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# Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases

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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 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.*

*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.<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*

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

*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.<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<sup>3</sup> cases. 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 U.S. Immigration Courts and the Board of Immigration Appeals (“BIA”).<sup>4</sup> Critics,

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<sup>2</sup> *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7<sup>th</sup> Cir. 2005 (Posner, J.)) (citations omitted).

<sup>3</sup> 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, Stephen W. Yale-Loehr & Elizabeth Cronin, Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Courts? An Empirical Analysis of the Recent Surge in Petitions for Review, 20 *Geo. Immigr. L.J.* 1, 9-10 (2005).

<sup>4</sup> See, e.g., *Benslimane v. Gonzales*, 430 F.3d at 829-30; see also Adam Liptak, Courts Criticize Judges' Handling of Asylum Cases, *New York Times*, Dec. 26, 2005 (“Federal appeals court judges around the nation have repeatedly excoriated immigration judges this year for what they call a

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 Appeal have found fault with adverse credibility determinations, they have acted in response to serious, sometimes egregious, errors by the administrative fact-finders.

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>

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pattern of biased and incoherent decisions in asylum cases.”)

<sup>5</sup> *See, e.g.,* Kumar v. Gonzales, 444 F.3d at 1060-61 (Kozinski, J., dissenting).

<sup>6</sup> *See infra* at note \_\_ and accompanying text.

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

### A. ADMINISTRATIVE INNOVATION

The administrative framework and review procedure in asylum and removal cases bears 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 Justice (“DOJ”).<sup>7</sup> Within DHS are two agencies that succeeded to the role of the former Immigration and Naturalization Service (“INS”): U.S. Customs and Immigration Services (“USCIS”), responsible for administering the system, and U.S. 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

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<sup>7</sup> See Evelyn H. Cruz, Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeal’s Summary Affirmance Procedures, 16 *Stan. L. & Pol’y Rev.* 481, 491-92 (2005).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* at 492.

<sup>11</sup> See *id.* at 482 n.3 and 7, 491-92.

<sup>12</sup> See Marisa Silenzi Cianciarulo, Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise, 43 *Harv. J. Legis.* 101, 113 (2006) (explaining “affirmative” and “defensive” asylum applications).

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 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 adopted in 1999 also required greater deference by the BIA to the IJ's factual findings, reduced the composition of the BIA from twenty-three to eleven members, and imposed other procedural changes.<sup>18</sup>

The BIA's decision (whether by a panel or a single member) is in turn subject to review by the U.S. Court of Appeals for the

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<sup>13</sup> See *id.* at 113-14; Cruz, *supra* note 5 at 491 and n.75.

<sup>14</sup> See Cianciarulo, *supra* note 10 at 114; Cruz, *supra* note 5 at 482 n.3, 492.

<sup>15</sup> See Cruz, *supra* note 5 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 (2004). The streamlined procedures were first adopted on a trial basis, and their use was expanded under regulations promulgated in 2002. 8 C.F.R. 1003.1 (2004); see Cruz, *supra* at 482 and n.2.; Guendelsberger, *supra* at 607. These procedures have been upheld against challenges on due process grounds. *Soadjede v. Ashcroft*, 324 F.3d 830 (5<sup>th</sup> Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962 (7<sup>th</sup> Cir. 2003); *Mendoza v. U.S. Attorney Gen.*, 327 F.3d 1283 (11<sup>th</sup> Cir. 2003). However, many critics argue that the streamlined procedures are seriously deficient and fail to provide asylum applicants with meaningful review of their cases. See *generally*, Cruz, *supra* note 5 and sources cited therein.

<sup>16</sup> 8 C.F.R. § 1003.1 (2004).

<sup>17</sup> 8 C.F.R. § 1003.1(e) (4) (2004); see Cruz, *supra* note 5 at 482.

<sup>18</sup> 8 C.F.R. § 1003.1(c) (3) (2004); see Cruz, *supra* note 5 at 482; Guendelsberger, *supra* note 13 at 607.

circuit having jurisdiction over the location where the IJ hearing took place.<sup>19</sup>

## B. JUDICIAL REVIEW AND LEGISLATIVE INTERVENTION

Judicial review of administrative decisions under immigration law came under “ferocious assault”<sup>20</sup> in 1996 with the enactment of two pieces of legislation – the Antiterrorism and Effective Death Penalty Act<sup>21</sup> (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act<sup>22</sup> (“IIRIRA”). AEDPA stripped the courts of jurisdiction to review certain administrative exclusion and removal decisions.<sup>23</sup> IIRIRA imposed a narrowed standard of judicial review of all BIA removal decisions, including asylum cases.<sup>24</sup>

More recently, under the guise of fighting “the Global War on Terror,” Congress passed the REAL ID Act of 2005<sup>25</sup> (“REAL

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<sup>19</sup> See Palmer, et al., *supra* note 6 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 U.S. District Court. See 8 U.S.C. § 1105a (1994) (repealed 1996); 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 section 2253 of the Judicial Code. 28 U.S.C. § 2253; see *Shukoor v. Schiltgen*, 1999 U.S. App. LEXIS 11079 (9<sup>th</sup> Cir. May 3, 1999). Congress eliminated that avenue of relief as part of the 1996 amendments to the Immigration and Nationality Act. See Legomsky, *supra* at 1624.

