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Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers

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BIAS ON THE BENCH: RAISING THE BAR FOR U.S. IMMIGRATION JUDGES TO ENSURE EQUALITY FOR ASYLUM SEEKERS

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INTRODUCTION

In July 2006, Syracuse University's Transaction Records Access Clearinghouse (TRAC) released findings announcing that wide disparities exist in the rate at which United States immigration judges grant asylum.¹ TRAC's report triggered a series of reactions from numerous sources including the government² and the public,³ while confirming disparities previously noted by the legal community.⁴ Although the study's findings were alarming on their own, the various reactions have instigated a number of significant ramifications. Shortly after TRAC's report was released, then-Attorney General Alberto Gonzales announced that competency tests and annual performance evaluations would be implemented in the coming months for each of the nation's immigration judges.⁵ Absent from this announcement, however, was any mention of how such a program would be implemented or by what standards an immigration judge should and would be evaluated. The announcement also failed to make mention of possible repercussions for repeated inappropriate conduct or a disciplinary system to punish offending judges.

Recognizing that absence, this Note suggests modifications and additions to Gonzales's proposed changes. Part I outlines the history and current organization of the United States's immigration system

1. See TRAC Immigration Report, Immigration Judges, <http://trac.syr.edu/immigration/reports/160> [hereinafter TRAC Immigration Judges] (last visited Nov. 25, 2007); see also Rachel L. Swarns, *Study Finds Disparities in Judges' Asylum Rulings*, N.Y. TIMES, July 31, 2006, at A15.

2. See, e.g., Human Rights First, *DOJ Announces Immigration Court Reforms*, Aug. 11, 2006, <http://www.humanrightsfirst.org/asylum/asylum.htm> (last visited Nov. 25, 2007); see also *infra* Part III.B.

3. See *infra* Part III.A.

4. See *infra* Part II.B.

5. Press Release, U.S. Dep't of Justice, Attorney Gen. Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006) [hereinafter DOJ Press Release], available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html; Memorandum from Attorney Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006) [hereinafter Gonzales Memo to IJs], available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>; Memorandum from Attorney Gen. Alberto Gonzales to Members of the Bd. of Immigration Appeals (Jan. 9, 2006) [hereinafter Gonzales Memo to BIA], available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-bia.pdf>.

and traces the development of the recent problem of disparity in rulings. Part II discusses highlights from TRAC's findings and identifies early warning calls sounded by the federal bench, the body responsible for reviewing immigration appeals. Part III provides a glimpse into the lives of individual asylum applicants affected by the disparities, articulates significant public reactions to the TRAC study, and analyzes the government's position on the problem. Part IV considers possible organizational changes within the system as well as the adoption of more stringent qualification requirements for immigration judges in order to increase the system's effectiveness and ensure equitable treatment for all.

In the end, although the proposed steps recently outlined by then-Attorney General Gonzales to address the disparities presented by TRAC represent a step in the right direction, they simply do not go far enough. In order to eradicate bias and irrational disparity from the immigration system, the government must hold immigration judges to a higher standard and create meaningful consequences for inappropriate behavior. Specifically, upfront screening of immigration judge applicants and frequent mandatory cultural sensitivity training for the entire immigration bench will increase the likelihood that the adjudicators of the American immigration justice system possess the proper temperament.⁶ Finally, recent steps taken by state and national law enforcement agencies to augment cultural awareness elucidate helpful analogies providing guidance in determining appropriate avenues for improving the cultural sensitivity and knowledge of immigration judges. In an ideal system, individual asylum determinations would be race and color blind.

6. See Executive Office for Immigration Review, Vacancy Announcement Number: EOIR-05-0130, <http://web.archive.org/web/20070211133013/http://www.usdoj.gov/oarm/jobs/ijoardmad.htm> [hereinafter EOIR Vacancy Announcement] (last visited Nov. 30, 2007) (listing "[d]emonstrates the appropriate temperament to serve as a judge" as a "Quality Ranking Factor").

I. BACKGROUND

A. Executive Office of Immigration Courts and the Asylum Process

Systematic regulation of immigration by the federal government began in 1891, when Congress established the office of Superintendent of Immigration.⁷ For nearly a century, the nation's immigration responsibilities bounced between various offices and departments.⁸ Forty-three years after inheriting the responsibility for federal immigration functions, the Department of Justice (DOJ) created the Executive Office of Immigration Review (EOIR) in 1983.⁹ Currently, all federal immigration courts and the Board of Immigration Appeals (BIA)—the office authorized with immigration appellate authority—reside under the EOIR umbrella.¹⁰

The Immigration and Nationality Act, which divides immigration into three general categories, establishes the standards for the asylum decisions made by members of the EOIR.¹¹ The first two categories strive to unite families¹² and allow immigration on employment grounds,¹³ respectively. The third category encom-

7. Act of Mar. 3, 1891, § 7, 26 Stat. 1084, 1085.

8. DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 8 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf. Commissioned by the American Bar Association's Commission on Immigration Policy, Practice and Pro Bono, the study presents findings regarding the 2002 "Procedural Reforms" at the Board of Immigration Appeals. The study includes information garnered from interviews with past and present officials from the Department of Justice, Executive Office of Immigration Review, the Board of Immigration Appeals, members of court clerk's offices in all federal circuits, and individual immigration lawyers and groups. *Id.* at 5.

The nation's immigration functions resided with the Treasury Department from the program's inception until 1903, when immigration functions moved to the Department of Labor and Commerce. *Id.* In 1906, Congress established the Bureau of Immigration and Naturalization within the new Department of Labor and bestowed upon it all immigration responsibilities until 1940, when Congress moved immigration regulation to the Department of Justice. *Id.*

9. *Id.*

10. *Id.*

11. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (2006).

12. *See* § 1151(b)(2)(A)(i) (exempting immediate relatives of current citizens from numerous limitations on immigration).

13. *See* § 1153(b) (providing for the admission of employment-based immigrants).

passes individuals seeking humanitarian relief, such as political asylum.¹⁴

Asylum, loosely defined as legal protection against deportation, may be gained affirmatively through a U.S. Citizenship and Immigration Services (USCIS) officer or defensively through an immigration judge via a removal hearing.¹⁵ Although their applications are governed under the same standard,¹⁶ asylum seekers differ from refugees in that to seek asylum an applicant must already be in the United States.¹⁷ Defensive asylum cases are heard in Immigration Court, which falls under the purview of the EOIR.¹⁸ The immigration judges who preside over removal hearings are not members of the federal judiciary but are employees of the Department of Justice.¹⁹ An asylum seeker may enter the defensive process by referral from the affirmative process, through which he has already been denied affirmative asylum,²⁰ or by way of either an

14. See § 1158 (outlining specific guidelines for asylum-based immigration); see also § 1157 (providing for the admission of emergency situation refugees).

15. See TRAC Immigration Report, *The Asylum Process*, <http://trac.syr.edu/immigration/reports/159> [hereinafter TRAC Asylum Process] (last visited Nov. 25, 2007).

16. Press Release, Executive Office for Immigration Review, U.S. Dep't of Justice, *Asylum Protection in the United States* (Apr. 28, 2005) [hereinafter EOIR News Release], available at <http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm> (articulating five internationally recognized grounds by which an individual may establish credible fear: race, religion, nationality, membership in a particular social group, or political opinion).

17. TRAC Asylum Process, *supra* note 15. Provided that they have not been arrested by the Department of Homeland Security and put into removal proceedings in immigration court, asylum applicants may file an affirmative petition even if they entered the country illegally. *Id.* Typically, the affirmative process is nonadversarial. Almost 251,000 affirmative asylum cases were filed between 2000 and 2004. Congress is debating proposed changes to the asylum system that would prohibit people who illegally enter the United States from seeking affirmative asylum. *Id.*; see also EOIR News Release, *supra* note 16 (reporting that individuals barred from obtaining asylum include those who: have resettled in a country other than the homeland in which they claim persecution before arriving in the United States; have participated in the persecution of another person; have been convicted of a serious crime; pose a danger to United States security; or are members of, or have participated in the activities of, a foreign terrorist organization).

