

**IN SEARCH OF UNIFORMITY: APPLYING THE FEDERAL RULES  
OF EVIDENCE IN IMMIGRATION REMOVAL PROCEEDINGS**

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I. INTRODUCTION .....	864
II. PATH TO A LEISURELY APPLICATION OF RECOGNIZED RULES OF EVIDENCE IN REMOVAL PROCEEDINGS.....	866
A. Federal Rules of Evidence Do Not Apply to Administrative Proceedings .....	866
B. Absence of Federal Rules of Evidence in Immigration Removal Proceedings as a Result of its Administrative Nature .....	867
III. RULES OF EVIDENCE USED IN IMMIGRATION PROCEEDINGS AND THEIR DEPARTURE FROM THE FRE .....	870
A. Testimonial Evidence.....	870
1. Prior Inconsistent Statements.....	871
2. Cross-Examination.....	874
B. Hearsay.....	876
C. Other Evidence.....	880
IV. IMMIGRATION JUDGES' IMMENSE DISCRETIONARY POWER AND THE CONSEQUENCES THAT FOLLOW AS A RESULT OF RELAXED EVIDENTIARY RULES.....	881
A. Deference Given to Immigration Judges (and the BIA).....	882
B. Existence of Bias by Immigration Judges .....	885
C. Disparity Amongst Immigration Judges .....	887
V. APPLYING THE FRE TO REMOVAL PROCEEDINGS TO PROMOTE CONSISTENCY AMONG IMMIGRATION JUDGES WHILE BALANCING THE INTERESTS OF THE GOVERNMENT AND NONCITIZEN.....	888
A. Consistency and Predictability – Amid Other Advantages .....	889

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B. Striking a Balance that Acknowledges the Unique Circumstances of Noncitizens .....	891
VI. CONCLUSION.....	893

## I. INTRODUCTION

There are more than 260 immigration judges in fifty-nine immigration courts scattered across the United States.<sup>1</sup> Immigration judges enjoy a vast amount of discretion concerning procedural and evidentiary rules in their courts.<sup>2</sup> Further expanding the immigration judge's discretionary power is the absence of a requirement to adhere to recognized rules of evidence in removal hearings.<sup>3</sup> The administrative nature of immigration removal proceedings,<sup>4</sup> coupled with the immigration judge's ever-expanding discretionary power, has given way to incongruous decisions throughout immigration courts and even among judges sitting on the same court.<sup>5</sup> While such incongruity may be a result of numerous variables, the lack of formal rules of evidence contributes to uneven outcomes.

Most, if not all, of the cases heard by immigration judges rely heavily on hearsay,<sup>6</sup> an evidentiary problem that is extensively addressed under the Federal Rules of Evidence ("FRE").<sup>7</sup> An asylum seeker in a removal proceeding, for example, will have to rely almost entirely on hearsay to make out his case as it will be friends and family members who will testify to the conditions that have caused

1. *Office of the Chief Immigration Judge*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/eoir/ocijinfo.htm> (updated Apr. 2011) [hereinafter OCIJ].

2. *See infra* Part IV.

3. *See* THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1047 (6th ed. 2008) ("As with most administrative proceedings, the formal rules of evidence do not apply in removal hearings."). The words "removal" and "deportation" will be used interchangeably throughout this Note because "removal hearings" were called "deportation proceedings" prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of Titles 8, 18, & 42 U.S.C.). *See* OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 4.1 (2008) [hereinafter COURT MANUAL], available at [http://www.justice.gov/eoir/vll/OCIJPracManual/PracticeManualFinal\\_compressedPDF.pdf](http://www.justice.gov/eoir/vll/OCIJPracManual/PracticeManualFinal_compressedPDF.pdf); ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 25 (2010) (describing how IIRIRA "combined the earlier 'deportation' and 'exclusion' into one procedure called 'removal'").

4. *See* ALENIKOFF ET AL., *supra* note 3, at 1047.

5. *See* Tanya Weinberg & Ruth Morris, *Gatekeepers: Who Gets Asylum? Experts Warn Bias Might Be Swaying Judges' Decisions*, SUN-SENTINEL, July 3, 2005, at 1H.

6. *See* Derek C. Smith & Bruce A. Hake, *Evidence Issues In Asylum Cases*, 90-10 IMMIGR. BRIEFINGS 1, 26 (1990).

7. *See* FED. R. EVID. 801-807.

him to seek asylum.<sup>8</sup> Immigration courts have recognized the crucial role hearsay statements hold for asylum seekers in immigration removal proceedings and have adjusted accordingly.<sup>9</sup> However, such “adjustment” of evidentiary requirements for asylees can also be a double-edged sword: the admission of hearsay evidence in removal proceedings can also serve to strengthen the government’s case against the asylee.<sup>10</sup> Sharpening the double-edged sword is the reality that the government has many more resources than the noncitizen and can benefit more from relaxed evidentiary rules. Nonetheless, both sides of the adversarial system can benefit from a uniform application of rules of evidence.

Incorporating the Federal Rules of Evidence in immigration removal proceedings can alleviate the growing disparity in how immigration judges apply evidentiary rules. For an administrative body that has been criticized for its unsatisfactory performance,<sup>11</sup> standard usage of more formal evidentiary rules of evidence can create much needed uniformity in removal proceedings and can mitigate the many dangers<sup>12</sup> posed by a relaxed set of evidentiary rules.

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8. See *Cordon-Garcia v. INS*, 204 F.3d 985, 992-93 (9th Cir. 2000). In *Cordon-Garcia*, the asylee stated that she could not return to her home country because her family had continuously told her that the guerillas were looking for her, and she feared them since they had killed her father and uncle. *Id.* at 992.

9. See *id.* at 992-93 (citing *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985)) (responding to the government’s complaints that the asylee was relying on multiple hearsay, the court stated that, “[t]his court recognizes the serious difficulty with which asylum applicants are faced in their attempts to prove persecution and has adjusted the evidentiary requirements accordingly” (citation omitted)).

10. See *Tamenut v. Ashcroft*, 361 F.3d 1060, 1061 (8th Cir. 2004) (finding that the government’s introduction of a fax from an embassy was admissible as rebuttal against the asylee’s testimony); see also *infra* note 74 and accompanying text.

11. See Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 97 (2007) (noting courts of appeal have consistently complained about inconsistent immigration rulings); *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) (reviewing a decision of the Board of Immigration Appeals). In *Pasha*, Circuit Judge Posner of the Court of Appeals for the Seventh Circuit stated:

At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA’s asylum decisions in this court by the Justice Department’s Office of Immigration Litigation. The performance of these federal agencies is too often inadequate.

433 F.3d at 531 (citation omitted).

12. See Kidane, *supra* note 11, at 149 (“These differing approaches clearly show that in the absence of clear guidance regarding hearsay, a due process check could be problematic, on top of being limited to only those who are able to challenge the admissibility of evidence on several stages of appeal.”).

Part II of this Note will briefly summarize the path that led to the flexible and leisurely application of recognized rules of evidence in removal proceedings. Part III will survey some of the rules of evidence currently used in removal proceedings and demonstrate how they depart from the Federal Rules of Evidence. Part IV will discuss the expansion of the immigration judge's discretionary power, and its negative consequences, as a result of the inobservance of official rules of evidence. Finally, Part V will provide suggestions for incorporating the Federal Rules of Evidence in immigration removal proceedings in a way that addresses and alleviates the growing disparity among immigration judges in applying evidentiary rules, all while attempting to strike a balance between the interests of the government and those of the noncitizen.

## II. PATH TO A LEISURELY APPLICATION OF RECOGNIZED RULES OF EVIDENCE IN REMOVAL PROCEEDINGS.

### A. *Federal Rules of Evidence Do Not Apply to Administrative Proceedings*

Since the early 1900's, courts have shown a reluctance to apply rules of evidence in administrative proceedings.<sup>13</sup> An attempt was made to employ some judicial characteristics in administrative proceedings through the introduction of a House bill,<sup>14</sup> but those efforts were halted by President Roosevelt's veto.<sup>15</sup> Arguing for fewer constraints on administrative proceedings, President Roosevelt stated that:

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. *A common-sense resort to usual and practical sources of information takes the*

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13. See *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25, 44 (1904) ("The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938) ("The obvious purpose . . . is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order.").

14. See William H. Kuehnle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829, 844-45 (2005) (discussing bills that attempted to "impos[e] procedures for appeals within agencies and provid[e] for external imposition of rules of trial practice and procedure").

15. See *id.* at 845.

*place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case.*<sup>16</sup>

In 1946, with the implementation of the Administrative Procedure Act (“APA”),<sup>17</sup> evidentiary rules in administrative proceedings began to look less like the FRE and more like a loose set of standards.<sup>18</sup> Evidence that would typically be inadmissible in nonadministrative federal courts was suddenly admissible, and even required to be considered, in administrative proceedings.<sup>19</sup> Without the requirement of strict adherence to official rules of evidence, the belief that “anything goes” can easily be held.

*B. Absence of Federal Rules of Evidence in Immigration Removal Proceedings as a Result of its Administrative Nature*

In immigration removal proceedings, the government arbitrates whether to allow a noncitizen to remain in the United States.<sup>20</sup> The proceedings are managed by the Executive Office of Immigration Review (“EOIR”), which “interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings.”<sup>21</sup> The EOIR was created in 1983 and was organized under the Department of Justice.<sup>22</sup> Immigration judges and the Board of Immigration Appeals (“BIA”) are also found under the umbrella of the EOIR.<sup>23</sup> In removal

16. PRESIDENT FRANKLIN D. ROOSEVELT, PROVIDING FOR THE EXPEDITIOUS SETTLEMENT OF DISPUTES WITH THE UNITED STATES, H.R. Doc. No. 76-986, at 1-2 (1940).

17. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered portions of 5 U.S.C.). For a glimpse at the development of administrative evidence standards prior to the APA, see Kuehnle, *supra* note 14, at 837-42.

18. See Kuehnle, *supra* note 14, at 832-33 (noting that agencies supplemented the APA through regulation); ROBERT S. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 132 (rev. ed., 1980) (“Generally speaking there are no specific rules governing admission of evidence in administrative adjudication . . .”).

19. Kidane, *supra* note 11, at 105.

20. DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2008-2009, at 348 (Jeffrey S. Lubbers ed., 2010).

21. *About the Office*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/eoir/orginfo.htm> (last updated Sept. 2010) [hereinafter *EOIR Background*].

22. See *id.* (stating that the EOIR is a separate agency within the DOJ). This restructuring separated immigration courts from the Immigration and Naturalization Service (“INS”), which was responsible for enforcing immigration laws. See *id.* In 2003, the Immigration and Customs Enforcement (“ICE”) agency was formed and replaced the INS. See *ICE Overview*, U.S. DEPT OF HOMELAND SEC., <http://www.ice.gov/about/overview/> (last visited May 23, 2012).

23. See *EOIR Background*, *supra* note 21; see also Immigration and Nationality

proceedings, the immigration judge has the responsibility of making findings of fact and law.<sup>24</sup> Although immigration judges wear black robes and are in many respects similar to judges adjudicating civil or criminal proceedings, they are not “Article III judges with life tenure; they are administrative agency personnel and not independent adjudicators, because they are accountable to the attorney general.”<sup>25</sup>

Both the government and the noncitizen can appeal the decision of the immigration judge.<sup>26</sup> Functioning as an appellate body, the BIA is the “highest administrative body for interpreting and applying immigration laws” and is responsible for hearing appeals from decisions made by immigration judges.<sup>27</sup> The BIA has also been described as the “the supreme court of immigration law,”<sup>28</sup> partly because its decisions “are binding on all administrative immigration proceedings in the United States.”<sup>29</sup> However, because the BIA is located within the Department of Justice, its powers are limited and defined by the Attorney General.<sup>30</sup> Thus, the Attorney General is the final decision maker for administrative immigration proceedings, and the BIA cannot act independently of him.<sup>31</sup>

The BIA is often the last resort for a noncitizen’s appeal,<sup>32</sup> but BIA decisions can also be reviewed on appeal by federal courts.<sup>33</sup> Beginning with the 1961 restructuring of the appeals process by means of amendments to the Immigration and Nationality Act (“INA”), and later with the creation of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), the noncitizen parties in removal proceedings were able to appeal decisions of the BIA.<sup>34</sup> Courts of appeals play a significant role in adjudicating

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Act (INA) of 1952, 8 U.S.C. § 101(b)(4) (2006).

24. See OCIJ, *supra* note 1 (“In removal proceedings, immigration judges determine whether an individual . . . should be allowed to enter or remain in the United States or should be removed. Immigration judges are responsible for conducting formal court proceedings and act independently in deciding the matters before them.”); see also § 240(a)(1).

25. LAW, *supra* note 3, at 205.

26. *Id.* at 21.

27. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

28. T. Alexander Aleinikoff & David A. Martin, Editorial, *Ashcroft’s Immigration Threat*, WASH. POST, Feb. 26, 2002, at A21.

29. DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, *supra* note 20, at 348.

30. See LAW, *supra* note 3, at 23.

31. *Id.*

32. *Id.* Aside from the uncertainty of whether the federal courts will hear an appeal from a BIA decision, noncitizens are often prevented from seeking appeal to the federal courts because they cannot afford the costs. *Id.* at 24-25.

33. *Id.*

34. See *id.* at 25; ALEINIKOFF ET AL., *supra* note 3, at 291-93. Prior to 1961, no

immigration cases due to the continuously growing number of BIA decisions that are appealed to the federal courts.<sup>35</sup> One study shows that “54 percent of the 2,005 cases appealed to three U.S. Courts of Appeals originate from the [BIA].”<sup>36</sup>

Given that removal proceedings are governed by an administrative agency, Federal Rules of Evidence do not control the admissibility of evidence.<sup>37</sup> Instead, the rules of evidence are governed entirely by the INA.<sup>38</sup> As such, not even the Administrative Procedure Act (“APA”) governs the rules of evidence in removal proceedings.<sup>39</sup> Noncitizens in removal proceedings have tried to rely on the FRE, but federal courts have rejected claims that evidence introduced was inadmissible because it violated the FRE.<sup>40</sup> Some immigration courts have also gone further by allowing “local rules to provide for basic procedural and evidentiary regulation.”<sup>41</sup> This increased flexibility in applying rules of evidence leads to cumbersome appeals where it is then questioned whether fair and adequate proceedings are taking place.<sup>42</sup>

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statute provided noncitizens with the right to appeal the BIA’s decisions to federal courts. LAW, *supra* note 3, at 25.

35. See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005). It has been argued that the high number of appeals is an indication of the crisis that immigration courts are facing. See *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596, 2596 (2006) [hereinafter *Pattern of Error*].

36. LAW, *supra* note 3, at 205.

37. See Kidane, *supra* note 11, at 115 (“Immigration proceedings are exclusively governed by the [INA].”).

38. See INA § 240, 8 U.S.C. § 1229a(a)(3) (2006) (“Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States.”); *Ardestani v. INS*, 502 U.S. 129, 133-34 (1991) (emphasizing that the methods prescribed in the INA are “the sole and exclusive” procedures in removal proceedings).

39. See *Ardestani*, 502 U.S. at 133 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955)) (“Although immigration proceedings are required by statute . . . we previously have decided that they are not governed by the APA.”). In *Marcello*, the Court stated that “[u]nless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.” 349 U.S. at 310. *But see* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 86-93 (2011) (discussing how the current evidentiary rules used resemble those of the APA).

40. See *Kim v. Holder*, 560 F.3d 833, 836-38 (8th Cir. 2009) (citing *Solis v. Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008)) (finding that the FRE do not apply to INA proceedings).

41. Kidane, *supra* note 11, at 149.

42. See Kidane, *supra* note 12 and accompanying text.

### III. RULES OF EVIDENCE USED IN IMMIGRATION PROCEEDINGS AND THEIR DEPARTURE FROM THE FRE

The rules of evidence used in removal proceedings are often ambiguous and unpredictable. All sorts of evidence can be admitted if the immigration judge finds them probative.<sup>43</sup> It is understandable that admissibility of a greater variety of evidence can be advantageous as “even the most basic facts about identity and citizenship are developed for the purpose of a removal proceeding under circumstances in which the truth is elusive and hard for either side to prove.”<sup>44</sup> However, it is often the government that benefits the most from the advantage of flexible rules of evidence as it has access to an array of resources that helps it better prepare and argue its cases.<sup>45</sup>

#### A. Testimonial Evidence

The most significant category of evidence in removal proceedings is almost always testimonial evidence, especially when the noncitizen is seeking asylum. In asylum proceedings, the noncitizen’s credible testimony may be enough to satisfy the burden of proof even if it is unsupported by additional evidence.<sup>46</sup> In *Dawoud v. Gonzales*, the Court of Appeals for the Seventh Circuit reasoned that:

The policy behind a rule permitting reliance solely on credible testimony is simple. Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in this country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.<sup>47</sup>

The REAL ID Act of 2005 established the standard of proof in asylum proceedings by providing that corroboration is usually not required if

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43. See *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004) (quoting *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)) (“The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.”).

44. ALEINIKOFF ET AL., *supra* note 3, at 1047.

45. See, e.g., Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 397 (2000) (“[T]he government may, in general, do a better job at preparing and arguing its case . . . than do other litigants.”).

46. See 8 C.F.R. §§ 1208.13(a), 1208.16(b) (2010) (providing guidelines for applicants to satisfy their burden of proof). For examples of circumstances where corroborating evidence is necessitated, see Kurtis A. Kemper, *Necessity and Sufficiency of Evidence Corroborating Alien’s Testimony to Establish Basis for Asylum or Withholding of Removal*, 179 A.L.R. FED. 357, § 2 (originally published in 2002).

47. 424 F.3d 608, 612-13 (7th Cir. 2005).

the factfinder is persuaded that the testimony is credible.<sup>48</sup> Credibility is determined by the totality of the circumstances and may be based on factors such as the witness' demeanor or candor.<sup>49</sup> As such, all types of evidence may be used to contradict or impeach the witness without adequate consideration to the type of evidence being introduced. Based on the current rules, there is no limit to the government's ability to introduce otherwise inadmissible evidence when the government is attempting to impeach a witness or contradict his testimony.<sup>50</sup> Such limitless admissibility can be very disadvantageous in cases where the noncitizen's testimony is the only evidence provided.