<sup>20</sup> Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 *Tex. L. Rev.* 1615, 1616 (2000).

<sup>21</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>22</sup> Pub. L. No. 104-208 Div. C, 110 Stat. 3009, 546 (1996).

<sup>23</sup> See 8 U.S.C. § 1252(a)(2)(A) (precluding judicial review of “expedited removal” orders); 8 U.S.C. § 1252(a)(2)(B) (providing that “no court shall have jurisdiction to review” administrative denials of various discretionary remedies); 8 U.S.C. § 1252(a)(2)(C) (eliminating judicial review over removal orders based on criminal convictions).

<sup>24</sup> 8 U.S.C. § 1252(b)(4)(B).

<sup>25</sup> P.L. 109-13 Div. B, 119 Stat. 231 (2005).

ID Act”). Among its various and wide-ranging provisions, the REAL ID Act codified the factors that an Immigration Judge may consider in deciding whether to credit the testimony of an asylum applicant, expressly rejecting a standard that the Courts of Appeal had adopted in reviewing credibility determinations.<sup>26</sup>

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

IIRIRA amended the INA 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>27</sup> This amendment essentially codified the standard previously set forth in *INS v. Elias-Zacarias*.<sup>28</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 reasonable fact finder could fail to find the requisite fear of persecution.”<sup>29</sup>

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<sup>26</sup> P.L. 109-13 Div. B, § 101(a)(3), 119 Stat. 231, 303 (2005) (amending 8 U.S.C. § 1158(b)(1)(B)(iii)).

<sup>27</sup> 8 U.S.C. § 1252(b)(4)(B). Prior its amendment by 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.” 8 U.S.C. § 1105a(a)(4)(1992); see Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 *Geo. Immig. L.J.* 133, 139 (2005) (quoting pre-IIRIRA version of statute).

<sup>28</sup> 502 U.S. 478 (1992); see House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292 (May 3, 2005) (“In 1996, as part of IIRIRA, Congress codified the principles that the Court articulated in *Elias-Zacarias*.”); Knight, *supra* note 25, at 140 (explaining that IIRIRA codified *Elias-Zacarias* standard).

<sup>29</sup> 502 U.S. at 483-84. As Knight, *supra* note 25, 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-*

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>30</sup> This marked a departure from the prevailing “substantial evidence” standard of judicial review applicable to administrative agency decisions.<sup>31</sup> Under that standard, agency fact-finding must rest on “sufficient evidence as a reasonable mind would accept as adequate to form a conclusion.”<sup>32</sup> *Elias-Zacarias*, and its subsequent statutory codification under IIRIRA, imposes a “review standard considerably more narrow than the kind of review available in other administrative contexts.”<sup>33</sup>

Given the close similarity between the Supreme Court’s language in *Elias-Zacarias* and the statutory language in IIRIRA, it is unclear why Congress felt the need to amend the statute. The legislative history of IIRIRA is not particularly illuminating. The conference committee report simply notes the provision, without offering any explanation of its significance.<sup>34</sup> However, testimony at a hearing on a precursor to the bill that ultimately became IIRIRA did address the “need to limit the [sic] periodically restate the limits of *de novo* review of asylum claims.”<sup>35</sup>

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*Zacarias*. See Knight, *supra* note 25, at 135-40.

<sup>30</sup> *Elias-Zacarias*, 502 U.S. at 481 n.1.

<sup>31</sup> See Knight, *supra* note 25 at 135 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); Jacob A. Stein, Glenn A. Mitchell & Basil J. Menzines, *Administrative Law* § 51.01 (2005)).

<sup>32</sup> Jacob A. Stein, Glenn A. Mitchell & Basil J. Menzines, *Administrative Law* § 51.01 (2005), quoted in Knight *supra* note 25 at 135 n. 13 and 136 n. 19; see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951) cited in Knight, *supra*.

<sup>33</sup> Knight, *supra* note 25 at 134, quoting Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 *Ind. J. Global Leg. Stud.* 197, 212 (2000)

<sup>34</sup> H. Rep. No. 104-828, at \_\_\_\_\_ (1996) (Conf. Rep.).

<sup>35</sup> *Immigrant Control and Financial Responsibility Act of 1995: Hearing on S. 269 Before the S. Comm. on the Judiciary, Subcommittee on*

Recently, several decisions adverse to the government in this area have not been appealed by the Department of Justice. These include several 9<sup>th</sup> Circuit decisions that appear to circumvent the Supreme Court limitations on judicial review stated in *INS v. Elias-Zacarias*, 112 S. Ct. 812, 502 U.S. 478 (1992) (the so-called ‘compelling evidence’ test for judicial review of an asylum decision”, finding that *de novo* review is appropriate where an evidentiary issue can be re-labeled an ‘error of law.’ See, *Gheblawi v. INS*, 28 F.3d 83 (9<sup>th</sup> Cir. 1994); *Nassari v. Moschorak*, 34 F.3d 723 (9<sup>th</sup> Cir. 1994); *Kotasz v. INS*, 31 F.3d 847 (9<sup>th</sup> Cir. 1994); *Fisher v. INS*, 37 F.3d 1371 (9<sup>th</sup> Cir. 1994). There are also several adverse precedents in the 7<sup>th</sup> and 1<sup>st</sup> Circuit of concern to us. The bottom line, however, is the overly-aggressive judicial micro-management of the nation’s asylum system.<sup>36</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 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*.