18. TRAC Asylum Process, *supra* note 15. If an individual engaged in removal proceedings expresses a "credible fear" of persecution in his home country, the defensive asylum process is automatically triggered. *Id.* A hearing provides such individuals with an opportunity to defend themselves against removal based on these fears; such hearings are adversarial, typically involving evidence, exhibits, and witness examination. *Id.*

19. *Id.*

20. *Id.* (reporting that 71 percent of defensive asylum seekers enter through this referral process).

arrest or initiation of expedited removal by the Department of Homeland Security (DHS).²¹

B. The Board of Immigration Appeals

As the highest administrative body in the immigration litigation system, the BIA has nationwide jurisdiction to hear appeals from immigration judges.²² As a practical matter, the BIA is the chief administrative law body for immigration law; it is not a statutory body, but instead exists only by virtue of the Attorney General's regulations.²³ Tasked with the responsibility of hearing appeals and issuing decisions in individual cases, the BIA produces both precedential and nonprecedential opinions.²⁴ In the absence of an overruling or modification of BIA opinions by the Attorney General, a federal court, or a later BIA decision,²⁵ precedential BIA opinions are binding on immigration courts.²⁶ Although the Attorney General

21. *Id.*

22. DORSEY & WHITNEY, *supra* note 8, at 9. In 1922, the Secretary of Labor established a board to review immigration cases in order to make recommendations to the Secretary regarding their disposition. *Id.* at 8. When Congress moved immigration regulation from the Department of Labor to the DOJ in 1940, this board became the BIA and inherited the "authority to make final decisions in immigration cases, subject only to possible review by the Attorney General." *Id.*

23. *Id.* (citing 8 C.F.R. pt. 3; Dep't of Justice Order No. 174-59, § 19, 25 Fed. Reg. 2460 (Mar. 28, 1960)).

24. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 1-2 (2004), available at <http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf>. See generally DORSEY & WHITNEY, *supra* note 8, at 8-9 (presenting findings regarding immediate adverse ramifications of the BIA, "Procedural Reforms" instituted under Attorney General John Ashcroft, and predicting that "the adverse impacts, particularly on aliens and on the federal courts, will worsen, not improve, as additional time passes"); Jessica R. Hertz, Comment, *Appellate Jurisdiction Over the Board of Immigration Appeals's Affirmance Without Opinion Procedure*, 73 U. CHI. L. REV. 1019, 1019 (2006) (discussing the federal circuit split on the authority of courts to review a BIA Affirmance Without Opinion).

25. DORSEY & WHITNEY, *supra* note 8, at 11 ("BIA decisions can be modified or overruled by subsequent BIA decisions, by the Attorney General, or by the federal courts.").

26. Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 44 (2004) (referencing DORSEY & WHITNEY, *supra* note 8, at 8, 11); see also DORSEY & WHITNEY, *supra* note 8, at 10-11 ("BIA decisions bind all ... Immigration Judges who administer the Immigration and Naturalization Act. Selected decisions may be designated by a majority vote of the permanent BIA members as precedents to be followed in future proceedings." (citations omitted)).

possesses the authority to review individual cases after they pass through the Immigration Courts and BIA, the Attorney General rarely exercises that power.²⁷ Consequently, BIA decisions typically represent the final decree on a particular case by an administrative body.²⁸

C. Changes Under Ashcroft

In February 2002,²⁹ then-Attorney General John Ashcroft announced plans to streamline BIA reviews of immigration decisions in order to reduce an increasing backlog of cases.³⁰ These changes essentially reversed the course set by the previous attempts at streamlining.³¹ Prior to the 2002 changes, most immigration appeals to the BIA were reviewed by three-judge panels, which typically issued written opinions.³² “[T]he BIA itself considered ‘the deliberative process available through three-Member review’ to be essential.”³³ Consequently, prior to the 2002 changes, single-member dispositions were the exception rather than the norm,³⁴ and “[t]he

27. Burkhardt, *supra* note 26, at 43-44.

28. *Id.* at 43.

29. Although announced in February, the “Procedural Reforms” were not implemented until September 25, 2002. *Id.* at 45.

30. Eleanor Acer & Anwen Hughes, *The Post-September 11 Asylum System*, 32 LITIG. 41, 43 (2006). Between 1992 and 2000, the number of appeals filed with the BIA doubled. Burkhardt, *supra* note 26, at 44. Eventually, the number of appeals pending was more than the BIA could handle and a backlog developed. *Id.* Growing steadily from 20,000 in 1992, the backlog reached a staggering 60,000 cases by 2000. *Id.* In an attempt to decrease this backlog, changes were made to BIA procedures in 1995. Most significantly, the size of the Board grew from five members to twelve. *Id.* at 44-45. By 2002, before the Ashcroft changes, the number of BIA members had grown to twenty-three. *Id.* at 45.

31. Burkhardt, *supra* note 26, at 45.

32. Acer & Hughes, *supra* note 30, at 43; *see also* Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members 3 (Aug. 28, 2000), *reprinted in* DORSEY & WHITNEY, *supra* note 8, at 3 [hereinafter Schmidt Memorandum] (outlining the plan for a pilot program aimed at streamlining BIA appeals, which predated the changes implemented under Ashcroft).

33. DORSEY & WHITNEY, *supra* note 8, at 9 (quoting Schmidt Memorandum, *supra* note 32, at 3).

34. *See* Schmidt Memorandum, *supra* note 32, at 2-3. In outlining the categories of cases that may be affirmed without opinion, dismissed summarily, as well as categories of cases involving “other procedural and ministerial issues” appropriate for review and disposition by a single Board Member, Schmidt emphasized that “not every case in a category will be suitable for streamlining. When in doubt, the best practice is to refer the case for three-

BIA issued a written decision that was supposed to discuss the evidence and the reasons for [its] determination sufficiently so that a reviewing court would know its basis.”³⁵ Ashcroft’s changes, however, reversed course, requiring review by a single BIA member in most cases³⁶ and instructing an increase in one-sentence summary orders.³⁷ In March 2002, the DOJ issued a memorandum authorizing summary affirmance by a single Board member for a much broader category of cases than had ever been subject to the practice before.³⁸ A few months later, in May 2002, the DOJ changed its mind and announced that it was abolishing the list of categories eligible for single-member review and instead authorized:

[S]ummary affirmation by single Board members for “all cases involving appeals of [immigration judge] decisions over which the Board of Immigration Appeals has jurisdiction and which meet the [regulatory] criteria” for affirmance without opinion and “all cases involving appeals of Immigration and Naturalization Service decisions over which the Board of Immigration Appeals has jurisdiction and which meet the [regulatory] criteria” for affirmance without opinion.³⁹

This seemingly minor change made affirmances without opinion the rule rather than the exception.⁴⁰ Significantly, the absence of an opinion leaves asylum applicants who are facing deportation unconvinced that the BIA actually considered their plight and federal appellate jurists without any legal reasoning to review when the affirmance comes before their bench.⁴¹

Member review.” *Id.* at 1-2.

35. DORSEY & WHITNEY, *supra* note 8, at 10.

36. See Acer & Hughes, *supra* note 30, at 43; Burkhardt, *supra* note 26, at 47 (noting that the 2002 Procedural Reforms “dramatically expanded this summary form of review”).

37. Acer & Hughes, *supra* note 30, at 43; Burkhardt, *supra* note 26, at 49.

38. The categories eligible for review by a single BIA member in March 2002 included entire ranges of cases, irrespective of “the type or complexity of the factual or legal issues presented therein.” Burkhardt, *supra* note 26, at 47.

39. *Id.* at 47-48 (quoting DORSEY & WHITNEY, *supra* note 8, at app. 23).

40. *Id.* at 49.

41. See Letter from Deepa Iyer, Esq., Executive Dir., S. Asian Am. Leaders for Tomorrow (SAALT), and C. Felix Amerasinghe, Esq., SAALT Policy Action Taskforce, to Hon. Paul J. McNulty, Deputy Att’y Gen., and Hon. Robert D. McCallum, Jr., Associate Att’y Gen., U.S. Dep’t of Justice 4 (Mar. 28, 2006), available at http://www.saalt.org/pdfs/SAALT_Letter_Immigration_Courts.pdf [hereinafter SAALT letter] (“Through summary affirmances, the BIA

This implementation is also significant because it reversed the assumption, present in the system before May 2002, that doubtful cases would undergo review by a three-member panel.⁴² Under the current system, single-member review is now required in all but six types of cases.⁴³

Logically, the rate at which cases before the BIA are decided, as well as the number of summary decisions, has increased radically.⁴⁴ Additionally, the 2002 procedural reforms reduced the BIA's "scope of review," resulting in fewer cases meeting the eligibility requirements for any consideration by the Board.⁴⁵ The BIA is now more likely to dispose of the cases that it does hear without opinion.⁴⁶ Before the 2002 changes, the BIA issued written decisions in most

has endorsed the logical fallacies, prejudices and unsupported conclusions in immigration judges decisions." (citing *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (listing opinions from various federal circuits criticizing the reasoning and conclusions of IJs and the BIA))).

