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ReNorming Immigration Court

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"For the [noncitizens] who appear before them our immigration judges are the face of American justice. . . . Not all . . . will be entitled to the relief they seek. But I insist that each case be reviewed proficiently and that each . . . be treated with courtesy and respect."

— Attorney General Alberto R. Gonzales**

I. Introduction

The Immigration Courts are in distress. Federal appellate judges have been scathing in their criticisms[1] and the national media has latched onto these stories.[2] Critiques of immigration adjudication are not new, but the increased intensity of such criticisms has focused a spotlight onto these administrative tribunals, traditionally a haven for immigration enforcement officials who have landed secure civil service jobs. This spate of bad publicity captured Attorney General Alberto Gonzales' attention; he

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** Memorandum from Attorney General Alberto Gonzales to Member of the Board of Immigration Appeals (Jan. 9, 2006) *available at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-bia.pdf (last visited Mar. 27, 2008).

1. The U.S. Court of Appeals for the Seventh Circuit, and Judge Richard A. Posner, in particular, has led the charge against flawed decision making. Judge Posner decried the "systematic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum," Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004), and pointed out that the Seventh Circuit had remanded 40% of the petitions for review of immigration cases on its docket. Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005), John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process,* 1 SEVENTH CIRCUIT REV. 216 (2006), *at* http://www.kentlaw.edu/7cr/v1-1/floss.pdf.

2. *See, e.g., Appeals Panel Rips 'Abusive' Phil. Immigration Judge*, PHIL. INQ. Apr. 30, 2006; Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. TIMES, Sept. 20, 2007, *available at* http://www.nytimes.com/2007/09/20/nyregion/20immigrant.html (last visited Apr. 10, 2008) [hereinafter Berstein 1]; Nina Bernstein, *U.S. Relieves Judge of Duties in Courtroom*, N.Y. TIMES, Mar. 13, 2007, *available at* http://www.nytimes.com/2007/03/13/nyregion/13judge.html (last visited Apr. 10, 2008) [hereinafter Bernstein 2] ; Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, *available at* http://www.nytimes.com/2005/12/26/national/26immigration.html (last visited Apr. 10, 2008).

announced that it is finally time to reform the Immigration Courts.[3]

This essay argues that successful reforms are the product of a shift in norms throughout the court. Courtesy, respect, professionalism, and transparency are key to reforming the Immigration Court, and many, if not all of the current immigration judges want to be part of a system that embodies such values. These values, and the specific reforms initiated by Attorney General Gonzales and his successors, will only take root and succeed if they are endorsed and accepted by the people they affect: the Immigration Judges who must buy into these changes. Additionally, reforms will only be effective if they appear credible to the public, especially the lawyers who practice in and the non-citizens whose lives are affected by Immigration Court rulings. Finally, the respect of exasperated and often vituperative federal judges must be restored.

This goal can be achieved by implementing small-scale procedures capable of grassroots change within the Immigration Court. Without radical legislative changes or major infusions of financial resources, immigration judges can institute and internalize changes in daily habits, personal values, and attitudes. The new norms will lead to increased credibility and respect for immigration courts and judges. Furthermore, meaningful and genuine re-norming in the Immigration Court will produce greater understanding of and esteem for the performance of individual judges and the court as an institution.

Specifically, this commentary recommends the following normative changes:

- adopting fixed renewable terms for judges with transparent selection criteria
- creating clear and public performance standards
- drafting clear retention standards
- greater oversight of conduct on the bench
- remedial action when judges' performances fall below acceptable standards
- standardizing and publicizing evidentiary norms
- building time for training and reflection into the court's workload
- authoring and publicizing written decisions
- supporting a system of appointed counsel

Creating these new standards and approaches to immigration adjudication will not be easy, but the proposals I make would lead to an Immigration Court that is very different from the status quo. These changes can be made without the destabilization and disorientation that often accompanies major federal government reorganization. There is an ever-growing academic community interested in immigration law and procedure, as well as an active immigration bar, both in private settings and in public service organizations, that can be mobilized into working groups to help immigration judges and government officials re-norm the Immigration Court.

3. *See* Gonzales Memorandum, *supra* note 1; *also* Pamela A. MacClean, *Immigration Judges Come Under Fire, Critics Say System Oversight is Weak*, NAT'L L. J. Jan. 30, 2006, at 1.