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:

Credibility determination. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a

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Immigration, S. Hrg. 104-731 (Mar. 14, 1995) (statement of Dan Stein, Director, Federation for American Immigration Reform).

<sup>36</sup> *Id.* S. 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, 104<sup>th</sup> Cong. § 142 (1995).

credibility determination on the demeanor, candor, or responsiveness or 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>37</sup>

Insofar as this provision “codifies factors identified in case law on which an adjudicator may make a credibility determination,”<sup>38</sup> it did not substantially alter the existing standard. The appellate courts have indeed long recognized that these are appropriate factors for an IJ to consider when assessing an asylum seeker's credibility.<sup>39</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, “minor 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>40</sup> All but one of the circuits had held likewise, finding

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<sup>37</sup> 8 U.S.C. § 1158(b)(1)(B)(iii).

<sup>38</sup> House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292 (May 3, 2005); *see also* Cianciarulo, *supra* note 10, at 134 (“The REAL ID Act the long-established prescription that adjudicators weigh the totality of the circumstances when making credibility determinations.”)

<sup>39</sup> *See, e.g.*, Nigussie v. Ashcroft, 383 F.3d 531, 537 (7<sup>th</sup> Cir. 2004) (affirming adverse credibility determination based on evasiveness and inconsistency of alien's testimony); Singh-Kaur v. INS, 183 F.3d 1147, 1151-53 (9<sup>th</sup> Cir. 1999) (affirming adverse credibility determination based on alien's demeanor when testifying, internal inconsistency of testimony, implausibility of alien's account, and lack of detail in testimony).

<sup>40</sup> INS Supplementary Refugee/Asylum Adjudication Guidelines,

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>41</sup> In contrast, the new statutory standard expressly permits reliance on any "inconsistency, inaccuracy, or falsehood ... without regard to whether [it] goes to the heart of the applicant's claim."<sup>42</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, Sen. Brownback (R-Kan.) assured the Senate that, even under the new standard, "it 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 fact."<sup>43</sup> That caveat, however, is not reflected in the final Conference Report<sup>44</sup>, nor in the statutory language itself.<sup>45</sup>

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reprinted in 67 Interpreter Releases 101-03 (Jan. 22, 1990), cited in Cianciarulo, *supra* note 10, at 135.

<sup>41</sup> See, e.g., Bojorques-Villanueva v. INS, 194 F.3d 14, 16 (1<sup>st</sup> Cir. 1999); Secaida-Rosales v. INS, 331 F.3d 297, 308 (2<sup>d</sup> Cir. 2003); Leia v. Ashcroft, 393 F.3d 427, 436 (3<sup>d</sup> Cir. 2005); Kabamba v. Gonzales, 2006 U.S. App. LEXIS 741 at \*6 (5<sup>th</sup> Cir. 2006); Sylla v. INS, 388 F.3d 924, 926 (6<sup>th</sup> Cir. 2004); Capric v. Ashcroft, 355 F.3d 1075 (7<sup>th</sup> Cir. 2004); Kondakova v. Ashcroft, 383 F.3d 792, 796 (8<sup>th</sup> Cir. 2004), cert. denied, 125 S. Ct. 894 (2005); Singh v. INS, 365 F.3d 1164, 1171 (9<sup>th</sup> Cir. 2003); Moscoso-Morales v. Gonzales, 2006 U.S. App. LEXIS 17909 (10<sup>th</sup> Cir. 2006); Marquez-Vasquez v. United States AG, 2005 U.S. App. LEXIS 11229 (11<sup>th</sup> Cir. 2005).

<sup>42</sup> 8 U.S.C. § 1158(b)(1)(B)(iii); see Cianciarulo, *supra* note 10, at 134 (nothing that "the REAL ID Act departs from established case law" in this regard).

<sup>43</sup> 151 Cong. Rec. S4816, 4838 (daily ed. May 10, 2005 (statement of Sen. Brownback (R-Kan.))(emphasis added).

<sup>44</sup> See House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240,

In contrast to 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>46</sup> Yet, the Report

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292-93 (May 3, 2005).

<sup>45</sup> See 8 U.S.C. § 1158(b)(1)(B)(iii) (providing that IJ or BIA may make 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 fact-finder base any credibility determination on “the totality of the circumstances, and all relevant factors”. See 8 U.S.C. § 1158(b)(1)(B)(iii).

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.”

Cianciarulo, *supra* note 10 at 135 (footnotes omitted) (quoting H.R. 418, 109<sup>th</sup> Cong. Sec 101(a)(3)(B)(iii) (2005)).