42. See Burkhardt, *supra* note 26, at 48; see also Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 683 (2006).

43. Burkhardt, *supra* note 26, at 48. Incoming cases are screened for the six criteria listed in the federal regulation governing the organization and jurisdiction of the BIA, any one of which requires that the case undergo review by a three-member panel. *Id.* Cases may be assigned to a three-member panel only if the case presents one of the following circumstances:

- (i) The need to settle inconsistencies among the rulings of different immigration judges;
- (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
- (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
- (iv) The need to resolve a case or controversy of major national import;
- (v) The need to review a clearly erroneous factual determination by an immigration judge; or
- (vi) The need to reverse the decision of an immigration judge or the Service, other than one reversed under [8 C.F.R.] § 1003.1(e)(5).

8 C.F.R. 1003.1(e)(6) (2007).

Every case not possessing one of the six criteria is automatically referred to a single BIA member for her individual review and decision. See Burkhardt, *supra* note 26, at 48. Once a BIA member is assigned to review a particular case, she may not refer that case to a three-person panel unless she believes that the case was improperly referred for single-member review originally. *Id.*

44. Burkhardt, *supra* note 26, at 49. In February 2002, the BIA handed down 3,300 opinions. *Id.* By August 2002, even before the official procedural reforms implementation, that number had jumped to more than 5,200. *Id.*

45. Acer & Hughes, *supra* note 30, at 43.

46. Burkhardt, *supra* note 26, at 49.

cases.⁴⁷ These opinions discussed both the evidence considered in and the rationale behind the BIA's decision in order to help federal appellate courts and the applicant understand how and why the particular result was reached.⁴⁸ The 2002 procedural reforms, however, prohibit BIA members from issuing a written opinion in cases where they are simply affirming an immigration judge's decision.⁴⁹ In such cases, the BIA member does not even have discretion over the wording of her opinion; that language is dictated by the procedural reforms.⁵⁰ The 2002 procedural reforms also authorized the use of summary decisions for cases meriting remand and modification.⁵¹

Perhaps most significantly, the 2002 reforms cut in half the number of BIA members from twenty-three to eleven.⁵² This drastic reduction affected not only the Board's size, but also had a noticeable impact on the Board's character.⁵³ Some observers speculate that changing the Board's character was the reform's primary goal.⁵⁴

47. *Id.*

48. *Id.*

49. *Id.* at 49-50.

50. 8 C.F.R. § 1003.1(e)(4)(B)(ii)(e)(5) (2006) (instructing that orders affirming a decision below without opinion shall "read as follows: 'The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination'.... An order affirming without opinion ... shall not include further explanation or reasoning." (internal citation omitted)).

51. Burkhardt, *supra* note 26, at 50.

52. *Id.* at 51; *see also* Durham, *supra* note 42, at 682 (noting that the size of the BIA had grown from five to twenty-three under Ashcroft's predecessors).

53. Burkhardt, *supra* note 26, at 51.

54. *Id.* The former Immigration and Naturalization Service (INS) General Counsel declared that "[u]ntil the attorney general discloses his reasons [for letting certain BIA members go], this has all the appearances of a purge of dedicated civil servants based on a perception of their policy views." *Id.* (quoting Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked To Leave*, L.A. TIMES, Mar. 12, 2003, at A16). In other words, some suspect that then-Attorney General Ashcroft pushed out those who disagreed with the new round of immigration procedure changes or with the Department of Justice's general immigration policy. *Id.*; *see also* Durham, *supra* note 42, at 683 (noting that "following the voluntary retirement of several of the most liberal members of the Board, the five members selected for 'reassignment' by the Attorney General were those with essentially the most immigrant-friendly and antiagency decision record[s]" (citation omitted)).

Taken together, these changes⁵⁵ “undermined the ability of asylum seekers to obtain a full and fair hearing on their claims.”⁵⁶ Critics of the present system, including members of the federal circuit courts,⁵⁷ insist that Ashcroft’s changes resulted in mere “rubber-stamping” by the BIA of denials by immigration judges.⁵⁸

The changes made to the BIA procedures and make-up of the administrative body drastically affected the number of cases filed in federal court.⁵⁹ Moreover, the change to affirmances without opinion as the general rule resulted in frustration for federal jurists reviewing the BIA decisions because no legal reasoning accompanied most of the judgments.⁶⁰ Although the BIA changes strove to streamline the process, they backfired, creating more work at the federal appellate level. Summary decisions from the BIA may move cases through the BIA more quickly, but they fail to catch instances of blatant bias or flawed decisions by the immigration judges below.

55. Other changes not discussed at length here include heightened standard of review for factual findings and credibility determinations, as well as shortened deadlines for disposition of appeals. See 8 C.F.R. § 1003.1(e)(8) (2006); Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 50,880, 50,881 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3); Burkhardt, *supra* note 26, at 50-51.

56. Acer & Hughes, *supra* note 30, at 43; see also Burkhardt, *supra* note 26, at 41 (arguing that changes to procedures governing BIA proceedings “make it much more likely that those involved in immigration proceedings will not benefit from the fair, unbiased, and thoughtful consideration their cases deserve”).

57. See *Iao v. Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005) (listing “[a]ffirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion” as a recurring “disturbing feature” of immigration appeals before the Seventh Circuit).

58. Acer & Hughes, *supra* note 30, at 43. The U.S. Commission on International Religious Freedom studied the impact of the changes under Ashcroft on asylum seekers who were detained upon arrival in the United States. *Id.* According to the Commission’s findings, the BIA sustained 24 percent of asylum appeals in such cases in 2001. *Id.* After the 2002 changes were implemented, that number dropped to 2-4 percent. *Id.* The Commission pointedly concluded that, “[s]tatistically, it is highly unlikely that any asylum-seeker denied by an immigration judge will find protection by appealing to the BIA.” *Id.* Consequently, the Immigration Courts are an applicant’s only opportunity to have her claim heard while in the immigration system. The next meaningful opportunity is the federal circuit courts. *Id.*; see also *Iao*, 400 F.3d at 533-35; Burkhardt, *supra* note 26, at 68 (predicting that “[t]he unprecedented expansion of the use of single-member review ... will undermine the quality of administrative adjudication of immigration cases and increase the propensity of judges to allow their ideological predilections to determine the results of those cases”).

59. See *infra* notes 70-75 and accompanying text.

60. See *supra* note 58 and accompanying text.

II. THE CURRENT CONTROVERSY REGARDING RULINGS

A. TRAC Findings

The TRAC study examined all recorded asylum cases (nearly 300,000) decided between 1994 and 1999 and between 2000 to the first few months of 2005.⁶¹ This “extensive analysis of how hundreds of thousands of requests for asylum in the United States have been handled has documented a great disparity in the rate at which individual immigration judges declined the applications.”⁶² The median “judge-by-judge denial rate” is 65 percent, whereas individual denial rates ranged from 10 to 98 percent.⁶³ Eight judges denied asylum to nine out of ten applicants who appeared before them, and two judges granted asylum to nine out of ten of their applicants.⁶⁴ Ten percent of the immigration judges whose records were studied denied asylum at least 86 percent of the time, whereas another 10 percent denied asylum in only 34 percent of their cases.⁶⁵ Miami Immigration Judge Mahlon F. Hanson’s denial rate was the highest at 96.7 percent of 1,118 cases before him in which the applicant had legal representation.⁶⁶ On the other end of the spectrum, Judge Margaret McManus of New York denied only 9.8 percent of the 1,638 represented cases before her.⁶⁷

61. TRAC Immigration Judges, *supra* note 1. The study broke the time period examined into two five-year blocks (1994-99 and 2000-2005) because significant changes occurred in immigration law over the course of the entire period, requiring different analysis of the post-2000 data. *Id.* Despite these substantive law changes and changes in the immigration court’s makeup, “the findings about the disparity in the two periods were surprisingly consistent.” *Id.*

62. *Id.* The data about individual judges was collected from a variety of sources over several years by the EOIR. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* Judge Hanson joined the immigration bench in 1995 after a legal career that included almost a decade in the then-existing U.S. Immigration and Naturalization Service (INS). *Id.*; see also TRAC Immigration Report, Judge Mahlon F. Nelson, <http://trac.syr.edu/immigration/reports/judgereports/116/index.html> (last visited Nov. 25, 2007).

67. TRAC Immigration Judges, *supra* note 1. Appointed in 1991, Judge McManus spent five years as a staff attorney with Legal Aid Society’s Immigration Unit. *Id.*; see also TRAC Immigration Report, Judge Margaret McManus, <http://trac.syr.edu/immigration/reports/judgereports/149/index.html> (last visited Nov. 25, 2007).

TRAC's findings confirmed what many federal jurists, asylum lawyers, and system observers already suspected: immigration decisions under the EOIR and the BIA vary widely and arbitrarily. Although TRAC's study presented all the evidence together conclusively for the first time, individual warning signs already had suggested that a problem existed.

