UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, 415 Michigan Avenue, N.E., Suite 140 McCormick Pavilion Washington, D.C. 20017, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, 918 F Street, NW Washington, D.C. 20004, Plaintiffs, vs. UNITED STATES DEPARTMENT OF JUSTICE, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530, THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW, 5201 Leesburg Pike Falls Church, VA 22041, JOHN ASHCROFT, in his official capacity as Attorney General of the United States, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530, Defendants.	)	Civil Action No. _____

COMPLAINT

Plaintiffs, the Capital Area Immigrants' Rights Coalition ("CAIR Coalition") and the American Immigration Lawyers' Association ("AILA"), bring this suit against the United States Department of Justice (the "Department"), the Executive Office of Immigration Review

("EOIR"), and John Ashcroft, in his official capacity as Attorney General of the United States, complaining and alleging as follows:

INTRODUCTION

1. This is a case about whether a federal agency whose decisions literally can mean the difference between life and death, family unity or family separation for affected individuals, may fundamentally restructure the administrative apparatus that makes those decisions without carefully analyzing the implications of its actions and giving serious attention to the concerns expressed by the public during rulemaking proceedings.

2. The Board of Immigration Appeals ("BIA" or the "Board") is the highest administrative body within the Department of Justice for interpreting and applying our nation's immigration laws. It has the final responsibility for adjudicating appeals, in a wide variety of cases, from decisions of Immigration Judges and officers of the Immigration and Naturalization Service ("INS" or the "Service"). By definition these cases involve the rights of immigrants to remain in this country. Frequently they also involve compelling claims for relief from persecution in the immigrants' home countries, or the compelling interest of long-term permanent residents in remaining in the United States rather than being deported to countries where they have few if any ties. The BIA is often the final authority to consider these cases. Its rulings have major reverberations beyond its own docket, because they provide precedent and guidance to Immigration Judges and other lower-level adjudicators considering over 250,000 immigration cases each year.

3. Over the past eight months the Department of Justice, under the leadership of Attorney General John Ashcroft, has embarked upon a concerted program to restructure the

BIA's operations in ways that will dramatically curtail the availability of meaningful appellate review. This includes: (a) encouraging the quick disposal of most appeals through summary dispositions without written opinions, by single Board Members acting in place of the BIA's traditional three-Member panels; (b) launching a program to dispose of all backlogged BIA cases within six months, a goal which would require adjudications at an average rate of 15 minutes per appeal; (c) cutting the size of the Board roughly in half at the end of six months, with decisions about which Members to retain left to the Attorney General's personal and unguided discretion; and (d) eliminating almost one-third of the time parties previously had to present written arguments to the Board, and forcing those in detention to file briefs simultaneously with government attorneys, without any subsequent opportunity to reply.

4. These alarming changes to BIA structure and procedures have been implemented without due consideration for the views of the interested public, including nongovernmental organizations like Plaintiffs that are knowledgeable about the immigration process and committed to protecting immigrants' rights. Although these parties submitted detailed comments as part of the Department's rulemaking proceedings, the Department failed to meaningfully address those comments or to explain the logic of its contrary decisions. At the same time, the Department attempted an end-run around the very rulemaking proceedings it had initiated, by implementing one of its most far-reaching reform proposals—the expanded use of summary affirmances by single Board Members, even in life or death asylum cases or other cases with compelling interests—through release of "memoranda" issued as final agency actions without opportunity for notice or comment. These agency memoranda purported to implement, but in fact signaled a complete departure from, positions the Department had publicly announced in

1999 about the suitability of summary affirmance procedures only for more limited categories of cases.

5. The Department's actions are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and thus violate its obligations under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (the "APA"). Plaintiffs, who are not-for-profit organizations dedicated to the protection of immigrants' rights, seek a declaration to that effect from this Court. Plaintiffs also seek orders vacating both the final BIA restructuring rules promulgated on August 26, 2002 and effective September 25, 2002, *see* 67 Fed. Reg. 54878 ("Final BIA Rules"), and the memoranda issued by the Board between March and May 2002 in ostensible implementation of certain 1999 regulations, *see* BIA Memoranda S-L 99-25, 99-26 and 99-27 (the "2002 Memoranda").

JURISDICTION AND VENUE

6. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1331.

7. Venue properly lies in this district under 29 U.S.C. § 1391(e).

THE PARTIES

8. Plaintiff CAIR Coalition is a not-for-profit organization incorporated and with its principal place of business in the District of Columbia. The CAIR Coalition combines the efforts of more than fifty advocates, community organizations, immigrants and other individuals working together to meet the legal needs and promote the civil rights of immigrants in the Washington, D.C. metropolitan area. The CAIR Coalition's purpose is to advance the human and civil rights of immigrants and refugees, to foster an environment of positive human and community relations in American society, and to work for a just and humane immigration policy.