<sup>46</sup> House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292 (May 3, 2005). 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 in which an IJ has made an adverse credibility determination.” *Kumar v. Gonzales*, 444 F.3d at 1060 (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.

does not cite a single Ninth Circuit opinion that is at odds with those from other circuits or the BIA in this regard.<sup>47</sup> Nor does the report offer any explanation as to the nature of the supposed “conflict on this issue.”<sup>48</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 of truth” and that an IJ’s credibility determinations, based as they are on first-hand observation of the testimony, are entitled to great weight.<sup>49</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>50</sup> In the course of debate, House Judiciary Committee Chairman James Sensenbrenner (R-Wisc.) referred to several “non-9/11 terrorists” who had sought asylum.<sup>51</sup> The REAL ID Act, Sensenbrenner suggested, would “give our judges the opportunity to tell these people no.”<sup>52</sup> The Conference Report likewise points to instances of alleged

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<sup>47</sup> See House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292-93 (May 3, 2005).

<sup>48</sup> House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292-93 (May 3, 2005).

<sup>49</sup> See House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 292-93 (May 3, 2005) (quoting *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9<sup>th</sup> Cir. 1985) and *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 622 (9<sup>th</sup> Cir. 2003)).

<sup>50</sup> House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 286 (May 3, 2005) (alterations in original) (quoting National Commission on Terrorist Attacks Upon the United States, Staff Report, 9/11 and Terrorist Travel 106 (2004) [“9/11 and Terrorist Travel”]).

<sup>51</sup> 151 Cong. Rec. H460 (daily ed. Feb 10, 2005) (statement of Chairman Sensenbrenner).

<sup>52</sup> *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 at 1061.

“asylum abuse” by “alien terrorists.”<sup>53</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>54</sup> None of the other individuals identified by Representative Sensenbrenner or the Conference Report succeeded in their asylum claims.<sup>55</sup> Indeed, during the Senate debate on final passage of the REAL ID 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>56</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

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<sup>53</sup> House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 286 (May 3, 2005).

<sup>54</sup> See House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 286 (May 3, 2005). The Report mentions the cases of Ramzi Yousef, Ahmad Ajaj, Sheikh Abdul Rahman, Mir Aimal Kansu, Hesham Hedayet, Gazi Ibrahim Abu Mezer, and Nuradin Abdi. Of these, only Abdi was granted asylum. See *id.* 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.* 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) [http://www.dispatch.com/dispatch/content/local\\_news/stories/2007/08/01/abdiplea.ART\\_ART\\_08-01-07\\_A1\\_877G1ES.html](http://www.dispatch.com/dispatch/content/local_news/stories/2007/08/01/abdiplea.ART_ART_08-01-07_A1_877G1ES.html) (visited Nov. 17, 2007).

<sup>55</sup> See Cianciarulo, *supra* note 10 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.”) see also 9/11 and Terrorist Travel, *supra* note 48 at 48, 51, 215, cited in Cianciarulo, *supra*.

<sup>56</sup> 151 Cong. Rec. S4816, 4838 (Daily ed. May 10, 2005) (statement of Sen. Brownback (R-KS))

application ... was false.”<sup>57</sup> However, the Report does not indicate whether the IJ in Abdi’s case made any credibility determination.<sup>58</sup> In any event, it does not appear that Abdi’s asylum ever reached the Court of Appeals.<sup>59</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 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 Ninth Circuit Court of Appeals has been especially prone to reversing adverse credibility determinations in such cases.

To test these assertions, I collected data on “credibility reversals,” i.e. opinions in which a federal Court of Appeals<sup>60</sup> vacated a BIA order of removal because of what the court found

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<sup>57</sup> See House Conference Report No. 109-72, 2005 U.S.C.C.A.N. 240, 286 (May 3, 2005) (alternations in original) (quoting Government’s Motion to Detain Defendant and Memorandum in Support at 4, *United States v. Nuradin M. Abdi* (S.D. Ohio 2004) (No. 2:04cr88).

<sup>58</sup> See House Conference Report No. 109-72, U.S.C.C.A.N. 240, 286 (May 3, 2005).

<sup>59</sup> A Lexis search for administrative and judicial decisions in Abdi’s asylum case produced no results.

<sup>60</sup> 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 U.S. Immigration Court located within the District of Columbia.

to be a flawed adverse credibility determination.<sup>61</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>62</sup> In a few instances,

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<sup>61</sup> I collected the data using Lexis. Under the heading “All Topics > Immigration Law > Deportation & Removal”, I searched for U.S. Court of Appeals opinions reversing or vacating decisions of the BIA, and identified those in which the appellate court reversed an adverse credibility determination.

