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# LIARS AND TERRORISTS AND JUDGES, OH MY: MORAL PANIC AND THE SYMBOLIC POLITICS OF APPELLATE REVIEW IN ASYLUM CASES

*Eric M. Fink\**

Point:

The larger problem with the majority's opinion is its know-it-all approach, an error oft repeated when our circuit reviews immigration cases in which an IJ [immigration judge] has made an adverse credibility determination. First, the majority lays out the applicant's story as if it were the gospel truth, making it seem like denial of rehearing will cause a huge miscarriage of justice. Then the majority picks apart the IJ's findings piece by piece, scrutinizing his every sentence as if it is completely unconnected to the rest of his opinion. Don't agree with the IJ that the applicant is lying? Not to worry; just label the IJ's finding "speculation and conjecture." Finding it difficult to dispute that the applicant is lying? No problem; just label the inconsistencies "minor," or "merely incidental to [the] asylum claim." The net effect is that any asylum applicant who is a skillful enough liar—and many who aren't—must be believed no matter how implausible or far-fetched their story. It also means that IJs, who are doubtless chary of being vilified by august court of appeals judges, become even more reluctant to make adverse credibility findings, even when they have good reason to believe the asylum applicant is lying.

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None of this bears any resemblance to administrative law, and none of it finds support in the statutes Congress has given us to apply, or the rules the Supreme Court has instructed us to follow.

—Judge Alex Kozinski<sup>1</sup>

Counterpoint:

This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. Whether this is due to resource constraints or to other circumstances beyond the Board's and the Immigration Court's control, we do not know, though we note that the problem is not of recent origin. All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.

—Judge Richard A. Posner<sup>2</sup>

## INTRODUCTION

In the past ten years, Congress has twice amended the federal immigration laws in an effort to restrain judicial review of administrative decisions in asylum and other removal cases.<sup>3</sup> These changes have emerged in the context of a battle over the degree of deference appellate courts should give to administrative determinations on immigration matters. Some appellate courts have issued opinions sharply critical of adverse credibility determinations by the bodies responsible for administrative review in asylum cases—the United States Immigration Courts and the Board of Immigration Appeals

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1 Kumar v. Gonzales, 444 F.3d 1043, 1060–61 (9th Cir. 2006) (Kozinski, J., dissenting) (footnote and citations omitted).

2 Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (citations omitted).

3 The general term “removal” refers to proceedings in which the government seeks to exclude or deport an alien from the United States. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 9–10 (2005).

(BIA).<sup>4</sup> Critics, including some appellate judges, have in turn alleged that the appellate courts have been insufficiently deferential to the factual determinations of Immigration Judges (IJs) and the BIA.<sup>5</sup>

I begin by reviewing the procedures for administrative and appellate review in removal cases and discussing the regulatory and statutory changes that have occurred in recent years. In particular, I examine the arguments offered in support of legislation aimed at limiting appellate review of credibility determinations in asylum and other removal cases.

Next, I offer an empirical assessment of the appellate courts' disposition of IJ/BIA credibility determinations in asylum cases over the past twelve years. I present data on the extent to which appellate courts have vacated administrative denials of asylum applications based on adverse credibility determinations. The data do not support the claim that the appellate courts have done so with alarming frequency. In fact, there have been relatively few such cases, and the apparent increase in recent years is most likely a result of changes in the administrative adjudication process itself. In those cases where the courts of appeals have found fault with adverse credibility determinations, they have acted in response to serious, sometimes egregious, errors by the administrative factfinders.

The stated justifications for restricting judicial review of credibility determinations in asylum cases thus appear to be unfounded. Rather, I argue that the controversy and legislative response can best be understood as an instance of symbolic politics and moral panic.<sup>6</sup>

## I. ADMINISTRATIVE ADJUDICATION AND APPELLATE REVIEW IN ASYLUM CASES

### A. *Administrative Innovation*

The administrative framework and review procedure in asylum and removal cases bear explanation for those unfamiliar with the system. Two cabinet departments are involved in asylum proceedings: the Department of Homeland Security (DHS) and the Department of

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4 See, e.g., *Benslimane*, 430 F.3d at 829–30; see also Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (“Federal appeals court judges around the nation have repeatedly excoriated immigration judges this year for what they call a pattern of biased and incoherent decisions in asylum cases.”).

5 See, e.g., *Kumar*, 444 F.3d at 1060–61 (Kozinski, J., dissenting).

6 See *infra* Part II.B.

Justice (DOJ).<sup>7</sup> Within DHS are two agencies that succeeded to the role of the former Immigration and Naturalization Service (INS): United States Customs and Immigration Services (USCIS), responsible for administering the system, and United States Immigration and Customs Enforcement (ICE), responsible for enforcement.<sup>8</sup> The Executive Office of Immigration Review (EOIR), a branch of DOJ, is responsible for adjudication through the Office of the Chief Immigration Judge (OCIJ) and the BIA.<sup>9</sup>

An immigrant may seek asylum affirmatively by filing an application with USCIS.<sup>10</sup> If the application is denied, the case goes before an Immigration Judge (IJ) for a removal hearing.<sup>11</sup> Alternatively, an immigrant facing removal for some other reason may assert eligibility for asylum as a defense to removal.<sup>12</sup> In either event, the removal hearing is an adversarial proceeding, in which the government is represented by ICE.<sup>13</sup>

The IJ's decision is subject to review by the BIA.<sup>14</sup> Since 1999, the BIA has followed streamlined procedures,<sup>15</sup> under which most appeals are decided by a single BIA member, rather than a three-member

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7 See 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, 491–92 (2005).

8 *Id.*

9 *Id.*

10 *See id.* at 492.

11 *See id.* at 482 nn.3 & 7, 491–92.

12 See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 113 (2006) (explaining “affirmative” and “defensive” asylum applications).

13 *See id.* at 113–14; Cruz, *supra* note 7, at 491 & n.75.

14 *See* Cianciarulo, *supra* note 12, at 114; Cruz, *supra* note 7, at 482 n.3, 492.

15 *See* Cruz, *supra* note 7, at 482–83; John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 607 (2005). The streamlined procedures were first adopted on a trial basis, and their use was expanded under regulations promulgated in 2002. *See* 8 C.F.R. § 1003.1 (2007); *see also* Cruz, *supra* note 7, at 482 & n.2 (discussing the Executive Office for Immigration Review's pilot program for testing the regulations and their subsequent adoption by the BIA); Guendelsberger, *supra*, at 607 (“Streamlining regulations promulgated in 1999 authorized single Board member decisions in place of panel decisions as well as affirmances of immigration judge decisions without opinion. Additional regulations in 2002 expanded the use of affirmances without opinion and limited the Board's authority to review findings of fact by immigration judges.”). These procedures have been upheld against challenges on due process grounds. *See* *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003); *Mendoza v. U.S. Attorney Gen.*, 327 F.3d 1283, 1288–89 (11th Cir. 2003); *Soadjede v. Ashcroft*, 324 F.3d 830, 832–33 (5th Cir. 2003). However, many critics argue that the streamlined procedures are seriously deficient and fail to provide asylum applicants with meaningful review of

panel.<sup>16</sup> If the reviewing member agrees with the outcome of the IJ's decision—even if the member disagrees with the IJ's reasoning—the member may issue an “Affirmance Without Opinion” (AWO).<sup>17</sup> The regulations also required greater deference by the BIA to the IJ's factual findings,<sup>18</sup> reduced the composition of the BIA from twenty-three to eleven members,<sup>19</sup> and imposed other procedural changes.<sup>20</sup>

The BIA's decision (whether by a panel or a single member) is in turn subject to review by the federal court of appeals for the circuit having jurisdiction over the location where the IJ hearing took place.<sup>21</sup>

### B. *Judicial Review and Legislative Intervention*

Judicial review of administrative decisions under immigration law came under “ferocious assault”<sup>22</sup> with the enactment of two pieces of legislation: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>23</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>24</sup> AEDPA stripped the courts of

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their cases. *See generally* Cruz, *supra* note 7, at 499–504 (summarizing the BIA appeal process and citing sources criticizing the process).

16 *See* 8 C.F.R. § 1003.1(d)(2)(i).

17 *See id.* § 1003.1(e)(4); Cruz, *supra* note 7, at 482.

18 *See* § 1003.1(d)(3)(i); Cruz, *supra* note 7, at 483; Guendelsberger, *supra* note 15, at 607.