### 1. Prior Inconsistent Statements

As aforementioned, the immigration judge has the authority to admit "any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or *any other person* during any investigation, examination, hearing, or trial" to contradict or undermine the noncitizen's testimony in removal proceedings.<sup>51</sup> In nonadministrative proceedings the admissibility of such evidence would be limited by FRE 613(b), which states that "[e]xtrinsic evidence of a witness' prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires."<sup>52</sup> In removal proceedings, noncitizens are not protected by FRE 613 and usually do not have the opportunity to challenge evidence based on prior statements.<sup>53</sup> This is most troublesome for noncitizens seeking asylum. Due to the expedited removal process created as a result of the IIRIRA,<sup>54</sup> many immigrants seeking asylum, for example, are

48. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a)(3)(B)(ii), 119 Stat. 302, 303 (codified at 8 U.S.C. § 1158(b)(1)(B)(ii)) (amending INA § 208).

49. *Id.* at § 101(a)(3)(B)(iii). The Act further states that the consistency of a witness' statement can be taken into account "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." *Id.*

50. Kidane, *supra* note 11, at 135.

51. 8 C.F.R. § 1240.7(a) (emphasis added).

52. FED. R. EVID. 613(b).

53. *See infra* notes 63-68 and accompanying text; *see also* 8 C.F.R. § 1240.7(a) (mentioning that the immigration judge may admit prior oral or written material and relevant statements from the respondent or any other person during any investigation, hearing, or trial). *But see* James Feroli, *Evidentiary Issues in Asylum Proceedings*, 10-11 IMMIGR. BRIEFINGS 1, 1 (2010) (finding that some immigration judges do not accord "weight to statements that are not in affidavit form").

54. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, § 302, 110 Stat. 3009-546, 579-85 (1996); Immigration and Nationality Act (INA), § 235(b)(1), 8 U.S.C. § 1225(b) (2006); *see, e.g.*, Allen Keller et al., *Evaluation of*

immediately questioned upon arrival to the United States regarding their fear of persecution, or lack thereof.<sup>55</sup> The asylum seekers most often have to give statements under stressful circumstances, which frequently results in erratic and impaired statements arising out of fear of being sent back to the country where they may face continued persecution.<sup>56</sup>

A study done by the U.S. Commission on International Religious Freedom ["CIRF"] suggests that "the Expedited Removal process is not designed to gather the asylum seeker's full story at the earlier screening stages before the [removal proceeding]."<sup>57</sup> The authors who analyzed the study note that some "would argue that the [asylum seeker's] real story is *less* likely to come out on the first telling due to the influence of vulnerability, disorientation, exhaustion, fear, poor interpretation, lack of understanding of the process, etc."<sup>58</sup> Courts have acknowledged the shortcomings of such interviews and have expressed uncertainty about their reliability.<sup>59</sup> Some courts have addressed the issue by treating it "as an evidentiary matter, refusing to accord significant weight to airport interview reports that contain indicia of unreliability."<sup>60</sup> However, in other cases, the sum of "the unreliability of the notes, their significance to the outcome of the claim, and the inability of an alien to cross-examine the author

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*Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, in 2 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 1, 4 (2005) (detailing the history of the IIRIRA); see also MATTHEW J. GIBNEY & RANDALL HANSEN, IMMIGRATION AND ASYLUM: FROM 1900 TO THE PRESENT 229 (2005).

55. See Keller et al., *supra* note 54, at 4.

56. See *Pattern of Error*, *supra* note 35, at 2599 (explaining the factors that result in such high-stress situations). Such reliance on prior statements is troublesome at the least and raises questions of fairness. See, e.g., Keller et al., *supra* note 54, at 29-30 (analyzing the relationship between credible fear referrals and the nature of the fear expressed); MARK HETFIELD ET AL., 1 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS & RECOMMENDATIONS 7 (2005) (noting inconsistencies in testimony); Kate Jastram & Tala Hartsough, *A-File and Record of Proceeding Analysis of Expedited Removal*, in 2 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS 44, 67-70 (2005).

57. Jastram & Hartsough, *supra* note 56, at 64 n.71.

58. *Id.* The authors also made the following comments:

We are not suggesting that all asylum seekers tell all of the truth all the time. Nor are we suggesting that statements made at the airport are always less reliable than the testimony at the hearing. Some would argue that the real story is *more* likely to come out on the first telling, before the asylum seeker might be coached to describe a particular fact pattern.

*Id.*

59. Feroli, *supra* note 53.

60. *Id.*

invoke due process of law.”<sup>61</sup>

In *Ramsameachire v. Ashcroft*, where an appeal to a BIA decision was sought, the noncitizen argued that “the INS incorrectly concluded that he was incredible solely on the basis of inconsistencies between his testimony at the removal proceeding and his airport statement.”<sup>62</sup> The court reasoned that airport statements may be used in determining an applicant’s credibility as long as they are “an accurate record of the alien’s statements.”<sup>63</sup> To determine the reliability of a prior record, the court used a four-part test: (1) whether the record provides a summary or verbatim account of the noncitizen’s statements; (2) whether the questions asked were designed to elicit more information from the noncitizen; (3) whether the noncitizen was reluctant to provide information due to prior coercive experiences; and (4) whether there were problems with English translations.<sup>64</sup> Unfortunately, these factors only address the weight of the evidence and not its admissibility. As a result, the evidence will be admitted and will nonetheless influence the immigration judge who is ultimately deciding the case.

The FRE further limits the use of prior inconsistent statements by admitting them into evidence only if “[t]he declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is inconsistent with the declarant’s testimony, and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.”<sup>65</sup> On the contrary, prior statements by asylum seekers, for example, are admissible even though the asylum seeker was not questioned under oath when he arrived and was screened at the airport.<sup>66</sup> In addition, courts have held that an immigration officer’s affidavit is sufficient to compensate for the officer’s unavailability to testify at removal proceedings.<sup>67</sup>

61. *Id.*

62. 357 F.3d 169, 179 (2d Cir. 2004).

63. *Id.* The Court relied on the holdings of *Balasubramaniam v. INS*, 143 F.3d 157, 164 (3d Cir. 1998), and *Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998), to emphasize that airport statements are not excluded when used to show an inconsistency when compared to statements made at the removal proceeding, so long as the airport statements are an accurate depiction of the alleged persecution suffered by the applicant. *Ramsameachire*, 357 F.3d at 179.

64. *Id.* at 180.

65. FED. R. EVID. 801(d)(1).

66. *See Singh v. Gonzales*, 403 F.3d 1081, 1089-90 (9th Cir. 2005) (“[There is no] record of the questions and answers at the asylum interview . . . . There is no indication of the language of the interview or of the administration of an oath before it took place. The asylum officer did not testify at the removal hearing.”).

67. *See Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990).

## 2. Cross-Examination

Noncitizens have a right to a “reasonable opportunity” to cross-examine witnesses in removal proceedings.<sup>68</sup> In *Hernandez-Garza v. INS*, the court held that the noncitizen was denied the right to cross-examination when the noncitizen’s attorney was prohibited from attempting to impeach the government witness, a Border Patrol agent who asserted to be fluent in Spanish and had translated a statement made by a witness who was unavailable to testify.<sup>69</sup> The attorney wanted to test the witness’ language fluency by requiring that he read a statement in Spanish; however, the immigration judge prevented the cross-examination even though a qualified interpreter was present at the proceedings.<sup>70</sup> Indeed, several courts have recognized that the government must make a reasonable effort to produce witnesses for cross-examination.<sup>71</sup> However, potential violations are common in that many hearsay statements are not subject to cross-examination because they are received in writing from officials and from private citizens that are not available for cross-examination.<sup>72</sup> Accordingly, as alluded to previously, it may not take much for the government to meet the “reasonable effort” requirement, and courts have further held that the right to cross-examine does not extend to the establishment of uncontested facts.<sup>73</sup>

In *Espinoza v. INS*, the Ninth Circuit considered whether the immigration judge was required to allow cross-examination of a government witness when the only admitted evidence was a copy of a form stating the noncitizen’s date of entry into the United States and that he was from Mexico.<sup>74</sup> The court distinguished the noncitizen’s situation from previous cases where cross-examination had been permitted because the noncitizen had failed to produce any evidence

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68. INA § 240(b)(4)(B); 8 U.S.C. § 1229a(b)(4)(B) (2006).

69. 882 F.2d 945, 947 (5th Cir. 1989).

70. *Id.* at 947-48.

71. *See, e.g.,* Xue Tong Zou v. U.S. Attorney Gen., 367 F. App’x 36, 39-41 (11th Cir. 2010) (holding that allowing a case to proceed without testimony of a key witness deprived appellant of a fair immigration hearing); Cinapian v. Holder, 567 F.3d 1067, 1074-75 (9th Cir. 2009) (holding the government’s failure to disclose forensic documents or make the documents’ author available for cross-examination denied the petitioner a fair hearing); Olabanji v. INS, 973 F.2d 1232, 1234-36 (5th Cir. 1992) (holding that the government denied petitioner a fair hearing when it did not make the author of an affidavit entered into evidence available for cross-examination).

72. *See* LORCH, *supra* note 18, at 134-35 (discussing hearsay evidence in administrative adjudications).

73. *Olabanji*, 973 F.2d at 1234 n.1; *see also* Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990) (holding valid the admission of an uncontested immigration form); Kuehnle, *supra* note 14, at 875-76 (discussing *Bustos-Torres* and noting that no attempt was made to impeach the information contained in the immigration form).