The CAIR Coalition pursues its purpose through numerous programs and provides—or helps to provide—representation for individuals at all stages of immigration proceedings, such as credible fear interviews, affirmative asylum applications, adversarial proceedings in Immigration Courts, appeals to the BIA, and appeals in the federal circuit courts of appeals. The CAIR Coalition is also a partner in the BIA Pro Bono Project, conducts annual training seminars with the District of Columbia Bar, visits rural jails on a weekly basis to meet with detained individuals, and coordinates credible fear interview representation in the D.C. metropolitan area for the Arlington, Virginia Asylum Office.

9. Plaintiff AILA, which is based in Washington, D.C. but has chapters throughout the United States, is a voluntary bar association of more than 7,800 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's member attorneys are integrally involved at all stages of immigration proceedings. They represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children and other close relatives to lawfully enter and reside in the United States. They represent thousands of U.S. businesses and industries that sponsor highly skilled professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. AILA members also represent asylum seekers, often on a *pro bono* basis. AILA members frequently appear before the BIA and are vitally interested in that body's processes and procedures.

10. The CAIR Coalition and AILA both filed timely comments on the BIA restructuring program that is challenged in this action, before the Final BIA Rules were finalized The CAIR Coalition and AILA both have members who represent individuals with cases

currently pending before the BIA or cases already decided by the BIA under the procedures challenged in this action. In addition, the CAIR Coalition has individual members who themselves have cases pending before the BIA or recently decided by the BIA. Plaintiffs bring this action on their own behalf as well as on behalf of their members who have been or are being directly affected by the procedures challenged in this action.

11. Defendant the United States Department of Justice ("the Department") is the federal government agency to which Congress, through the Immigration and Nationality Act, has delegated statutory responsibility for administering, interpreting and enforcing federal immigration laws and regulations.

12. Defendant Executive Office of Immigration Review (the "EOIR") is an administrative component of the Department of Justice, under the direction of the Attorney General. EOIR administers and interprets federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews and administrative hearings in individual cases. The BIA is an administrative component of the EOIR.

13. Defendant John Ashcroft is Attorney General of the United States, and is sued in his official capacity as head of the Department of Justice. Congress has delegated to Attorney General Ashcroft the authority and duty to administer our nation's immigration laws, including their provision for administrative review of decisions in individual cases.

BACKGROUND

I. THE FUNCTION AND CASELOAD OF THE BIA

A. The Critical Role of the BIA in Our Nation's Immigration System

14. The BIA is the highest administrative body within the Department of Justice for interpreting and applying immigration laws and regulations. The Board adjudicates appeals from decisions of Immigration Judges as well as certain decisions of INS officers. Until recently, virtually all appeals to the BIA were heard by a panel of three Members drawn from a broader Board designated by the Attorney General.

15. Decisions of the BIA may be appealed to the federal courts only in limited circumstances, which were significantly curtailed in 1996 through the Illegal Immigrant Reform and Immigration Responsibility Act. Even where appeals are legally possible, many immigrants do not have the financial resources or the language and legal skills to take their cases to federal court. For most non-citizens subject to removal proceedings, the Board is thus the final authority to consider their individual cases.

16. As the court of last resort in the nation's administrative immigration system, the Board also has the unique duty to provide guidance to the Immigration Judges, as well as the INS, on vital immigration issues. The Board's decisions serve as precedents for decisions by lower-level adjudicators across the country. The Board's written decisions also serve as the basis for federal circuit court review in cases that ultimately are appealed to the courts.

17. Through these activities, the Board plays a critical role in a wide variety of immigration matters. For example, a significant number of cases that the Board adjudicates involve requests for asylum, withholding of removal, or relief under the Convention Against

Torture—and thus involve individuals who face potential persecution, torture or even death in their home countries. Through its rulings in these cases, the Board makes decisions that could determine whether these individuals will get protection and live, or be returned to their home countries and die. The Board also plays a crucial role in satisfying the United States' obligations to protect refugees under international conventions and treaties.

18. The Board also frequently makes decisions that determine whether a U.S. family will be divided, or whether a permanent resident who has lived in the United States for decades will be returned to a country where he or she has few or no ties.

19. Board Members have to make these decisions in a dynamic framework, often in cases involving parties who are uneducated, unrepresented, frequently traumatized foreign nationals. Some 34% of BIA cases are brought or defended *pro se*. These individuals are frequently working from poor quality transcripts and an extremely limited understanding of our nation's rapidly changing immigration laws. There have been three major overhauls of the immigration laws since 1986, and in the last six years alone, Congress has enacted a number of important changes to the law or procedures relating to numerous forms of deportation relief. Each change in the law brings with it new and significant issues, arising from ambiguities in the laws themselves or applications of those laws to new and complex factual settings.