19 Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,901 (Aug. 26, 2002). The BIA's composition has since been increased to fifteen members. *See* 8 C.F.R. § 1003.1(a)(1).

20 *See* § 1003.1(d); *see also* Cruz, *supra* note 7, at 482–83 (discussing briefly some of these procedural changes); Guendelsberger, *supra* note 15, at 607 (same).

21 *See* Palmer et al., *supra* note 3, at 19–21. Prior to 1996, an alien in government custody could seek relief from a deportation order by filing a writ of habeas corpus in a federal district court. *See* 8 U.S.C. § 1105a (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306(b), 110 Stat. 3009-546, 3009-612; Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1623 (2000). Grants or denials of habeas relief were appealable pursuant to § 2253 of the Judicial Code. *See* 28 U.S.C. § 2253 (1994); *see also* Shukoor v. Schiltgen, No. 97-55441, 1999 U.S. App. LEXIS 11079, at \*2 (9th Cir. May 3, 1999) (“We have jurisdiction over the government's appeal pursuant to 28 U.S.C. § 2253.”). Congress eliminated that avenue of relief as part of the 1996 amendments to the Immigration and Nationality Act. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217–18; *see* Legomsky, *supra*, at 1623–24.

22 Legomsky, *supra* note 21, at 1616.

23 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, 50 U.S.C.).

24 Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 (codified as amended in scattered sections of 8, 18 U.S.C.).

jurisdiction to review certain administrative exclusion and removal decisions.<sup>25</sup> The IIRIRA imposed a narrowed standard of judicial review of all BIA removal decisions, including asylum cases.<sup>26</sup>

More recently, under the guise of fighting “the Global War on Terror,” Congress passed the REAL ID Act of 2005<sup>27</sup> (“REAL ID Act”). Among its various and wide-ranging provisions, the REAL ID Act codified the factors that an IJ may consider in deciding whether to credit the testimony of an asylum applicant, expressly rejecting a standard that the courts of appeals had adopted in reviewing credibility determinations.<sup>28</sup>

### 1. IIRIRA: Narrowing the Scope and Standard of Review

The IIRIRA amended the Immigration and Nationality Act (INA)<sup>29</sup> to provide that, in an appeal from the BIA, “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>30</sup> This amendment essentially codified the standard previously set forth in *INS v. Elias-Zacarias*.<sup>31</sup> In that case, the Court held that, when an asylum applicant “seeks to obtain judicial reversal of the BIA’s determination, he must show that the evidence he presented was so compelling that no rea-

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25 See 8 U.S.C. § 1252(a)(2)(A) (2000 & Supp. V 2005) (precluding judicial review of expedited removal orders); *id.* § 1252(a)(2)(B) (providing that “no court shall have jurisdiction to review” administrative denials of various discretionary remedies); *id.* § 1252(a)(2)(C) (eliminating judicial review over removal orders based on criminal convictions).

26 See *id.* § 1252(b)(4)(B) (2000).

27 Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified as amended in scattered sections of 8, 49 U.S.C.).

28 See 8 U.S.C. § 1158(b)(1)(B)(iii) (Supp. V 2005).

29 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

30 8 U.S.C. § 1252(b)(4)(B). Prior to its amendment by the IIRIRA, the INA standard of appellate review provided that “findings of facts, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.” *Id.* § 1105a(a)(4) (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306(b), 110 Stat. 3009-546, 3009-612; see also Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133, 139 (2005) (quoting the pre-IIRIRA version of the statute).

31 502 U.S. 478 (1992); see also H.R. REP. NO. 109-72, at 167 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292 (“In 1996, as part of IIRIRA, Congress codified the principles that the Court articulated in *Elias-Zacarias*.”); Knight, *supra* note 30, at 140 (explaining that the IIRIRA codified the *Elias-Zacarias* standard).

sonable fact finder could fail to find the requisite fear of persecution.”<sup>32</sup>

In *Elias-Zacarias*, the Court declared that “[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it.”<sup>33</sup> This marked a departure from the prevailing “substantial evidence” standard of judicial review applicable to administrative agency decisions.<sup>34</sup> Under that standard, agency factfinding must rest on “sufficient evidence as a reasonable mind would accept as adequate to form a conclusion.”<sup>35</sup> *Elias-Zacarias*, and its subsequent statutory codification under the IIRIRA, imposes a “review standard considerably more narrow than the kind of review available in other administrative contexts.”<sup>36</sup>

Given the close similarity between the Supreme Court’s language in *Elias-Zacarias* and the statutory language in the IIRIRA, it is unclear why Congress felt the need to amend the INA. The legislative history of the IIRIRA is not particularly illuminating. The conference committee report simply notes the provision without offering any explanation of its significance.<sup>37</sup> However, testimony at a hearing on a precursor to the bill that ultimately became the IIRIRA did address the “need to limit and periodically restate the limits of de novo review of asylum claims.”<sup>38</sup>

Recently, several decisions adverse to the government in this area have not been appealed by the Department of Justice. These include several 9th Circuit decisions that appear to circumvent the Supreme Court limitations on judicial review stated in *INS v. Elias Zacarias* (the so-called “compelling evidence” test for judicial review of an asylum decision), finding that de novo review is appropriate

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32 *Elias-Zacarias*, 502 U.S. at 483–84. As Knight observes, the *Elias-Zacarias* standard and its subsequent statutory codification “dramatically narrow” the “substantial evidence” standard that typically applies to administrative agency determinations in other contexts, and which the majority of federal courts had applied in asylum cases prior to *Elias-Zacarias*. See Knight, *supra* note 30, at 140.

33 *Elias-Zacarias*, 502 U.S. at 481 n.1.

34 See Knight, *supra* note 30, at 135 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971)); JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 51.01 (2005)).

35 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

36 Knight, *supra* note 30, at 134 (quoting Susan K. Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 212 (2000)).

37 See H.R. REP. NO. 104-828, at 219 (1996) (Conf. Rep.).

38 *Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing on S. 269 Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 165 (1996) (statement of Dan Stein, Executive Director, Federation for American Immigration Reform).



where an evidentiary issue can be re-labeled an “error of law.” There are also several adverse precedents in the 7th and 1st Circuit of concern to us. The bottom line, however, is the . . . overly-aggressive judicial micro-management of the nation’s asylum system.<sup>39</sup>

It thus appears that at least some observers believed that legislative action was necessary to reinforce the *Elias-Zacarias* standard. The question that remains is whether the statutory change had the desired effect on the appellate courts.

## 2. The REAL ID Act: Specifying the Indicia of Credibility

Ten years after passing the IIRIRA, Congress returned to the issue of judicial review in asylum cases. Once again, the impetus for legislative action was the perception that appellate courts, especially the Ninth Circuit, had not sufficiently heeded the Supreme Court’s directions in *Elias-Zacarias*.<sup>40</sup>

The REAL ID Act amended the INA to specify a list of factors that IJs and the BIA may consider when assessing the credibility of an asylum applicant’s testimony:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.<sup>41</sup>

Insofar as this provision “codifies factors identified in case law on which an adjudicator may make a credibility determination,”<sup>42</sup> it did not substantially alter the existing standard. The appellate courts

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39 *Id.* (citations omitted). Senate Bill 269 contained provisions limiting the availability of judicial review in removal cases, but did not address the scope of judicial review in those cases where it would remain available. See Immigrant Control and Financial Responsibility Act of 1995, S. 269, 104th Cong. § 142 (1995).

40 See H.R. REP. NO. 109-72, at 167–68 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292–94.

41 8 U.S.C. § 1158(b)(1)(B)(iii) (Supp. V 2005).

42 H.R. REP. NO. 109-72, at 166–67, *reprinted in* 2005 U.S.C.C.A.N. at 291–92; see also Cianciarulo, *supra* note 12, at 134 (“The Real ID Act codifies the long-established

have indeed long recognized that these are appropriate factors for an IJ to consider when assessing an asylum seeker's credibility.<sup>43</sup>

However, the statutory provision did alter the prior law in at least one significant respect. Established INS guidelines for asylum cases had provided that "[m]inor inconsistencies, misrepresentations, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim."<sup>44</sup> All but one of the circuits had held likewise, finding that inconsistencies, inaccuracies, or falsehoods in an asylum applicant's testimony could support an adverse credibility determination only if they go "to the heart of the claim."<sup>45</sup> In contrast, the new statutory standard expressly permits reliance on any "inaccuracies or falsehoods . . . without regard to whether [they] go[] to the heart of the applicant's claim."<sup>46</sup>

There is at least some indication that the measure's proponents did not intend to give IJs and the BIA free rein to base credibility determinations *solely* on peripheral inconsistencies, inaccuracies, or falsehoods. In debate, Senator Brownback (R-Kan.) assured the Senate that, even under the new standard, "[i]t would not be reasonable to find a lack of credibility based on inconsistencies, inaccuracies or falsehoods that do not go to the heart of the asylum claim *without other evidence* that the asylum applicant is attempting to deceive the trier of

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prescription that adjudicators weigh the totality of the circumstances when making credibility determinations.").

