. R. EVID. 611(b) (limiting the subject matter of cross-examination to the scope of direct examination).

123. FED. R. EVID. 608, 609 (specifying what type of conduct and crimes can be used to impeach the witness's character for truthfulness).

witnesses virtually without boundaries because of the lack of formal rules of evidence.[124]

In sum, removal hearings lack the core components of an adversarial model. There is often no "sharp clash of proofs presented by adversaries"[125] because of the high rate at which noncitizens appear pro se. Removal hearings also lack the highly structured setting, with exacting burdens of proof and strict rules of evidence, which is important in keeping the contest between adversaries fair.[126]

B. The Current Adversarial Structure Violates Noncitizens' Procedural Due Process Rights

The removal hearing, in its entirety, is missing essential adversarial principles. When it comes to contesting noncitizens' applications for relief, the ICE attorney's presence as an adversary is no longer necessary to fulfill the government's enforcement objectives. These two deficiencies culminate during the relief stage to create a hearing that is inherently unfair, thereby violating noncitizens' right to procedural due process.[127] A basic requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[128]

Since the early 1900s, the Supreme Court has recognized that noncitizens are entitled to due process of law in deportation proceedings.[129] Nonetheless, most circuits—all but the Second and

124. *See* Kidane, *supra* note 71, at 136 (noting that "[t]here is virtually no limitation as to what questions may be asked regardless of whether they pertain to any disputed issues or not").

125. LANDSMAN, *supra* note 8, at 2.

126. *Id.* at 4–5 (discussing the reasons behind the importance of the highly structured forensic procedures of the adversarial model).

127. The Fifth Amendment provides that the government cannot deprive a person of life, liberty, or property without due process of law. U.S. CONST. amend. V. The Due Process Clause has both a substantive and procedural element—the procedural aspect requires that the government follow adequate procedures in taking away a person's life, liberty, or property. Erwin Chemerinsky, *Procedural Due Process Claims,* 16 TOURO L. REV. 871, 871 (2000).

128. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

129. *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903) (recognizing the right to procedural due process in deportation hearings for the first time). In contrast, the Supreme Court has held that noncitizens who are stopped at the border may be deported without the benefit of any type of hearing or procedure that affords them due process of law. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). The Supreme Court, however, did carve out an exception for returning LPRs who are stopped at the border. *See* Landon v. Plasencia, 459 U.S.

Ninth—have held that the relief stage's proceedings need not conform to traditional standards of fairness on the grounds that noncitizens have no liberty interest in discretionary forms of relief.[130]

1. The Right to Procedural Due Process Extends to Discretionary Applications for Relief

In order for a noncitizen to be entitled to constitutional procedural due process protections in a relief hearing, he or she must have a valid "property" or "liberty" interest at stake.[131] Whether someone has a protected property or liberty interest under the Due Process Clause is determined by whether the Constitution, a federal statute, or a state law has created a reasonable expectation of a benefit.[132] Additionally, a "liberty interest may arise from the

21, 33–34 (1982) (holding that a returning LPR seeking admission after a brief trip abroad was entitled to due process before being deported).

The Supreme Court has not clearly addressed how these judicial precedents apply in light of the shift to unitary removal hearings that focus on inadmissibility-deportability, rather than the traditional exclusion-deportation framework. ALEINIKOFF ET AL., *supra* note 32, at 613–14; *see also* Legomsky, *supra* note 50 (explaining the shift from distinct exclusion and deportation hearings to a single removal hearing). In *Immigration and Citizenship: Process and Policy*, the authors posit the question of whether "clandestine border crossers" who are deemed inadmissible would receive due process rights under *Knauff*, or under the more generous due process analysis of *Yamataya*. ALEINIKOFF ET AL., *supra* note 32, at 614. Although the Supreme Court has not clearly addressed this issue, the Circuits are in agreement that due process applies to removal hearings, at least when it comes to establishing whether a noncitizen is inadmissible or deportable. *See* discussion *infra* Part III.B.1 (discussing the Circuit split over whether due process extends to applications for discretionary forms of relief).

Additionally, in 1996, Congress instated a program called expedited removal, which allows for border officers to deport noncitizens without providing them with a hearing or access to an immigration judge when the officer believes that the noncitizen is inadmissible because of misrepresentation or lack of proper documentation. *See* Family, *supra* note 42, at 624–27 (discussing expedited removal procedures and the concerns that come from employing such removal procedures, which are subjected to almost no judicial review and limited administrative review); *see also* KANSTROOM, *supra* note 47, at 14–15 (discussing the government's expansion of the expedited removal program to certain noncitizens who are seized in the interior of the United States).

130. Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings Matter of Compean and the Fundamental Fairness Doctrine*, 22 FLA. J. INT'L L. 65, 107 n.231 (2010); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 635 (2006). However, Professor Gerald Neuman notes that most of the circuits that hold that procedural due process does not apply to discretionary forms of relief do not apply the same reasoning when dealing with asylum applications, even though asylum is a discretionary form of relief. Neuman, *supra* note 130, at 635 n.93.

131. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1651–52 (1992).

132. *See* Chemerinsky, *supra* note 127, at 881–82. In 1972, the Supreme Court specified that in order to have a protectable property interest, "a person must clearly have more than an abstract need or desire for it" and "more than a unilateral expectation"; instead, the person must "have a

Constitution itself, by reason of guarantees implicit in the word 'liberty.'"[133] If such an interest is at stake, the court will then decide on a case-by-case basis whether the process provided is constitutionally sufficient under the Due Process Clause.[134]

In reaching the determination that noncitizens are not entitled to any type of procedural due process in the adjudication of an application for a discretionary form of relief, most circuits have concluded that there is no protected liberty or property interest in a discretionary application for relief.[135] These circuits reason that there is no protected liberty or property interest at stake because of the discretionary nature of the relief sought. In concluding that suspension of deportation, a precursor to cancellation of removal, did not create a protectable liberty or property interest, the Fourth Circuit reasoned that "[a]s an illegal alien [the noncitizen] has no right to continue to reside in the United States," and "eligibility for suspension is not a right protected by the Constitution."[136] Similarly, the Eighth Circuit has held that

> [c]ancellation of removal is a discretionary remedy, roughly equivalent to executive clemency, over which the executive branch has unfettered discretion. Because adjustment of status amounts to a power to dispense mercy, an alien can have no constitutionally protected liberty interest in such

legitimate claim of entitlement to it." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). The Supreme Court extended this rationale to liberty interests in *Paul v. Davis*, 424 U.S. 693 (1976). Chemerinsky, *supra* note 127, at 881. In *Paul v. Davis*, the Supreme Court held that reputation by itself is not a liberty interest. 424 U.S. at 711–12.

133. Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

134. Motomura, *supra* note 131, at 1652. Courts usually determine whether the process is constitutionally sufficient by analyzing the process under the three-prong balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* discussion *infra* Part III.B.2.

