CLOSING REMARKS

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First, I would like to congratulate the *Administrative Law Review* for returning to this extremely important issue of immigration reform[1]—and to thank this distinguished panel for coming and providing us with so much food for thought.

We are a nation of immigrants. Most of us—myself included—do not have to go very far back in our family trees to find ancestors who made it to the United States, often with great hardship, to start better lives for themselves and their families.

This fact will always give the issue of immigration great resonance in this country. How can we keep the lamp of the Statue of Liberty lit for those who want to follow in the footsteps of our own ancestors, while keeping our borders secure from those who would do us harm or inundate our system of social services? This is the main dilemma posed by most of our immigration legislation, including the Secure Fence Act.[2]

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1. The ADMINISTRATIVE LAW REVIEW published a symposium on immigration issues in 2000. *See Recent Developments Federal Agency Focus: Immigration and Naturalization Service*, 52 ADMIN. L. REV. 213-421 (2000). Articles included: Jeffrey S. Lubbers, *Introduction*, at 213; David H.E. Becker, *Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in Policy and Apply its Decisions Retroactively?*, at 219; Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, at 253; Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, at 305; and John A. Scanlan, *American-Arab—Getting the Balance Wrong—Again!*, at 347.

2. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

And in the administration of immigration adjudication—designed to implement a set of laws governing entry and removal of immigrants, with a special two-tiered administrative court that has been set up to decide disputed issues of material fact[3]—we face the familiar administrative law issue of how to balance the essential needs of fairness, efficiency, and acceptability.[4]

I will focus on the second question because I am a teacher (and student) of administrative law. However, I do want to make a few remarks about the Secure Fence Act.

First, I would like to comment on the name of the Act. Like the USA PATRIOT Act and the No Child Left Behind Act, its name contains a high quotient of PR spin. We are not talking about a fence in the sense that Robert Frost wrote about—meaning "[g]ood fences make good neighbours."[5] (Although I humbly suggest that a better title for this symposium would be "Do Fences Make Good Neighbors?: Immigration Reform and Border Security in the United States.")

But make no mistake about it—we are talking about a wall, like what one sees outside of maximum security prisons, or what we used to see between East and West Berlin.

Such a wall should never be built between two allies. The United States and Mexico are not enemies—we are friendly neighbors. The symbolism is terrible. It poisons our relations with Mexico[6] and damages the United States' image around the world. How can we maintain any moral authority to criticize other countries for building walls when we are embarking on a 700-mile wall of our own? It is ironic that we are doing this at the same time that Europe is removing travel barriers between the twenty-seven countries of the EU, even though several of the countries of the expanded

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3. The immigration judges "completed" 323,845 "proceedings" in FY 2006, of which 317,032 (98%) were removal (formerly called "deportation") proceedings. U.S. DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW, FY 2006 STATISTICAL YEAR BOOK C4 (2007), http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited June 10, 2007). This was the highest number in any recent year. The Board of Immigration Appeals completed 39,707 cases in FY 2006, down from a high of 48,705 in FY 2004. *Id.* at S2.

4. This formulation is a variation of the statement of the criteria for evaluating administrative procedures of accuracy, efficiency, and acceptability developed by Roger Cramton. *See* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972); *see also* Margaret Gilhooley, *The Administrative Conference and the Progress of Food and Drug Reform*, 30 ARIZ. ST. L.J. 129, 133 & n.24 (1998) (citing Cramton, *supra*, and using the formula of "efficiency, reliability, fairness and public accountability").

5. Robert Frost, *Mending Wall*, NORTH OF BOSTON 12 (1914).

6. *See, e.g.*, Deb Riechmann, *Bush Seeks Better Ties in Latin America*, WASH. POST, Mar. 14, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300894.html (citing Mexican President Calderon's denunciation of the proposed fence).

EU, including Bulgaria, Romania, and Latvia, have per capita GNPs that rank below Mexico's.[7] Yet instead of building walls, Europe is removing them.

I am not advocating open borders. We need to use modern law enforcement measures to secure our borders, but we also need to take other steps. First, we should make it easier for legal immigrants and visitors to cross the border. The long lines at the San Diego border crossing are legendary. Although these problems began to occur in the 1990s, current plans to reconstruct the crossing to accommodate more people call for completion only by 2012.[8] Second, we should enforce the laws on the books, such as targeting for prosecution the "coyotes" who lure illegal immigrants across the border, and enforcing our employer sanction and anti-discrimination laws[9] so that the magnet produced by illegal hiring is diminished. And third, we should agree on a sufficient guest worker program and a realistic path to citizenship for those immigrants who are willing to work and pay taxes in the United States for a reasonable number of years.