43 See, e.g., *Nigussie v. Ashcroft*, 383 F.3d 531, 537 (7th Cir. 2004) (affirming an adverse credibility determination based on evasiveness and inconsistency of the alien's testimony); *Singh-Kaur v. INS*, 183 F.3d 1147, 1151–53 (9th Cir. 1999) (affirming an adverse credibility determination based on the alien's demeanor when testifying, internal inconsistency of testimony, implausibility of alien's account, and lack of detail in testimony).

44 Cianciarulo, *supra* note 12, at 135 (alteration in original) (quoting INS Supplementary Refugee/Asylum Adjudication Guidelines, *reprinted in* 67 INTERPRETER RELEASES 101, 102 (1990)).

45 See, e.g., *Moscoco-Morales v. Gonzales*, 188 F. App'x 780, 784 (10th Cir. 2006); *Kabamba v. Gonzales*, 162 F. App'x 337, 340 (5th Cir. 2006); *Marquez-Vasquez v. U.S. Attorney Gen.*, 135 F. App'x 326, 328 (11th Cir. 2005); *Leia v. Ashcroft*, 393 F.3d 427, 436 (3d Cir. 2005); *Sylla v. INS*, 388 F.3d 924, 926 (6th Cir. 2004); *Kondakova v. Ashcroft*, 383 F.3d 792, 796 (8th Cir. 2004); *Singh v. Ashcroft*, 362 F.3d 1164, 1171 (9th Cir. 2004); *Capric v. Ashcroft*, 355 F.3d 1075, 1089–91 (7th Cir. 2004); *Secaida-Rosales v. INS*, 331 F.3d 297, 308 (2d Cir. 2003); *Bojorques-Villanueva v. INS*, 194 F.3d 14, 16 (1st Cir. 1999).

46 8 U.S.C. § 1158(b)(1)(B)(iii); see also Cianciarulo, *supra* note 12, at 134 (noting that "the Real ID Act departs from established case law" in this regard).

fact.”<sup>47</sup> That caveat, however, is not reflected in the final conference report,<sup>48</sup> nor in the statutory language itself.<sup>49</sup>

In contrast to the IIRIRA, the REAL ID Act has a fairly detailed legislative history. The conference report asserts that “the creation of a uniform standard for credibility is needed to address a conflict on this issue between the Ninth Circuit on one hand and other circuits and the BIA.”<sup>50</sup> Yet, the report does not cite a single Ninth Circuit opinion that is at odds with those from other circuits or the BIA in this regard.<sup>51</sup> Nor does the report offer any explanation as to the nature of the supposed “conflict on this issue.”<sup>52</sup> Instead, the report cites two opinions in which the Ninth Circuit agreed that an IJ is “uniquely qualified to decide whether an alien’s testimony has about it the ring

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47 151 CONG. REC. S4838 (daily ed. May 10, 2005) (statement of Sen. Brownback) (emphasis added).

48 See H.R. REP. NO. 109-72, at 167–68 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292–94.

49 See 8 U.S.C. § 1158(b)(1)(B)(iii) (providing that an IJ or the BIA may make a credibility determination “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim”). The import of this provision is arguably tempered by the requirement that the factfinder base any credibility determination on “the totality of the circumstances, and all relevant factors.” See *id.*

This provision of the Real ID Act, however, is not a license to base a negative credibility finding in whole or in any significant part upon inconsistencies regarding immaterial facts. It merely permits immaterial inconsistencies to be considered as part of the totality of the circumstances. This is clear because the conference committee expressly rejected language in the House of Representatives version of the bill that would have allowed adjudicators to dispense with a reasoned totality of the circumstances analysis and make negative credibility determinations based on “*any such factor, including . . . any inaccuracies or falsehoods . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.*”

Cienciarulo, *supra* note 12, at 135 (footnote omitted) (alterations in original) (quoting H.R. 418, 109th Cong. § 101(a)(3)(B)(iii) (2005)).

50 H.R. REP. NO. 109-72, at 167, *reprinted in* 2005 U.S.C.C.A.N. at 292. Judge Alex Kozinski echoed this contention in a dissent excoriating his Ninth Circuit colleagues’ “know-it-all approach, an error *oft repeated* when *our circuit* reviews immigration cases in which an IJ has made an adverse credibility determination.” *Kumar v. Gonzales*, 444 F.3d 1043, 1060 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis added). The implication (whether intended or not) is that the Ninth Circuit has frequently reversed adverse credibility determinations and that it has been more prone to do so than the other courts of appeals. The Ninth Circuit decided *Kumar* after passage of the REAL ID Act but applied the pre-REAL ID standard of review because the case had been initiated before the effective date of the new standard. See *id.* at 1049–50 (majority opinion).

51 See H.R. REP. NO. 109-72, at 167, *reprinted in* 2005 U.S.C.C.A.N. at 292–93.

52 See *id.*

of truth’”<sup>53</sup> and that an IJ’s credibility determinations, based as they are on firsthand observation of the testimony, are entitled to great weight.<sup>54</sup>

More generally, proponents argued that changes in the system for adjudicating and reviewing asylum claims were necessary because “[a] number of terrorists [have] . . . abused the asylum system.”<sup>55</sup> In the course of debate, House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) referred to several “non-9/11 terrorists” who had sought asylum.<sup>56</sup> The REAL ID Act, Representative Sensenbrenner suggested, would “give our judges the opportunity to tell these people no.”<sup>57</sup> The conference report likewise points to instances of alleged “asylum abuse” by “alien terrorists.”<sup>58</sup> Yet, contrary to the implication of these remarks, only one of the individuals named in the conference report, Narudin Abdi, was actually granted asylum.<sup>59</sup> None of the other individuals identified by Representative Sensenbrenner or the conference report succeeded in their asylum claims.<sup>60</sup> Indeed, during the Senate debate on final passage of the REAL ID

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53 *Id.* at 167–68, *reprinted in* 2005 U.S.C.C.A.N. at 293 (quoting *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985), and citing *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 622 (9th Cir. 2003)).

54 *See id.* at 168, *reprinted in* 2005 U.S.C.C.A.N. at 293 (citing *Mendoza Manimbao*, 329 F.3d at 662).

55 *Id.* at 160, *reprinted in* 2005 U.S.C.C.A.N. at 286 (alterations in original) (quoting THOMAS R. ELDRIDGE ET AL., 9/11 AND TERRORIST TRAVEL 106 (2004)).

56 151 CONG. REC. H460 (daily ed. Feb. 9, 2005) (statement of Rep. Sensenbrenner).

57 *Id.* Again, Judge Kozinski echoes this sentiment when he warns that “oft repeated” reversals by appellate courts make IJs “even more reluctant to make adverse credibility findings.” *Kumar v. Gonzales*, 444 F.3d 1043, 1061 (9th Cir. 2006) (Kozinski, J., dissenting).

58 H.R. REP. NO. 109-72, at 160, *reprinted in* 2005 U.S.C.C.A.N. at 285–86.

59 *See id.* at 161, *reprinted in* 2005 U.S.C.C.A.N. at 286–87. The report mentions the cases of Ramzi Yousef, Ahmad Ajaj, Sheikh Abdul Rahman, Mir Aimal Kansi, Hesham Hedayet, Gazi Ibrahim Abu Mezer, and Nuradin Abdi. *Id.* at 160–61, *reprinted in* 2005 U.S.C.C.A.N. at 286. Of these, only Abdi was granted asylum. *See id.* at 161, *reprinted in* 2005 U.S.C.C.A.N. at 286. He was later arrested for allegedly plotting to blow up a shopping mall and “charged with conspiring to provide material support to al Qaeda,” and his asylum was revoked. *Id.*, *reprinted in* 2005 U.S.C.C.A.N. at 286–87. Earlier this year, Abdi pleaded guilty to one count of conspiring to support terrorists. *See* Jodi Andes, *Somali Man Pleads Guilty to Plot*, COLUMBUS DISPATCH, Aug. 1, 2007, at A1.