74. 45 F.3d 308, 309 (9th Cir. 1995).

contrary to the contents of the Form I-213.<sup>75</sup> The court stated that a contrary result would create unnecessary procedural barriers and that “[e]stablishing an automatic right to cross-examine the preparers of such documents would place an unwarranted burden on the INS.”<sup>76</sup> The court’s reasoning in *Espinoza* appears to prioritize the burden placed on the government without giving equal weight to the deprivation that the claimant may face by not having the opportunity to cross-examine.<sup>77</sup>

Apart from the concerns that are raised from the unavailability of government witnesses to be examined, the actual practice of cross-examination in removal proceedings can be troublesome as well. Unlike FRE 611, which sets the boundaries for cross-examinations, the parties in removal proceedings are allowed to cross-examine a witness on issues beyond the subject matter of the direct examination.<sup>78</sup> As such, government attorneys can use it as an intimidation mechanism to the extent that the witness may fear telling the truth.<sup>79</sup> This is an issue that the FRE in all probability intended to mitigate by limiting the scope of cross-examination so as to “protect witnesses from harassment or undue embarrassment.”<sup>80</sup> It has also been argued that the INA gives immigration judges too much latitude by having their inquisitorial role extend to participation in cross-examination.<sup>81</sup>

Cross-examination is usually used by an adversary as a means to elicit damaging or unhelpful information to the party that is cross-examined.<sup>82</sup> Given the function of cross-examination, an immigration judge that engages in the practice with a noncitizen in removal proceedings may be demonstrating one-sidedness while assisting the government in making its case. In one startling example, an immigration judge interrupted the noncitizen’s cross-examination and blurted out: “You have no right to be here. All of the applicants that are applying for asylum have no right to be here. . . . You have to

75. *Id.* at 311.

76. *Id.*

77. See DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, *supra* note 20, at 348 (noting the procedural consequences of an adverse decision for the noncitizen in removal proceedings).

78. See FED. R. EVID. 611(b) (“Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness’ credibility. The court may allow inquiry into additional matters as if on direct examination.”); Kidane, *supra* note 11, at 136-37.

79. See Kidane, *supra* note 11, at 136-37. Kidane also mentions that “[t]he immigration court environment could be very intimidating for a non-citizen who faces government attorneys who are often very experienced and treated with some degree of reverence by defense attorneys and immigration judges alike.” *Id.* at 137.

80. FED. R. EVID. 611(a)(3).

81. Kidane, *supra* note 11, at 124-25.

82. *Id.* at 125.

understand, the whole world does not revolve around you.”<sup>83</sup> It can hardly be argued that such behavior and procedure fall within the realms of a proper cross-examination even when it is not required that the cross-examination follow the FRE. Although courts condemn this behavior,<sup>84</sup> allowing immigration judges to participate in cross-examinations can lead to abuse.

*B. Hearsay*

No other rule of evidence better exemplifies the inapplicability of the FRE in removal proceedings than the hearsay exception.<sup>85</sup> Rooted in the tenet that the sole requirement for the admissibility of evidence is its probative value and fairness,<sup>86</sup> hearsay is also admissible in removal proceedings so long as it “is probative and its admission is fundamentally fair.”<sup>87</sup> FRE 802 states that “[h]earsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”<sup>88</sup> In removal proceedings there are no bright line rules, or helpful definitions, used by the courts to determine what type of evidence is fundamentally fair or probative.<sup>89</sup> Hence, there are no categorical rules for determining the types of hearsay that are admissible. For example, in *Felzcerek v. INS*, the Court of Appeals for the Second Circuit simply stated that “[i]n the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.”<sup>90</sup> Courts have struggled to provide standards for the admissibility of hearsay evidence in removal proceedings, which leaves both the noncitizen and the government without guidance on the kinds of evidence that can or cannot be

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83. See *Pattern of Error*, *supra* note 35, at 2597-98.

84. See *id.* at 2598. See also *Abulashvili v. Attorney Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (finding that the immigration judge did not act as a neutral arbiter when she asked the noncitizen “a total of 87 questions” and “the government’s attorney did not follow up with a *single question*”). In *Abulashvili*, the court emphasized that “[i]t is not the [immigration judge’s] function to protect the government by becoming its counsel when its own counsel is not prepared.” *Id.*

85. See *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) (“Perhaps the classic exception to strict rules of evidence in the administrative context concerns hearsay evidence. Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evidence is that it bear satisfactory indicia of reliability.”). Hearsay is “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).

86. See *Nyama v. Ashcroft*, 357 F.3d 812, 816 (8th Cir. 2004).

87. See *Solis v. Mukasey*, 515 F.3d 832, 836 (8th Cir. 2008) (quoting *Nyama*, 357 F.3d at 816).

88. FED. R. EVID. 802.

89. Kidane, *supra* note 11, at 135.

90. 75 F.3d 112, 115 (2d Cir. 1996).

introduced.<sup>91</sup> Because of a lack of firm standards, even courts have had to resort back to the FRE hearsay rule and exceptions as guidance.<sup>92</sup>

Nonetheless, the fairness standard for admitting hearsay evidence is arguably very low and subjects the noncitizen to the same hazards as those created by the admission of prior inconsistent statements.<sup>93</sup> In attempting to undermine the noncitizen's credibility, the government may introduce into evidence notes from interviews that took place at the time the noncitizen attempted to enter the United States.<sup>94</sup> These interviews generate a variety of reports and notes, consisting of statements made at the interviews, which are typically handwritten or typed by the immigration officer.<sup>95</sup> These reports and notes raise concerns over its reliability because "they are not transcribed verbatim" and "may be incomplete and reflect misunderstandings resulting from translation errors."<sup>96</sup> In addition, an interpreter may not have been at the interview to assist the noncitizen.<sup>97</sup> The noncitizen may contest the accuracy of the notes, and if they are not typed, there is the risk that "they may be illegible" or "may not be properly certified by [an] interpreter."<sup>98</sup>

In nonadministrative proceedings, FRE 802 is the primary rule of hearsay exclusion, although it is subject to twenty-nine exceptions and eight exemptions pursuant to which many kinds of hearsay statements are admitted.<sup>99</sup> The hearsay rule, along with its several exceptions and exemptions, seeks to protect the parties from the dangers of unreliable evidence.<sup>100</sup> It can be said that the fairness standard in removal proceedings inevitably takes into account the reliability of the evidence; after all, admitting unreliable evidence is

91. See Kidane, *supra* note 11, at 145.

92. See *id.*; see also *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) ("We agree with the BIA that information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien. This position closely tracks the Federal Rules of Evidence, which exempt public records containing factual findings from an official investigation from the prohibition on hearsay 'unless the sources of information or other circumstances indicate lack of trustworthiness.'" (quoting FED. R. EVID. 803(8)(c))).

93. See *Espinoza*, 45 F.3d at 310; see also *supra* Part III.A.1.

94. See Feroli, *supra* note 53, at 6. For asylum seekers, these interviews may be "in the form of a Form I-131 Record of Sworn Declaration; it may occur in the context of a credible fear interview; or the interview may take place as an affirmative asylum interview with an asylum officer." *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. RONALD J. ALLEN, ET AL. EVIDENCE: TEXT, PROBLEMS, AND CASES 452 (4th ed. 2006).

100. *Id.* at 452-53.

not per se fair. However, unreliable hearsay evidence is often admitted during removal proceedings.<sup>101</sup> The concern with fairness governs any and all evidence and is also the focal question when a due process violation is alleged due to the improper admission of evidence.<sup>102</sup> As such, if there is any limit to an immigration judge's reliance on hearsay evidence, it might be found in due process claims.<sup>103</sup>

The Court of Appeals for the Fourth Circuit has implied that an immigration judge's decision based entirely upon hearsay may violate the noncitizen's due process rights.<sup>104</sup> As previously mentioned, admitting hearsay evidence can also result in a due process violation if it denies the noncitizen the right to cross-examine the witnesses from whom the hearsay statements originate.<sup>105</sup> Yet, courts have also held that while admitting hearsay evidence deprives the claimant of the right to cross-examine, it is only temporary and the claimant still has the remedy of subpoenaing witnesses himself and, thus, has an opportunity to examine them.<sup>106</sup> If the FRE were used, the government would have to satisfy one of the twenty-three exceptions to the hearsay rule in order to use evidence from a witness that is unavailable,<sup>107</sup> thereby making it more difficult to use evidence or testimony needed for cross-examination from an unavailable witness.

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101. See *supra* notes 93-98 and accompanying text.

102. See *Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008).

103. See *Alexandrov v. Gonzales*, 442 F.3d 395, 405 (6th Cir. 2006) (cautioning against excessive reliance on potentially unreliable hearsay evidence (citing *Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004))).

104. See *Anim*, 535 F.3d at 258-61 (holding that the noncitizen's due process right had been violated when the immigration judge based his denial of relief from removal solely on hearsay evidence that was found to be highly unreliable and ultimately led to the judge finding the noncitizen incredible). *But see* *Kiareldeen v. Ashcroft*, 273 F.3d 542, 549 (3d Cir. 2001) (noting that the Supreme Court has "recognized that a hearsay document (INS Form I-213) typically constitutes the exclusive basis for a decision made in a removal proceeding." (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984))).

105. See 3 AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION LAW AND BUSINESS § 8:13 (2010).

106. See *Cohen v. Perales*, 412 F.2d 44, 50-51 (5th Cir. 1969), *rev'd sub nom.* *Richardson v. Perales*, 402 U.S. 389 (1971); Ernest H. Schopler, Comment, *Hearsay Evidence in Proceedings Before Federal Administrative Agencies*, 6 A.L.R. FED. 76, § 8 (Supp. 2011) (providing an example of a case where a claimant who failed to request that doctors be subpoenaed to testify was precluded from claiming that his right to cross-examine was violated).