B. Federal Courts Sound Early Warning Calls

Appeals from BIA decisions are most typically made to a federal circuit court⁶⁸ via a petition for review.⁶⁹ Asylum applicants unable to attain a satisfactory appeal before the BIA are appealing to federal court in greater numbers after the 2002 changes to BIA procedures.⁷⁰ Three percent of all appeals filed in federal court during 2001 were BIA decision appeals.⁷¹ By 2004, that number had jumped to 25 percent.⁷² Moreover, some commentators estimate that "[t]he number of federal court cases reviewing removal orders has increased 970% in the past ten years."⁷³ For example, the Sixth Circuit saw an increase in immigration appeals from 1,642 cases in

68. Appeals may also be made to a federal district court under a writ of habeas corpus. See Burkhardt, *supra* note 26, at 44.

69. *Id.* On April 3, 2006, Judge John M. Walker, Chief Judge of the Second Circuit Court of Appeals, appeared before the Senate Judiciary Committee to express his view regarding a proposal to the Committee that all immigration appeals be consolidated under the U.S. Court of Appeals for the Federal Circuit. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at http://www.judiciary.senate.gov/print_testimony.cfm?id=1845&wit_id=5214 [hereinafter *Hearing*] (statement of Hon. John M. Walker, Chief Judge of the U.S. Court of Appeals for the Second Circuit). Judge Walker began his remarks with a brief overview of the immigration litigation system, explaining that if an asylum applicant is ordered deported by an immigration judge, and that order is affirmed by the BIA, the applicant may seek further review in the federal court of appeals within whose jurisdiction the immigration judge's decision was rendered. *Id.*; see also *Senate Considers Immigration Litigation Reform*, THIRD BRANCH, Apr. 2006, <http://www.uscourts.gov/ttb/04-06/immigration/index.html>.

70. Acer & Hughes, *supra* note 30, at 43.

71. *Id.*

72. *Id.*; see also Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 39 (2007) ("As of September 2005, ... immigration cases represented 18% of the appellate civil docket." (citation omitted)).

73. Benson, *supra* note 72, at 39 (citing Sarah Kroll-Rosenbaum, *Non-Citizens Access the Federal Courts: How Demand for Review Exceeds Statutory Restrictions*, Master Trends in the Law 12 (Jan. 28, 2005) (unpublished paper, on file with the New York Law School Law Review)).

2001 to 11,366 cases in 2004, a 592 percent increase.⁷⁴ In the Second Circuit, immigration appeals now account for nearly 50 percent of all filings received annually.⁷⁵

The exponential increase in immigration cases has not gone unnoticed by federal judiciary members, several of whom have repeatedly expressed frustration and disappointment over the immigration system's current state. The opportunity for meaningful administrative review has deteriorated to the point where the circuit courts now represent the first line of defense against mistaken or biased immigration judge decisions.⁷⁶ Not only are circuit court judges displeased about the backlog of immigration cases now before them, but some federal judges lament the *quality* of the opinions coming out of the immigration courts.⁷⁷

Criticism of immigration judges and BIA members by the federal judiciary has become increasingly severe. Judge Richard Posner displayed particular displeasure with the administrative immigration system in his *Benslimane* opinion.⁷⁸ Specifically, he noted that in 2005, 40 percent of 136 opinions decided on the merits by immigration courts and affirmed by the BIA were reversed by the Seventh Circuit.⁷⁹ In comparison, the circuit's reversal rate for civil cases in which the United States was the appellee was only 18 percent during this period.⁸⁰ Additionally, Judge Posner cited twelve cases in which other federal appellate panels sharply critiqued the

74. Acer & Hughes, *supra* note 30, at 43.

75. *Hearing*, *supra* note 69. In October 2005, Judge Jon O. Newman spearheaded an effort by the Second Circuit to create a Non-Argument Calendar (NAC) for asylum cases. *Id.* Running parallel to the Regular Argument Calendar, the NAC is expected to eliminate the Second Circuit's backlog of asylum cases in roughly four years. *Id.* Under the NAC, forty-eight asylum cases are heard every week, and a three-judge panel reviews each case. *Id.*

76. *Id.*; see *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). Judge Posner lamented that "different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits." *Id.*

77. See, e.g., *Huang v. Gonzales*, 453 F.3d 142, 143 (2d Cir. 2006) (remanding asylum case for reconsideration by a different immigration judge due to the appearance that the first could not impartially adjudicate the case); *Wang v. Att'y Gen. of the U.S.*, 423 F.3d 260, 261 (3d Cir. 2005) (finding that the immigration judge had failed the "basic requirement" of neutrality).

78. *Benslimane*, 430 F.3d at 829-30 (declaring that the adjudication of immigration cases at the administrative level "has fallen below the minimum standards of legal justice").

79. *Id.* at 829.

80. *Id.*

judgment and competence of immigration judges and the BIA.⁸¹ Nearly every case Posner cited highlighted bias, hostility, or abusive conduct by immigration judges towards asylum applicants.⁸² Although refraining from speculation as to the reason for substandard performance, Judge Posner pointedly noted that this was not a new problem.⁸³

The Third Circuit's Judge Fuentes made similar observations in a 2005 opinion, which remanded an asylum case for reconsideration by a different immigration judge.⁸⁴ In his opinion, Judge Fuentes reproduced a line of questioning by the original immigration judge directed at the asylum applicant, noting that the questions "preshadowed her hostile attitude towards him and his claims."⁸⁵ The opinion also emphasized that the immigration judge's oral opinion was "consistent in tone and substance with her comments during the ... hearing."⁸⁶ Mr. Wang, the asylum applicant, appealed the immigration judge's decision to the BIA, which affirmed in a one-paragraph opinion that failed to address the inappropriate language, tone, or attitude of the immigration judge below.⁸⁷

The Third Circuit did not mince words in its analysis of the evidence of bias. Expressing dismay at a "disturbing pattern"⁸⁸ of inappropriate conduct by immigration judges, Judge Fuentes declared that:

Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we have had to admonish immigration judges who failed to treat the asylum

81. *Id.*

82. *Id.*

83. *Id.* at 830 ("Whether this is due to resource constraints or to other circumstances ... we do not know, though we note that the problem is not of recent origin.").

84. *Wang v. Att'y Gen. of the U.S.*, 423 F.3d 260, 260 (3d Cir. 2005).

85. *Id.* at 262.

86. *Id.* at 265.

87. *Id.* at 266. Judge Fuentes explained that the Third Circuit would review the immigration judge's decision because "[w]here an opinion issued by the BIA essentially adopts the opinion of the IJ, we review the latter." *Id.* at 267.

88. *Id.* at 268 (citing opinions by sister circuits regarding inappropriate conduct by immigration judges).

applicants in their court with the appropriate respect and consideration.⁸⁹

Other circuits reviewing similar BIA affirmances echoed the *Wang* panel's frustration with immigration judges' flagrantly inappropriate reasoning in written opinions and disrespectful comments made during asylum hearings.⁹⁰

In June 2006, the Second Circuit, in an opinion by Judge Newman, found that the immigration judge's bias against the applicant mandated a remand to the BIA and reassignment to a different immigration judge if further fact finding was warranted.⁹¹ After reproducing problematic portions of the asylum hearing and the immigration judge's written opinion, Judge Newman noted that this was not the first instance of bias by Immigration Judge Chase.⁹² Citing a laundry list of cases in which the immigration judge's conduct had been inappropriate, Judge Newman stated that "such displays of hostility and apparent bias" required remedial action.⁹³ The only remedial action available to a federal circuit court reviewing an asylum decision, however, is remand with the strong

89. *Id.* at 267. In *Zhang v. Gonzales*, 405 F.3d 150 (3d Cir. 2005), a Third Circuit panel noted that the immigration judge had "search[ed] for ways to undermine and belittle" the applicant's testimony. *Id.* at 159. The adjectives used by the court in *Fiadjoe v. Attorney General*, 411 F.3d 135 (3d Cir. 2005), to describe an immigration judge's opinion included "crude," "cruel," "hostile," "extraordinarily abusive," and "extreme[ly] insensitiv[e]." *Id.* at 144, 146, 154, 155. In *Korytnyuk v. Ashcroft*, 396 F.3d 272 (3d Cir. 2005), the case was remanded for reassignment to a different immigration judge because the court found the first to have exhibited "extreme hostility" toward the applicant. *Id.* at 287.