60 *See* Cianciarulo, *supra* note 12, at 104–05 (“[A]ll of the terrorists’ applications that Chairman Sensenbrenner mentions as evidence of a faulty asylum system were submitted prior to the implementation of stricter asylum provisions contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and were denied even under the less strict provision in place at the time.” (footnotes omitted));

Act, Senator Brownback criticized the changes affecting asylum: "This language was added based on a claim that our asylum system can be used by terrorists to enter the country. This is not the case."<sup>61</sup>

In Abdi's case, the conference report quotes the government's contention that, "'with the exception of some minor biographical data, every aspect of [Abdi's] asylum application . . . was false.'"<sup>62</sup> However, the report does not indicate whether the IJ in Abdi's case made any credibility determination.<sup>63</sup> In any event, it does not appear that Abdi's asylum ever reached a court of appeals.<sup>64</sup> Consequently, whatever other significance Abdi's case might have, it does not evidence any problem with judicial review of IJ and BIA credibility determinations.

## II. ANALYSIS

### A. *Assessing the Claims in Support of Restricted Judicial Review*

In the case of both the IIRIRA and the REAL ID Act, proponents contended that legislative intervention was necessary to constrain judicial review of credibility determinations by IJs and the BIA in asylum and removal cases. In particular, proponents asserted that the United States Court of Appeals for the Ninth Circuit has been especially prone to reversing adverse credibility determinations in such cases.<sup>65</sup>

To test these assertions, I collected data on "credibility reversals," i.e., opinions in which a federal court of appeals<sup>66</sup> vacated a BIA order of removal because of what the court found to be a flawed adverse

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see also *id.* at 104–05 & nn.20–21 (citing ELDRIDGE ET AL., *supra* note 55, at 47–48, 51, 215, 230).

61 151 CONG. REC. S4838 (daily ed. May 10, 2005) (statement of Sen. Brownback).

62 See H.R. REP. NO. 109-72, at 161, *reprinted in* 2005 U.S.C.C.A.N. at 287 (alterations in original) (quoting Government's Motion to Detain Defendant and Memorandum in Support at 4, *United States v. Abdi*, No. 2:04-CR-88 (S.D. Ohio June 14, 2004)).

63 See *id.*

64 A Lexis search for administrative and judicial decisions in Abdi's asylum case produced no results.

65 See Comment, *U.S. Asylum Law out of Sync with International Obligations: REAL ID Act*, 8 SAN DIEGO INT'L L.J. 209, 245 (2006) [hereinafter *Out of Sync*].

66 The data include opinions from the First through Eleventh Circuits. The Court of Appeals for the D.C. Circuit does not have jurisdiction over petitions for review in asylum and removal cases because there is no United States Immigration Court located within the District of Columbia. See U.S. Dep't of Justice, Executive Office for Immigration Review, <http://www.usdoj.gov/eoir/sibpages/ICadr.htm> (last visited Apr. 27, 2008).

credibility determination.<sup>67</sup> A decision counts as a “credibility reversal” if the appellate court cites the IJ’s or BIA’s erroneous credibility determination as a basis for vacating the BIA’s order. In most instances, the court’s stated basis for rejecting the adverse credibility determination is a lack of substantial evidentiary support.<sup>68</sup> In a few instances, appellate courts have vacated and remanded on the grounds that an adverse credibility determination resulted from a due process violation.<sup>69</sup>

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67 I collected the data using Lexis. Under the heading “All Topics > Immigration Law > Deportation & Removal,” I searched for federal courts of appeals opinions reversing or vacating decisions of the BIA, and I identified those in which the appellate court reversed an adverse credibility determination.

68 The following do not count as “credibility reversals”:

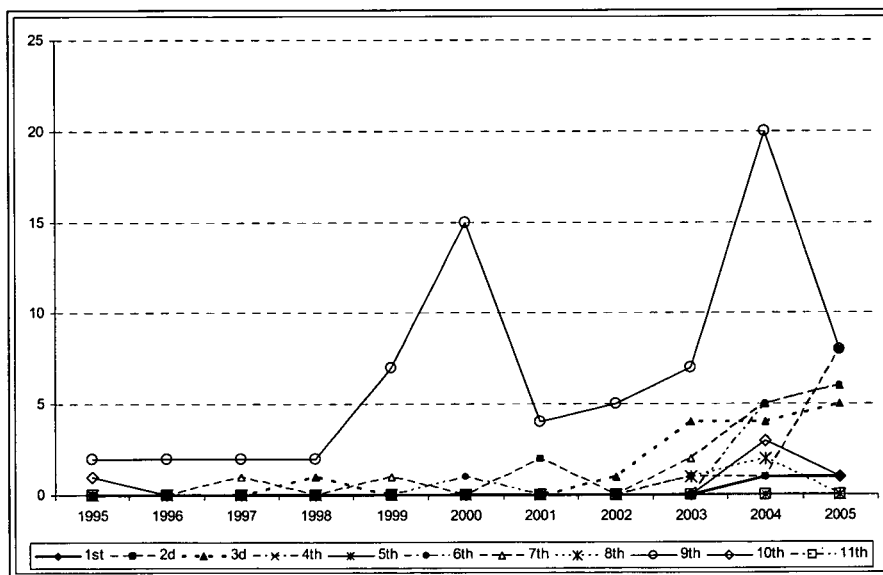
- Cases in which the appellate court upholds or does not address the IJ’s adverse credibility determination, but vacates and remands on other grounds. *See, e.g.,* *Dhoumo v. Bd. of Immigration Appeals*, 416 F.3d 172, 174 (2d Cir. 2005) (vacating and remanding where the IJ and the BIA failed to address the “threshold question” of the alien’s nationality, but “not decid[ing] whether the IJ’s adverse credibility finding was supported by substantial evidence”); *Camara v. Ashcroft*, 378 F.3d 361, 369–71 (4th Cir. 2004) (finding the IJ’s adverse credibility determination supported by evidence in the record, but vacating and remanding where the IJ ignored other evidence that could support the asylum claim).
- Cases in which the appellate court questions the IJ’s adverse credibility determination in dicta, but affirms anyway on other grounds. *See, e.g.,* *Kumah v. Ashcroft*, 102 F. App’x 185, 186–87 (1st Cir. 2004) (characterizing an IJ’s adverse credibility determination as “somewhat surprising” and “just barely” supported by the record, but affirming denial of asylum where the alien’s testimony, even if credible, was insufficient to demonstrate eligibility for asylum).
- Cases in which the BIA did not adopt the IJ’s adverse credibility determination, but denied asylum on other grounds. *See, e.g.,* *Zhen Hua Li v. Attorney Gen.*, 400 F.3d 157, 161, 168–70 (3d Cir. 2005) (vacating and remanding where the BIA did not adopt the IJ’s adverse credibility determination but denied asylum on grounds that the alien’s testimony, even if credible, was insufficient to prove eligibility for asylum); *Mukamusoni v. Ashcroft*, 390 F.3d 110, 118–19, 126 (1st Cir. 2004) (same).
- Cases in which the appellate court vacates and remands where the IJ or BIA failed to make a credibility determination at all. *See, e.g.,* *Lin Un v. Gonzales*, 415 F.3d 205, 208–11 (1st Cir. 2005) (vacating and remanding where the IJ assumed the alien’s credibility but denied asylum on grounds that testimony failed to establish past persecution).

69 In several cases, the appellate court found a due process violation where the apparent evasiveness and inconsistencies in the alien’s testimony, on which the IJ or BIA based the adverse credibility determination, were attributable to an incompetent translator. *See, e.g.,* *Amadou v. INS*, 226 F.3d 724, 728 (6th Cir. 2000); *Perez-Lastor v. INS*, 208 F.3d 773, 777–78 (9th Cir. 2000). In other cases, the appellate court found a due process violation where the BIA made an adverse credibility determination based

I tallied the annual number of credibility reversals for each circuit during the period from 1995–2005. For each circuit, I also calculated the cumulative and average number of credibility reversals over the entire eleven-year period; similarly, I calculated the aggregate and average number of credibility reversals across all circuits in each year.<sup>70</sup>

The number of credibility reversals is fairly small overall. I identified only 138 such opinions over the entire eleven-year period under examination. Of these, more than half (76) were from the last two years. The Ninth Circuit accounts for just over half (74) of the total for the eleven-year period, about three-quarters (46) of the total (62) for the period from 1995–2003, and just over four-fifths (39) of the total (47) for the period from 1995–2002.<sup>71</sup>

FIGURE 1. CREDIBILITY REVERSALS BY CIRCUIT: 1995–2005



Viewed in isolation, these numbers might appear to support the contentions that the Ninth Circuit has more frequently reversed adverse credibility determinations than its sister courts and that the courts of appeals overall have done so more frequently in recent

on alleged inconsistencies in the alien's testimony that the IJ had not raised, so that the alien had no notice of, nor opportunity to respond to, the perceived inconsistencies. See, e.g., *Campos-Sanchez v. INS*, 164 F.3d 448, 450–51 (9th Cir. 1999).