B. The Case Backlog at the BIA

20. In large part as a result of the many changes in the immigration law, the number of appeals filed each year with the BIA has jumped radically over the last fifteen years. From less than 3,000 annual appeals in 1984, the rate increased tenfold to nearly 30,000 in the year

2000. The BIA now reviews the decisions of over 200 immigration judges, up from just 69 in 1990.

21. The BIA has not been able to keep pace with its increasing caseload. As of September 2001, there was a backlog of over 57,000 cases at the BIA. The Board's ability to address this backlog has been further compromised by the additional filing of some 35,000 new appeals each year.

22. As a result of this case overload, the adjudication of individual appeals has generally faced significant delays. There have been repeated calls for reforms to increase the efficiency of BIA case management, while not sacrificing thorough and fair review.

II. PREVIOUS ATTEMPTS TO IMPROVE BIA CASE MANAGEMENT

A. Efforts to Increase the Board's Size

23. Until earlier this year, the Department repeatedly and consistently suggested that the heavy BIA caseload be addressed by increasing the resources dedicated to BIA operations, through adding more Board Members as well as supporting legal and paraprofessional staff. The Department has increased the authorized number of Board Members five times since 1995: from 5 to 12 Members in 1995, to 15 Members in 1996, to 18 Members in 1998, to 21 Members in 2000, and just last year to 23 Members.

24. The last expansion, to 23 Members, was authorized by Attorney General Ashcroft himself on December 3, 2001. He stated at the time that the addition of two new Members "is necessary to maintain an effective, efficient system of appellate adjudication." 66 Fed. Reg. 61788 (Dec. 3, 2001).

25. The Attorney General has not, however, utilized all available appointments. As of earlier this year, there were only 19 appointed Board Members with four vacancies that the Attorney General has not attempted to fill.

B. The 1999 "Streamlining" Experiment

26. In addition to increasing the Board's size, the Department has experimented over the last few years with a new "streamlined" appellate review procedure, applied to certain categories of immigration cases. Through a final agency rule effective October 18, 1999 ("the 1999 Streamlining Regulations"), the Department authorized the Board Chairman to "designate certain categories of cases as suitable" for summary affirmance by a single Board Member, rather than being considered by a three-Member panel. 8 C.F.R. § 3.1(a)(7)(i), 64 Fed. Reg. 56135, 56141 (Oct. 18, 1999). Within the categories of cases so designated, the single Board Member was authorized to "affirm the decision of the Service or the Immigration Judge, without opinion," upon a determination that

> the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or
>
> (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.

8 C.F.R. § 3.1(a)(7)(ii), 64 Fed. Reg. 56135, 56141 (Oct. 18, 1999).

27. As part of the 1999 rulemaking, the Department explicitly rejected suggestions that it move to single-Member review of most BIA cases, rather than simply designated categories of cases. It explained that while "single-Member review is appropriate in many cases

coming before the Board," in other cases "where a significant issue is presented, or where there is a reasonable possibility that the result below was incorrect, three-Member adjudication is preferable" to "reduce the risk of error in complex cases." 64 Fed. Reg. 56135, 56139 (Oct. 18, 1999).

28. The Department further explained that "[t]hree-Member adjudication of such cases also provides an additional check, and provides more guidance to the Immigration Judges, the Service, the bar and the public." Finally, it explained, "a move to single-Member adjudication of nearly all cases would make it more difficult to maintain the consistency of adjudication that the Board attempts to provide." 64 Fed. Reg. 56135, 56139 (Oct. 18, 1999).

29. The 1999 Streamlining Regulations were implemented in a number of phases. Phase I and II involved the conversion of certain categories of cases to single-Member review. Phase III, which was known as the "Streamlining Pilot Project" and which was inaugurated in early September of 2000, incorporated for the first time the summary affirmance procedures provided for in the regulation.

30. By a memorandum dated August 28, 2000, the Chairman designated the categories of cases that might be affirmed without opinion by a single Board Member. The list was limited to highly specific types of petitions that were considered fairly straightforward, such as "petitions based on relationships for which [the law does not] accord immigrant status to the beneficiary"; appeals from an Immigration Judge's denial of motions that were untimely made; appeals involving asylum claims barred by convictions for aggravated felonies; and appeals that were time-barred as a matter of law. *See* BIA Memorandum S-L 99-11, Aug. 28, 2000. The

Chairman added a few similarly narrow categories by a second memorandum dated November 1, 2000. *See* BIA Memorandum S-L 99-13, Nov. 1, 2000.