90. *See, e.g.*, *Tun v. Gonzales*, 485 F.3d 1014, 1027 (8th Cir. 2007) ("In our view, the IJ's assessment ... contained commentary ... that suggests the IJ may not have acted as a neutral arbiter."); *Florioiu v. Gonzales*, 481 F.3d 970, 974 (7th Cir. 2007) (finding that the IJ's labeling of the asylum applicants as "religious 'zealots' whose exercise of religion was 'offensive to the majority'" tainted the proceedings, ended the appearance of fairness, and resulted in a denial of due process) ("We find it ironic that the IJ—who is charged with protecting asylum applicants from religious persecution in their countries of origin—spoke in the unacceptable language of religious intolerance."); *Islam v. Gonzales*, 469 F.3d 53, 56 (2d Cir. 2006) (vacating and remanding a denial of asylum decision because IJ Chase "repeatedly addressed [the applicant] in an argumentative, sarcastic, impolite, and overly hostile manner that went beyond fact-finding and questioning").

91. *Huang v. Gonzales*, 453 F.3d 142, 151 (2d Cir. 2006).

92. *Id.* at 150 ("[T]he conduct of IJ Chase has raised substantial questions as to his apparent bias against and hostility toward ... petitioner." (citations omitted)).

93. *Id.*

recommendation that the case not return to the original immigration judge.⁹⁴

Federal appellate panels appear to be making the recommendation that remanded cases be reassigned with increasing frequency.⁹⁵ In at least one case, a Seventh Circuit panel even went so far as to direct the court's clerk to send a copy of the panel's opinion to the Attorney General of the United States so that agency disciplinary action against the IJ could be considered. The panel noted that this opinion represented the second time that it had been forced to reprimand the particular IJ for employing "unsupported speculation about an asylum applicant" in his asylum denials.⁹⁶

Although certainly not an ideal system for the long term, the EOIR could utilize opinions by the federal bench chastising intemperate or biased behavior by IJs as a means of identifying problem IJs who may be in urgent need of review, official reprimand, or even removal.⁹⁷ Ideally, the EOIR and BIA will implement a system of evaluating IJs and identifying red flags that does not need to involve the federal bench at all, thereby reducing the backlog of immigration cases in federal court.⁹⁸

III. REACTIONS TO TRAC'S FINDINGS

A. *The Public Reacts: Giving a Face to a Number*

If proliferation of news articles is an accurate gauge of public interest, TRAC's findings certainly piqued the American public's

94. See, e.g., *Immigration and Naturalization Serv. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

95. *Florioiu*, 481 F.3d at 976.

96. *Id.*

97. In September 2007, the *New York Times* published an article highlighting a Second Circuit panel opinion rebuking an IJ for exhibiting inappropriate behavior towards an asylum applicant before her. Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. TIMES, Sept. 20, 2007, at B1. The federal panel further instructed that the IJ be removed from the case. See *id.* The article also reported that Jeffrey Chase, a New York immigration judge, had been "relieved of court duties ... and assigned to a desk job after he was repeatedly rebuked by federal appeals judges for his hostile questioning of asylum seekers." *Id.* See *supra* note 92 and accompanying text for previous criticism of IJ Chase by federal judges.

98. See *supra* notes 70-75 and accompanying text.

interest. Released on July 30, 2006, the study attracted the immediate attention of many major media outlets. Beginning on July 31, headlines across the nation blared the news of the disparities in the rulings.⁹⁹ While some articles focused on the question of whether an applicant had a lawyer impacted the asylum decision,¹⁰⁰ others insinuated that the biases of individual judges accounted for the discrepancies.¹⁰¹ The *New York Times* ran an article on July 31, the day after the study's release,¹⁰² emphasizing the importance of the impartiality of immigration judges. The article provided specific

99. Interestingly, many newspapers awarded the study coveted space on the front page or in their beginning sections. See, e.g., Pamela A. MacLean, *Wide Disparities Are Found in Granting Asylum, Lawyerless Applicants Denied 93% of the Time*, 28 NAT'L L.J. 5, Aug. 14, 2006 [hereinafter MacLean, *Wide Disparities*]; Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at A1; Suzanne Gamboa, *Chance of Gaining Asylum Depends on Who's the Judge*, SEATTLE TIMES, July 31, 2006, at A4; Vanessa Hua, *Judges Deny Asylum at Widely Varying Rates: Report Says Success of Application May Depend Largely on Who Hears the Case*, S.F. CHRON., July 31, 2006, at A3; *Immigration Crapshoot*, CONN. L. TRIB., Sept. 4, 2006, at 4; Steve Lash, *Chances on Asylum Depend on Judge: Report*, CHI. DAILY L. BULL., Aug. 1, 2006, at 1; Pamela A. MacLean, *Judges All Over the Board in Asylum Cases, Study Finds*, RECORDER, Aug. 18, 2006, at 3; Eunice Moscoso, *Asylum Requests Judged Inconsistently*, ATLANTA J. CONST., July 31, 2006, at A3; Harvey Rice, *Houston Judges Are More Even on Asylum, Huge Disparity in Immigration Cases Elsewhere Seen as Problem of Fairness*, HOUSTON CHRON., Aug. 1, 2006, at B1; Elaine Silverstrini, *Study Finds Large Discrepancies*, TAMPA TRIB., Aug. 8, 2006, at 1; *Study Finds Disparities in Judges' Asylum Rulings*, CHI. TRIB., July 31, 2006, at 6; Swarns, *supra* note 1, at A15; Rachel L. Swarns, *Study Finds Significant Variations in Granting of Asylum by Immigration Courts*, INT'L HERALD TRIB., Aug. 1, 2006, at 8.

100. See, e.g., *Immigration Crapshoot*, *supra* note 99 (reporting that applicants without representation were denied 93 percent of the time while applicants with lawyers were denied 64 percent of the time); Pamela A. MacLean, *Want Asylum? Better Get a Lawyer*, NAT'L L.J., Aug. 17, 2006, available at <http://www.usdoj.gov/eoir/press/06/NLJWantAsylum.pdf>; MacLean, *Wide Disparities*, *supra* note 99. Most asylum seekers lack the financial resources to pay an attorney and are forced to proceed through the system unrepresented. Acer & Hughes, *supra* note 30, at 41. A few may be able to secure representation through a faith- or community-based program or find a pro bono attorney willing to take their case. *Id.* A study conducted by Georgetown University's Institute for the Study of International Migration found that more than one-third of asylum applicants are unrepresented. *Id.* at 41, 44 ("Asylum seekers are up to six times more likely to be granted asylum when they are represented.").

101. See, e.g., Gamboa, *supra* note 99; Hua, *supra* note 99; Lash, *supra* note 99; Moscoso, *supra* note 99; see also *Immigration Crapshoot*, *supra* note 99 (using the track records of individual judges to highlight the wide range of the disparities: Miami Judge Mahlon F. Hanson granted a record low of 3 percent of asylum cases and New York Judge Terry Bain granted a high of 89 percent). The article also notes that the disparities vary widely within individual regions: Judge Bain's record was compared to fellow New York Judge Alan Vomacka's 96 percent denial rate. *Id.*

102. Swarns, *supra* note 1.

numbers and statistics from the TRAC study and posited that the system lacked a “commitment to providing a uniform application of the nation’s immigration laws in all cases.”¹⁰³

The second wave of newspaper articles regarding the TRAC findings were much more personal. Rather than spouting statistics and numbers, these articles focused on specific families and community members who had crossed paths with the immigration system.¹⁰⁴ These stories brought the practical reality of TRAC’s cold, hard numbers into a new light.

For example, the *Bucks County Courier Times* ran a weeklong series of stories about local families trapped in the web of the immigration system.¹⁰⁵ Arguing that the United States, “[a]s a land of immigrants,”¹⁰⁶ should provide illegal residents the opportunity to try to gain citizenship, the series focused on the Musaka family, who fled Albania in 1999 in order to escape brutal persecution by communists seeking to reestablish power.¹⁰⁷ Husband Lulezim had already been savagely beaten by the communists by the time the family was able to save the \$23,000 necessary to escape to the United States.¹⁰⁸ Settling in a Michigan town among friends from their Albanian village, the Musakas quickly applied for asylum less than three weeks after arriving in the United States.¹⁰⁹ Three years, an asylum denial, and one failed appeal later, the family fled to

103. *Id.* (quoting TRAC’s co-director, David Burnham).

104. The *New York Times* has been especially prolific in printing articles regarding the TRAC study and its aftermath, perhaps in part because one of the nation’s largest immigration courts sits in lower Manhattan. An article by Nina Bernstein traces the history of Chinese immigrant Meizi Liu’s asylum application through the immigration system. Bernstein, *supra* note 99. Liu petitioned a New York immigration judge for asylum after being forcibly sterilized in China. *Id.* During Liu’s asylum hearing, Judge Chase, who had won awards for his human rights advocacy before ascending to the bench, accused her of lying and “ridiculed her story.” *Id.* Despite his accusations, Judge Chase offered to grant her application if Liu would “admit to lying.” *Id.* She refused and her application was denied. *Id.* In a curt opinion, the Board of Immigration Appeals denied Liu’s appeal of the denial. *Id.* The Second Circuit remanded Liu’s case to the New York Immigration Court in February, nearly three years after her original appearance before Judge Chase. *Id.* Ms. Liu continues to wait for a new hearing and does not yet know which of the New York Court’s twenty-seven immigration judges will decide her fate this time. *Id.*

105. See, e.g., Barbara J. Isenberg, *An Albanian Family Who Has Tried Legal Channels To Stay in America Still Faces Deportation*, BUCKS COUNTY COURIER TIMES, Sept. 4, 2006, at A1.