<sup>70</sup> See *infra* Appendix, Table 1.

<sup>71</sup> See *infra* Appendix, Table 1.

years.<sup>72</sup> Political debate is often driven by anecdote rather than rigorous data.<sup>73</sup> Each instance of a credibility reversal stands as an anecdote that critics may use to illustrate the supposed propensity of the appellate courts generally, and the Ninth Circuit in particular, to “pick[] apart the IJ’s [credibility] findings.”<sup>74</sup>

Nevertheless, the raw numbers are deceptive, because they fail to account for the significant disparity in the volume of petitions for review in removal cases as between the Ninth Circuit and the other circuits, and the significant increase in such petitions across all circuits during the last two to three years of the period under examination. To put the figures into perspective, I tallied the total number of opinions reviewing BIA orders of removal, by circuit, for the same eleven-year period.<sup>75</sup>

Of the 9072 opinions tallied, the Ninth Circuit was responsible for more than half (5211).<sup>76</sup> The annual number of such opinions across all circuits, which remained fairly steady from 1995 until 2002, nearly doubled in 2003, and more than doubled again in 2004, remaining steady at the new peak the following year.<sup>77</sup> Thus, the last two years account for more than half (4657) of the total opinions over

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<sup>72</sup> See *supra* Figure 1.

<sup>73</sup> Various commentators, both scholarly and otherwise, have discussed, and criticized, anecdote-driven public policy. See, e.g., Hans S. Nichols, *Making Policy by Political Anecdote*, INSIGHT ON NEWS, Aug. 20, 2001, at 20; *Morning Edition: Commentary by William Galston* (NPR radio broadcast Mar. 9, 2000), available at <http://www.npr.org/templates/story/story.php?storyId=1071358>. Anecdotes have a legitimate role in policy debate. See David A. Rochefort, Commentary, *The Role of Anecdotes in Regulating Managed Care*, HEALTH AFF., Nov.–Dec. 1998, at 142, 143–48. Because of their “relative brevity, the qualitative information they provide, and their illustrative poignancy,” anecdotes can serve the useful purpose of calling attention to an issue and getting it on the policy agenda. *Id.* at 142. However, “anecdotal reports of abuses certainly should not be used by public officials as an excuse to overreact with new laws or rules that disregard standards of regulatory reasonableness.” *Id.* at 147.

<sup>74</sup> *Kumar v. Gonzales*, 444 F.3d 1043, 1060 (9th Cir. 2006) (Kozinski, J., dissenting); see also Palmer et al., *supra* note 3, at 80 (“[I]t may be that litigants pay less attention to rates of reversal than to the overall number of reversals and the content of the courts’ opinions. A large number of reversals might make an impression on people, regardless of how many affirmances are issued in the same year, at least if those reversals establish favorable precedent.”). What is true of litigants is doubtless also true of politicians.

<sup>75</sup> See *infra* Appendix, Table 2. Again, I used the Lexis heading “All Topics > Immigration Law > Deportation & Removal,” this time searching for all federal courts of appeals opinions reviewing decisions of the BIA, and recording the total annual number of such opinions for each circuit.

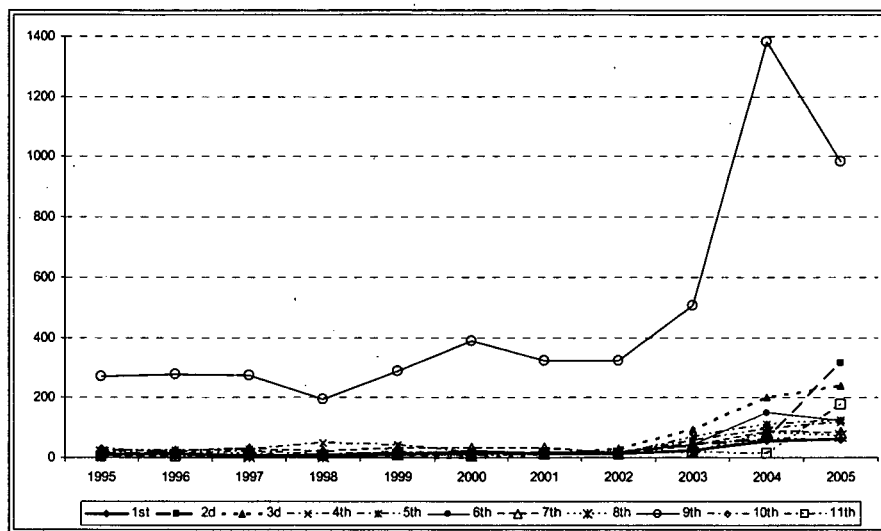
<sup>76</sup> See *infra* Appendix, Table 2.

<sup>77</sup> See *infra* Appendix, Table 2.



the eleven-year period, and the last three years account for more than three-fifths (5589) of the total.<sup>78</sup>

FIGURE 2. REMOVAL CASES BY CIRCUIT: 1995–2005



The figures for the last three years reflect “a dramatic increase in immigration cases” in the courts of appeals during that period.<sup>79</sup> The explanation for the so-called “immigration surge”<sup>80</sup> is twofold. First, the output of BIA decisions increased substantially in 2002, when the BIA began making greater use of summary review procedures to dispose of a backlog of more than 56,000 appeals from IJ decisions.<sup>81</sup> Second, the proportion of BIA decisions from which appellate review is sought has also increased over the same period.<sup>82</sup>

<sup>78</sup> See *infra* Appendix, Table 2.

<sup>79</sup> See Palmer et al., *supra* note 3, at 3–4 (noting a fivefold increase in petitions for review of BIA decisions since 2002).

<sup>80</sup> *Id.* at 3.

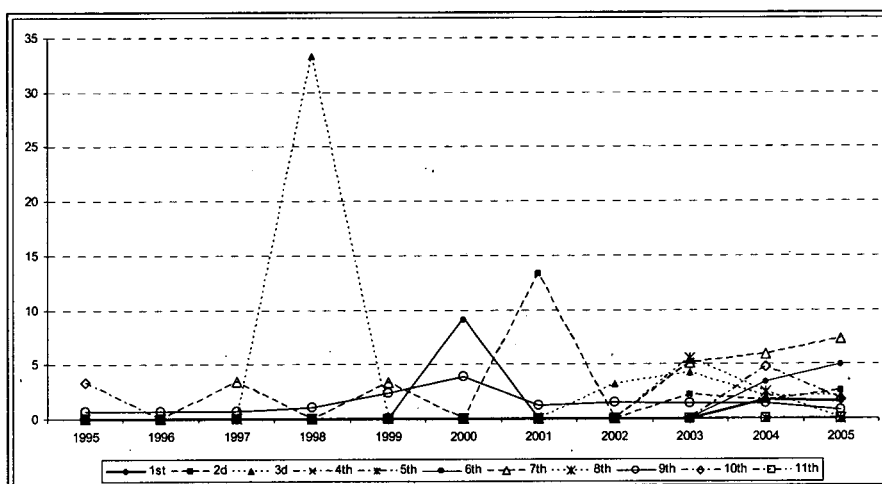
<sup>81</sup> *Id.* at 3–4; see *supra* notes 14–20 and accompanying text.

<sup>82</sup> Palmer et al., *supra* note 3, at 4. Palmer, Yale-Loehr, and Cronin examine data on petitions for review in an effort to test various competing explanations for the increased appeal rate in immigration cases generally. *Id.* at 43–48. They consider several possible explanatory variables pertaining to characteristics of BIA decisions, characteristics of the BIA itself, characteristics of decisions by the courts of appeals, and changes in behavior by aliens facing removal and their attorneys. See *id.* at 55–93. Their analysis is inconclusive as to most of these variables, but it supports their hypothesis that an increased proportion of final orders of dismissal among the pool of BIA decisions has prompted an increased resort to judicial review by immigration attorneys on behalf of clients facing removal. See *id.* at 94.