31. For roughly 18 months, these remained the only types of BIA appeals that could be summarily affirmed, without opinion, by a single Board Member. The balance of BIA appeals—including claims for asylum, withholding of deportation and the Convention Against Torture, and claims for suspension of deportation or cancellation of removal—were still decided by three-Member panels.

32. In 2001, the Department commissioned a report by an outside auditor, Arthur Andersen, to evaluate the effectiveness of the streamlining experiment. The auditor concluded that, as applied to the limited categories of cases for which streamlining was authorized, the experiment had been successful in improving the Board's efficiency and case-processing speed. *See* Arthur Andersen, Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report (Dec. 2001) ("Streamlining Assessment Report").

33. However, the auditor cautioned that it lacked the data "to provide an 'objective' evaluation of [the Project's] effect upon the *quality* of [the Board's] decision[s]." Streamlining Assessment Report at 8 (emphasis added). It reported anecdotal evidence suggesting concerns in this regard from Board Members and employees, including the following observation:

> There are repeated reports, particularly from some Board members who have served in streamlining as well as from some streamlining [staff] attorneys, of incorrect orders that were signed and sent out in an effort to simply move cases and boost streamlining numbers. My impression is that there is not a large percentage of these, but enough cases to make some queasy with the process and question the legal sufficiency of the review.

Id. at E-9.

III. THE DEFENDANTS' NEW APPROACH TO BIA OPERATIONS

A. The February 2002 Proposal to Dramatically Expand Streamlining and Restructure the BIA

34. On February 6, 2002, the Department announced a new set of proposed rules (the "Proposed BIA Rules") to dramatically restructure the BIA. The Proposed BIA Rules were published in the Federal Register on February 19, 2002. *See* 67 Fed. Reg. 7309.

35. These Proposed BIA Rules reaffirmed both the basic legal duties and function of the Board:

> The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. *The Board shall resolve the questions before it in a manner that is timely, impartial and consistent with the [Immigration and Nationality] Act* and regulations. In addition, *the Board, through precedent decisions, shall provide clear and uniform guidance* to the [INS], the immigration judges and the general public on the proper interpretation and administration of the [Immigration and Nationality] Act and its implementing regulations.

8 C.F.R. § 3.1(d)(1) (emphasis added).

36. The Proposed BIA Rules thus obligated the Board to make timely, impartial and legally correct adjudications of all cases assigned to it. They also legally obligated Board Members to "exercise their independent judgment and discretion in considering and determining the cases coming before the Board. . . ." *Id.* at § 3.1(d)(1)(ii).

37. In addition, the Proposed BIA Rules also set some particular goals to be achieved through restructuring. These included: (a) eliminating the backlog, and (b) allowing more Board resources to be allocated towards resolving difficult or controversial legal questions that may justify precedent decisions. 67 Fed. Reg. at 7310.

38. In order to accomplish these objectives, the Department proposed a sweeping set of reforms to BIA structure and procedures. Among other things, it proposed:

- Mandating the use of single-Member review so that such review would be used for *all* immigration appeals—with cases being referred to three Member-panels "only if" the single-Board member initially assigned to those cases determined that they presented certain specified characteristics;

- Authorizing single Board Members to affirm, without opinion, any decision of the Service or an Immigration Judge that they believed to be correct or to reflect "harmless or nonmaterial" error, and to fall within existing precedent or raise appellate issues that "are not so substantial" as to warrant issuance of a written opinion;

- Authorizing single Board Members to affirm, reverse, modify or remand other decisions through a "brief order," without further review by a three-Member panel;

- Imposing strict time limits for review of individual appeals, such that single Board Members must "dispose of all appeals" assigned to them within 90 days, and three-Member panels within 180 days;

- Evaluating Board Member performance based on "the timeliness of [his or her] disposition of cases"; and

- Reducing the Board's size from the previously authorized 23 Members to a new level of just 11 Members chosen at the discretion of the Attorney General, at the end of a six-month transition period and a program during which it was anticipated that the Board's enormous case backlog would be entirely eliminated.

See proposed 8 C.F.R. §§ 3.1(a)(1), 3.1(e), *published in* 67 Fed. Reg. 7309, 7314-16.

39. The Department also proposed that the briefing period for appeals be shortened from 30 days to 21 days after transcripts of the underlying proceedings become available, and that the individuals appealing those decisions (or responding to appeals lodged by the government) be required to submit written arguments simultaneously with the Service, with no

opportunity for later reply. *See* proposed 8 C.F.R. § 3.3(c), *published in* 67 Fed. Reg. 7309, 7316-17.

40. The Department limited public comment on the Proposed BIA Rules to a period of just 30 days, ending on March 21, 2002. The Department rejected requests by multiple parties that the comment period be extended to facilitate public input on issues of such grave importance.