107. See FED. R. EVID. 803. *But see* *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (reasoning that the admissibility of an authenticated immigration form that was presumed to be reliable "closely tracks the [FRE], which exempt public records containing factual findings from an official investigation from the prohibition on hearsay").

One of the greatest concerns in establishing an adequate standard for the admissibility of hearsay evidence in removal proceedings is that a noncitizen may have to rely entirely and solely on hearsay evidence to make his case.<sup>108</sup> This is particularly true of asylum applicants facing removal because they often have to support their claims with “statements from friends and family members [that] . . . may take the form of letters from relatives and friends still in the home country, or sworn statements or affidavits from witnesses present in the United States.”<sup>109</sup> In fact, some argue that hearsay evidence should be given full weight if the asylum seeker is considered credible.<sup>110</sup> The Court of Appeals for the Ninth Circuit has stated that “[t]estimony should not be disregarded merely because it is uncorroborated and in the individual’s own interest.”<sup>111</sup> This, without a doubt, benefits a noncitizen in removal proceedings because they frequently have to rely substantially on hearsay evidence that cannot be corroborated.<sup>112</sup>

However, with the exception of probative value and fairness, the clearest disadvantage in allowing the admission of an indiscriminate amount of hearsay is the lack of predictability and inconsistency resulting from nonexistent standards.<sup>113</sup> While the noncitizen may depend heavily on the liberal admission of hearsay, the government simultaneously enjoys the same advantage and will likely benefit more from the admission of hearsay.<sup>114</sup> As such, the noncitizen is not

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108. See Smith & Hake, *supra* note 6, at 30 (“The most important, and sometimes the only, evidence in asylum cases is the applicant’s testimony. The BIA has ruled that when the applicant’s testimony is the only evidence available, it can suffice . . . if it is . . . sufficiently detailed.”).

109. Feroli, *supra* note 53, at 2.

110. Nicole J. Thomas, Note, “*They Told Me He Said He Would Kill Me.*” *Why Hearsay Should Get Full Weight in Asylum Proceedings*, 37 CAL. W. INT’L L.J. 299, 301 (2007).

111. *Murphy v. INS*, 54 F.3d 605, 611 (9th Cir. 1995) (internal citations omitted). *But see* Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can’t: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases*, 06-11 IMMIGR. BRIEFINGS 1 (2006) (noting that there has been a rise in the demand for corroborating evidence in federal courts); Kemper, *supra* note 46, § 5(a) (discussing cases where courts upheld the validity of a BIA rule requiring corroborating evidence).

112. See Smith & Hake, *supra* note 6, at 27; *see also* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 122-23 (2006) (noting the difficulties that some asylum seekers face when having to provide corroborating evidence and that “[i]n many cases . . . the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof”).

113. See Kidane, *supra* note 11, at 150 (noting the serious inconsistency and unpredictability that has resulted from an “ad hoc type local rule making by immigration courts” in applying the loose standards of evidentiary rules).

114. See *Espinoza v. INS*, 45 F.3d 308, 309 (9th Cir. 1995); *supra* notes 75-79 and

gaining as much from the admission of hearsay as it may appear at the outset. In addition, it may very well be that much of the hearsay evidence that is usually admitted in removal proceedings will continue to be admissible if the FRE are used, because the FRE hearsay rules provide numerous exceptions<sup>115</sup> to allow for hearsay evidence that “possess[es] circumstantial guarantees of trustworthiness.”<sup>116</sup> FRE 803 provides twenty-three exceptions to hearsay evidence where the availability of the declarant is irrelevant.<sup>117</sup> While it may seem like a great amount of hearsay evidence is admissible, the FRE provide predictability and consistency by means of their categorical approach.

### C. Other Evidence

Another stark contrast to the FRE is the admissibility of otherwise excludable evidence. Illegally obtained evidence is regularly admitted in removal proceedings, and immigration courts routinely depend on such evidence to reach a decision.<sup>118</sup> Courts have refused to give weight to the values protected by exclusionary rules in the interest of expedient removal proceedings.<sup>119</sup> In *INS v. Lopez-Mendoza*, the Court held that the social costs of applying the exclusionary rule are much greater than any benefit the rule might offer.<sup>120</sup> The Court reasoned that removability will still be possible based on other evidence that was not legally obtained; it is “highly unlikely” that the noncitizen will challenge the admissibility of the illegally obtained evidence; there is a “comprehensive scheme for deterring Fourth Amendment violations”; and there are alternative remedies for the violation of Fourth Amendment rights.<sup>121</sup> While the FRE does not have a specific rule for the admissibility of illegally obtained evidence, constitutionally protected rights are nonetheless respected and acknowledged—FRE 402 specifies that evidence that is excluded by the Constitution is excluded, whether relevant to the proceedings or not.<sup>122</sup>

On a more positive note, in removal proceedings, like nonadministrative proceedings, evidence must be authenticated.<sup>123</sup> In

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accompanying text.

115. See FED. R. EVID. 803-04.

116. FED. R. EVID. 803, 807.

117. FED. R. EVID. 803.

118. See generally *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004) (affirming deportation order because petitioner did not show a violation in having evidence admitted).

119. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048-49 (1984).

120. *Id.* at 1045-46.

121. *Id.* at 1043-46.

122. See FED. R. EVID. 402.

123. See *Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981) (concluding that “there is no

*Iran v. INS*, the Court of Appeals for the Ninth Circuit stated that “[t]he INS’ contention that authentication is not required in a deportation hearing is erroneous. While there is some doubt as to which methods of proof are acceptable in such proceedings, there is no question that authentication is necessary.”<sup>124</sup> The court further stated that “[w]hatever confusion exists concerning the authentication requirement may arise because we have not attempted to set forth all of the approved methods for authenticating writings in deportation hearings.”<sup>125</sup> Although evidence must be authenticated through some recognized procedure, proof could be minimal.<sup>126</sup> In *Vatyan v. Mukasey*, the court held that the immigration judge erred in requiring the noncitizen to produce official certification to authenticate documents produced by the foreign government.<sup>127</sup> The court then held that the judge further erred in not considering the noncitizen’s testimony in determining the authenticity of the documents.<sup>128</sup>

#### IV. IMMIGRATION JUDGES’ IMMENSE DISCRETIONARY POWER AND THE CONSEQUENCES THAT FOLLOW AS A RESULT OF RELAXED EVIDENTIARY RULES

Without the constant reminder and pressure to comply with formal rules of evidence, immigration judges have the luxury of exercising complete discretion at any and every moment in removal proceedings.

The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this Act.<sup>129</sup>

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question that authentication [of evidence in INS proceedings] is necessary”).

124. *Id.* (citation omitted).

125. *Id.*

126. *See Yongo v. INS*, 355 F.3d 27, 31 (1st Cir. 2004) (holding that the authenticity of German immigration records was sufficiently established by the testimony of the immigration officer, even if testimony contained hearsay); *Sukwanputra v. Gonzales*, 434 F.3d 627, 636 (3d Cir. 2006) (holding that the immigration judge erred in not giving any weight to the unauthenticated evidence); *Gebreeyesus v. Gonzales*, 482 F.3d 952, 955 (7th Cir. 2007) (stating that requirement of authentication “does not apply to unsworn statements of facts or letters from family members”).

127. 508 F.3d 1179, 1184-85 (9th Cir. 2007).

128. *See id.*

129. INA § 240 (b)(1) (2010). For a discussion of the evolution of immigration judges, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERP. REL. 453, 453 (1988).

In addition, the Court of Appeals for the Ninth Circuit has held that an immigration judge is required to develop the record in circumstances where the immigrant is not represented by counsel.<sup>130</sup> In the event that the immigration judge is required to develop a full and practical record, he must question the immigrant in order to explore any inconsistencies and to develop the pertinent facts.<sup>131</sup> Immigration cases are very fact intensive and, for instance, judgments pertaining to a social group's characteristics or the "relationship of individual harm(s) within collective entities (e.g., social groups, religions, nationalities, political groups) require much discretion."<sup>132</sup> Given the particular framework of immigration cases in removal proceedings, some argue that the accessibility of wide discretion allows immigration judges to engage in an "honest reading of the evidence" and minimizes adjudicative bias.<sup>133</sup> However, so much discretion can easily backfire and result in increased adjudicative bias<sup>134</sup> or other negative consequences.<sup>135</sup>

A. *Deference Given to Immigration Judges (and the BIA)*

The BIA has continuously stated that it grants deference to the immigration judge when the issue debated or appealed pertains to credibility.<sup>136</sup> The rationale for giving deference to the immigration judge stems from the fact that the judge is present during testimonies and can make relevant observations, such as a witness' demeanor.<sup>137</sup> In the BIA decision *In re A-S-*, the dissent argued that, although "well-intentioned," the standard of deference given to immigration judges "unduly restricts the de novo review authority of Board Members."<sup>138</sup> By "well-intentioned" the judge was referring to the purported uniformity that such an enhanced deference standard may provide for the various panels and the guidance it may serve to

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130. See *Jacinto v. INS*, 208 F.3d 725, 732-33 (9th Cir. 2000); *Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002) ("Remand to the Board recognizes that the Board is the adjudicative body having primary responsibility and experience in asylum matters. This procedure recognizes that the IJ . . . is not merely the fact finder and adjudicator but also has an obligation to establish the record.").