Based on the data for the annual number of credibility reversals and the number of petitions for review in removal cases, I calculated the annual credibility reversal rates for each circuit. I also calculated the cumulative and mean rates for each circuit over the entire eleven-year period and the aggregate and mean for all circuits in each year.<sup>83</sup>

Viewing credibility reversals as a proportion of all appellate decisions in removal cases, the data fail to support the claim that the Ninth Circuit has been especially prone to rejecting adverse credibility determinations. However, the data do show an increasing credibility reversal rate for other courts of appeals in recent years.

FIGURE 3. CREDIBILITY REVERSALS PERCENTAGE BY CIRCUIT: 1995–2005



For the overall period from 1995–2005, the Ninth Circuit did not reverse a greater percentage of removal orders on credibility grounds than the other circuits. The Ninth Circuit's cumulative credibility reversal rate for the eleven-year period was 1.42% compared to 1.49% for the aggregate of all circuits. The mean annual reversal rate over the same period was 1.45% for the Ninth Circuit, slightly higher than the 1.37% mean annual rate for the aggregate of all circuits.<sup>84</sup> However, rates for the other circuits during this period must be viewed with caution, given the very small number of cases involved. For example, the 33.33% reversal rate for the Third Circuit in 1998<sup>85</sup> reflects a single credibility reversal out of a total of three petitions for review in removal cases decided that year. Such outliers affect both

83 See *infra* Appendix, Table 3.

84 See *infra* Appendix, Table 3.

85 See *infra* Appendix, Table 3.

the cumulative rates for the individual circuits concerned and the aggregate rates for all circuits, limiting the reliability of cross-circuit comparisons.

For the period from 2003–2005, when the overall volume of opinions in removal cases mushroomed, a very different picture emerges. While the Ninth Circuit's annual credibility reversal rate remained at or below its annual average for the eleven-year period, the rates for most of the other circuits increased markedly.<sup>86</sup> The Ninth Circuit's cumulative credibility reversal rate for the period from 2003–2005 was lower than those of the Second, Third, Sixth, Seventh, Eighth, and Tenth Circuits, and below the overall rate for all eleven circuits.<sup>87</sup> In each of the last two years under examination, the Ninth Circuit had a lower credibility reversal rate than any court other than the Fourth, Fifth, and Eleventh Circuits,<sup>88</sup> none of which ever reversed an adverse credibility determination over the entire eleven-year period from 1995–2005.<sup>89</sup>

Thus, for the years leading up to the passage of the REAL ID Act, the data flatly refute the notion that the Ninth Circuit had been an activist outlier when it came to reviewing adverse credibility determinations in asylum cases. To the contrary, the most activist court in this regard in recent years has been the Seventh Circuit, with cumulative and mean credibility reversal rates exceeding six percent for the period 2003–2005—more than five times the mean credibility reversal rate for the Ninth Circuit over the same period.<sup>90</sup>

The longitudinal trends do indicate an increasing propensity on the part of several of the circuits to reject IJ/BIA adverse credibility determinations. There are several possible explanations for why the First, Second, Third, Sixth, Seventh, Eighth, and Tenth Circuits have caught up to or surpassed the Ninth Circuit in recent years. It may

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86 See *infra* Appendix, Table 3.

87 See *infra* Appendix, Table 4.

88 See *infra* Appendix, Table 5.

89 See *infra* Appendix, Table 3. It is notable that in 2006—following the passage of the REAL ID Act—the Fourth and Fifth Circuits each reversed an adverse credibility determination for the first time in at least twelve years. See *Tewabe v. Gonzales*, 446 F.3d 533, 540 (4th Cir. 2006) (“The IJ erred in this case simply because he gave no cogent explanation based on common sense, the record, or any other relevant factor for disbelieving Tewabe.”); *Kabamba v. Gonzales*, 162 F. App’x 337, 343 (5th Cir. 2006).

90 See *infra* Appendix, Table 4. The great disparity in volume of opinions in removal cases between the Ninth Circuit and the other circuits holds true for the period from 2002–2005. However, the volume of opinions in each of the other circuits grew to levels at which annual credibility reversal rates are less susceptible to distortion by a small absolute number of reversals.

simply be that these courts are now seeing a much greater number of petitions for review in removal cases and thus have more exposure to flawed IJ and BIA decisions. It may also be that the underlying error rate for IJ and BIA credibility determinations has increased in recent years. Various factors might account for a rise in the error rate. The BIA's increased reliance on summary review by a single Board member may mean that IJ decisions are receiving less careful scrutiny at the BIA level.<sup>91</sup> Increased attention to, and concern over, terrorism following 9/11 has likely given rise to great political pressure on IJs and the BIA to deny asylum claims, and these administrative actors may increasingly be using adverse credibility determinations as a basis to accomplish that goal.<sup>92</sup>

### B. *Moral Panic and the Symbolic Politics of Restricting Judicial Review*

If the REAL ID Act's limitations on appellate review in removal cases are aimed at an illusory problem, the question arises of how best to understand the provision. One possibility, of course, is that the legislation's proponents were merely ill-informed, and honestly, if mistakenly, believed that out-of-control appellate courts were wreaking havoc with the asylum system by interfering with administrative credibility determinations and imperiling national security by enabling alien terrorists to gain entry to the United States under false pre-

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91 See Palmer et al., *supra* note 3, at 5, 27–32 (discussing the increased reliance on “streamlined” procedures since 2002 and criticisms thereof).

92 Critics, particularly within the immigration law bar, have alleged that a “culture of no” has become pervasive within the agencies responsible for immigration law enforcement. See, e.g., Nina Bernstein, *Children Alone and Scared, Fighting Deportation*, N.Y. TIMES, Mar. 28, 2004, § 1, at 1; Mike Nixon, *Immigration Practice Advances Privilege of Independence*, ST. LOUIS DAILY REC., July 4, 2005, at A1 (“‘Ever since 9/11, even with simple petitions, you have this whole culture of “no,” where everybody is afraid of being the one who let in the next terrorist.’” (quoting immigration lawyer Tim Wichmer)); *The Politics of Immigration: Business v. Bush*, ECONOMIST, Oct. 18, 2003, at 29; Ann Woolner, *Immigrants to U.S. Face Delays Posed by Culture of “No,”* L.A. BUS. J., Sept. 13, 2004, at 39; Pam Zubeck, *Immigration Horror Stories Aren’t Unusual*, GAZETTE (Colo. Springs, Colo.), Oct. 19, 2003, at A1; Press Release, Am. Immigration Lawyers Ass’n, Visa Denials and “Culture of No” Hurt America (Sept. 3, 2004), available at <http://www.aila.org/content/default.aspx?docid=11337>; Catholic Legal Immigration Network, Inc., Department of Homeland Security, <http://www.cliniclegal.org/Advocacy/dhs.html> (last visited Mar. 12, 2008) (“[S]ince the transfer of immigration services to a department focused on security, a ‘culture of no’ has pervaded application decisions.”); see also Palmer et al., *supra* note 3, at 31 n.170 (discussing the perceived loss of independence and the increased politicization of the BIA). See generally Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481 (reviewing the immigration law landscape in the aftermath of 9/11).

tenses. An alternative hypothesis is that the legislation, and the supporting assertions of judicial activism and terrorist threat, have some other significance.

"Political action has a meaning inherent in what it signifies about the structure of the society as well as in what such action actually achieves."<sup>93</sup> Thus, political action—whether by social movements or by legislatures—may seek to advance "symbolic rather than . . . instrumental goals."<sup>94</sup> From the perspective of a "dramatistic" understanding of politics,<sup>95</sup> legislative enactments, even where they do not have any instrumental significance or effect, may have powerful symbolic significance by establishing certain ideas or norms as socially and politically authoritative.<sup>96</sup> The dramatistic perspective helps explain why "[t]he most intensive dissemination of symbols commonly attends the enactment of legislation which is most meaningless in its effects upon resource allocation."<sup>97</sup>

Symbolic politics frequently come to the fore in the context of "moral panic." In sociologist Stanley Cohen's formulation,

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might pro-

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93 JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE* 166 (2d ed. 1986).

94 *Id.*

95 *Id.* ("We refer to it as a dramatistic theory because, like drama, it represents an action which is make-believe but which moves its audience . . . . It is make-believe in that the action need have no relation to its ostensible goal. The effect upon the audience comes from the significance which they find in the action as it represents events or figures outside of the drama.").