135. Neuman, *supra* note 130, at 635.

136. Appiah v. I.N.S., 202 F.3d 704, 709 (4th Cir. 2000). Although in *Appiah* the Fourth Circuit included the fact that the noncitizen was in the United States illegally as part of its reasoning, the Fourth Circuit and the other circuits that hold that due process does not attach to applications for discretionary relief apply this holding to all noncitizens, even those with legal status, i.e. LPRs. Espinoza, *supra* note 130, at 107; *see also* Neuman, *supra* note 130, at 637 ("Nonetheless, circuit courts that deny the relevance of procedural due process to discretionary relief has included relief for permanent residents in this rejection."). However, if we follow these circuits' entitlement rationale, then it does not follow that LPRs have no liberty interest at stake. Although LPRs are not immune from deportation, LPRs clearly have a reasonable expectation of a continued benefit—the benefit of continued presence in the United States created by the government's grant of legal status.

speculative relief and cannot state a claim for a violation of due process rights.[137]

In contrast, the Second and Ninth Circuits have held that noncitizens may assert a procedural due process claim in appealing a denial of discretionary relief.[138] In reaching this conclusion, the Ninth Circuit did not expressly analyze whether noncitizens have a cognizable liberty or property interest at stake in applying for a discretionary form of relief. However, the Ninth Circuit implicitly recognized the existence of noncitizens' liberty interest at the relief stage by finding that the right to procedural due process protection naturally extends to the entire removal hearing—including the application for discretionary relief.[139]

The Second and Ninth Circuits' failure to distinguish between the contesting-removability stage of the removal hearing and the relief stage correctly reflects the reality that the whole hearing centers on noncitizens' liberty interest in remaining in the United States.[140] The Supreme Court specifically articulated that even noncitizens who entered the country illegally may be deported only

137. Guled v. Mukasey, 515 F.3d 872, 880 (8th Cir. 2008) (internal citations omitted); *see also* Sanchez-Velasco v. Holder, 593 F.3d 733, 737 (8th Cir. 2010) (relying on *Guled* in holding that since the noncitizen lacked a protectable interest in the ultimately discretionary relief of cancellation of removal, his claim that the immigration judge's actions violated his due process rights by excluding his witnesses and by failing to fully consider the evidence presented must fail); *accord* Jupiter v. Ashcroft, 396 F.3d 487, 492 (1st Cir. 2005); Assaad v. Ashcroft, 378 F.3d 471, 475–76 (5th Cir. 2004); Dave v. Ashcroft, 363 F.3d 649, 652–53 (7th Cir. 2004); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 809 (8th Cir. 2003); Aguilera v. Kirkpatrick, 241 F.3d 1286, 1292 (10th Cir. 2001); Ashki v. I.N.S., 233 F.3d 913, 920–21 (6th Cir. 2000); Mejia Rodriguez v. Reno, 178 F.3d 1139, 1147 (11th Cir. 1999).

138. *See, e.g.*, Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1056–58 (9th Cir. 2005) (holding that the immigration judge's refusal to hear testimony from the noncitizen's experts during her application for cancellation of removal violated the noncitizen's due process); Rabiu v. I.N.S., 41 F.3d 879, 882–83 (2d Cir. 1994) (finding that the noncitizen's counsel was prejudicially ineffective for failing to file his application for relief on time).

139. Fernandez v. Gonzales, 439 F.3d 592, 602 n.8 (9th Cir. 2006) (noting that "procedural due process and ineffective assistance of counsel claims, which are predicated on the right to a full and fair hearing are not affected by the nature of the relief sought" (internal citations omitted)); *see also* Reyes-Melendes v. I.N.S., 342 F.3d 1001, 1006, 1008 (9th Cir. 2003) (holding that the immigration judge violated due process by abandoning her role as a neutral fact-finder in adjudicating the noncitizen's application for suspension of deportation).

140. Similarly, Professor Evelyn Cruz argues that the distinction between a noncitizen seeking relief from removal, rather than contesting removal, "is meaningless." Cruz, *supra* note 57, at 488. The interest is not a property interest in the noncitizen's application, but "his interest in remaining in the country, in remaining with his family, and in continuing to pursue the American way of life." *Id.*

after proceedings that comport with the standards of due process.[141] In reaching the conclusion that deportation proceedings must comport with due process, the Supreme Court has acknowledged that "deportation may deprive a man 'of all that makes life worth living.'"[142] This deprivation is the same regardless of whether the noncitizen possesses legal immigration status or not; consequently, all noncitizens have a liberty interest at stake during the relief stage.

On the other hand, the majority of circuits' reasoning in finding that procedural due process does not attach to applications for discretionary relief is unpersuasive for multiple reasons. First, in creating this artificial distinction between contesting the government's allegations and the relief stage, the circuits ignore Supreme Court precedent holding that noncitizens can only be deported after a hearing that comports with the Due Process Clause.[143] Such court holdings contained no qualifying language that such protections did not extend to the relief stage.

Next, by focusing on the discretionary nature of the relief, the majority of circuits overlook what the actual due process violation alleged is. The circuits are correct in holding that a denial of discretionary relief is not itself a violation of procedural due process; it is that the procedures used to adjudicate the application for relief that are fundamentally unfair. To that end, although noncitizens do not have a *right* to discretionary relief, it does not logically follow that noncitizens are not entitled to a fair hearing to present their applications for relief.[144]

Last, providing noncitizens with avenues for relief but denying that they have a right to a fair hearing in adjudicating an application for relief is contrary to common sense and debases our justice system. Congress has articulated what types of relief are available to noncitizens and under what circumstances. Immigration judges are

141. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

142. Galvan v. Press, 347 U.S. 522, 530 (1954) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

143. *See supra* note 129 and accompanying text.

144. *See* Attorney General Alberto Gonzales, *Memorandum to Members of the Board of Immigration Appeals* (Jan. 9, 2006), www.justice.gov/ag/readingroom/ag-010906-boia.pdf ("Not all aliens will be entitled to the relief they seek. But I insist that each case be reviewed proficiently and that each alien be treated with courtesy and respect.").

even statutorily required to inform noncitizens of available forms of relief.[145] Yet, in holding that the procedures employed in adjudicating applications for relief do not need to comport with due process, the circuits are frustrating Congress's intent in providing these forms of relief.

To support the holdings of the Second and Ninth Circuits in finding that due process does attach to the relief stage, Professor Gerald Neuman analogizes the relief stage to the sentencing of a criminal defendant.[146] In this comparison, discretionary relief and deportation can be viewed as two ends of the sentencing spectrum when a noncitizen is found to be removable.[147] Although the Supreme Court has refused to recognize that deportation is punishment,[148] it has acknowledged the "high and momentous"[149] stakes that accompany a deportation order, along with the "drastic deprivations"[150] that follow from deportation. Hence, the comparison between deportation and incarceration is not an unreasonable one to make—a deprivation of liberty clearly accompanies both.[151] In holding that the sentencing process of a criminal defendant must comply with the requirements of the Due Process Clause, the Court reasoned that the "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process."[152] The Due Process Clause attaches to the sentencing process even in cases where the defendant pleads guilty.[153] In the same way, when a noncitizen either contests and loses or concedes

145. *See* 8 C.F.R. § 1240.11(a)(2) (2010).