Secretary Hutchinson remarked that a fence is not the answer on our northern border.[10] I would suggest that it is not the answer on our southern border either. The panel members from the Department of Homeland Security (DHS) today seem to agree that the 700-mile fence is not necessary. So, let us not build that wall between the United States and Mexico.

With respect to the immigration adjudication system in the Executive Office of Immigration Review (EOIR), it is clear that the system is suffering from extreme duress. Changes in the substantive immigration laws have created strong incentives for immigrants threatened with removal to litigate to the nth degree. Meanwhile, the immigration bar has clearly lost faith in the administrative adjudication system—due largely to the procedural changes made between 2000 and 2002 and the increasingly low rate of success at EOIR—and has turned to the courts for relief. At the

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7. *See* Global Income Per Capita–Published 2006, FINFACTS IRELAND, http://www.finfacts.com/biz10/globalworldincomepercapita.htm (last visited June 27, 2007) (showing Mexico's per capita GNP ranking as forty-fifth in the world; Latvia is forty-ninth, Romania is seventieth, and Bulgaria is seventy-fifth).

8. *See* U.S. Customs and Border Protection, *San Ysidro Seeks to Add Security, Reduce Wait Time*, http://www.cbp.gov/xp/cgov/newsroom/full_text_articles/tours_cbp_facilities/san_ysidor_wait.xml (last visited June 27, 2007) (emphasizing that this improvement is a long way off).

9. *See* Immigration Reform and Control Act of 1986 § 101, 8 U.S.C. §§ 1324(a), 1324(b) (2000)*; see also* Matt Hayes, *INS Fails to Enforce Employer Sanctions*, FOX NEWS, Jan. 9, 2003, http://www.foxnews.com/story/0,2933,75009,00.html (reporting that in 2002, INS fined 320 U.S. employers $5.3 million for hiring illegal aliens, although only $2.6 million was collected).

10. Asa Hutchinson, *Keynote Address*, 59 ADMIN. L. REV. 533, 541 (2007).

same time, Congress has sought to modify and shrink avenues of relief in court. This has created extreme pressures on the overall adjudication system to the point that efficiency concerns have trumped fairness concerns.

The result is an exploding caseload in the federal courts of appeals. After Attorney General Ashcroft issued his regulation expanding the "streamlining" of the Board of Immigration Appeals (BIA) case handling procedures in August 2002,[11] the volume of petitions for review that reached the federal courts almost immediately began to rise by about five-fold.[12]

Empirical studies have shown that "[w]hereas about 7% of the BIA's decisions were challenged nationwide before March 2002, about 25% are now being challenged . . . . For BIA decisions arising within the Second and Ninth Circuits, the appeal rate has now surpassed 40%."[13] And conservative judges like Richard Posner have probably stimulated such appeals by repeatedly castigating EOIR decisions that deny asylum or relief from removal as based on insufficient evidence.[14]

These problems have clearly mushroomed since the BIA procedures were radically changed, but the roots of this problem lie in the draconian immigration legislation enacted by the 104th Congress in 1996. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[15] as well as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[16] explicitly stripped courts of jurisdiction to review immigrants' claims in several crucial areas.[17]

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11. *See* Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

12. *See* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 20 (2006-2007). This issue of the NEW YORK LAW SCHOOL LAW REVIEW, vol. 51, number 1, contains an excellent symposium, *Seeking Review: Immigration Law and Federal Court Jurisdiction*.

13. *See* Palmer, *supra* note 12, at 20 (stating that there were not only more Board of Immigration Appeals (BIA) decisions subject to challenge, but that a larger proportion of these decisions were actually being challenged).

14. For example, see the consolidated cases of *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (Posner, J.) (finding the Immigration Judge's (IJ) decision denying relief to a Sudanese asylum seeker was riddled with errors) and *Blagoev v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (Posner, J.) (finding that the IJ ignored evidence of persecution in the record pertaining to the Bulgarian asylum applicant). These cases and others are discussed in Michael Asimow, *Adjudication*, *in* DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 3, 8-10 (Jeffrey S. Lubbers ed., ABA Publishing 2004).

15. Pub. L. No. 104-132, tit. III & IV, 110 Stat. 1247-81 (1996).

16. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (part of the Omnibus Consolidated Appropriations Act of 1997).