131. James L. Buchwalter, Annotation, *Existence and Effect of Bias by Immigration Judge*, 45 A.L.R. FED. 2d 219, § 2 (2010).

132. Carrie Menkel-Meadow, *Asylum in a Different Voice?: Judging Immigration Claims and Gender*, in REFUGEE ROULETTE 202, 211-12 (2009).

133. See Stephen H. Legomsky, in *Learning to Live With Unequal Justice: Asylum and the Limits to Consistency*, in REFUGEE ROULETTE 250, 279 (2009).

134. See discussion *infra* Part IV.

135. See LAW, *supra* note 3, at 126-41.

136. See, e.g., *A-S-*, 21 I. & N. Dec. 1106, 1109 (B.I.A. 1998).

137. *Id.* at 1109, 1111. For a discussion of other alleged benefits of deference see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759-62 (1982).

138. 21 I. & N. at 1113 (Schmidt, Board Member, dissenting).

the public.<sup>139</sup> On the other hand, the dissent stressed the problem that enhanced deference created—the likelihood that it will “make it more difficult for an asylum applicant who has received an adverse credibility finding to prevail on appeal.”<sup>140</sup>

In 2002, legislation “expanded the use of affirmances without opinion and limited the [BIA’s] authority to review findings of fact by immigration judges.”<sup>141</sup> Furthermore, an immigration judge’s and BIA’s discretionary determinations are generally left untouched under certain circumstances because the INA expressly prevents judicial review of discretionary determinations.<sup>142</sup> In *Torres-Riasco v. Gonzales*, the court found that it did not have the jurisdiction to review an immigration judge’s denial of relief from removal because it was barred by the jurisdiction-stripping provision of the INA.<sup>143</sup> The Supreme Court has also warned the federal courts that they should grant more deference to BIA decisions in removal proceedings.<sup>144</sup> In *INS v. Aguirre-Aguirre*, the Court held that the

139. *Id.*

140. *Id.* 1114. The dissent was aware of the disparate impact that could result from the application of enhanced deference:

The overwhelming majority of appeals that we adjudicate are from aliens, rather than the Immigration and Naturalization Service. In the asylum area, almost all credibility appeals involve an alien who has been found incredible by an Immigration Judge . . . .

In effect, we are instructing Board Members to defer to reasonable rulings by Immigration Judges even where another outcome might have been justified on the record. I have considerable misgivings about this rule, particularly in asylum cases, notwithstanding its apparent administrative and systemic advantages. Also, while the majority’s rule is likely to achieve more uniform affirmation of adverse credibility findings on appeal, it does not, in any way, promote uniformity of credibility decisions among the many Immigration Courts.

*Id.*

141. John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 606-07 (2004) (citing Procedural Reforms to Improve Case Management, Final Rule, 67 Fed. Reg. 54,878 (Aug. 26, 2002)).

142. INA § 242(a)(2)(B) (codified as amended at 8 U.S.C. § 1252(a)(2)(B) (2006).

[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 or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

*Id.*; see also, LAW, *supra* note 3, at 127 (discussing congressional efforts to “limit the exercise of discretion by U.S. Courts of Appeal”).

143. 122 F. App’x 170, 171 (5th Cir. 2005).

144. See *INS v. Yang*, 519 U.S. 26, 28-32 (1996) (reversing Court of Appeals for the Ninth Circuit and holding that immigration judge’s denial of discretionary waiver should be given deference); *INS v. Elias-Zacarias*, 502 U.S. 478, 481-84 (1992)

Ninth Circuit Court of Appeals had erred in requiring the BIA to consider additional factors in making its determination, and that more deference should have been given to the BIA's statutory interpretation.<sup>145</sup>

The circuit courts of appeal have raised concerns about affording too much deference to the BIA, which subsequently must afford just as much deference to immigration judges' discretionary findings.<sup>146</sup> In *Yepes-Prado v. INS*, for example, the Ninth Circuit Court of Appeals stated that "the BIA has no fixed situs for the basic discretionary determination and thus no fixed standard for reviewing decisions by IJs."<sup>147</sup> A significant problem with allowing immigration judges to have so much discretion, and consequently more deference afforded to them, is the difficulty of distinguishing when the immigration judge is exercising discretion. The BIA has attempted to "standardize the exercise of discretion," but such attempts "tend to blur the line between interpretation and discretion."<sup>148</sup> In *Yepes-Prado*, the court further declared that "[u]ntil the BIA sees fit to fix its standard of review, we are left with the problem of deciding in each case which decision we must examine for an abuse of discretion: the IJ's or the BIA's."<sup>149</sup>

The courts of appeal have demonstrated an unwillingness to be deterred by jurisdiction-stripping provisions of the INA when it comes to addressing its concerns over the requisite amount of deference that should be given.<sup>150</sup> In *Flores-Miramontes v. INS*, the court reasoned that it retained jurisdiction, notwithstanding INA § 242(a)(2)(C)'s jurisdictional bar, to determine "whether a petitioner

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(reversing Court of Appeals for the Ninth Circuit and holding that deference should be given to the BIA's factual determinations).

145. 526 U.S. 415, 423-25 (1999).

146. See *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996). Some courts apply a substantial evidence test in reviewing credibility findings of a noncitizen by an immigration judge. See *id.* In *Osorio*, the court stated, "we do not accept blindly an IJ's conclusion that a petitioner is not credible. Rather, we examine the record to see whether substantial evidence supports that conclusion and determine whether the reasoning employed by the IJ is fatally flawed." *Id.* (quoting *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990)). But see Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 734 (1997) [hereinafter Kanstroom I] (stating that the "recent trend has been toward [a unifying] theory of deference to agency decisionmakers" (footnote omitted)).

147. 10 F.3d 1363, 1367 (9th Cir. 1993).

148. 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. 161, 197 (2007) [hereinafter Kanstroom II]; see also LAW, *supra* note 3, at 126 (stating that "in some instances, appellate court judges will be asked to use their own discretion in determining how a fact pattern should be construed and how much latitude to grant the decision makers below").

149. 10 F.3d at 1367.

150. See, e.g., *Flores-Miramontes v. INS*, 212 F.3d 1133, 1135 (9th Cir. 2000).

‘is an alien [removable] by reason of having been convicted of one of the enumerated offenses.’”<sup>151</sup> The courts of appeal have also taken in stride the Supreme Court’s warning that more deference should be given to the BIA.<sup>152</sup>

[C]ongressional attempts to limit the exercise of discretion by the U.S. Courts of Appeals are not meaningful if the Supreme Court is not going to police instances where the U.S. Courts of Appeals have not given sufficient deference to the discretion of another decision maker by reversing the U.S. Courts of Appeals’ rulings.<sup>153</sup>

Perhaps the courts have expressed a reluctance to accord much deference to immigration judges because, after all, it is the job of the federal courts to oversee decisions from administrative agencies and check abuses of discretion.<sup>154</sup>

### B. Existence of Bias by Immigration Judges

It would be naïve to believe that immigration judges do not have some formed opinions or biases concerning the very issues they adjudicate in court. It should not come as a surprise, then, that some immigration judges depart from their role as neutral adjudicators and sway towards biased behavior.<sup>155</sup> In what is perhaps an extreme case, an immigration judge “repeatedly addressed [the noncitizen] in an argumentative, sarcastic, impolite, and overly hostile manner that went beyond fact-finding and questioning.”<sup>156</sup> The court argued that even if an immigration judge adamantly believes the noncitizen is untruthful, such conduct “erode[s] the appearance of fairness and call[s] into question the results of the proceeding.”<sup>157</sup> The court went

151. *Id.* (quoting *Magana-Pizano v. INS*, 200 F.3d 603, 607 (9th Cir. 1999)); see *Aragon-Ayon v. INS*, 206 F.3d 847, 849 (9th Cir. 2000) (“We continue to have jurisdiction to determine whether jurisdiction exists . . .”).

152. See *Kanstroon II*, *supra* note 148, at 180-89 (discussing the conflicting views on judicial construction of discretion).

153. *LAW*, *supra* note 3, at 127.

154. See *LAW*, *supra* note 3, at 94-95 (discussing judicial review of administrative action under the APA).

155. See *Buchwalter*, *supra* note 131, § 2 (“Courts have ruled on whether bias infected an immigration judge’s overall actions in conducting the proceedings . . . , as well as, more particularly, whether the judge’s questioning of witnesses . . . , evaluation of testimony or other evidence, or adjudicative rulings and evaluations displayed bias.”); Stephen H. Legomsky, *Learning to Live With Unequal Justice: Asylum and the Limits to Consistency*, in *REFUGEE ROULETTE* 272 (Jaya Ramji-Nogales et al. eds., 2009) (“[A]djudicators will arrive with biases. Anyone with specialized experience is likely to have thought about the issues and formed opinions and in that sense, at least, will have preexisting bias.”).

156. *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006). For a discussion on other similarly “bad” judges, see Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 *GEO. IMMIGR. L.J.* 1, 28-36 (2006).