96 *Id.*; cf. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 319 (2001) (discussing "the role of rhetoric in constructing law, legal power relationships, and even public perceptions of social crises that lead to new legislation").

97 Murray Edelman, *Symbols and Political Quiescence*, 54 AM. POL. SCI. REV. 695, 697 (1960).

duce such changes as those in legal and social policy or even in the way society conceives itself.<sup>98</sup>

The political arguments in support of restricting appellate review in asylum cases bear the principal hallmarks of moral panic<sup>99</sup>:

- concern about the threat (real or imagined) that terrorists will use fraudulent asylum claims to enter into and remain in this country;<sup>100</sup>
- exaggeration of the number and significance of cases cited, such that the expression of concern is disproportionate to the true extent and seriousness of the alleged problem;<sup>101</sup>
- a consensus that judicial reversals of adverse credibility determinations in asylum cases pose a serious threat that must be addressed;<sup>102</sup> and
- expressions of hostility and moral outrage toward “activist judges,” casting them as “folk devils” who personify the threat.<sup>103</sup>

The narrowed scope and standard of appellate review in asylum cases, as enacted under the REAL ID Act, purportedly serves the instrumental purpose of stemming “asylum abuse” by “alien terrorists” aided and abetted by “activist judges.”<sup>104</sup> Yet the evidence demonstrates that the vaunted threat is, at best, grossly exaggerated. The courts of appeals have reversed only a tiny fraction of adverse credibility determinations by IJs and the BIA, and the cases in which they have

98 STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (3d ed. 2002); *see also* Filler, *supra* note 96, at 318, 346–66 (analyzing the legislative debate and adoption of sex offender registration statutes in terms of “moral panic”); Michael Welch, *Ironies of Social Control and the Criminalization of Immigrants*, 39 CRIME, L. & SOC. CHANGE 319, 319–21 (2003) (examining legislation and public debate over immigration and terrorism in terms of moral panic).

99 *See* COHEN, *supra* note 98, at 1; *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003) (“The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community. Although the fervor typically fades in a relatively short time, panics can effectively become institutionalized if legal and policy changes result.”).

100 *See supra* note 55 and accompanying text; *see also* COHEN, *supra* note 98, at xviii–xxi (discussing moral panic concerning “bogus” asylum seekers).

101 *See* COHEN, *supra* note 98, at 19–26; *see, e.g.*, Scott & Steinberg, *supra* note 99, at 807 (discussing the “exaggerated perception of the seriousness of the threat and the number of [juvenile] offenders”).

102 *See* COHEN, *supra* note 98, at xix; *supra* notes 50–51.

103 *See Out of Sync*, *supra* note 65, at 211–12.

104 *See id.*; *supra* notes 50–61 and accompanying text.

done so are fairly egregious, with IJs and the BIA relying on shaky, speculative, or specious grounds for discrediting the applicant's testimony.<sup>105</sup> Nor has there been any case in which a court of appeals reversed an IJ/BIA denial of an asylum claim by a known or suspected "alien terrorist."<sup>106</sup>

In contrast, there has been growing recognition that perceived flaws in the administrative adjudication of asylum and other removal cases, including but not limited to unfounded adverse credibility determinations, are a real concern, not just for the individual asylum claimants affected, but for the integrity of the administrative adjudication system itself.<sup>107</sup> In response to criticism, DOJ commissioned a review of IJ case handling and announced measures aimed at improving IJ and BIA procedures and decisionmaking.<sup>108</sup> By further insulating IJ credibility determinations from judicial review, the REAL ID Act only compounds that problem.

Yet, the REAL ID Act's restriction of appellate review in asylum cases is more than simply a misguided "solution" to an illusory "threat." The enactment of this legislation has powerful symbolic significance by establishing certain ideas or norms as socially and politically authoritative.<sup>109</sup> It represents a dramaturgical set piece in which "activist judges" and "alien terrorists" are cast as folk devils who threaten the integrity and security of the nation.<sup>110</sup>

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105 See *supra* Part II.A.

106 See *supra* notes 58–64 and accompanying text.

107 See Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–36 (2006) (examining disparities in IJ disposition of asylum cases); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–78 (2007) (same); Julia Preston, *Wide Disparities in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1 (noting controversy over political influence in the appointment of IJs); see also *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (7th Cir. 2005) (criticizing the administrative adjudication of asylum claims).

108 See Ramji-Nogales et al., *supra* note 107, at 381 n.151 (citing Memorandum from Alberto Gonzalez, Attorney Gen., to Immigration Judges (Jan. 9, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>). See generally U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION (2006), available at <http://trac.syr.edu/tracatwork/detail/P104.pdf> (summarizing measures designed to achieve reform). The DOJ study and proposed measures have met with skepticism from critics who contend they are inadequate to redress the problems with the IJ/BIA system. See Ramji-Nogales et al., *supra* note 107, at 385 (criticizing certain measures as "vague and apparently very limited reform [that] does not go nearly far enough").

109 See GUSFIELD, *supra* note 93, at 166.

110 In applying the dramaturgical perspective and folk-devil/moral-panic framework to discourse about "alien terrorists," I do not mean to suggest that concerns over terrorism are merely delusions. Real people (both alien and domestic) have commit-

The folk demonization of “activist judges” hardly began with the REAL ID Act. To the contrary, symbolic (and not-so-symbolic) attacks on “activist judges” have been a staple of right-wing politics for some time.<sup>111</sup> In a sense, the controversy over judicial review of IJ asylum determinations represents a “perfect storm”: the confluence of two ongoing moral panics and the association of “activist judges” with “alien terrorists” as folk devils posing a grave threat to the nation.

### CONCLUSION

The REAL ID Act seeks to limit judicial review of adverse credibility determinations and denials of asylum by Immigration Judges and

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ted real acts of violence and destruction for the purpose of expressing some political grievance or advancing some political cause; to the extent that “terrorism” refers to such people and their actions, the object of concern is real enough. My argument here is that the discourse of “terrorism” has—particularly since September 11, 2001—been applied in contexts and for purposes of questionable, or even nonexistent, relationship to actually existing terrorism, and with the effect of exaggerating its real significance. The dramatic perspective and folk-devil/moral-panic framework provide a useful analytical device for understanding and critiquing such symbolic-political invocations of a “terrorist” threat.

111 Dahlia Lithwick summarizes the argument:

You’ve heard “activist judges” so many times—from the president, from Congress, from the angry guys on the radio—that you can define it right along with me. Together then: Liberal activist judges make law, as opposed to interpreting it. They ignore the plain meaning of texts to invent new rights. Superimposing their moral views onto their legal reasoning, they brazenly advance the cause of the fringe liberal elites in the culture wars.

Dahlia Lithwick, *Activist Judges? What’s in a Name?*, SEATTLE POST-INTELLIGENCER, Aug. 18, 2004, at B7; see also Jane Lampman, *Bringing the Case Against Judges*, CHRISTIAN SCI. MONITOR, Apr. 13, 2005, at 15 (summarizing the debate over judicial activism); Rush Limbaugh, *Liberalism Implemented by Activist Judges*, *The Rush Limbaugh Show* (radio broadcast Dec. 1, 2004), available at [http://www.rushlimbaugh.com/home/estack/liberalism\\_implemented\\_by\\_activist\\_judges.guest.html](http://www.rushlimbaugh.com/home/estack/liberalism_implemented_by_activist_judges.guest.html) (characterizing judicial activism as “some liberal judge” overruling the will of the voters); Bill Mears, *O’Connor: Don’t Call Us ‘Activist Judges,’* CNN.COM, Nov. 28, 2006, <http://www.cnn.com/2006/POLITICS/10/27/mears.judicialindependence> (summarizing the debate over judicial activism). The charge of judicial activism has specifically been leveled by critics who assert that courts must not “second guess” administrative decisionmakers on matters concerning terrorism and national security. See, e.g., Associated Press, *Gonzales: Judges Unfit to Rule on Terror Policy*, MSNBC.COM, Jan. 17, 2007, <http://www.msnbc.msn.com/id/16668110>; Terry Frieden, *Ashcroft: ‘Activist’ Judges Can Put Nation’s Security at Risk*, CNN.COM, Nov. 12, 2004, <http://www.cnn.com/2004/ALLPOLITICS/11/12/ashcroft.judges/index.html>. The attacks against “activist judges” have sometimes gone beyond mere rhetoric, provoking death threats. See Susan Jacoby, *The Activist Judge Myth*, TOMPAINE.COM, Aug. 14, 2006, [http://www.tompaine.com/articles/2006/08/14/the\\_activist\\_judge\\_myth.php](http://www.tompaine.com/articles/2006/08/14/the_activist_judge_myth.php) (noting death threats against judges in the Terry Schiavo case and the Dover, Pennsylvania “intelligent design” case).



the Board of Immigration Appeals. The stated justifications for this legislative intervention—that the appellate courts have been insufficiently deferential to IJ and BIA decisions, and that judicial interference threatens national security by enabling alien terrorists to remain in the United States under the guise of false asylum claims—lack evidentiary support. In fact, appellate courts have reversed IJ/BIA adverse credibility determinations in only a small fraction of cases, and they have done so in response to highly questionable administrative procedures and reasoning. None of the cases in which appellate courts have reversed unfounded adverse credibility determinations have involved suspected alien terrorists.