146. Neuman, *supra* note 130, at 636–37.

147. *See* Stumpf, *supra* note 71, at 1693–704 (discussing how relief from deportation creates the appearance of proportionality in immigration law, but that providing forms of relief fails to create true proportionality because there is no other sanction at issue besides deportation and because of the limited availability of relief).

148. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation was not criminal punishment); *see also* Legomsky, *supra* note 52, at 511 n.206 (detailing the jurisprudence that has maintained the civil label for deportation).

149. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

150. Woodby v. I.N.S., 385 U.S. 276, 285 (1966).

151. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

152. Gardner v. Florida, 430 U.S. 349, 358 (1977).

153. *See* Townsend v. Burke, 334 U.S. 736, 739 (1948).

the government's allegations supporting deportation, the noncitizen should also be entitled to procedural due process in an application for discretionary relief.[154]

In conclusion, the reasoning of the majority of circuits in treating applications for discretionary relief in isolation from the rest of the removal hearing is incorrect. By focusing solely on the discretionary nature of the relief that noncitizens seek, the circuits have lost sight of the reality that a noncitizen's liberty interest is at stake during the entire removal proceeding, from the moment an NTA is filed until the last appeal is exhausted. The Supreme Court has clearly held that the procedures used to establish a noncitizen's deportability must adhere to the standards embodied in the Due Process Clause.[155] Therefore, the procedures used in adjudicating an application for relief, a denial of which will also result in deportation, should conform to those standards as well.

2. The Current Adversarial Structure of the Relief Stage Deprives the Noncitizen of the Opportunity to Be Heard

In *Mathews v. Eldridge*,[156] the Court articulated three distinct factors to balance in determining whether the procedure is due in a given civil proceeding.[157] These factors are: (1) the private interest that will be affected by the official action; (2) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (3) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.[158] Given the disproportionate weight of the individual's interest at stake in relief hearings compared to the government's minimal efficiency and enforcement interests, the current adversarial practices and procedures entail an unreasonable risk of erroneous denial of relief in violation of the Due Process Clause.

154. Neuman, *supra* note 130, at 637.

155. *See supra* note 129 and accompanying text.

156. 424 U.S. 319, 335 (1976).

157. *Id*; *cf.* Markowitz, *supra* note 52, at 54 (arguing that the basic *Mathews v. Eldridge* test is insufficient in assessing whether process is due in the deportation context; instead, Professor Markowitz proposes a "*Mathews v. Eldridge* with teeth").

158. *Mathews*, 424 U.S. at 335. The Court first applied the *Mathews v. Eldridge* balancing test in the immigration context in *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

a. The noncitizen's liberty interest is substantial

When it comes to being deported, the Court has recognized that a noncitizen's interest at stake is "without question, a weighty one" because the noncitizen stands to "lose the right to stay and live and work in this land of freedom" and "the right to rejoin [the noncitizen's] immediate family, a right that ranks high among the interests of the individual."[159] This liberty interest exists during the relief stage to the same degree because the possible end result remains the same—deportation.[160]

Another recent example of the private interest at stake is illustrated by the story of Shing Ma Li.[161] Li's parents fled China to avoid persecution and landed in Peru, where Li was born.[162] When Li was eleven years old, his parents brought him and his sister to the United States.[163] Unbeknownst to Li, his parents applied for asylum for the family, which was denied, but they failed to leave the country, as the immigration judge ordered.[164] This left Li, at age twenty, subject to a deportation order to Peru, a country where he knew no one and could barely speak the language.[165] Li's liberty interest in applying for relief from deportation is a weighty one indeed.

b. The government's administrative and enforcement interests are minimal

The government's interest during the relief stage is twofold—the EOIR has an interest in the fair, expeditious, and uniform administration of immigration laws,[166] and ICE has an interest in "protect[ing] national security, public safety and the integrity of our

159. *Plasencia*, 459 U.S. at 34 (internal citation and quotations omitted).

160. *See* discussion *supra* Part III.B.1.

161. Jessica Kwong, *Steve 'Shing Ma' Li Freed as Feinstein Intervenes*, SFGate.com (Nov. 20, 2010), http://articles.sfgate.com/2010-11-20/bay-area/24842424_1_feinstein-dream-act-private-bill.

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.* Lucky for Li, the press behind his situation was able to attract the attention of Senator Feinstein, who introduced a Private Bill to temporarily stay Li's deportation to Peru. However, what will happen to Li after his temporary stay expires is unknown. *See id.*

166. *EOIR Mission*, EXEC. OFFICE FOR IMMIGRATION. REVIEW, http://www.justice.gov/eoir/index.html (last visited Apr. 1, 2011).

borders through the criminal and civil enforcement of federal law governing border control, customs, trade and immigration."[167] The current immigration court system under EOIR is hardly expeditious or uniform. Under the current system, the backlog of cases in the immigration court system is continuing to grow, with the average wait time being 467 days.[168] Although the disparity in immigration judges' asylum grant rates is declining, the disparity still pervades the immigration court system.[169] Thus, the government does not have a strong argument that an adversarial structure during the relief stage is necessary in order to meet its adjudication goals.

Furthermore, contesting applications for relief is not imperative in fulfilling the government's enforcement objectives. Specifically, ICE attorneys in removal hearings are charged with "protect[ing] the homeland by diligently litigating cases while adhering to the highest standards of professional conduct . . . ."[170] While the ICE attorney's presence in order to establish the noncitizen's removability is arguably justified by the government's interest in protecting the integrity of the borders, national security, and public safety through enforcing immigration laws, this justification dissipates once the relief stage commences. The justification ceases because the focus of the relief stage is about granting mercy,[171] not whether immigration laws have been violated.

i. The government's diminished interest in protecting the integrity of the United States' borders

ICE's concentration on the enforcement of immigration laws in the interior of the United States is an important component in

167. STRATEGIC PLAN FY 2010–2014, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 2 (2010), *available at* http://www.ice.gov/news/releases/1006/100630washingtondc.htm.

168. *Immigration Case Backlog Still Growing in FY 2011*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/reports/246/ (last updated Feb. 7, 2011).

169. *Latest Data from Immigration Courts Show Decline in Asylum Disparity*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/immigration/reports/209/ (last updated June 22, 2009); *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudications*, 60 STAN. L. REV. 295, 328–49 (2007) (discussing the disparities in asylum grant rates among immigration courts and immigration judges, and the relationship between different factors, such as the immigration judge's gender).

170. *About the Office of the Principal Legal Advisor*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/offices/leadership/opla/ (last visited Apr. 1, 2011).

171. *See* Guled v. Mukasey, 515 F.3d 872, 880 (8th Cir. 2008).

protecting the security of the United States' borders.[172] The ICE attorney fulfills this duty once the ICE attorney successfully establishes a noncitizen's removability. In contrast, when it comes to contesting noncitizens' applications for relief, the ICE attorney is no longer advocating a position that ensures the protection of the country's borders. For example, in contesting asylum applications, the ICE attorney may take the stance that the noncitizen is not credible and is telling a fictitious story, or that the persecution that the noncitizen suffers or fears is not substantial enough for the immigration judge to find that the noncitizen qualifies for asylum. Neither of these arguments is related to the noncitizen's unlawful presence in the country, and thus, in arguing against asylum, the ICE attorney is not protecting the integrity of the country's borders.