157. *Islam*, 469 F.3d at 56.

on to hold that the immigration judge's apparent bias toward the noncitizen necessitated remand and assignment to a different immigration judge.<sup>158</sup> As mentioned previously, there are circumstances where it is deemed necessary for the immigration judge to develop the record, and thus, question the immigrant in order to attain the relevant facts,<sup>159</sup> but it is that same duty imparted on the judge that demands his impartiality.<sup>160</sup>

Besides the bias shown by the overall disposition of some immigration judges towards the immigrant in the proceedings, courts have also found bias in immigration judges' evaluation of evidence.<sup>161</sup> In *Lopez-Umanzor v. Gonzalez*, the Ninth Circuit found that an immigration judge had been biased when he refused to hear testimony from the immigrant's domestic violence experts.<sup>162</sup> The judge had expressed doubts about the immigrant's credibility and domestic violence claims prior to hearing testimonies, which prompted the Ninth Circuit to state that they could not "assume that the IJ would have struck the same balance had the weighing begun on an even plane."<sup>163</sup> Unfortunately, not all cases blighted by an immigration judge's bias has so fortunate an outcome.<sup>164</sup> Overall, these demonstrated biases are an aggravating factor in the increasing inconsistencies in decisions among immigration judges,

158. *Id.* at 56-57.

159. *See supra* note 130-31 and accompanying text.

160. *See* Buchwalter, *supra* note 131, § 2. Some judges are able to set aside personal biases or sympathies and render a just decision. *See* James P. Vandello, *Perspective of an Immigration Judge*, 80 DENV. U. L. REV. 770, 775 (2003). For instance, one judge offered the following account of his experiences behind the bench:

Each case I hear is a life story. I have been able to grant refuge to persons who have a genuine fear of persecution. I have been able to unite or re-unite families. On the other hand, in many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit.

*Id.*

161. *See* Buchwalter, *supra* note 131, 271-72; Weinberg & Morris, *supra* note 5, at 1H.

162. 405 F.3d 1049, 1052, 1054 (9th Cir. 2005).

163. *Id.* at 1054.

164. *See, e.g.*, *Abdulrahman v. Ashcroft*, 330 F.3d 587, 595-97 (3d Cir. 2003). In *Abdulrahman*, a noncitizen argued that the immigration judge had acted as a witness by demonstrating bias in conducting the removal proceedings. *Id.* at 595-96. The court held that the immigration judge had not acted as a witness against the noncitizen but had instead simply "questioned the logic of [the noncitizen's] factual assertions [concerning his credibility]." *Id.* at 596. Lastly, the court stated that "there were places where the [immigration judge] . . . [made] some additional and problematic generalized assertions of her own. While . . . we are understandably troubled by some of those comments, in the context of the record as a whole there is insufficient evidence to conclude that the overall proceedings were biased . . ." *Id.*

and may even be the cause of them.<sup>165</sup> As will be discussed later, applying the FRE leaves less room for discretion and, ultimately, creates some safeguards against the likelihood of an immigration judge rendering a decision tainted by bias.<sup>166</sup>

### C. Disparity Amongst Immigration Judges

For the past few years, concerns over disparities within and among immigration courts in the disposition of immigration cases have surfaced.<sup>167</sup> Prominent studies have been done that cast a light on the issue and even suggest possible abuse by immigration judges.<sup>168</sup> A 2006 report done by the Transactional Records Access Clearinghouse (“TRAC”) revealed a large disparity in the dispositions of immigration cases after observing 297,240 immigration cases decided from 1994 through 2005.<sup>169</sup> In 2010, TRAC produced another report which showed that a judge in the Houston Immigration Court denied 100 percent of his asylum cases.<sup>170</sup> As well, over a two-year period, a judge from the Arlington Immigration Court denied only 15.1 percent of his asylum cases.<sup>171</sup>

Striking disparities in the disposition of cases are also seen within the same immigration court.<sup>172</sup> From 2008-2010 a judge sitting on the New York Immigration Court denied 69.9 percent of the asylum claims brought to him while another judge, also from the New York Immigration Court, had an asylum denial rate of 6.2 percent.<sup>173</sup>

It has also been shown “that the five largest [immigration] courts have consistent outliers; that is, from one-third to three-quarters of the judges on these courts grant asylum . . . at rates more than 50% greater or more than 50% less than the national average.”<sup>174</sup> These

165. See Alexander III, *supra* note 156, at 25 (“[T]he problem may be worse than simple non-uniformity; inconsistency among judges suggests that bias and prejudice are influencing the outcomes.”).

166. See *infra* Part V.

167. See LAW, *supra* note 3, at 178-79.

168. See *id.*

169. *Immigration Judges*, TRAC (July 31, 2006), <http://trac.syr.edu/immigration/reports/160/> [hereinafter TRAC I].

170. *Judge-by-Judge Asylum Decisions in Immigration Courts Before and After the Attorney General's Directive*, TRAC (June 21, 2010), <http://trac.syr.edu/immigration/reports/240/include/denialrates.html> [hereinafter TRAC II]. The years listed are by the court's fiscal year, which begins in October of the previous year. *Federal Court Management Statistics*, U.S. COURTS, <http://www.uscourts.gov/statistics/FederalCourtManagementstatistics.aspx> (last visited May 23, 2012) (stating that a court's fiscal year ends on September 30).

171. TRAC II, *supra* note 170.

172. See *id.*

173. See *id.*

174. JAYA RAMJI-NOGALES, ANDREW IAN SCHOENHOLTZ & PHILIP G. SCHRAG,

studies suggest that an overall lack of consistency is creating a crisis in the immigration courts. The 2006 TRAC report concluded by stating that “[i]t is clear that these findings directly challenge the EOIR’s commitment to providing a ‘uniform application of the nation’s immigration laws in all cases.’”<sup>175</sup> The report also indicated that the problem of disparity “has existed for at least a decade and that it persists even when the [asylum] applicants being compared appear to be quite similar.”<sup>176</sup> This last statement is further corroborated by a finding that case samples used in similar studies are random and large enough to represent the underlying caseload of immigration judges, thus showing that judges within the same immigration court are receiving consistent caseloads but are producing inconsistent results.<sup>177</sup>

Most importantly, a study done by CIRF—which also found significant variations in the grant of asylum rates of individual immigration judges<sup>178</sup>—showed that in almost 40 percent of decisions where relief from removal was denied, the immigration judge had cited an evidentiary issue, in the form of witness credibility, as the grounds for denial.<sup>179</sup> In particular, the immigration judge cited to inconsistencies between the noncitizen’s testimony and prior statements such as initial asylum claims.<sup>180</sup> Furthermore, in almost 25 percent of the cases observed where asylum was denied, the judge found the noncitizen’s testimony not credible because of details added to prior statements made by the noncitizen.<sup>181</sup> These cases are a good example of the urgent need for immigration courts to adopt more formalized rules of evidence. Application of the FRE along with an understanding of the intricacies of removal proceedings would be beneficial to all the parties involved, particularly the noncitizen which has the most to lose from an adverse decision.

V. APPLYING THE FRE TO REMOVAL PROCEEDINGS TO PROMOTE  
CONSISTENCY AMONG IMMIGRATION JUDGES WHILE BALANCING  
THE INTERESTS OF THE GOVERNMENT AND NONCITIZEN

Although there has always been indisposition to apply the FRE

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REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 38-39 (2009). The eight largest immigration courts by volume are: Baltimore, Chicago, Los Angeles, Miami, Newark, New York, Orlando, and San Francisco. *Id.* at 38.

175. TRAC I, *supra* note 169.

176. *Id.*

177. See Alexander III, *supra* note 156, at 24-25.

178. See HETFIELD ET AL., *supra* note 56, at 7.

179. *Id.*

180. See *id.*

181. *Id.*

rules of evidence to administrative proceedings in general,<sup>182</sup> the growing concern over the disparities in the disposition of immigration removal cases calls for a reconsideration of the benefits that can be provided by the application of the FRE.

A. *Consistency and Predictability – Amid Other Advantages*

As suggested by Sydenham B. Alexander III, “[i]nconsistency is itself a failure to provide uniform application of the law.”<sup>183</sup> Uniformity in the application of the law can best be achieved by the use of a fixed set of evidentiary rules such as the FRE. Other than the basic rationale given for the inapplicability of strict rules of evidence in administrative proceedings,<sup>184</sup> there are no real significant and persuading justifications for the digression from the solid rules of evidence that nonadministrative courts have been using for an extended period of time. Nonadministrative courts have been successful in relying on the FRE, which would validate the FRE’s role in administrative proceedings.<sup>185</sup> In effect, anything contrary to the reliance on the FRE has arguably proven to be fruitless as exemplified in Part IV of this Note.

The initial rationale for why the FRE can, and should, be applied to immigration removal proceedings is that the goals and purpose of the FRE are one and the same with those of the EOIR. FRE 102 states that “[t]hese rules should be construed so as to administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination.”<sup>186</sup> Likewise, the EOIR states its primary goal to be the “adjudicat[ion of] immigration cases in a careful and timely manner . . . while ensuring the standards of due process and fair treatment for all parties involved.”<sup>187</sup> In furtherance of this goal, the EOIR intends to “[i]ncrease productivity and timeliness of case processing by setting appropriate standards.”<sup>188</sup> If these are indeed the goals of the EOIR, then, it should be receptive to the proposal of applying the FRE. By applying the use of the FRE, immigration courts may diminish the inconsistencies and criticism that plague immigration courts.<sup>189</sup> Hence, using the FRE can at least serve as the foundation for more adequate rules of evidence in removal proceedings.

182. *See supra* note 13 and accompanying text.

183. Alexander III, *supra* note 156, at 25.

184. *See supra* note 16 and accompanying text.