B. The Defendants' Immediate Expansion of Streamlining, Without Waiting for the Conclusion of Rulemaking Procedures

41. While the rulemaking process was still underway on the Proposed BIA Rules, and without apparent consideration of any of the comments that were being submitted with respect to those Rules, the Defendants moved to expand streamlining through unilateral agency action.

42. First, on March 15, 2002—while the comment period on the Proposed BIA Rules was still open—the Acting Chair of the Board issued a memorandum invoking her authority under the 1999 Streamlining Regulations to designate categories of cases suitable for summary affirmance without opinion by a single Board Member. After almost eighteen months in which those categories had been settled, new categories were added, effective immediately. These included "cases involving claims for Asylum, Withholding of Deportation and Convention Against Torture," which prior to March 15 had been heard by three-Member panels. It also included "cases involving claims for suspension of deportation or cancellation of removal," such as those of long-term legal permanent residents previously convicted of criminal activity. *See* BIA Memorandum S-L 99-25 (March 15, 2002). Because this change was made through an internal memorandum, there was no opportunity for public comment.

43. A month later, the Chair designated two other categories of cases as appropriate for affirmance without opinion by a single Board Member. *See* BIA Memorandum S-L 99-26 (April 18, 2002). Again, there was no public notice or opportunity for comment.

44. Finally, on May 3, 2002, the Chair issued a memorandum declaring that "*all cases*" involving appeals to the BIA, whether from decisions of Immigration Judges or Service officers, could now be summarily affirmed, without opinion, by a single Board Member. *See* BIA Memorandum S-L 99-27 (May 3, 2002) (emphasis added). The memorandum characterized this decision as a designation of "categories of cases" pursuant to the 1999 Streamlining Regulations, with the "categories" so designated extending to the limits of the Board's jurisdiction. *Id.*

45. The three memoranda issued from March through May 2002 (the "2002 Memoranda") thus effectively reversed the decision that the Department had announced in the 1999 Streamlining Regulations, *i.e.*, that the Department would not "move[] to single-Member review of most cases," but only of selected categories of cases. 64 Fed. Reg. 56135, 56139.

46. The 2002 Memoranda also purported to accomplish the same result that was still under notice and comment procedures through the Proposed BIA Rules, namely the move to single-Member review and summary decisions, with no opinion or only "brief orders," as the dominant method of adjudicating immigration appeals.

47. As a result of the 2002 Memoranda, the BIA's processing of appeals surged from a rate of 3300 decisions per month in February 2002 to a rate of 5200 decisions per month in June or July 2002. These rates contrasted with average monthly decisionmaking rates of 1800 for

2000 and 2600 for 2001, when streamlining was still limited to certain defined categories of cases. *See* 67 Fed. Reg. 54878, 54899-54800 (Aug. 26, 2002).

C. The View of Most Commentators That The Department's Proposed Rule Was Misguided

48. Meanwhile, despite the short period that the Department had allowed for comment on the Proposed BIA Rules, more than 68 separate commentators submitted detailed comments on those Rules. This included each of the Plaintiffs and a variety of other nongovernmental organizations, members of Congress, private attorneys and other interested individuals. 67 Fed. Reg. 54879 (Aug. 26, 2002).

49. The majority of commentators agreed with the goals stated by the Department, of reforming the BIA to enable it to better provide timely, impartial, independent and legally correct adjudications that provide clear and uniform guidance to the INS, immigration judges and the public. Many commentators profoundly disagreed, however, that the specific changes reflected in the Proposed BIA Rules would best achieve these goals, while enabling the Board to continue to provide meaningful appellate review consistent with the due process rights of individual parties. Examples of the types of issues raised by commentators on the Proposed Rule follow.

50. For example, commentators (including Plaintiffs) expressed deep concern that the six-month program envisioned to clear the BIA case backlog would sacrifice quality of review in the quest for quantity. According to calculations provided to the Department, clearing the backlog in six months while remaining current on newly filed appeals would require each of the present 19 Board Members to decide 32 cases per workday, or more than one case every 15 minutes. *See* CAIR Coalition Comments at 11-12 (Mar. 20, 2002).

51. This time was not sufficient, commentators argued, to do justice to most appeals, whose case files generally run at least 75 pages and often contain several types of critical documentary evidence. It was particularly alarming in light of the stakes involved for many applicants, which could involve torture or death in their native countries or separation from U.S. citizen or LPR family members, often after decades of establishing roots in this country. *See* CAIR Coalition Comments at 12; AILA Comments at 9 (March 20, 2002).