On the other hand, to this point may be that in contesting fraudulent applications for asylum, ICE attorneys are protecting the integrity of our borders. Yet, in practice, the perception of practitioners and scholars is that ICE attorneys contest most applications for relief without any regard to the merits of the noncitizen's application, and consequently, are not really ensuring that our immigration laws are being properly applied. To illustrate, in removal hearings, "the government's objective can seem to be defeat through any method, without considering the merits of the case," and the "perception is that the government views a victory as a denial of relief accompanied by a removal order (i.e. 'guilty')."[173] By presuming that a majority of asylum claims are fraudulent claims, ICE attorneys' aggressive oppositional stance burdens honest applicants by making it more difficult for them to present truthful accounts of their asylum claims to the immigration judge, which, in turn, affirmatively frustrates the intent of Congress in providing

172. *See* Bennie G. Thompson, *A Legislative Prescription for Confronting 21st-Century Risks to the Homeland*, 47 HARV. J. ON LEGIS. 277, 310 (2010). CBP is the branch of DHS that is responsible for protecting America's borders at official points of entry. *Id.*

173. Family, *supra* note 81; *see also* Armen H. Merjian, *A Guinean Refugee's Odyssey: In Re Jarno, The Biggest Asylum Case in U.S. History and What It Tells Us About Our Broken System*, 23 GEO. IMMIGR. L.J. 649, 668 (2009) ("In practice, however, and particularly since 9/11, INS lawyers have assumed fully adversarial roles, fighting asylum claims vigorously, regardless of their merit. 'Before 9/11, we used to be able to negotiate with INS, and work something out in a case like this,' said one member of [the noncitizen's] legal team, 'but post-9/11, their lawyers try to cream you.'").

asylum as a form of relief to those who have suffered persecution.[174] It also undermines the immigration judge's ability to make an informed decision regarding whether asylum should be granted.

Similarly, when it comes to an application for cancellation of removal, the noncitizen has already entered the United States, either lawfully or unlawfully. Again, the dispute is not over whether that entrance was lawful but whether the noncitizen should now be entitled to remain in the country.[175] Accordingly, contesting the noncitizen's application for cancellation is unrelated to protecting the integrity of our borders.

ii. The government's diminished interest in protecting national security and public safety

In protecting national security and public safety, ICE concentrates on investigating and removing noncitizens who present a risk to the community, including terrorists, gang members, and convicted criminals.[176] If the noncitizen is part of a terrorist organization or has been convicted of certain enumerated crimes, then the immigration judge might initially determine that the noncitizen is removable.[177] Thus, once the ICE attorney establishes that the noncitizen is deportable on criminal or national security grounds, the ICE attorney has fulfilled his or her duty to protect the homeland.[178]

174. *See* HUTCHINSON, *supra* note 69, at 521 (noting that in providing asylum as a form of relief, Congress has "no doubt been moved by various considerations, political and national as well as humanitarian, but [has] consistently shown sympathy for the unfortunate and a sense of obligation to preserve the national image and provide a haven of refuge for the oppressed").

175. *See* discussion *supra* Part II.C.2.b.ii.

176. STRATEGIC PLAN FY 2010–2014, *supra* note 167, at 6.

177. *See* 8 U.S.C. § 1182(a)(2), (3) (2006) (providing the criminal and security related offenses that make someone inadmissible); *Id.* § 1227(a)(2), (4) (same, but for deportable noncitizens).

178. Yet, it is not always clear that ICE attorneys are targeting noncitizens who actually pose a threat to the United States's national security and public safety. *See* APPLESEED, *Chapter 4: Empowering DHS Trial Attorneys to Handle Cases More Efficiently in* ASSEMBLY LINE INJUSTICE: BLUE PRINT TO REFORM AMERICA'S IMMIGRATION COURTS 16 (2009), *available at* http://appleseednetwork.org/bOurProjectsb/ImmigrantRights/CourtReform/tabid/596/Default.aspx [hereinafter *Empowering DHS Trial Attorneys*] (reporting that one practitioner interviewed had observed an ICE attorney argue that a noncitizen should be deported because he "provided 'material support' to terrorists, a group of Burundi rebels, based solely on the fact that the rebels robbed him of $4.12 and his lunch"); *see also* Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CTR. (Feb. 2010), http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas (last visited Mar. 1, 2011) (concluding that the Criminal Alien

A criminal conviction will often automatically bar a noncitizen from qualifying for a form of relief. Yet, the argument that the ICE attorney is protecting the homeland by contesting applications based on a noncitizen's prior criminal conviction falls short because the ICE attorney's presence is not necessary to establish the existence of the criminal conviction. The ICE attorney merely needs to submit the noncitizen's record of conviction, or similar official court documentation, to the immigration judge.[179] For example, a conviction for an aggravated felony[180] can disqualify a noncitizen from applying for asylum[181] and cancel removal.[182]

The term *aggravated felony* is unique to the INA,[183] and, as a result, it is not always clear whether a state conviction qualifies as an aggravated felony for immigration purposes. In order to qualify as an aggravated felony, the conduct prohibited by state law must be punishable as a felony under federal law.[184] Whether a noncitizen's past criminal conviction qualifies as an aggravated felony may not be as easily discernible when there is not perfect overlap between the state and federal offenses. To illustrate, a noncitizen may have been convicted of cocaine possession in state court, but the record of conviction might not include whether the crime involved more than five grams of crack cocaine, which is necessary for a federal court to consider it an aggravated felony.[185] Yet, even in contested situations,

Program, which prioritizes deportation of noncitizens convicted of crimes, "has not fulfilled its mission of enhancing public safety," and rather than limiting its focus to noncitizens convicted of violent crimes, the program identified a majority of noncitizens who "are people who were arrested for mere misdemeanor violations").

179. *See* 8 U.S.C. § 1229a(c)(3)(B) (listing the documents or records that can constitute proof of a criminal conviction); *see also* ALEINIKOFF ET AL., *supra* note 32, at 775 (explaining that the record of conviction cannot be collaterally attacked in immigration court).

180. 8 U.S.C. § 1101(a)(43) (listing the categories of criminal offenses that qualify as aggravated felonies); Legomsky, *supra* note 52, at 483–86 (discussing the expansion of the list of crimes that now qualify as aggravated felonies).

181. 8 U.S.C. § 1158(b)(2)(A)(ii) (stating that a conviction of a particularly serious crime will make the noncitizen ineligible for asylum). Section (b)(2)(B)(i) of this same provision provides that a noncitizen "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." *Id.* § 1158(b)(2)(B)(i).

182. *Id.* §§ 1229b(a)(3), (b)(1)(C) (providing that a conviction of an aggravated felony will make both LPRs and non-LPRs ineligible for cancellation of removal).

183. Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2585 (2010).

184. *Id.* at 2589.

185. *See* 8 U.S.C. § 1101(a)(43)(B) (providing that "[t]he term 'aggravated felony' means . . . illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)"). A conviction for possession of more

the ICE attorney's presence is not necessary because the ICE attorney is unable to go outside the record of conviction in trying to establish that the noncitizen's prior conviction is an aggravated felony.[186] For this reason, since the immigration judge's determination will rest on the documentation that the ICE attorney presents and the immigration judge's interpretation of such documentation, the ICE attorney's presence is not necessary to effectuate the government's enforcement goals.

c. ICE attorney practices and the lack of procedural safeguards produce an unreasonable risk that the immigration judge will deny an application for relief based on incomplete or inaccurate information

The current adversarial procedures create a risk that noncitizens will be erroneously deprived of the opportunity to effectively present their applications for relief because ICE attorneys are allowed to cross-examine noncitizens without the procedural safeguards commonly found in adversarial systems. Such a risk is unreasonable in light of the high personal interest that is at stake in applying for relief and the lack of justifiable government interest in contesting applications for relief.

While there is nothing wrong per se with the ICE attorney using cross-examination as a tool to test a noncitizen's credibility, the mode and scope of cross-examination in an adversarial system is usually limited by formal rules of evidence that are not present in

than five grams of crack cocaine is punishable pursuant to 18 U.S.C. § 924(c), and therefore amounts to an aggravated felony.

186. *See Carachuri-Rosendo*, 130 S.Ct. at 2586 (rejecting the "hypothetical approach" for determining whether a state conviction qualifies as an aggravated felony because such an approach "would treat all 'conduct punishable as a felony' as the equivalent of a 'conviction' of a felony whenever, hypothetically speaking, the underlying conduct could have received felony treatment under federal law"). Although the Supreme Court in *Carachuri-Rosendo* narrowed its holding to situations involving subsequent simple possession offenses and recidivist possession statutes, the Court did make clear that

> [t]he mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be 'convicted of a[n] aggravated felony' before he loses the opportunity to seek cancellation of removal.

Id. at 2589.

removal hearings.[187] Similar formal rules are absent in removal hearings, despite the fact that the same considerations that compel the evidentiary restrictions on cross-examination in federal civil and criminal proceedings exist in removal hearings.[188] Due to the lack of rules restricting the form and scope of the ICE attorney's cross-examination, the ICE attorney may impeach the noncitizen's testimony on irrelevant, and what might otherwise be considered impermissible, grounds, which can mislead the immigration judge and prevent the basis of the noncitizen's applications from coming to light.

This risk is amplified during the relief stage because noncitizens applying for relief often have no choice but to testify on their own behalf. For instance, noncitizens often do not have concrete proof to support their asylum claims because of the circumstances in which noncitizens usually flee their country.[189] Also, the noncitizen's testimony is ordinarily the most persuasive evidence supporting the application for relief. In addition, if a noncitizen chooses to not testify, an immigration judge may draw a negative inference from the noncitizen's silence.[190]

One study reported that in impeaching the noncitizen's credibility, the ICE attorney usually focused the cross-examination on disparaging the noncitizen's moral character, rather than on the merits of the noncitizen's asylum claim.[191] For example, in one application for asylum, the ICE attorney centered the cross-examination on why the noncitizen had left his children behind and had not married his children's mother, rather than on the basis for the noncitizen's asylum claim.[192] Conversely, if rules similar to the Federal Rules of Evidence were in place, the ICE attorney would not

187. For example, in the federal judiciary, Rules 607, 608, 609, 611, and 613 of the Federal Rules of Evidence dictate how a witness may be cross-examined. THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 357–412 (Aspen Publishers, 4th ed. 2009).

188. Kidane, *supra* note 71, at 136–37.

189. *See supra* notes 79–80 and accompanying text.

190. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153–54 (1923) ("Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character."). However, silence on its own is insufficient to meet the government's burden in establishing deportability. *See* Matter of Guevara, 20 I. & N. Dec. 238, 242 (1991). In contrast, in the American adversarial criminal justice system, the trier of fact may not make a negative inference if the defendant chooses to invoke the right to remain silent.

191. Anker, *supra* note 83, at 493.

192. *Id.* at 493–94; FED. R. EVID. 402.

have been able to pursue this line of questioning because it would have been improper impeachment evidence since the noncitizen's relationship with the mother of his children did not bear on his character for truthfulness,[193] nor was it relevant to his asylum claim.[194]

Professor David A. Martin credits this "impoverished" cross-examination to ICE attorneys' lack of preparation time due to heavy caseloads and lack of resources.[195] Professor Martin argues that, as a result of these factors, the ICE attorney will not know what type of case is before him or her until well into the proceeding, and, as a result, he or she cross-examines without regard to the merits of the asylum application.[196] In spite of what may be an understandable explanation of the ICE attorney's disregard for the underlying merits of a noncitizen's application for asylum, the ICE attorney's aimless and boundless cross-examination—in contesting the noncitizen's application for asylum without investigating whether the claim is colorable—unjustly thwarts the noncitizen's ability to effectively present his or her application for relief.

Problems associated with the ICE attorney's cross-examination are further exacerbated when the noncitizen is unrepresented by counsel. When competent counsel is present, the noncitizen's counsel may prepare the noncitizen for aggressive cross-examination before the hearing, object to the ICE attorney's irrelevant or improper questions, or rehabilitate the noncitizen's testimony by asking questions on redirect examination to explain inconsistencies that were exposed during the cross-examination.[197]

According to the Supreme Court, "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[198] A removal hearing often features a noncitizen who is unfamiliar with American jurisprudence, who does not speak the English language, and, most importantly, who is unrepresented by

193. *See* FED. R. EVID. 608, 609(a)(2).

194. *See* FED. R. EVID. 402 (providing that evidence that is not relevant is not admissible).

195. Martin, *supra* note 72, at 1308; *see also Empowering DHS Trial Attorneys*, *supra* note 178, at 16 (reporting that, according to ICE, in 2005, ICE trial attorneys only had twenty minutes to prepare for each case).

196. Martin, *supra* note 72, at 1309.

197. *See* MAUET & WOLFSON, *supra* note 187, at 413–15 (discussing the law and practice of redirect examination during a trial).

198. Goldberg v. Kelly, 397 U.S. 254, 268–69 (1969).

trained legal counsel. The noncitizen must then face an aggressive adversary, the ICE attorney, in applying for a form of relief. The result? An adversarial hearing that is not tailored to the capacities and circumstances of the noncitizens. It is an adversarial hearing that, in fact, creates the risk that noncitizens will be deprived of the opportunity to effectively present their applications for relief to immigration judges, which causes the immigration judges to make uninformed decisions regarding the applications.