185. *See* Kidane, *supra* note 11, at 157.

186. FED. R. EVID. 102.

187. EOIR Background, *supra* note 21.

188. *Id.*

189. *See* Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005) (discussing the inadequacies of the federal immigration agencies as a whole).

In regards to particular rules, the most problematic rule in removal proceedings is hearsay. Establishing an appropriate rule of evidence is difficult due to the unique circumstances of the noncitizen in removal proceedings. As previously discussed, noncitizen parties, typically asylum seekers, constantly rely on hearsay evidence.<sup>190</sup> However, the government also relies on hearsay evidence, which many times works to the disadvantage of the noncitizen, such as interview notes from when the noncitizen first stepped foot in the United States.<sup>191</sup> At first it may appear that a more rigorous application of the FRE's hearsay rules will be detrimental to noncitizens in removal proceedings, but when profoundly examined, the noncitizen may actually benefit more.

First and foremost, applying the FRE hearsay rules can generate consistency and predictability in immigration courts.<sup>192</sup> The FRE hearsay rules use specific categories that enable a litigant to predetermine the various types of evidence that are admissible.<sup>193</sup> All parties in removal proceedings, including the immigration judge, would benefit from more comprehensible evidentiary rules like the FRE by not having to second guess the admissibility of a given piece of evidence, unless it is evidence that is exceptionally uncommon. That, in turn, allows the parties to better prepare for the proceedings by using evidence that is less likely to be deemed inadmissible given that most forms of hearsay admitted under the FRE are deemed to be more trustworthy.<sup>194</sup> Thus, there is "less reason for concern about the absence of cross-examination."<sup>195</sup> This line of reasoning also applies to almost all of the FRE. For example, asylum seekers have been harmed by immigration judges' reliance on prior inconsistent statements,<sup>196</sup> but under the FRE they can better protect themselves by being aware of the types of prior statements that can or cannot be used against them. They can strategize ways to receive asylum by not having to worry about statements that they made under fear, which can alone result in denial of asylum.<sup>197</sup>

Next, the predictability resulting from the categorical approach of the FRE hearsay rules may promote expediency in removal proceedings. If the parties are knowledgeable of the types of evidence that are admissible, they will less than likely resort to questionable

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190. See *Cordon-Garcia v. INS*, 204 F.3d 985, 992-93 (9th Cir. 2000).

191. See *Feroli*, *supra* note 53.

192. See *Kidane*, *supra* note 11, at 161.

193. ALLEN ET AL., *supra* note 99, at 453.

194. *Id.*

195. *Id.*

196. See *supra* note 51 and accompanying text.

197. See *Jastram & Hartsough*, *supra* note 56, at 67 (finding that "most of the few cases in our sample that were granted asylum were from the cases where prior statements were not introduced at the hearing").

evidence that may require more time from the immigration judge in assessing its trustworthiness. Under the FRE, the hearsay evidence will either fit a category or not, which will not require as much time to consider.<sup>198</sup> Expediency would also benefit the noncitizen, given that the courts have expressed more interest in the expediency of removal proceedings than in the liberty interests of the noncitizen.<sup>199</sup> Perhaps attaining more expediency can sway the attention of the courts to the harsh consequences that noncitizens potentially face.

Furthermore, application of the FRE in removal proceedings can ultimately halt the expanding discretion of immigration judges. With a few exceptions,<sup>200</sup> immigration judges would be given less freedom under the FRE to exercise unwarranted use of discretion that has been shown to include unjustifiable bias.<sup>201</sup> Although the judge would still need to exercise discretion in making findings of fact, the FRE would require stricter adherence to evidentiary rules with less regard to the immigration judge's subjective beliefs regarding admissibility. After all, the use of discretionary decision making by immigration judges has "standardize[d] the exercise of discretion" and "blur[red] the line between interpretation and discretion."<sup>202</sup> Reducing or controlling the discretionary power of immigration judges may also result in their decisions being reversed less often by the appellate courts. If the FRE applied in removal proceedings, and the immigration judges sincerely abided by them, the BIA and the courts of appeal would have some guidance in reviewing the decisions. The appellate courts would then be less likely to reverse decisions by immigration judges because they would apply a deferential standard of review of evidentiary errors.<sup>203</sup>

*B. Striking a Balance that Acknowledges the Unique Circumstances of Noncitizens*

As already suggested throughout this note, the noncitizen is

198. The immigration judge would still be able to consider other factors in examining the evidence that is being introduced. FED. R. EVID. 403 allows a judge to exclude otherwise relevant information if "its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

199. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048-49 (1984).

200. FRE 403 may be the most discretionary rule out of all of the FRE, allowing the judge to exercise more discretion in comparison to the other rules, but it is still limited by the provisions of the rule itself. See ALLEN, ET AL., *supra* note 99, at 133-34, 149. FRE 807 is also different from other rules as it is the only hearsay rule that is not a categorical exception and thus requires the judge to exercise more discretion. See ALLEN, ET AL., *supra* note 99, at 574-75.

201. See *supra* Part IV (B).

202. See Kanstroom II, *supra* note 148, at 197.

203. See ALLEN ET AL., *supra* note 99, at 106-107.

typically the party that has the most at risk from an adverse decision in removal proceedings.<sup>204</sup> In light of this, the FRE should be applied with consideration towards the unique circumstances of the noncitizen. In hindsight this may seem like an unfair advantage for the noncitizen but the government is a very resourceful and powerful adversary that will not be significantly affected. Removal proceedings are unique from other types of proceedings or administrative hearings and should therefore provide some flexibility in considering issues that are only debated in removal proceedings.<sup>205</sup>

As argued above, noncitizens, such as asylum seekers, can actually benefit from more standardized FRE hearsay rules because they can prevent the government from using untrustworthy hearsay evidence that may effectuate the denial of asylum.<sup>206</sup> However, there might be cases where the noncitizen's sole evidence is hearsay for which there is no exception, not even the residuary hearsay exception.<sup>207</sup> In cases like this, where the only evidence is hearsay and the noncitizen is likely to face harsh consequences as a result of an adverse decision,<sup>208</sup> it is only fair that some additional hearsay exceptions be provided for the noncitizen. These additional exceptions can be similar to FRE 407 where the judge is allowed to consider additional factors in determining the admissibility of the evidence.<sup>209</sup> For example, the judge can limit the additional hearsay exception to noncitizens who face the severest consequences from an adverse decision and who have not been able to support their claims with evidence other than hearsay.

In addition, a modification to the application of the FRE on prior inconsistent statements should be made. Asylum seekers have been denied asylum due to possible miscommunication.<sup>210</sup> The extremely detrimental effect of admitting a noncitizen's prior and allegedly inconsistent statements is alarming and should be taken into

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204. See LUBBERS, *supra* note 20, at 348 (noting the removal proceeding's potential to separate a respondent from family and to expose the respondent to persecution).

205. It has been argued that the diversity of administrative bodies is an important consideration in discussing its functions and that "not all administrative agencies require the same level or kind of check or scrutiny." Kidane, *supra* note 11, at 155.

206. See *supra* notes 113-17 and accompanying text.

207. FED. R. EVID. 407.

208. DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, *supra* note 20, at 348.

209. *Id.* See also ALLEN ET AL., *supra* note 99, at 575-80 (explaining residual exceptions to the hearsay rule).

210. See *Abulashvili v. Att'y Gen.*, 663 F.3d 197, 206 (3rd Cir. 2011) ("[W]e also think it important to stress that the linguistic and cultural difficulties endemic in immigration hearings may frequently result in statements that appear to be inconsistent, but in reality arise from a lack of proficiency in English or cultural differences rather than attempts to deceive."); see also *supra* notes 179-82 and accompanying text.

consideration if applying FRE 613. The immigration judge should err on the side of excluding evidence of prior inconsistent statements or perhaps enforce FRE 613 more stringently so that it is not as easily admissible. These slightly altered applications of the FRE would enable the attainment of just and fair removal proceedings while adding a touch of compassion.

## VI. CONCLUSION

With the ever-increasing complexities of immigration law it is no surprise that immigration courts have struggled to provide adequate and fair adjudication in removal proceedings. Several studies have been done, and the consensus is that immigration judges are failing in one way or another.<sup>211</sup> Their almost unrestrained exercise of discretion and failure to establish guidelines by which cases should be adjudicated has raised much concern and criticism.<sup>212</sup> Immigration courts can start taking steps toward improvement and validate themselves by first acknowledging that the inconsistencies and unpredictability of their decisions in removal proceedings is a serious problem, particularly for noncitizens who face injurious consequences as a result of an unfavorable judgment. Acknowledging that inconsistencies in removal proceeding dispositions are problematic, immigration courts need to then reconsider the benefits and rationale in applying the FRE in removal proceedings.

Incorporating the FRE in immigration removal proceedings can help transform immigration courts into effective and fair administrative adjudicators by lessening the growing disparity among immigration judges in applying evidentiary rules and rendering decisions in general. Standard usage of more formal evidentiary rules of evidence can create much-needed uniformity in removal proceedings and can mitigate the many dangers posed by a relaxed set of evidentiary rules. In applying the FRE, immigration courts can then begin to focus on the distinct circumstances of the noncitizen in removal proceedings and set precedents that rely, not on ambiguity, but on concepts of justice, fairness, and effectiveness.

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211. See *supra* Part IV.A-B.

212. See *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) (discussing the inadequate performance of immigration courts).