<sup>62</sup> 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.*, *Camara v. Ashcroft*, 378 F.3d 361 (4<sup>th</sup> Cir. 2004) (finding IJ’s adverse credibility determination supported by evidence in record, but vacating and remanding where IJ ignored other evidence that could support asylum claim); *Dhoumo v. Board of Immigration Appeals*, 416 F.3d 172 (2<sup>d</sup> Cir. 2005) (vacating and remanding where IJ and BIA failed to address “threshold question” of alien’s nationality, but “not decid[ing] whether the IJ’s adverse credibility finding was supported by substantial evidence”).
- 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*, 2004 US. App. LEXIS 14398 at \*4-5 (1<sup>st</sup> Cir., July 14, 2004) (characterizing IJ’s adverse credibility determination as “somewhat surprising” and “just barely” supported by record, but affirming denial of asylum where 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. AG of the United States*, 400 F3d 157 (3<sup>d</sup> Cir. 2004) (vacating and remanding where BIA did not adopt IJ’s adverse credibility determination, but denied asylum on grounds that alien’s testimony, even if credible, was insufficient to prove eligibility for asylum); *Mukamusoni v. Ashcroft*, 390 F.3d 110 (1<sup>st</sup> Cir. 2004) (same).
- Cases in which the appellate court vacates and remands where

appellate courts have vacated and remanded on the grounds that an adverse credibility determination resulted from a due process violation.<sup>63</sup>

I tallied the annual number of credibility reversals for each circuit during the period 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>64</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 (n=76) were from the last two years. The Ninth Circuit accounts for just over half (n=74) of the total for the eleven-year period, about three-quarters (n=46) of the total (n=62) for the period

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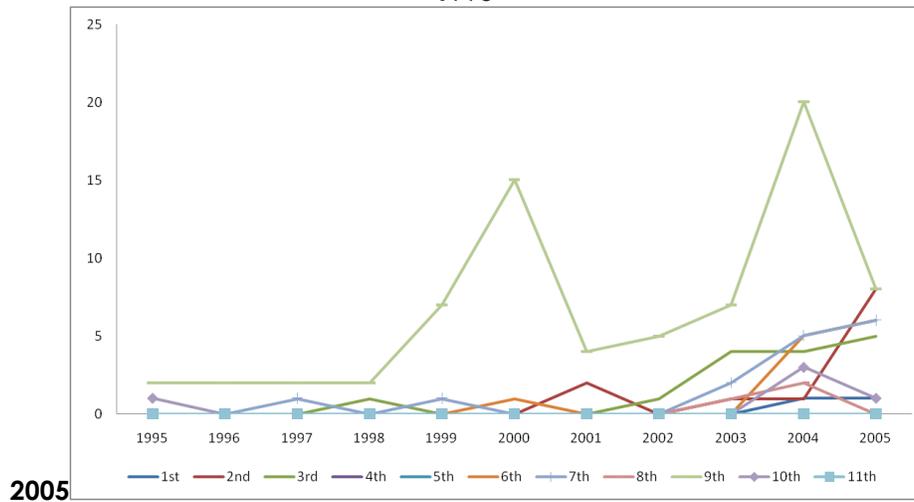
the IJ or BIA failed to make a credibility determination at all. *See, e.g., Lin Un v. Gonzales*, 415 F.3d 205 (1<sup>st</sup> Cir. 2005) (vacating and remanding where IJ assumed alien's credibility, but denied asylum on grounds that testimony failed to establish past persecution).

<sup>63</sup> 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 (6<sup>th</sup> Cir. 2000); *Perez-Lastor v. INS*, 208 F.3d 773 (9<sup>th</sup> Cir. 2000). In other cases, the appellate court found a due process violation where the BIA made an adverse credibility determination based 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 (9<sup>th</sup> Cir. 1999).

<sup>64</sup> These data are presented in Table 1 (Appendix).

from 1995-2003, and just over four-fifths (n=39) of the total (n=47) for the period from 1995-2002.

**Figure 1:  
Credibility Reversals by Circuit  
1995-**



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 years (See Figure 1). Political debate is often driven by anecdote rather than rigorous data.<sup>65</sup> Each

<sup>65</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 Magazine*, Aug. 20, 2001 at \_\_; William Galston, Commentary (NPR Morning Edition radio broadcast Mar. 9, 2000) at <http://www.npr.org/templates/story/story.php?storyId=1071358>; Chris Satullo, Government by Anecdote Can Be Dangerous, *Philadelphia Inquirer*, May 9, 1995 at \_\_\_\_\_. Anecdotes have a legitimate role in policy debate. *See* David A. Rochefort, The Role of Anecdotes in Regulating Managed Care, 17(6) *Health Affairs* 142 (1998). Because of their “relative brevity, the qualitative information they provide, and their illustrative

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>66</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 2-3 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>67</sup>

Of the 9072 opinions tallied, the Ninth Circuit was responsible for more than half (n=5211). 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 (See Figure 2). Thus, the last two years account

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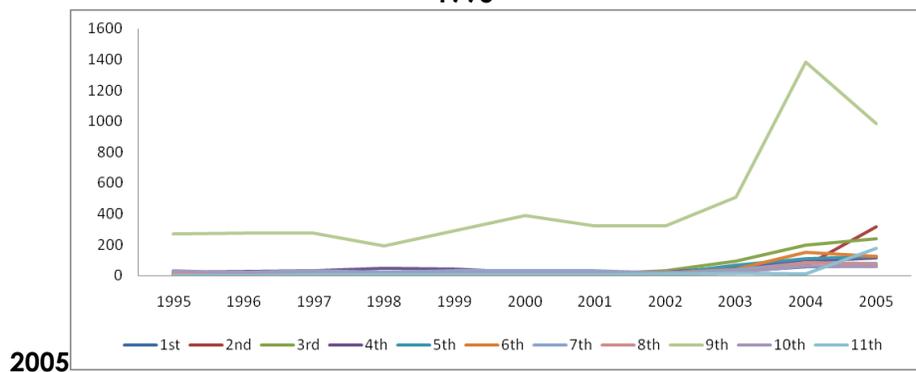
poignancy” anecdotes can serve the useful purpose of calling attention to an issue and getting it on the policy agenda. *Id.* At 142, 147. However, “anecdotal reports of abuses certainly should not be used by public officials as an excuse to overreact with new laws or rules that disregard standards of regulatory reasonableness.” *Id.* at 147.