IV. PROPOSAL: APPLICATIONS FOR RELIEF SHOULD BE NONADVERSARIAL

The current adversarial structure of the relief stage cannot continue to exist as it does. Some proponents of immigration court reform advocate that adopting stricter rules of evidence would restore integrity to the immigration court system.[199] Yet, strict rules of evidence without counsel would do little to assist noncitizens in presenting their applications for relief.[200] However, providing government-appointed counsel to all noncitizens in removal hearings is not a realistic solution, given the large administrative and financial burden in making such a shift. Furthermore, some scholars speculate whether providing government appointed counsel to indigent litigants is the best way to increase those litigants' access to justice.[201]

Despite the American preference for adversarial justice, the adversarial model is not always the most appropriate means of

199. *See* Kidane, *supra* note 71 (arguing that adopting appropriate rules of procedure and evidence mirrored after the Federal Rules of Evidence could ensure consistency, credibility, and predictability of deportation proceedings); *see also* Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 94–95 (2007–2008) (advocating for standardized rules of evidence within the immigration courts).

200. *See* Baldacci, *supra* note 121, at 447–48 (noting that "our lawyer-based adversarial litigation regime . . . is bound—some might say hidebound—by formal rules of evidence and procedure that effectively require representation by lawyers both for access to its promise of a fair and impartial resolution of disputes and to be able to navigate its shoals").

201. *See* Pearce, *supra* note 7, at 974–78 (arguing that access to lawyers will never solve the problem of unequal justice; rather, attention should focus on judges' ability to equalize justice and redress the failures of the market for justice); *see also* Benjamin H. Barton, *Against Civil* Gideon *(And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1250–62 (2010) (arguing that civil *Gideon* will not ameliorate the execrable state of pro se litigation for the poor in the United States).

adjudicating certain types of claims.[202] For instance, the main determination during the relief stage involves whether the noncitizen deserves the relief that he or she seeks. This type of determination is better suited for an inquisitorial system aimed at finding the absolute truth—a full account of what happened based on an evaluation of all the evidence available—rather than for the adversarial model, which seeks a pragmatic truth, "the best truth that it can get under the circumstances."[203] Shifting to a nonadversarial inquisitorial format at the relief stage, while apparently radical, would address the deficiencies of the current adversarial structure of the relief stage without putting an undue financial or administrative burden on the government.

A. The Nonadversarial Structure of the Relief Stage

The portion of the removal hearing in which the ICE attorney is charged with establishing the noncitizen's removability will remain unchanged—the ICE attorney will still be responsible for establishing the noncitizen's inadmissibility or deportability. This will allow the ICE attorney to continue to fulfill the government's enforcement objectives. However, once the noncitizen concedes the government's allegations or the ICE attorney succeeds in proving that the noncitizen is removable, the ICE attorney's active role in the proceedings will terminate. The ICE attorney will not be present at the relief stage of the removal hearing.

At the outset of the removal hearing, the ICE attorney will be required to provide both the immigration judge and the noncitizen with a copy of the noncitizen's A-file. Although the ICE attorney is already required to provide the A-file to the noncitizen on request, the ICE attorney does not always do so.[204] Providing the immigration judge with the noncitizen's A-file at the start of the hearing would

202. *See* ALEINIKOFF ET AL., *supra* note 32, at 1036 (posing the question of whether part of the problem with removal proceedings is the Anglo-American preference for adversarial, lawyer-centered proceedings); *see also* Friendly, *supra* note 1, at 1289 (suggesting that it might be better to abandon the adversary system in certain areas of mass justice).

203. Matthew T. King, *Security, Scale, Form and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 188–89 (2002) (explaining how the justification for allowing party control in the adversarial system versus state control in the inquisitorial system depends on the mode of truth-seeking that each model aims to discover).

204. *See supra* notes 113–17 and accompanying text.

change the current structure, but it is vital to the immigration judge embracing his role as an inquisitorial judge. Once removability is established, the ICE attorney may also provide the immigration judge with any additional documentation or information pertinent to the noncitizen's application for relief, such as names of witnesses who the immigration judge may wish to subpoena or the noncitizen's criminal record. This way, the immigration judge will be well equipped to elicit the important information from the noncitizen and witnesses in making the ultimate determination of whether to grant the noncitizen's requested relief. The A-file and additional documentation would satisfy the same function as the dossier does in the French inquisitorial system.[205]

During the master calendar hearing, or after the noncitizen's removability is established, the immigration judge will then provide the noncitizen with information about possible forms of relief and advise the noncitizen on securing that relief, as is already the immigration judge's duty.[206] The noncitizen will then have time to fill out the necessary forms for the application for relief and gather evidence from witnesses, as is also currently the process. The only change occurs during the actual hearing regarding the noncitizen's application for relief. The immigration judge, instead of an ICE attorney, will question the noncitizen. The immigration judge must be conscious not to assume the role of an adversarial opponent, but he or she must ask the questions necessary to reach a decision. Yet, even if the immigration judge engages in aggressive questioning similar to that of an ICE attorney, a nonadversarial structure will still decrease the probability that the noncitizen will be unable to effectively present his or her application for relief because at least the noncitizen will only be facing one "adversary," rather than two—the ICE attorney and the immigration judge.[207]

The noncitizen would still have the right to be represented by counsel in a nonadversarial hearing. The role of the noncitizen's counsel would not alter the proceedings substantially, however. Instead of the immigration judge taking the lead in questioning the

205. *See supra* notes 15–17 and accompanying text.

206. *See supra* note 61 and accompanying text.

207. *See* Anker, *supra* note 83, at 489 (discussing how the perception arose in asylum adjudications in immigration courts that the noncitizen faced two prosecutors, instead of one).

noncitizen, the noncitizen's counsel will begin the questioning, allowing the immigration judge to further inquire into areas that were not thoroughly explored.

In order to facilitate a nonadversarial environment while questioning the noncitizen and witnesses, the immigration judge should receive training in human rights law and national and international refugee law and principles, which are already statutorily required for asylum officers who hear affirmative asylum claims.[208] Being versed in these subjects, along with receiving training in questioning noncitizens in a nonadversarial fashion,[209] will help the immigration judge stay neutral while he or she questions the noncitizen. In addition to questioning the noncitizen, the immigration judge should allow the noncitizen to tell his or her narrative without interruption, and, when asking questions of the noncitizen, the immigration judge should adopt a manner that assists the noncitizen in relating his or her narrative.[210] This will allow the noncitizen to more effectively present his or her claims for relief, which, in turn, will provide the immigration judge with better information in making a determination of whether the noncitizen should be entitled to a grant of relief. The inquisitorial role of the immigration judge also comports with immigration judges' existing duty to develop a full record.[211]

An inquisitorial immigration judge will be well equipped to handle any burden-shifting that exists in the current adversarial structure of the relief stage because ICE attorneys largely rely on documentation in sustaining their burden. For example, in defensive asylum applications, if the noncitizen succeeds in persuading the

208. *See supra* note 77 and accompanying text.

209. *See, e.g.*, Daniel Forman, *Improving Asylum-Seeker Credibility Determinations: Introducing Appropriate Dispute Resolution Techniques into the Process*, 16 CARDOZO J. INT'L & COMP. L. 207, 237–38 (2008) (suggesting that training immigration judges to ask questions by using active listening or looping techniques will provide immigration judges with a better understanding of whether the noncitizen has a viable claim for relief and will provide the noncitizens with a better platform to convey applications for relief to immigration judges).