106. Editorial, *Illegal Immigrants*, BUCKS COUNTY COURIER TIMES, Sept. 5, 2006, at A6.

107. Isenberg, *supra* note 105.

108. *Id.*

109. *Id.*

Pennsylvania in order to escape a deportation order.¹¹⁰ After remaining under the radar for more than two years in Bucks County and working hard to support his family, Lulezim was discovered in 2006 and deported, leaving behind a pregnant wife and two small girls.¹¹¹ According to the article, the TRAC study reported that more than 50 percent of the 6,154 Albanians who filed applications between 2000 and 2005 were granted asylum.¹¹² Vjollca Musaka's brother was granted asylum in Miami in 2001 on the same grounds on which the Musakas had lost in Michigan.¹¹³ Vjollca insists that she knows of other people from her small Albanian village who fled for the same reasons as her family and were granted asylum in both Florida and the District of Columbia while her family's applications were repeatedly denied.¹¹⁴

Putting stories like the Musaka family's in print alongside TRAC's numbers brought the human reality of TRAC's findings into focus. No longer was this an abstract problem difficult to nail down or easy to ignore. TRAC's statistics suddenly represented real people with very real lives, with whom many Americans could empathize. As evidenced by the *Bucks County Courier Times* article, the effect of unjust immigration decisions pervades society, even seeping into small, rural towns.

B. Gonzales Articulates the Federal Government's Position

TRAC's findings likely did not come as a great surprise to the federal government.¹¹⁵ Months before the findings were released, then-Attorney General Alberto Gonzales sent separate memoranda to the members of the Immigration Court¹¹⁶ and Board of Immigration Appeals.¹¹⁷ The first two paragraphs of both of the three-

110. *Id.*

111. *Id.*

112. *Id.* (citing TRAC Immigration Judges, *supra* note 1).

113. *Id.*

114. *Id.*

115. See TRAC Immigration Judges, *supra* note 1 ("The Justice Department ... was provided a brief summary of some of the [TRAC] report's findings and ... declined to comment.").

116. Gonzales Memo to IJs, *supra* note 5.

117. Gonzales Memo to BIA, *supra* note 5.

paragraph memoranda are identical.¹¹⁸ Gonzales began each document by expressing dismay at “reports of immigration judges who fail to treat aliens ... with appropriate respect and consideration.”¹¹⁹ In order to “assess the scope and nature of the problem,” Gonzales indicated that he had requested that a “comprehensive review” of the immigration litigation system—including the Immigration Court and the BIA—be conducted by the Deputy Attorney General and the Associate Attorney General.¹²⁰ According to the memoranda, the review would examine not only quality of work but also “the manner in which it is performed.”¹²¹ The memo to the immigration judges closed with a reminder of the unique role that immigration judges play as “the [first] face of American justice” that many immigrants see¹²² as well as an instruction to treat every individual with “courtesy and respect.”¹²³ The last paragraph of the memorandum to the BIA emphasized the “critical function” of the BIA members who review immigration decisions on the Attorney General’s behalf.¹²⁴ Although not every immigrant seeking appeal would be entitled to relief, each case should nevertheless be “reviewed proficiently.”¹²⁵

Perhaps, then-Attorney General Gonzales’s communication was inspired by a growing cacophony of complaints about the immigration system from the print media, as well as a cluster of pointed decisions from the federal judiciary that came down shortly before the memoranda appeared.¹²⁶ On December 26, 2005, less than two weeks before the memoranda were released, the *New York Times* ran a front-page article detailing concerns by federal court judges about the immigration courts and the BIA.¹²⁷ Noting that appellate

118. *Id.*; Gonzales Memo to IJs, *supra* note 5.

119. Gonzales Memo to IJs, *supra* note 5.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Gonzales Memo to BIA, *supra* note 5.

125. *Id.*

126. Acer & Hughes, *supra* note 30, at 43 (noting the temporal proximity between the Attorney General’s memoranda and a *New York Times* article relating the concerns of federal judges with the immigration system after former Attorney General John Ashcroft’s tenure); see also *supra* Part II.B.

127. Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

judges from several circuits had “repeatedly excoriated” immigration judges, the article cited particularly scathing rebukes from the Third, Seventh, and Ninth Circuits.¹²⁸ Deputy Assistant Attorney General Jonathan Cohn defended the immigration courts, insisting that “the quality of the decisions rendered ... on the whole was good” and that circuit courts see only a small fraction of the tens of thousands of cases decided every year by immigration judges.¹²⁹

Fast forward several months to the release of the TRAC study: on August 9, 2006, only days after TRAC’s release, the Department of Justice announced that the immigration courts and BIA would undergo reforms.¹³⁰ Interestingly, the DOJ’s press release indicated that the implementation of reforms resulted from “the completion of a comprehensive review of the Immigration Courts and the Board that was initiated by the Attorney General in January 2006, following reports of judges failing to display temperament and produce work meeting the Department’s standards.”¹³¹ Despite the temporal proximity to the TRAC study’s release, no mention of TRAC’s findings appears anywhere in the press release.¹³²

Although vague on specifics, the reforms will supposedly contain twenty-two new measures, including: performance evaluations; an immigration law exam for newly appointed immigration judges and Board members; a sanction power to be wielded by immigration judges “for false statements, frivolous behavior and other gross misconduct”; increased budget resources aimed at bolstering the number of immigration judges and law clerks and hiring more staff attorneys for the BIA; technological and support improvements; improvements to the BIA’s “streamlining” practice in order to “encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification”; a new code of conduct specific to immigration judges and the BIA; “improved mechanisms to detect poor conduct and quality by immigration judges”; and a pilot program to assign one or more of

128. *Id.*

129. *Id.*

130. Gamboa, *supra* note 99; DOJ Press Release, *supra* note 5; Human Rights First, *supra* note 2.

131. DOJ Press Release, *supra* note 5.

132. *See id.*

the Assistant Chief Immigration Judges to serve closer to the immigration courts that they oversee.¹³³

A few of these recommended reforms merit further discussion. DOJ's stated goal behind establishing performance evaluations is "to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals."¹³⁴ Moreover, the evaluations will purportedly allow for the identification of areas where a particular judge or BIA member might need improvement, "while fully respecting his or her role as an adjudicator."¹³⁵ According to the Department of Justice, the EOIR's Director will also conduct an assessment during each immigration judge's initial two-year trial period "as to whether [the] new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed."¹³⁶ This last component—scrutiny during the trial period—affects only incoming judges. Although certainly a step in the right direction towards addressing the problems of bias apparent from the TRAC findings and the recent federal circuit opinions, the recommended reform fails to put pressure on the major offenders of bias: those immigration judges who—although not new to the system—are simply overworked and jaded.

Similarly, a new immigration law exam, which endeavors to "ensure that all immigration judges are proficient in the key principles of immigration law," has only been administered to judges and BIA members appointed since December 31, 2006.¹³⁷ Appointees taking the bench after that date are required to pass the exam in order to hear and adjudicate cases.¹³⁸ Judges appointed to the bench before December 2006 have no such requirement. Requiring all immigration judges and BIA members to take and pass the exam, regardless of how long they have been on the bench, will greatly increase the potency of this reform measure. Familiarity with key

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* Additionally, the required training for immigration judges appointed after December 2006 includes "mock-hearing and oral-decision exercises." AILA-EOIR Liaison Meeting Agenda Questions 3 (Apr. 11, 2007), available at <http://www.usdoj.gov/eoir/statspub/eoiraila041107.pdf>.

principles of immigration law should be a prerequisite for each and every member of the immigration judiciary, and the more than 200 jurists already on the bench should have to pass the same test in order to ensure that they possess the requisite skills to effectively continue in the job.