<sup>66</sup> *Kumar v. Gonzalez*, 444 F.3d 1043, 1060 (9<sup>th</sup> Cir. 2006) (Kozinski, J., dissenting); see *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 issues in the same year, at least if those reversals establish favorable precedent.”). What is true of litigants is doubtless also true of politicians.

<sup>67</sup> These data are presented in Table 2 (Appendix). Again, I used the Lexis heading “All Topics > Immigration Law > Deportation & Removal”, this time searching for all U.S. Court of Appeals opinions reviewing decisions of the BIA, and recording the total annual number of such opinions for each circuit.

for more than half (n=4657) of the total opinions over the eleven-year period, and the last three years account for more than three-fifths (n=5589) of the total.

**Figure 2:  
Removal Cases by Circuit  
1995-**



The figures for the last three years reflect “a dramatic increase in immigration cases” in the Courts of Appeals during that period.<sup>68</sup> The explanation for the so-called “immigration surge”<sup>69</sup> is two-fold. First, the output of BIA decision 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>70</sup> Second, the proportion of BIA decisions from which appellate review is sought has also increased over the same period.<sup>71</sup>

<sup>68</sup> See Palmer, et al., *supra* note 3 at 3-4 (noting five-fold increase in petitions for review of BIA decisions since 2002).

<sup>69</sup> Palmer, et al., *supra* note 3 at 3.

<sup>70</sup> Palmer et al., *supra* note 3 at 3-4; *see supra*, notes 13-15 and accompanying text.

<sup>71</sup> Palmer, et al., *supra* note 3 at 4. Palmer, et al., examine data on petitions for review in an effort to test various competing explanations for the increased appeal rate in immigration cases generally. They consider several possible explanatory variables pertaining to characteristics of BIA

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>72</sup>

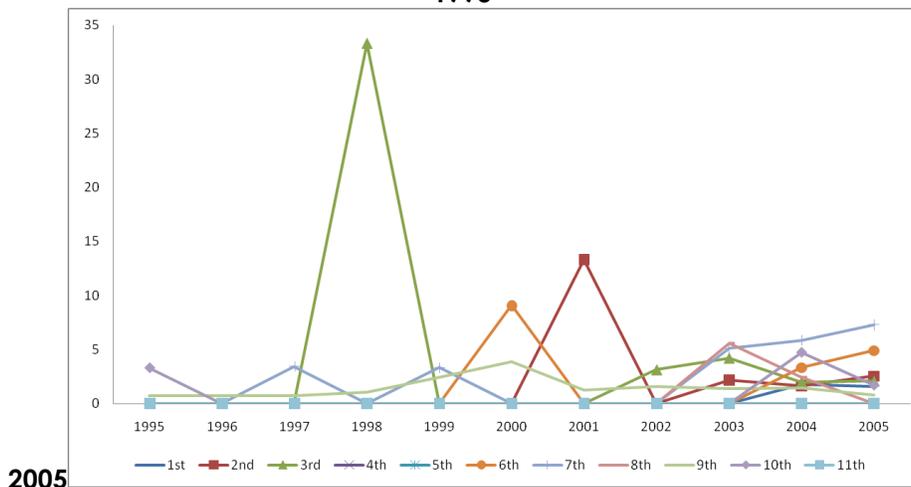
Viewing credibility reversals as a proportion of all appellate decisions in removal cases, the data fail to support the claim that the Ninth Circuit has been especially prone to rejecting adverse credibility determinations. However, the data do show an increasing credibility reversal rate for other Courts of Appeal in recent years (See Figure 3).

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decisions, characteristics of the BIA itself, characteristics of decisions by the Court of Appeals, and changes in behavior by aliens facing removal and their attorneys. *Id.* At 55-93. Their analysis is inconclusive as to most of these variables, but 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. *Id.* At 94.

<sup>72</sup> These data are presented in Table 3 (Appendix).