210. *See* Baldacci, *supra* note 121, at 476–79 (discussing how ALJs can assist pro se litigants in structuring and developing their narratives so that their legal adequacy can be articulated and evaluated, and discussing the benefits associated with adopting such a practice).

211. *See* Martin, *supra* note 72, at 1349 (explaining why the author thinks that all asylum adjudications should move to a nonadversarial structure, and commenting that "[i]t could hardly be thought unfair to the applicant to replace such interrogation (designedly adverse) with questioning done instead by an examiner who has been instructed that her role is to develop a full record and not to strive zealously for a negative outcome").

court that he or she was subjected to past persecution, the burden shifts to the government to show that country conditions have changed.[212] However, in the nonadversarial hearing, instead of relying on the ICE attorney to present country conditions, the immigration judge can turn to State Department reports, credible news sources, and other reliable and verifiable authorities in international law. In his 1990 proposal for a nonadversarial asylum adjudication system for all asylum applications, Professor Martin noted that adversarial tools are not of great assistance to the immigration judge in determining country conditions because that information is usually documentary.[213] For the same reasons, an immigration judge will be able to address whether a noncitizen's criminal conviction qualifies as an aggravated felony that bars him or her from satisfying the eligibility criteria for cancellation of removal without an adversarial presentation, since the ICE attorney normally relies on documentary evidence.[214]

In conclusion, a nonadversarial relief stage would afford noncitizens the opportunity to be heard in a manner tailored to the noncitizens' capacities and circumstances,[215] without drastically altering the current immigration court system.

B. Shifting to a Nonadversarial Structure Would Not Place an Undue Financial or Administrative Burden on the Government

The Supreme Court has noted that in order to ensure fairness in the immigration context, the hearing "must provide [the noncitizen] an opportunity to present her case effectively, though at the same time it cannot impose an undue burden on the Government."[216] Shifting to a nonadversarial structure in adjudicating applications for relief would, at worst, place only a slight burden on the government, and could potentially result in substantial benefits. Requiring the ICE attorney's presence only to establish the noncitizen's removability would decrease the role of ICE attorneys and might mean that ICE attorneys could handle larger caseloads or manage their current

212. *See* discussion *supra* Part II.C.2.b.i.

213. Martin, *supra* note 72, at 1349–50.

214. *See* discussion *supra* Part III.B.2.b.ii.

215. *See* Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970).

216. Landon v. Plasencia, 459 U.S. 21, 36 (1982).

caseloads more efficiently. Investing the immigration judge with inquisitorial responsibilities in adjudicating applications for relief will, however, likely increase the time that an immigration judge spends on such applications, adding to immigration judges' already overwhelming workload.[217] There are two solutions in dealing with this increased workload—hire more immigration judges and hire more support staff, in particular, more law clerks.

The need for more law clerks and immigration judges already exists, and it would not be a new phenomenon if the application-for-relief stage of the removal hearing were shifted to a nonadversarial structure.[218] The government is also already making efforts to increase the number of immigration judges and law clerks.[219] Since there is already a need for more immigration judges and law clerks, the additional burden of having the immigration judge assume an inquisitorial role would just increase the already existing need, but it would not create an undue burden on the government. Furthermore, since the EOIR and ICE are both under the DOJ, money saved from reducing the role of ICE attorneys could be shifted to hiring more immigration judges and law clerks.

Moreover, removing the ICE attorney from the application-for-relief stage of the removal hearing may increase the efficiency of the

217. *See* Howard Mintz, *Study: Immigration Judge as Stressed Out as Emergency Room Doctors, Prison Wardens*, SAN JOSE MERCURY NEWS, Aug. 22, 2009, *available at*, http://cgrs.uchastings.edu/pdfs/SJ%20Mercury%20News,%20Howard%20Mintz%20-%20Study,%20Immigration%20judges%20as%20stressed%20out%20as%20emergency%20room%20doctors,%20prison%20wardens.pdf (discussing the results of a study released in the 2009 summer by University of California-San Francisco researchers, which found that immigration judges are as stressed out and burned out as emergency room doctors and prison wardens are).

218. *See* APPLESEED, *Chapter 2: Giving Immigration Judges the Tools to Achieve Justice in* ASSEMBLY LINE INJUSTICE: BLUE PRINT TO REFORM AMERICA'S IMMIGRATION COURTS 11 (2009), *available at* http://appleseednetwork.org/bOurProjectsb/ImmigrantRights/CourtReform/tabid/596/Default.aspx (suggesting that more immigration judges and law clerks be hired in order for immigration judges to have the tools to achieve justice); *see also* Einhorn, *supra* note 82, at 165–66 (providing the opinion of Immigration Judge Bruce Einhorn, who believes that more law clerks are needed under the current system in order "to allow for more research and written decisions regarding those cases that prove more complicated and demanding"); Legomsky, *supra* note 50, at 1651–57 (crediting the extreme underresourcing of the EOIR as one of the prime suspects for the problems existing within the current immigration court structure).

219. *Executive Office for Immigration Review: Hearing Before the H.R. Comm. on the Judiciary Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law*, 111th Cong. 2–3 (2010) (statement of Juan P. Osuna, Assoc. Deputy Att'y Gen. of the United States), [hereinafter Osuna Statement], *available at* http://judiciary.house.gov/hearings/pdf/Osuna100617.pdf. In 2010, the EOIR hired forty-seven new immigration judges. *Id.* The EOIR was also projected to hire ninety law clerks for the 2010–2011 law clerk term, about thirty more than the prior amount. *Id.*

proceeding. Allowing immigration judges, rather than ICE attorneys, to shape the issues permits immigration judges to spend time on the issues that they know will be important to their ultimate determination. This may serve to offset some of the additional time that the immigration judge will need to spend becoming familiar with a particular application for relief. Altogether, the shift to a nonadversarial structure will not be a substantial financial burden on the government.

Also, removing the ICE attorney from the application-for-relief portion of the removal hearing will not substantially alter the administrative structure. Shifting to a nonadversarial structure would not require the development of a new state actor or a new position within the immigration court. It would, however, require further education for immigration judges on how to appropriately and effectively embrace the inquisitorial role. This may require the EOIR to hold more training sessions in order to shift to a nonadversarial structure, but, overall, the shift would not create a substantial administrative burden for the government.

Additionally, the nonadversarial structure could be implemented without congressional action, avoiding the accompanying administrative hassle and delay. Since ICE attorneys are not statutorily required to be present during the relief stage[220] and immigration judges already have authority to act as inquisitorial judges,[221] ICE could issue a department memorandum mandating that once removability is established, the ICE attorney's role ceases.[222]

C. Does Shifting to a Nonadversarial Structure Put Too Much Power in the Hands of Immigration Judges?

Circuit judges, practitioners, and advocates have criticized immigration judges for adjudicating cases without regard to the

220. *See* discussion *supra* Part II.B.

221. *See* discussion *supra* Part II.C.2.