Rather than a rational response to a serious problem, this legislative intervention is best understood as an instance of symbolic politics. The legislative debate and the emerging legislation are scenes in a political drama (in varying measures tragedy, comedy, and farce) in which “activist judges” and “alien terrorists” are cast as folk devils at the center of overlapping moral panics. From this perspective, it is immaterial whether the asserted rationale for the legislation accords with reality, or even whether appellate judges actually show greater deference to IJ and BIA credibility determinations. Regardless of the factual foundation or behavioral impact, the enactment of this measure is significant in relation to establishing the social and political authority of certain ideas or norms<sup>112</sup>—namely that judges ought not to exercise independent review over administrative decisions and that alien terrorists represent a threat justifying curbs on judicial independence and the rule of law.

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112 See GUSFIELD, *supra* note 93, at 166.

## APPENDIX

TABLE 1. CREDIBILITY REVERSALS BY CIRCUIT: 1995–2005

	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>	<i>6th</i>	<i>7th</i>	<i>8th</i>	<i>9th</i>	<i>10th</i>	<i>11th</i>	<i>Aggr.</i>	<i>Mean</i>
2005	1	8	5	0	0	6	6	0	8	1	0	35	3.18
2004	1	1	4	0	0	5	5	2	20	3	0	41	3.73
2003	0	1	4	0	0	0	2	1	7	0	0	15	1.36
2002	0	0	1	0	0	0	0	0	5	0	0	6	0.55
2001	0	2	0	0	0	0	0	0	4	0	0	6	0.55
2000	0	0	0	0	0	1	0	0	15	0	0	16	1.45
1999	0	0	0	0	0	0	1	0	7	0	0	8	0.73
1998	0	0	1	0	0	0	0	0	2	0	0	3	0.27
1997	0	0	0	0	0	0	1	0	2	0	0	3	0.27
1996	0	0	0	0	0	0	0	0	2	0	0	2	0.18
1995	0	0	0	0	0	0	0	0	2	1	0	3	0.27
<i>Cumul.</i>	2	12	15	0	0	12	15	3	74	5	0	138	12.55
<i>Mean</i>	0.18	1.09	1.36	0.00	0.00	1.09	1.36	0.27	6.73	0.45	0.00	12.55	1.14

TABLE 2. REMOVAL DECISIONS BY CIRCUIT: 1995–2005

	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>	<i>6th</i>	<i>7th</i>	<i>8th</i>	<i>9th</i>	<i>10th</i>	<i>11th</i>	<i>Aggr.</i>	<i>Mean</i>
2005	63	316	240	117	124	122	82	72	983	58	178	2355	214.0
2004	57	61	200	97	111	150	85	82	1381	63	15	2302	209.2
2003	23	46	95	56	69	42	39	18	506	22	16	932	84.73
2002	13	19	32	17	11	17	15	15	324	19	13	495	45.00
2001	14	15	12	14	15	16	31	15	324	14	10	480	43.64
2000	20	18	1	17	20	11	30	8	389	16	8	538	48.91
1999	11	14	4	43	8	13	30	11	289	17	8	448	40.73
1998	8	12	3	49	1	7	20	3	193	9	6	311	28.27
1997	4	5	2	28	15	7	29	5	275	22	6	398	36.18
1996	13	13	6	25	6	14	21	9	278	15	3	403	36.64
1995	10	13	3	22	7	12	23	18	269	30	3	410	37.27
<i>Cumul.</i>	236	532	598	485	387	411	405	256	5211	285	266	9072	824.7
<i>Mean</i>	21.45	48.3	54.3	44.0	35.1	37.3	36.8	23.2	473.7	25.9	24.18	824.73	74.98

TABLE 3. CREDIBILITY REVERSAL PERCENTAGE BY CIRCUIT: 1995–2005

	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>	<i>6th</i>	<i>7th</i>	<i>8th</i>	<i>9th</i>	<i>10th</i>	<i>11th</i>	<i>Aggr.</i>	<i>Mean</i>
2005	1.59	2.53	2.08	0.00	0.00	4.92	7.32	0.00	0.81	1.72	0.00	1.49	1.91
2004	1.75	1.64	2.00	0.00	0.00	3.33	5.88	2.44	1.45	4.76	0.00	1.78	2.11
2003	0.00	2.17	4.21	0.00	0.00	0.00	5.13	5.56	1.38	0.00	0.00	1.61	1.68
2002	0.00	0.00	3.13	0.00	0.00	0.00	0.00	0.00	1.54	0.00	0.00	1.21	0.42
2001	0.00	13.33	0.00	0.00	0.00	0.00	0.00	0.00	1.23	0.00	0.00	1.25	1.32
2000	0.00	0.00	0.00	0.00	0.00	9.09	0.00	0.00	3.86	0.00	0.00	2.97	1.18
1999	0.00	0.00	0.00	0.00	0.00	0.00	3.33	0.00	2.42	0.00	0.00	1.79	0.52
1998	0.00	0.00	33.33	0.00	0.00	0.00	0.00	0.00	1.04	0.00	0.00	0.96	3.12
1997	0.00	0.00	0.00	0.00	0.00	0.00	3.45	0.00	0.73	0.00	0.00	0.75	0.38
1996	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.72	0.00	0.00	0.50	0.07
1995	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.74	3.33	0.00	0.73	0.37
<i>Cumul.</i>	0.85	2.26	2.51	0.00	0.00	2.92	3.70	1.17	1.42	1.75	0.00	1.49	1.51
<i>Mean</i>	0.30	1.79	4.07	0.00	0.00	1.58	2.28	0.73	1.45	0.89	0.00	1.37	1.19

TABLE 4. CREDIBILITY REVERSAL PERCENTAGE BY CIRCUIT: 2003–2005

	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>	<i>6th</i>	<i>7th</i>	<i>8th</i>	<i>9th</i>	<i>10th</i>	<i>11th</i>	<i>Aggr.</i>	<i>Mean</i>
2005	1.59	2.53	2.08	0.00	0.00	4.92	7.32	0.00	0.81	1.72	0.00	1.49	1.91
2004	1.75	1.64	2.00	0.00	0.00	3.33	5.88	2.44	1.45	4.76	0.00	1.78	2.11
2003	0.00	2.17	4.21	0.00	0.00	0.00	5.13	5.56	1.38	0.00	0.00	1.61	1.68
<i>Cumul.</i>	1.40	2.36	2.43	0.00	0.00	3.50	6.31	1.74	1.22	2.80	0.00	1.63	1.98
<i>Mean</i>	1.11	2.11	2.76	0.00	0.00	2.75	6.11	2.66	1.22	2.16	0.00	1.63	1.90

TABLE 5. CREDIBILITY REVERSAL PERCENTAGE BY CIRCUIT: 2004–2005

	<i>1st</i>	<i>2d</i>	<i>3d</i>	<i>4th</i>	<i>5th</i>	<i>6th</i>	<i>7th</i>	<i>8th</i>	<i>9th</i>	<i>10th</i>	<i>11th</i>	<i>Aggr.</i>	<i>Mean</i>
2005	1.59	2.53	2.08	0.00	0.00	4.92	7.32	0.00	0.81	1.72	0.00	1.49	1.91
2004	1.75	1.64	2.00	0.00	0.00	3.33	5.88	2.44	1.45	4.76	0.00	1.78	2.11
<i>Cumul.</i>	1.67	2.39	2.05	0.00	0.00	4.04	6.59	1.30	1.18	3.31	0.00	1.63	2.05
<i>Mean</i>	1.67	2.09	2.04	0.00	0.00	4.13	6.60	1.22	1.13	3.24	0.00	1.64	2.01