**Figure 3:  
Credibility Reversals Percentage by Circuit  
1995-**



For the overall period 1995-2005, the Ninth Circuit did reverse a greater percentage of removal orders on credibility grounds than the other circuits, though at first glance, the difference appears relatively small. The Ninth Circuit's cumulative credibility reversal rate for the eleven-year period was 1.67% compared to 1.35% for the aggregate of all circuits; the mean rate for the Ninth Circuit over the same period was 1.54%, compared to a mean of 1.27% for the aggregate of all circuits. 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 reflects a single credibility reversal out of a total of three petitions for review in removal cases decided that year. Such likely outliers affect both 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 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 eleven year average, the rates for most of the other circuits increased markedly. The Ninth Circuit's cumulative credibility reversal rate for the period 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>73</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>74</sup> none of which ever reversed an adverse credibility determination over the entire eleven-year period from 1995-2005.<sup>75</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 has been an activist outlier when it comes 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 6% for the period 2003-2005 – more than five times the rates for the Ninth Circuit over the same period.<sup>76</sup>

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<sup>73</sup> See Table 4 (Appendix).

<sup>74</sup> See Table 5 (Appendix).

<sup>75</sup> It is notable that in 2006-following the passage of the REAL ID Act-the Fourth and Fifth Circuits have each reversed an adverse credibility determination for the first time in at least 12 years. *Tewabe v. Gonzales*, 446 F.3d 533, 540 (4<sup>th</sup> 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*, 2006 U.S. App. LEXIS 741 at \*13 (5<sup>th</sup> Cir. 2006).

<sup>76</sup> The great disparity in volume of opinions in removal cases between the Ninth Circuit and the other circuits holds true for the period 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.

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 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>77</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>78</sup>

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<sup>77</sup> See Palmer, at al., *supra* note 3 at 5, 27-32 (discussing increased reliance on "streamlined" procedures since 2002, and criticisms thereof).

<sup>78</sup> 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. Mike Nixon, Practice of Immigration Law Advances Privilege of Independence, St. Louis Daily Record, July 4, 2005 at \_ (quoting immigration lawyer Tim Wichmer) ("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."); Ann Woolner, Immigrants to U.S. Face Delays Posed by Culture of "No", L.A. Bus. J., Sept. 13, 2004 at \_; American Immigration Lawyers Ass'n, Visa Denials and "Culture of No" Hurt America, Sept. 7, 2004, available at <http://www.aila.org/content/default.aspx?docid=11337>; Nina Bernstein, Children Alone and Scared, Fighting Deportation, N.Y. Times, Mar. 28, 2004 at A1; Pam Zubeck, Immigration Horror Stories Aren't Unusual, Colorado Springs Gazette, Oct. 19, 2003 at \_; Business v. Bush, The Economist, Oct. 16, 2003 at \_; Catholic Legal Immigration Network, Inc., Department of Homeland Security, available at

## 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 U.S. under false pretenses. 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>79</sup> Thus, political action—whether by social movements or by legislatures—may seek to advance “symbolic rather than ... instrumental goals.”<sup>80</sup> From the perspective of a “dramatistic” understanding of politics,<sup>81</sup> legislative

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<http://www.cliniclegal.org/Advocacy/dhs.html> (“since 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 30-31 and n.170 (discussing perceived loss of independence and increased politicization of BIA); *see also* Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 *Utah L. Rev.* 481 (reviewing immigration law landscape in the aftermath of 9/11).

<sup>79</sup> Joseph Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* 166 (1970)

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

<sup>81</sup> *Id.* at 166. As Gusfield explains, “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

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>82</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 on resource allocation.”<sup>83</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 produce such changes as those in legal and social policy or even in the way society conceives itself.<sup>84</sup>

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figures outside of the drama.” *Id.*

<sup>82</sup> *Id.*; cf. Daniel M. Filler, Making the Case for Meghan’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”).

<sup>83</sup> Murray Edelman, Symbols and Political Quiescence, 54 *American Political Science Review* 695, 697 (1960)

<sup>84</sup> Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* 9 (Martin Robinson & Co. 1980) (1972); see also Michael Welch, Ironies of Social Control and the Criminalization of Immigrations, 39 *Crime, Law & Social Change* 319, 320 (2003) (examining legislation and public debate over immigration and terrorism in terms of moral panic); Filler, Making the Case for Meghan’s Law, *supra* note \_\_ (analyzing

The political arguments in support of restricting appellate review in asylum cases bear the principal hallmarks of moral panic:<sup>85</sup>

- concern about the threat (real or imagined) that terrorists will use fraudulent asylum claims to enter into and remain in this country;<sup>86</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>87</sup>
- a consensus that judicial reversals of adverse credibility determinations in asylum cases pose a serious threat that must be addressed;<sup>88</sup>
- expressions of hostility and moral outrage toward “activist judges,” casting them as “folk devils” who personify the threat;<sup>89</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”

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legislative debate and adoption of sex-offender registration statutes in terms of “moral panic”)

<sup>85</sup> See Cohen, *Folk Devils & Moral Panics*, *supra* note \_\_ at 9; see also Elizabeth S. Scott and Laurence Steinberg, 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.”).