17. *See* Jeffrey S. Lubbers, *Closing the Courthouse to Immigrants*, 24 ADMIN. & REG. L. NEWS. 1 (1999), and, more extensively, David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of the REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 76, 82-90 (2006-2007).

Non-citizens charged with "aggravated felonies" are subject to deportation (now called "removal") and, since 1996, may not challenge a final decision by the BIA.[18] "Aggravated felons" have been deportable since 1988, but when this concept was introduced twenty years ago, it covered only the crimes of murder, drug trafficking, and firearms trafficking. Since then, Congress has expanded "aggravated felonies" to the point that a plethora of crimes are now covered, including some where the minimum sentence is as short as one year.[19] It also includes *suspended sentences and probation*—thus embracing crimes such as shoplifting and driving while intoxicated (DWI) in some states.[20] In many such cases, the defendants accepted a plea bargain on advice of counsel.[21] But when IIRIRA made the effect of this provision retroactive and eliminated any appeal in such cases, it created a great potential of unfairness that cannot be challenged in court.

The 1996 laws also cut to the bone the possibility of discretionary relief earlier known as "suspension of deportation" (now called "cancellation of removal"). Under prior law, a deportable immigrant could ask for relief if he or she could show physical presence in the United States for seven years and that either the immigrant or his or her citizen/permanent-resident family members would suffer "extreme hardship" if the immigrant were deported. IIRIRA not only barred aggravated felons from seeking such relief, but it also increased the physical presence requirement to ten years and required an immigration judge to find that the immigrant's family members (*not* including the immigrant) would suffer "exceptional and extremely unusual hardship"—a standard that few applicants are able to meet.[22] Moreover, even where INS (now U.S. Citizenship and Immigration

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18. Section 440(a) of AEDPA amended section 106(a) of the Immigration and Nationality Act (INA) to provide that the deportation orders of such criminal aliens "shall not be subject to review in any court." This was carried over into Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* McConnell, *supra* note 17, at 86. While courts upheld this provision, in a decision released just before September 11, 2001, the Supreme Court ruled that this did not prevent courts from hearing habeas corpus petitions. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

19. The current provision states that the parts of the INA providing for inadmissibility and for the bar on judicial review do not apply to an alien who committed only one crime if the maximum penalty possible for the crime for which the alien was convicted "did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentences was ultimately executed)." 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2000).

20. *Id.*

21. Note also that most courts have held that an attorney's failure to inform a non-citizen client of the immigration-related consequences of pleading guilty to an aggravated felony does not constitute ineffective assistance of counsel. *See* United States v. Fry, 322 F.3d 1198, 1200-01 (9th Cir. 2003) and cases cited therein. *But see* United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002) ("[A]ttorney's affirmative misrepresentations on the subject might well constitute ineffective assistance." (emphasis omitted)).

22. *See* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review*

Services (CIS)) does retain some discretion to waive requirements, such as to adjust one's status, IIRIRA precludes judicial review of the exercise of that discretion.[23]

These statutory preclusion provisions led to a Supreme Court decision that held that habeas corpus review was preserved in such cases.[24] But Congress, in the Real ID Act of 2005,[25] sought to eliminate habeas relief as well—providing that "constitutional claims or questions of law" may only be brought in direct petitions to the courts of appeals.[26]

The cumulative effect of these substantive and procedural changes is that immigration lawyers now have few options to advise their at-risk, non-citizen clients in many cases, other than to "lay low." This hardly breeds respect for the law. And once ensnared in the detention/removal net, immigrants and their lawyers have every reason to litigate to the hilt.

What can we do about this? As a general matter, I think that our mindset about the purpose of immigration adjudication must change.

First, we need to recognize the value of thorough and fair adjudications. The BIA streamlining of 2002 clearly went too far. Mr. Guendelsberger, from the BIA staff, seemed to acknowledge as much today when he recounted some of the changes afoot at the BIA. These changes included adding more BIA members, allowing more panel reviews, and having fewer decisions without opinions.[27]

But Congress, too, needs to focus on the entire EOIR process and the need for independent adjudications.[28] The Administrative Procedure Act (APA) has produced a system of independent Administrative Law Judges

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and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. SCH. L. REV. 37, 50 (2006-2007) (citing INA § 240A, 8 U.S.C. § 1229b (2000)).