52. Commentators (including Plaintiffs) also expressed concern that during this six-month program, Board Members would be aware that they essentially were auditioning to retain their jobs, given the impending cuts in Board size at the close of the period and the knowledge that Members were being assessed on the speed of their dispositions. This could create tremendous pressure to summarily affirm as many appeals as possible, without careful attention to the merits of each individual case. The lack of standards or guidance to govern the Attorney General's decisions about which Members to dismiss could also constrain Members from fulfilling their legal duty to "exercise their independent judgment and discretion" if doing so meant deciding individual cases in ways perceived to be contrary to the current administration's preferences. *See* CAIR Coalition Comments at 10; AILA Comments at 9-10.

53. Commentators also expressed concerns about the dramatic expansion of single-Member review, in an environment of ongoing pressure to dispose of cases as quickly as possible. Members acting alone were more likely to bend to pressure to "rubber stamp" decisions below in the interest of meeting productivity goals. CAIR Coalition Comments at 20, 23; AILA Comments at 8. Commentators noted that the Streamlining Assessment Report commissioned by the Department suggested this already might be occurring, even with respect to

the much more limited single-Member review in place during 2000 and 2001. CAIR Coalition Comments at 21-22.

54. Single-Member review also "eliminates the possibility that divergent views of Board Members would be considered in deciding an appeal, thereby increasing the risk of erroneous decision-making." CAIR Coalition Comments at 13. Commentators argued that this risk was particularly significant for the many appeals requiring interpretation or application of relatively new statutory provisions. Such cases are not suitable for single-Member review in a matter of minutes, but might routinely be handled through such processes under the Proposed BIA Rules. AILA Comments at 16-19.

55. These concerns were heightened, commentators argued, by the apparent premium being placed by the Department on summary affirmances without written opinion. Commentators noted that individuals receiving these cursory decisions could have no basis for knowing whether the Board considered the rulings below correct, or incorrect but allegedly posing "harmless error." Nor could parties have assurance that their arguments to the contrary even had been meaningfully considered. Over time, commentators suggested, these problems could seriously undermine the perceived legitimacy of the nation's appellate review system. It could also result in more appeals to the federal circuit courts, and remands from those courts to the Board due to inadequate explication of the reasons for decision and consequent violations of due process rights. This would only increase the inefficiency of the broader immigration review process, which the Proposed BIA Rules were intended to alleviate. *See* CAIR Coalition Comments at 28-32; AILA Comments at 20.

56. Finally, commentators expressed serious concerns about the Department's proposed truncated briefing schedule, particularly when coupled with the requirement of simultaneous briefing with no opportunity of reply. They noted that a substantial percentage of appeals are brought *pro se* by uneducated aliens with little knowledge of the immigration laws, little understanding of the legal arguments potentially available to them, and often limited competence in the English language. Reforms that hampered their ability to research these issues, or to retain outside counsel to assist them (generally on a *pro bono* basis), could seriously prejudice their ability to present a meaningful appeal. Reforms preventing them from reviewing the government's papers before finalizing their own submissions could only compound these problems, particularly where the INS is the appellant from the decision below. *See* CAIR Coalition Comments at 46-49; AILA Comments at 21-22.

57. In light of these substantial concerns, commentators urged the Department to rethink the Proposed BIA Rules and instead consider more appropriate options for achieving the Department's stated goals. For example, commentators recommended that the Department not reduce the size of the Board but instead fill its existing vacancies, increase staff attorneys and support personnel, and provide additional funding for more hearing transcribers to redress transcription delays that consistently postponed adjudication of appeals. *See* CAIR Coalition Comments at 14; AILA Comments at 23, 30.

58. Some commentators also proposed that if the Department persisted with increased use of summary affirmances in some categories, it at least should continue to require full written opinions in those cases presenting life-or-death consequences for affected individuals. This

would include appeals from denial of applications for asylum, withholding of removal, or relief under the Convention Against Torture. *See* CAIR Coalition Comments at 32-33.

D. The Defendants' Adoption of Final Rules That Were Nearly Identical to Those Originally Proposed

59. On August 26, 2002, the Department published the Final BIA rules. *See* 67 Fed. Reg. 54878.

60. In the accompanying Supplementary Information, the Department noted its receipt of 68 separate comments on the Proposed BIA Rules, and characterized "many" of those comments as "thoughtful and extensive." 67 Fed. Reg. 54879 (Aug. 26, 2002). It claimed to have "reviewed and carefully considered all of the comments submitted." *Id.*

61. Nonetheless, the Department issued the Final BIA Rules in a form that was largely identical to the Proposed BIA Rules. Declaring an overarching goal of "facilitat[ing] the ability of the Board to adjudicate the case backlog, as well as to provide meaningful guidance" about the scope of the immigration laws through increasing the uniformity of Board decisions, 67 Fed. Reg. 54878, 54879 (Aug. 26, 2002), the Department left unchanged the most significant provisions in the Proposed BIA Rules.