IV. SUGGESTIONS FOR A MORE EFFECTIVE AND EQUITABLE SYSTEM

A. Increase the Size of BIA and Number of IJs

Former Attorney General Gonzales's proposed plan simply does not go far enough to effectuate a meaningful change. His announcement that DOJ will endeavor to increase the number of BIA members certainly represents a positive step.¹³⁹ The increase in the size of the BIA, however, must entail the addition of more than four new members in order to effectively facilitate a more in-depth review of immigration judges' opinions and to allow BIA members to produce written opinions outlining the rationales behind their decisions.¹⁴⁰ In his testimony before the Senate Committee on the Judiciary, Second Circuit Chief Judge John Walker noted that eleven BIA members simply cannot handle the nearly 43,000 petitions for review submitted to the Board each year.¹⁴¹ While applauding the proposal to add four members to the BIA, Judge Walker cautioned that this addition would not be substantial enough.¹⁴² Judge Walker advocated increasing the BIA to thirty

139. See Susan Gamboa, *Immigration Courts Get New Rules*, TULSA WORLD, Aug. 10, 2006, at A8 (reporting that Gonzales "wants to add four members to the Board of Immigration Appeals and continue using temporary members as needed").

140. Burkhardt, *supra* note 26, at 75 (suggesting that the elimination of written decisions may result in a decrease in the "intellectual rigor in decisionmaking" because BIA members are not required to collect the facts necessary to the decision (quoting ABA COMM'N ON IMMIGRATION POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 3 (2003), available at <http://www.abanet.org/publicserv/immigration/bia.pdf>)).

141. See *Hearing*, *supra* note 69 (estimating that even under the single-member review system, each BIA member must decide 4,000 cases a year, or 80 per week, in order to keep up with the rate of filings).

142. *Id.* (implying a need for immediate action and suggesting that this step could be "taken right away at modest cost").

members,¹⁴³ more than twice the size of the current Board and an increase of seven over the size that the BIA was at its largest in 2002, just before the Ashcroft-implemented changes. Without a drastic increase in the BIA's size, asylum applicants will continue to have difficulty attaining meaningful and adequate review of their applications and appeals to federal court will continue in large numbers.¹⁴⁴

B. Return to a Policy Where Written BIA Opinions Are the Norm, Not the Exception

Requiring written opinions from BIA members in all decisions will provide federal courts with the information they need to adequately review the petitions before them.¹⁴⁵ In order to properly affirm a BIA decision, a federal court must be in agreement with the rationale employed by the BIA in reaching its decision. Without the insight that a written decision provides into the reasoning applied by the affirming BIA judge, a federal court has no choice but to remand the case in order to gather more information, even if it is in agreement with the ultimate outcome reached by the BIA.¹⁴⁶ The lack of written opinions has resulted in a greater number of cases being remanded back to the BIA (and sometimes back to immigration judges),¹⁴⁷ a fact that undermines the goal of "streamlining."¹⁴⁸

143. *Id.*

144. *See id.* ("Until sufficient numbers of Immigration Judges and BIA members are in place, the backlog is likely to continue ... to grow, no matter which court is responsible for deciding petitions for review.").

145. Burkhardt, *supra* note 26, at 76 (noting that without written opinions, federal courts performing appellate review will have only the outcome of a decision, not the underlying rationale supporting it).

146. *Id.* (arguing that the elimination of written opinions is counterintuitive to the DOJ's stated goal of increasing efficiency at the BIA level); *see also* Iao v. Gonzales, 400 F.3d 530, 535 (7th Cir. 2005) ("[W]e are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned.").

147. *See Hearing, supra* note 69. Judge Walker testified that a "higher-than-expected number[] of cases are remanded" by federal appellate courts to the BIA and Immigration Courts. *Id.* Specifically, the Second Circuit remands about 20 percent of its immigration cases, and the Seventh Circuit's remand rate stands at 40 percent. *Id.*

148. *See* Burkhardt, *supra* note 26, at 76.

C. Provide Cultural Sensitivity and Awareness Training to All Immigration Judges

The DOJ's proposed reforms include only a brief mention of "improved training for immigration judges, Board members, and EOIR staff."¹⁴⁹ The lack of specifics as to what kind of training is envisioned creates plenty of room for additional suggestions. To be effective, the training program must, at a minimum, include cultural sensitivity training for all IJs.¹⁵⁰ Asylum applicants often do not speak English, and "their cases often turn in part on changing political and social conditions around the world."¹⁵¹ Cultural disconnects between judge and applicant may account for a significant number of the outcome discrepancies.

Of course, it is not possible to craft a training program that incorporates details of every culture with which an immigration judge may cross paths. Each immigration court could, however, implement a training program focusing on the cultures that appear most often before it.¹⁵² A program aimed at increasing general

149. DOJ Press Release, *supra* note 5.

150. In an opinion remanding an asylum case due to a lack of rational analysis, Judge Posner summarized six recurring "disturbing features" detected by his court in a large number of the asylum decisions it reviewed; of particular relevance are his observations of "[a] lack of familiarity [by immigration judges] with relevant foreign cultures ..., [i]nsensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages," and "insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American." *Iao*, 400 F.3d at 533-34. The applicant in *Iao* was Chinese, and Judge Posner specifically pointed out that "[b]ehaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect." *Id.*

151. Liptak, *supra* note 127; see also Tresa Baldas, *Waiting for Asylum*, NAT'L L.J., Mar. 13, 2006, at 20 (stating that the "turning point" in the successful political asylum case for a Nicaraguan woman, who was allegedly beaten and raped by her common law husband for fifteen years before fleeing to the United States, was "the testimony of an expert witness on Nicaraguan culture who ... painted for the judge a picture of a desperate woman stuck in a society that condoned abuse and could not protect her"; and indicating that the immigration judge indicated to counsel after her ruling that she had been planning to deny the asylum application until she heard the expert's testimony).

152. Miami Immigration Judge Denise Noonan Slavin insinuated that identifying the culture most relevant in each Immigration Court might not be difficult. Liptak, *supra* note 127. The New York and Philadelphia courts see a lot of Chinese immigrants; Chicago has a large number of cases involving Eastern European immigrants; Miami courts get a lot of Haitians, Colombian and Venezuelan applicants; and California courts have high numbers of Central and South American applicants. *Id.* Training programs implemented in each of those immigration courts could easily be geared toward the relevant predominant culture or

cultural awareness and improving overall cultural sensitivity could be implemented in all jurisdictions and supplemented with specially geared programs catering to the specific needs in each various court or region.

Moreover, the EOIR already provides some limited cultural sensitivity training to immigration judges. In his February 2002 testimony before the United States Senate Committee on the Judiciary regarding the Unaccompanied Alien Child Protection Act, Chief Immigration Judge Michael Creppy testified that "Immigration Judges have been provided books, guidelines and cultural sensitivity training pertaining to juvenile issues."¹⁵³ Because cultural sensitivity training is already available to immigration judges, at least in limited circumstances, the EOIR does not have to incur the expense of identifying a training provider or implementing a completely new program. Instead, EOIR officials could expand and build upon the resources already in place.¹⁵⁴ Presumably, the same organization or individuals who currently provide cultural awareness training for immigration judges dealing with alien juveniles simply could provide more expansive training on a larger scale.

In the event that the EOIR must start from scratch to design and implement a cultural awareness training program, other government agencies may be able to offer guidance. Specifically, the U.S. Transportation Security Administration (TSA) as well as law enforcement agencies constitute two government groups implementing programs to augment employees' cultural awareness and sensitivity,

cultures.

153. *Unaccompanied Alien Child Protection Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002), available at http://judiciary.senate.gov/testimony.cfm?id=172&wit_id=236 (statement of Mr. Michael Creppy, Chief Immigration Judge, Executive Office of Immigration Review). Creppy also testified that "Immigration Judges are committed to provide fair hearings for all, not just juveniles, and I encourage the Immigration Judges to do all that is required to ensure that this occurs." *Id.* In a memorandum to the immigration judges outlining guidelines for cases involving unaccompanied alien children, however, Mr. Creppy gave only passing mention to cultural sensitivity considerations. Memorandum from the Office of the Chief Immigration Judge to all Immigration Judges 4 (Sept. 16, 2004), available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf> ("OCIJ [Office of the Chief Immigration Judge] has provided training to immigration judges on some of these issues and will continue to do so in the future.").

154. Mr. Creppy's February 2002 comments were coterminous with the introduction of the streamlining changes implemented by Ashcroft. No information indicating that the streamlining changes eliminated or affected the cultural sensitivity training referenced by Creppy, however, has been uncovered to date.

especially in the wake of post-September 11 tensions. The TSA provides cultural awareness and sensitivity training to its employees, in particular with respect to facilitating appropriate interaction with Muslim travelers generally and during high-volume travel times.¹⁵⁵

Similarly, police officers and law enforcement agents, both on the national and local levels, have also experienced an increased focus on bolstering cultural awareness. For example, the police department in Dearborn, Michigan, services a community with one of the largest Arab populations outside the Middle East.¹⁵⁶ In response to this fact, Dearborn police officers must attend cultural diversity training sessions every year, and the focus of these sessions varies by different ethnic groups depending on the issues currently facing the city at the time of training.¹⁵⁷ Recognizing that outreach in immigrant communities is essential to law enforcement, the Houston Police Department regularly organizes luncheons for local refugees from Somalia, Sudan, Bosnia, Afghanistan, Iraq, Cuba, and the former Soviet Union, populations with which its officers come into contact most often.¹⁵⁸

Individual immigration courts nationwide likely interact with many of the same populations that police departments and immigration enforcement agencies in the same regions encounter. Consequently, cultural awareness and sensitivity training could encompass both IJs and law enforcement personnel. Even if IJs and law enforcement agents must attend separate training for judicial propriety reasons, training providers likely could consolidate planning and preparation activities, thereby reducing overall costs.