23. After the 1996 laws, the INA provided in 8 U.S.C § 1252(a)(2)(B)(2000) that:

> [N]o court shall have jurisdiction to review—(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

The REAL ID Act of 2006 has tightened this restriction even more. *See id.* (amended). For an extended discussion of the problems posed by this provision, see Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 162 (2006-2007).

24. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

25. Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005).

26. *Id.* § 106, 119 Stat. at 310. What is meant by "questions of law" is not entirely clear. *See* Aaron G. Leiderman, Note*, Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367 (2006).

27. John Guendelsberger, Bd. Member, Bd. of Immigration Appeals, Remarks at the American University Washington College of Law Administrative Law Review Symposium: Holes in the Fence: Immigration Reform and Border Security in the United States (Mar. 20, 2007) (recording available at http://www.wcl.american.edu/secle/video.cfm).

28. For an excellent review of these independence issues, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

(ALJs) for most of our important types of agency adjudications; but Immigration Judges (IJs) are not ALJs. IJs lack the statutory independence that ALJs have. That should change.[29]

The BIA is one administrative appeal board that needs to be independent too.[30] Given the Attorney General's power to review BIA decisions *sua sponte*, and the severe limits on judicial review, there is more reason for *both* the IJs and BIA members to be independent adjudicators. Lives are at stake in these cases and they need to be subjected to a fair hearing and review. It goes without saying that EOIR needs better funding and increased support, including more law clerks, to accomplish the large adjudication task before it. We also need to rethink the division of responsibilities between the Department of Justice, which houses the EOIR, and DHS, which houses the former INS.

Second, we need to recognize the value of the judicial review process. Rather than shying away from, or even trying to limit judicial review in, immigration law, we should embrace a carefully constructed system of judicial review. This is not an impossible task. We have provided for judicial review in other mass justice programs. In 1988, we ended the long history of preclusion of judicial review of denials of veterans' benefits by creating a special court.[31] In the Social Security program, where we have 600,000 administrative hearings a year, we allow judicial review in federal district courts.[32] An appropriate system can be designed for judicial review in the immigration context if we devote the necessary attention and resources to the problem.

Third, Congress needs to establish reasonable incentives to comply with our immigration laws. I agree with Professor Lenni Benson of New York Law School, who recently wrote that "[i]f Congress would more carefully tailor its use of deportation and consider more generous exceptions or waivers, it is likely that many of the people now litigating so fiercely would either not be in the removal system" or would feel like they were getting

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29. *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 73 (1996).

30. Unlike administrative law judges, who are guaranteed significant independence by the Administrative Procedure Act (APA), agency appeal board members are not. *See* Kalaris v. Donovan, 697 F.2d 376, 393 (D.C. Cir. 1983). Furthermore, unless Congress specifies otherwise, the APA leaves the structure of the agency appeal process to the agency's discretion. And, since most appeals boards "stand in the shoes" of the agency head, the need for independence is lessened. *See generally* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 252 (1996). However, due to the importance of removal cases and the Attorney General's residual review authority, independence for the BIA seems warranted.

31. *See* Veterans' Judicial Review Act—Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, tit. III, § 4052, 102 Stat. 4105, 4113 (1988) (describing the jurisdiction and partial finality of decisions of the U.S. Court of Veterans Appeals).

32. *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 785 app. B (2003).

fairer treatment at the administrative levels.[33] As she said, "When we make the forgiveness boundaries too small, people will litigate about the boundaries of the net or the box."[34]

One way to reduce the incentive to fight would be to create adequate forms of relief from removal. As Professor Benson asked, if a person being deported has the skills and qualities that would otherwise make him or her eligible for immigration through our employment system or has the close relatives that qualify the person for immigration through the family system, does it really make sense to subject him or her to a permanent bar upon departure? Why not allow the bar to be waived in appropriate equitable circumstances?[35]

I agree wholeheartedly with Professor Benson's conclusion that if we provide reasonable and realistic opportunities for a person who has been found deportable (especially where it was simply for immigration violations) to *legally* immigrate in the future, it will create an incentive for that person to play by the rules and stop litigating about the boundaries.[36]

In conclusion, as an administrative lawyer, I worry that this corner of administrative law has lost the appropriate balance between fairness and efficiency. Efficiency need not always be the enemy of fairness, but it certainly can be, and I think it has been with respect to immigration adjudication. I hope that panels like this one will help our lawmakers and administrators focus on ways to restore that balance.

Thank you.

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33. Benson, *supra* note 22, at 65-66.
34. *Id.* at 66.
35. *See id.*
36. *See id.* at 68.