62. For example, the Department retained the shift to single-Member review as "the dominant method of adjudication for the large majority of cases before the Board." 67 Fed. Reg. 54878, 54879 (Aug. 26, 2002). It justified this decision by asserting that the "overwhelming percentage of immigration judge decisions . . . [are] legally and factually correct," and that "the majority of cases . . . do not present novel or complex issues." *Id.* at 54880.

63. The Department also maintained its decision to allow single-Members to affirm decisions without any written opinion, or to reverse, modify or remand decisions through a "brief order." It justified this decision by reference to the Board's more limited experiment with summary affirmances under the 1999 Streamlining Regulations, citing favorable "anecdotal evidence" in the Streamlining Assessment Report. The Department also cited statistics suggesting a low reversal or remand rate by the federal courts of summary affirmances issued under the 1999 Streamlining Regulations. 67 Fed. Reg. at 54885.

64. The Department left unchanged its imposition of strict deadlines for disposition of appeals, and its evaluation of Board Members with reference to their speed of processing appeals.

65. The Department maintained its proposed six-month program to eliminate the Board's case backlog. It did not dispute commentators' calculations that this would require appeals to be considered and resolved in an average of 15 minutes, or explain why that time, on average, would be sufficient to do justice to the merits of such appeals. It simply noted that "pure mathematical formulas in this area have the beauty of simplicity but are deceptive," and that "for each . . . simple case" that "can be dispatched promptly," "more time is afforded for considering the issues to which the Board's time should be devoted." 67 Fed. Reg. at 54899.

66. The Department persisted in its plan to dramatically reduce Board size after 180 days, with no standard provided to guide the Attorney General in selecting Members for removal. It attributed its selection of 11 Members as the appropriate size to "judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and

the requirements of the existing and projected caseload." 67 Fed. Reg. at 54893. The Department suggested that this smaller Board "should increase the coherence of Board decisions and facilitate the *en banc* process, thereby improving the value of Board precedents." *Id.* at 54894.

67. The Department acknowledged but did not address concerns that during the transition period, "Board members would be 'auditioning' to keep their jobs and that it would affect the perceived impartiality of current Board members given that it was announced before the backlog was reduced." 67 Fed. Reg. at 54893.

68. One material change from the Proposed BIA Rules to the Final BIA Rules was to *water down* the requirement that single-Member reviewers refer difficult or novel cases to three-Member panels, instead making these referrals discretionary. Where the Proposed BIA Rules had provided that "[c]ases *shall* be assigned" to three-Member panels in specified circumstances, the Final BIA Rules provided that "[c]ases *may only* be assigned" to three-Member panels in those circumstances. *Compare* Proposed 8 C.F.R. § 3.1(e)(6), *published in* 67 Fed. Reg. 7309, 7315 (Feb. 19, 2002), *with* Final 8 C.F.R. § 3.1(e)(6), *published in* 67 Fed. Reg. 54878, 54903 (Aug. 26, 2002).

69. The Final BIA Rules also restored sequential briefing of appeals in cases where individual aliens were not in custody, but retained simultaneous briefing for those in detention, with no opportunity for subsequent reply. 67 Fed. Reg. at 54894-95. The Department provided no explanation for the distinction.

70. The Final BIA Rules became effective on September 25, 2002.

IV. THE ABSENCE OF REASONED DECISIONMAKING REFLECTED IN THE FINAL BIA RULES

71. The Department's decisionmaking in matters of immigration law, as in other agency action, is controlled by the requirements of the Administrative Procedure Act. The APA imposes a duty of reasoned analysis in rulemaking proceedings. As part of this duty, the Department is required to consider all relevant factors presented by commentators during the rulemaking process. 5 U.S.C. § 553(c). The Department is required to acknowledge and explain any apparent departures from past practices, findings or precedents. The Department also is required to explain, in issuing the final rules, why it reached the particular decisions it did in the face of the comments received.

72. The Department failed to satisfy these obligations, in numerous material and prejudicial respects, in the issuance of the Final BIA Rules.