155. See, e.g., David Shelby, *U.S. Airport Security Officers Briefed on Hajj Traditions*, USINFO, Dec. 26, 2006, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=December&x=20061226172155ndyblehs0.4967768> (reporting that the TSA provided special training to sensitize 45,000 airport security employees to cultural traditions of American Muslims in preparation for an anticipated high volume of travel to Saudi Arabia to participate in the Hajj).

156. Carolee Walker, *U.S. Police Work To Build Trust with Muslim Populations*, USINFO, Feb. 5, 2007, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=February&x=20070205144855bcrekaw0.714657> (estimating that nearly 40,000 Arab Americans live in the Dearborn region).

157. See *id.*

158. See *id.*

D. Hold Offending IJs Accountable

In June 2007, the EOIR issued a notice proposing newly formulated Codes of Conduct for IJs and members of the BIA.¹⁵⁹ The notice indicated that the EOIR sought public comment on the proposed codes before finalizing publication.¹⁶⁰ Specifically, Canons IX and X of the proposed IJ Codes pertain to the issue of maintaining impartiality and exhibiting appropriate behavior and demeanor towards the parties and lawyers who appear before an IJ.¹⁶¹ The commentary following the proposed canons instructs that “[a]n immigration judge who manifests bias or engages in unprofessional conduct in any manner during a proceeding may impair the fairness of the proceeding and may bring into question the impartiality of the immigration court system.”¹⁶² Accordingly, the test for the appearance of impropriety by an immigration judge is “whether the conduct would create in the mind of a reasonable person with knowledge of the relevant facts the belief that the immigration judge’s ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence has been impaired.”¹⁶³ Violations of the canons may be a basis for disciplinary action against an IJ.¹⁶⁴

The Chief Immigration Judge is tasked with the responsibility of supervising and evaluating the performance of all immigration judges.¹⁶⁵ Included in this duty is the ability to take corrective action “where indicated.”¹⁶⁶ In the event that they become final, the Codes of Conduct will serve as an effective tool for evaluating IJ conduct and should be vigorously enforced. A violation of the Codes should be considered an indication that corrective action is warranted. Intemperate behavior and display of irrational bias against applicants by IJs simply should not be tolerated. As recognized by

159. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510 (Dep’t of Justice June 28, 2007).

160. *Id.* As of the publication date of this Note, the final Codes of Conduct had not yet been released.

161. *Id.* at 35,511.

162. *Id.*

163. *Id.*

164. *Id.*

165. 8 C.F.R. § 1003.9 (2007).

166. 8 C.F.R. § 1003.9(b) (2007).

the proposed commentary, even a few such occurrences jeopardize the appearance of justice and propriety of the entire immigration system.¹⁶⁷ Although certainly the vast majority of IJs exemplify model judicial behavior, the system should not tolerate the few who fail to follow suit.¹⁶⁸ Removal from office is always a drastic remedial measure, but, in order to maintain the integrity of the immigration system, the office of the Chief Immigration Judge should not shy away from utilizing the measure. As evidenced by observations and reprimands by the federal bench, misconduct by IJs, even one-time offenders, can be shockingly egregious.¹⁶⁹

E. Change Application Requirements for IJ and BIA Vacancies To Include Familiarity with U.S. Immigration Law

In addition to increased cultural awareness, immigration judges must possess a substantial familiarity with governing U.S. immigration law. Requiring IJ applicants to demonstrate at least a working knowledge of immigration law, as well as providing training to current IJs regarding new developments in the law, would help ensure that all judges are keenly aware of the law that they are applying daily and by which they are affecting many lives.¹⁷⁰ Currently, applicants to immigration judge vacancies must have an LL.B. or a J.D. degree; be an active member of the bar in any jurisdiction; be a U.S. citizen; and have a minimum of seven years' relevant post-bar admission legal experience.¹⁷¹ Applicants must

167. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,512-13 (June 28, 2007).

168. EOIR Director Kevin A. Ohlson responded by letter to a *New York Times* article reporting that the federal bench had ordered the removal of an IJ from an asylum case because the IJ had exhibited intemperate behavior towards the applicant, even rebuking him for crying during his testimony. Letter from Kevin A. Ohlson, Director, EOIR, to Thomas Fayer, Editor, N.Y. TIMES, Sept. 21, 2007, available at <http://www.usdoj.gov/eoir/press/07/LtrtoEdNYTSep07.pdf>. Director Ohlson noted that the EOIR now is "committed to taking action to address the problem [of IJs who do not meet the standard for judicial professionalism]." *Id.* Included in the EOIR's arsenal of tools to combat IJ misconduct are individualized training, counseling or the imposition of discipline, "to include, if warranted, removal from the bench." *Id.*

169. See *supra* notes 76-96 and accompanying text.

170. See SAALT letter, *supra* note 41, at 6 (calling for more training on changes in case law and a more diverse pool of immigration judges).

171. EOIR Vacancy Announcement, *supra* note 6.

address, in writing, three of five listed topics as part of the application.¹⁷² “Knowledge of immigration laws and procedures” is the only one of the five topics that illuminates an applicant’s familiarity with immigration law, and applicants are not required to address it.¹⁷³

Furthermore, BIA members should also possess a current and substantial familiarity with immigration law in order to execute fair and efficient reviews of IJ decisions. To that end, the persons hired or promoted to fill the new BIA seats created by then-Attorney General Gonzales’s proposed improvement plan must be required to demonstrate at least a modicum of past experience working with immigration law.¹⁷⁴

CONCLUSION

Nationwide discrepancies in asylum rulings are symptomatic of a greater problem in the immigration system: irrational bias. Several origins for this phenomenon are plausible and each are likely present in varying degrees: too many asylum applicants and not enough judges on the Immigration Court and BIA, cultural disconnects and misunderstandings, and, in some cases, intentional bias. An effective solution for moving forward and ensuring equality for asylum seekers must address each of these factors. The Attorney General must bolster the BIA ranks by more than just four. An overwhelming number of asylum applicants logically translates into many appeals, and thus a strong BIA is the only way to handle the large volume without constantly resorting to the federal bench. More immigration judges are needed as well in order to allow IJs to have sufficient time to handle each case fairly.

172. *Id.*

173. *See id.* (“Applicants must address at least three of the following factors in narrative form on a separate sheet of paper: 1) knowledge of immigration laws and procedures; 2) substantial litigation experience, preferably in a high volume context; 3) experience handling complex legal issues; 4) experience conducting administrative hearings; and/or 5) knowledge of judicial practices and procedures.”).

174. *See Operations of the Executive Office for Immigration Review (EOIR): Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. (Feb. 2002) (statement of Hon. Lauren R. Mathon, former BIA Member from 1995-2001), available at http://commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_0.HTM (noting that four BIA members appointed between 2000 and 2002 “had no immigration background or expertise” and required “time to learn a new body of law and become proficient at their work”).

Additionally, the immigration system must implement a comprehensive training program incorporating periodic cultural sensitivity training for all members.¹⁷⁵ A cursory glance at statistics from each immigration court should provide insight into which cultures or ethnicities each immigration court interacts with most frequently. An effective training program would include specific sessions geared towards educating members of individual immigration courts about the cultures it sees most often. General training about appropriate ways to communicate and interact with people from different cultures would be effective as well.

Finally, disciplinary procedures—with teeth—must be created to deal with those judges whose bias transcends a lack of cultural awareness and enters the realm of intentional. The federal courts, to some extent, have already identified some judges who may need specific scrutiny. Moving forward, the immigration system cannot rely on the federal courts to identify its weakest links. There must be a system created in the BIA for raising a red flag when a certain judge repeatedly displays biased or inappropriate behavior. A seat on the immigration bench is a privilege, and those individuals who consistently demonstrate an inability to exercise respect and courtesy should have no place among the ranks.

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175. One possible source of current, concise information is the State Department's country briefs. See U.S. Dep't of State, Countries, <http://www.state.gov/countries> (last visited Nov. 25, 2007).

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