<sup>86</sup> See *supra*. at \_\_\_

<sup>87</sup> See *supra*. at \_\_\_

<sup>88</sup> See *supra*. at \_\_\_

<sup>89</sup> See *supra*. at \_\_\_

by “alien terrorists” aided and abetted by “activist judges”.<sup>90</sup> Yet the evidence demonstrates that the vaunted threat is, at best, grossly exaggerated. The Courts of Appeal have reversed only a tiny fraction of adverse credibility determinations by IJs and the BIA, and the cases in which they have done so are fairly egregious, with IJ’s and the BIA relying on shaky, speculative, or specious grounds for discrediting the applicant’s testimony.<sup>91</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>92</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>93</sup> In response to criticism, the Department of Justice commissioned a review of IJ case handling and announced measures aimed at improving IJ and BIA procedures and decision-making.<sup>94</sup> By further insulating IJ credibility

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<sup>90</sup> *See supra.* at \_\_\_

<sup>91</sup> *See supra.* at \_\_\_

<sup>92</sup> *See supra.* at \_\_\_

<sup>93</sup> *See* Jaya Ramji-Nogales, Andrew Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* \_\_\_ (forthcoming 2008) (examining disparities in IJ disposition of asylum cases); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 *Geo. Immig. L.J.* 1 (2006) (examining disparities in IJ disposition of asylum cases); Julia Preston, *Big Disparities in Judging of Asylum Cases*, *New York Times*, May 31, 2007 (citing Ramji-Nogales, et al., and noting controversy over political influence in appointment of IJs); *see also* *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7<sup>th</sup> Cir. 2005) (Posner, J.) (criticizing administrative adjudication of asylum claims).

<sup>94</sup> *See* Ramji-Nogales, et al, *supra* note \_\_ at 84 n.141 (citing Memorandum to Immigration Judges from Attorney General Alberto Gonzalez (Jan. 9, 2006) and Department of Justice, *Measures to Improve*

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>95</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>96</sup>

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>97</sup> In a sense, the controversy

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the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006). 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* ("most of the measures are formulated in very general terms, and may be ineffective in improving the administration of justice in the immigration courts.")

<sup>95</sup> Gusfield, *supra*. note \_\_, at 166.

<sup>96</sup> In applying the dramatic 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 committed 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 non-existent, 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.

<sup>97</sup> Dalia 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

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.

### III. CONCLUSION

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

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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.

Activist Judges? What’s In a Name”, Seattle Post-Intelligencer (Aug. 18, 2004); *see also* Jane Lampman, Bringing the Case Against Judges, Christian Science Monitor (Apr. 13, 2005); Rush Limbaugh, Liberalism Implemented By Activist Judges (Dec. 1, 2004) [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) (visited December 10, 2007); 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> (visited December 10, 2007).

The charge of judicial activism has specifically been leveled by critics who assert that courts must not “second guess” administrative decision-makers on matters concerning terrorism and national security. See, e.g., 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> (visited December 10, 2007); Gonzales: Judges Unfit to Rule on Terror Policy, MSNBC (Jan. 17, 2007) <http://www.msnbc.msn.com/id/16668110> (visited December 10, 2007).

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) (noting death threats against judges in Terry Schiavo case and Dover, Pennsylvania “intelligent design” case) [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) (visited December 10, 2007).

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 U.S. 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>98</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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<sup>98</sup> Gusfield, *supra*. note \_\_, at 166.

## Appendix

**Table 1**  
**Credibility Reversals by Circuit**  
**1995-2005**

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

	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Aggr.	Mean
<b>2005</b>	63	316	240	117	124	122	82	72	983	58	178	2355	214.09
<b>2004</b>	57	61	200	97	111	150	85	82	1381	63	15	2302	209.27
<b>2003</b>	23	46	95	56	69	42	39	18	506	22	16	932	84.73
<b>2002</b>	13	19	32	17	11	17	15	15	324	19	13	495	45.00
<b>2001</b>	14	15	12	14	15	16	31	15	324	14	10	480	43.64
<b>2000</b>	20	18	1	17	20	11	30	8	389	16	8	538	48.91
<b>1999</b>	11	14	4	43	8	13	30	11	289	17	8	448	40.73
<b>1998</b>	8	12	3	49	1	7	20	3	193	9	6	311	28.27
<b>1997</b>	4	5	2	28	15	7	29	5	275	22	6	398	36.18
<b>1996</b>	13	13	6	25	6	14	21	9	278	15	3	403	36.64
<b>1995</b>	10	13	3	22	7	12	23	18	269	30	3	410	37.27
<b>Cumul.</b>	236	532	598	485	387	411	405	256	5211	285	266	9072	824.73
<b>Mean</b>	21.45	48.36	54.36	44.09	35.18	37.36	36.82	23.27	473.73	25.91	24.18	824.73	74.98

**Table 3**  
**Credibility Reversal Percentage by Circuit**  
**1995-2005**

	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Aggr	Mea
<b>2005</b>	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
<b>2004</b>	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
<b>2003</b>	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
<b>2002</b>	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
<b>2001</b>	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
<b>2000</b>	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
<b>1999</b>	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
<b>1998</b>	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
<b>1997</b>	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
<b>1996</b>	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
<b>1995</b>	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
<b>Cumul.</b>	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
<b>Mean</b>	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**

	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Aggr.	Mean
<b>2005</b>	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
<b>2004</b>	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
<b>2003</b>	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
<b>Mean</b>	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**

	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Aggr.	Mean
<b>2005</b>	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
<b>2004</b>	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
<b>Mean</b>	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