73. For example, with respect to the increased use of single-Member review and summary affirmances, the Department failed to engage in reasoned decisionmaking and was otherwise arbitrary, capricious, abused its discretion, and failed to act according to applicable law. Among other things, the Department:

- Relied heavily on favorable "anecdotal evidence" in the Streamlining Assessment Report about the results of the Board's implementation of the 1999 Streamlining Regulations, while ignoring all unfavorable "anecdotal evidence" contained in that Report and ignoring the substantial differences between the cases evaluated in that Report and those now subject to streamlining under the 2002 Memoranda or the Final BIA Rules;

- Relied heavily on references to statistical support for increased use of streamlining, without explaining the source or basis for these alleged statistics;

- Failed to explain why the concern about coherence and uniformity of Board decisionmaking that the Department felt supported the dramatic reduction in Board size did not also weigh against increased use of single-Member review; and

- Failed to explain why the Department had *increased* the discretion of single-Member reviewers in the Final BIA Rules, in the face of a broad consensus from commentators that the Proposed BIA Rules provided too much discretion already.

74. Similarly, with respect to the dramatic reduction in Board size, the Department again failed to engage in reasoned decisionmaking and was otherwise arbitrary, capricious, abused its discretion, and failed to act according to applicable law. For example, the Department:

- Failed to acknowledge that just three months before proposing this dramatic reduction, the Department (under the same Attorney General) had urged the precise opposite approach of increasing Board size, and failed to explain the logic that led to this stark reversal of position;

- Relied heavily on references to analytical support for smaller Board size, without explaining the source or basis for this alleged analysis; and

- Failed to explain how a reduction in Board membership was consistent with the goals emphasized in advocating expansion of single-Member review, namely accelerating Board processing of its substantial caseload.

75. With respect to the six-month program to eliminate the BIA's case backlog, the Department (for example):

- Failed to fairly address arguments that an average processing time of 15 minutes per case was insufficient to do justice to the complexity and importance of the issues raised by many BIA appeals; and

- Failed to acknowledge or respond to arguments that imposing this time-pressure on Board Members and evaluating their performance in light of case-processing speed, while simultaneously announcing the

> impending reduction of the Board's size, would create improper incentives to "rubber-stamp" decisions below without careful analysis of their merits, and thus undermine the Department's stated statutory goal of impartial decisionmaking

76. Finally, with respect to the briefing schedule for BIA appeals, the Department failed to explain the logic behind its decision to allow sequential briefing for appeals of individuals not in detention, while rejecting the same briefing rules for detained individuals.

COUNT I

77. The foregoing allegations are realleged and incorporated herein by reference.

78. The issuance of the Final BIA Rules constitutes final agency action within the meaning of the APA. 5 U.S.C. § 551(13).

79. The APA imposes upon federal courts a mandatory statutory duty to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

80. The promulgation by Defendants of the Final BIA Rules, without the reasoned decisionmaking required by the APA and applicable precedent, demonstrates arbitrary and capricious conduct in violation of the APA, § 706(2)(A).

81. The Defendants' failure to respond reasonably to significant comments and adverse evidence, unexplained departure from its own past practices, precedents and findings, internally inconsistent reasoning, and other errors are, independently and collectively, material and prejudicial.

82. Plaintiffs have exhausted all of their administrative remedies.

COUNT II

83. The foregoing allegations are realleged and incorporated herein by reference.

84. The issuance of the 2002 Memoranda constitutes final agency action within the meaning of the APA. 5 U.S.C. § 551.

85. The APA obligates federal courts to "hold unlawful and set aside agency actions . . . found to be . . . arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law . . .[or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

86. The Department's use of the 2002 Memoranda to institute streamlining procedures for all appeals to the BIA, at the same time the Department had solicited comments from the public concerning the Proposed BIA Rules' accomplishing the same result, constituted an "end-run" around and a violation of the notice and comment requirements set forth in the APA. 5 U.S.C. § 553.

87. The Department's stark reversal of position in the 2002 Memoranda, which reversed without explanation its explicit rejection of global streamlining procedures at the time it promulgated the 1999 Streamlining Regulations, was also arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A).

88. The Defendants' errors, independently and collectively, are material and prejudicial.

89. Plaintiffs have exhausted all of their administrative remedies.

WHEREFORE, Plaintiffs respectfully request that this Court (i) enter judgment in their favor and against the Defendants; (ii) declare that the Defendants' promulgation of the Final BIA Rules was arbitrary and capricious in violation of the APA; (iii) declare that the Defendants' issuance of the 2002 Memoranda, which reversed the positions taken by the Defendants in the 1999 Streamlining Regulations while the Proposed BIA Rules were under notice and comment, was also in violation of the APA; (iv) vacate the Final BIA Rules; (v) vacate the 2002 Memoranda; and (vi) order such further relief as this Court deems appropriate.

Respectfully submitted,

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Dated: October 24, 2002

CERTIFICATE OF SERVICE

I certify that on this 24th day of October, 2002, I caused the foregoing Complaint to be served by hand upon:

UNITED STATES DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530,

THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW,
5201 Leesburg Pike
Falls Church, VA 22041,

and

JOHN ASHCROFT
Attorney General of the United States
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_____

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