222. However, ICE officials have come under attack from politicians when the officials assert their administrative discretion to address some of the problems within the immigration court system. *See* Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 26, 2010, at A14, *available at* http://www.nytimes.com/2010/08/27/us/27immig.html?_r=2 (reporting on the story of how when ICE officials exercised discretion by cancelling removal proceedings (without prejudice) against noncitizens with applications pending for adjustment to lawful status with USCIS, the ICE officials came under heat from their own union and politicians for being soft on enforcement).

merits of the cases or the evidence presented, and for treating noncitizens disrespectfully.[223] That immigration judges have a reputation for being biased against noncitizens, coupled with the inaccurate assumption that judges who assume an inquisitorial role lose impartiality,[224] may cause some advocates to be apprehensive about shifting to a nonadversarial relief stage. Noncitizens' advocates may also be concerned that immigration judges will merely adopt the "deport-in-all-cases" philosophy among ICE attorneys[225] if the ICE attorney is removed from the relief stage.

Some advocates attribute immigration judges' bias against noncitizens to a lack of independence due to politicized hiring processes and political pressures and to the notion that that some immigration judges are just not well suited for the position.[226] Immigration judges are appointed by the Attorney General and are employees of the DOJ.[227] Consequently, the Attorney General holds great power over the immigration judges, which can create a conflict of interest and put pressure on the immigration judges to rule in favor of the government.[228] There are also certain immigration judges who

223. *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (providing a list of several cases where circuit courts expressed disapproval of the way that immigration judges made determinations without regard to the evidence presented, disparaged noncitizens, or demonstrated a clear bias toward noncitizens throughout the hearing); *see also* Jacqueline Stevens, *Lawless Courts*, THE NATION (Oct. 20, 2010), *available at* http://www.thenation.com/article/155497/lawless-courts (criticizing Immigration Judge William Cassidy in Atlanta for his unethical conduct); The Nuñez Firm, *Ninth Circuit Allows for Asylum Claims for Guatemalan Women*, OC IMMIGR. ATT'Y BLOG (July 23, 2010), http://www.ocimmigrationattorney.com/blog/?tag=ninth-circuit (discussing an unpublished case, *Shi v. Holder*, where the Ninth Circuit criticized Immigration Judge Anna Ho for badgering "the noncitizen with loaded, pejorative questions and effectively abandon[ing] her role as a neutral fact finder").

224. *See* Baldacci, *supra* note 121, at 492 & n.134.

225. *See Empowering DHS Trial Attorneys*, *supra* note 178, at 16–18; Mary Giovagnoli, *Assembly Line Injustice at Immigration Court* (June 15, 2010), IMMIGR. IMPACT, http://immigrationimpact.com/2009/06/15/assembly-line-injustice-at-immigration-court/ (commenting that "there has long been a culture clash between those who follow the Department of Justice's motto that 'Government wins when justice is done,' and those who think that winning in immigration court is all about deporting people").

226. *See* Legomsky, *supra* note 50, at 1651; Family, *supra* note 42, at 600–01 (discussing the effect of the overwhelming caseload on immigration judges' adjudications).

227. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372 (2006).

228. *Id.* at 373–74 (discussing the National Association of Immigration Judges' 2002 proposal for an independent court system, which was advocated for, in part, because immigration judges believed that their positions within the DOJ created a conflict of interest that is insidious and pervasive).

are known to be particularly harsh toward noncitizens and who pride themselves on the number of removals that they order each year.[229]

Yet encouraging the current immigration judges to assume a more inquisitorial role does not increase the risk that noncitizens' applications for relief will be unfairly adjudicated because doing so does not provide unfair and unethical immigration judges with more authority than they already possess to remove noncitizens. Moreover, encouraging the inquisitorial authority of immigration judges does not require fair and ethical immigration judges to lose their neutrality.[230] The BIA has even noted that the special inquiry officer, the immigration judge's predecessor, did "not cease to be impartial [in a deportation proceeding] merely because, in his quest for the truth, he s[ought] to clarify the record by calling the attention of the trial attorney to certain areas of inquiry not yet developed."[231]

Another check on immigration judges will be possible if the other circuits follow the lead of the Second and Ninth Circuits in holding that procedural due process attaches to an application for discretionary relief.[232] If this occurs, then the circuits will be able to review whether procedures in adjudicating the application for relief conformed with the Due Process Clause, even though the circuits will be precluded from reviewing the immigration judge's discretionary decision itself.[233] For example, if review is allowed, the

229. *See* Legomsky, *supra* note 50, at 1675–76 (attributing some of the problems with immigration courts to the "bad apples" within the immigration judge corps); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 30–31 (2006) (focusing on the series of errors and abuses that the Philadelphia Immigration Judge Donald Ferlise committed).

230. Baldacci, *supra* note 121, at 492–93; Finegan, *supra* note 6, at 497. *But cf.* Kidane, *supra* note 71, at 124–27 (arguing that the immigration judge's statutory authority to cross-examine the noncitizen impedes the immigration judge's ability to be a neutral adjudicator). Furthermore, efforts are being made to create a less-politicized hiring process. Recently, the DOJ formally investigated the politicized hiring practice of immigration judges. From this investigation, new hiring practices were implemented and utilized in the hiring of the EOIR's new immigration judges. For a detailed discussion of the politicized hiring practices, see generally Penn State Law's Center for Immigrant Rights, *Playing Politics at the Bench: A White Paper on the Justice Department's Investigation into the Hiring Practices of Immigration Judges*, 11–13 (2009), http://www.law.psu.edu/_file/Playing%20Politics%20at%20the%20Bench%20101209.pdf (analyzing the DOJ's official report regarding the political hiring of immigration judges between 2004 and 2007, and the impact of those illegal hirings on immigration laws and noncitizens); *see also* Osuna Statement, *supra* note 219, at 2 (discussing the new hiring process for immigration judges).

231. Matter of Lam, 14 I. & N. Dec. 168, 170 (1972).

232. *See* discussion *supra* Part III.B.1.

233. *See* discussion *supra* Part II.C.3.

circuits will be able to provide a check to ensure that immigration judges' determinations are not the result of bias or prejudgment.[234]

V. CONCLUSION

Shifting to a nonadversarial structure in adjudicating noncitizens' applications for relief from deportation is just one step toward achieving an immigration adjudication system that strikes the right balance between enforcing immigration laws and providing noncitizens with a fair opportunity to present their applications for relief. Advocating for a nonadversarial relief hearing may sound like a radical proposal. But implementing such a change would not drastically alter the landscape of removal hearings. ICE attorneys would retain their central role in establishing noncitizens' inadmissibility or deportability, and immigration judges would still have the duty to inform noncitizens of available forms of relief and to develop a full record. Yet, with ICE attorneys removed as aggressive adversaries and immigration judges encouraged to embrace their statutorily permitted inquisitorial role rather than shy from it, noncitizens will be able to present their applications for relief in a hearing that comports with the traditional standards of fairness that are encompassed in the Due Process Clause.

234. *See supra* note 139 and accompanying text.