II. Immigration Court Today

Much has been written about the how the Immigration Court evolved to its current status.[4] Many proposals to alter the structure of immigration adjudication have been advanced unsuccessfully over the years.[5] Recently there have been numerous failed legislative initiatives to restructure immigration courts and adjudication.[6] My focus in this essay will be on reforms that can be developed and put into place now. I will start with a short sketch of the current Immigration Court structure, and I will then expand on the new norms that should be developed and instilled.

Under the aegis of the Executive Office of Immigration Review (EOIR), Immigration Courts throughout the country are staffed by judges, administrators, support staff, interpreters, and clerical personnel. There are 51 courts located in 23 states, including Puerto Rico with approximately 210-215 judges currently sitting.[7] According to EOIR statistics, the Immigration Courts handled an enormous caseload in 2006 – totaling well over 300,000.[8] Most observers agree that more judges and increased support are needed to handle this caseload.[9]

Immigration Court basically looks, feels, and operates like most other courts but some of its characteristics strike even experienced litigators as foreign. The court lacks formal rules of evidence.[10] Non-lawyers can appear on behalf of re-

4. *See, e.g.*, Sidney B. Rawitz, *From* Wong Yang Sung *to Black Robes*, 65 INTERPRETER RELEASES 453 (1988); MICHAEL J. CREPPY, H. JERE ARMSTRONG, THOMAS L. PULLEN, BRIAN M. O'LEARY & ROBERT P. OWENS, THE UNITED STATES IMMIGRATION COURT IN THE 21ST CENTURY 67-88 (1999) [hereinafter CREPPY, ET AL.].

5. *See, e.g.* Maurice Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 7 (1980); Dana Marks Keener & Denise Noonan Slavin, *An Independent Immigration Court: An Idea Whose Time Has Come* 8 (2002)(on file with author); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIG BULL. 3, 5 (2008); U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 174-182 (1997) (recommending independent executive agency).

6. *See, e.g.*, United States Immigration Court Act of 1996, H.R. 4258, 104th Cong. (1996); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998); United States Immigration Court Act of 1999, H.R. 185, 106th Cong. (1999); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707 (2006); Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 701-707 (2007).

7. U.S. DEP'T OF JUST., EXEC. OFFICE FOR IMMIGR. REV., LIST OF ADMIN. CONTROL CTS. (Feb. 8, 2008) *available at* http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Mar. 26, 2008).

8. The vast majority of these cases (317,032) were removal proceedings. U.S. DEP'T OF JUST., EXEC. OFFICE OF IMMIGR. REV., FY 2006 STAT. YEAR BOOK A1 (2007) *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf [hereinafter YEAR BOOK].

9. *See, e.g.*, Stuart L. Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul,, Dana Leigh Marks & Denise Slavin, *Burnout and Stress Among United States Immigration Judges*, 13-1 BENDER'S IMMIGR. BULL. 22, 29-30 (2008) (on file with author); Human Rights First, *Summary of Recommendations Relating to the Comprehensive Review of the Immigration Courts and the Board of Immigration Appeals*, *available at* http://www.humanrightsfirst.org/pdf/recs-doj.pdf (last visited Mar. 27, 2006); John T. Noonan, Jr., *Symposium on Immigration Appeals and Judicial Review: Immigration Law 2006*, 55 CATH. U. L. REV. 905, 916 (2006).

10. FED. R. EVID. 1101. The rules of evidence are relaxed in immigration hearings. 8 C.F.R. § 1240.7 (2008) ("The immigration judge may receive in evidence 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."). *See also*, Matter of Wadad, 19 I. & N. Dec. 182, 188 (BIA 1984). Hear-

spondents.[11] Generally neither routine calendar proceedings nor the non-testimonial portions of hearings are interpreted to non-English speakers.[12] Lawyers for the government work very closely with the judges, and they are sometimes observed engaging in bad habits, such as *ex parte* conversations.

Most immigration judges (IJs) are dedicated, diligent and compassionate. They work long days under arduous conditions. Caseloads are high and what is at stake is enormous, creating huge pressure given the often antagonistic goals of efficiency and thoroughness. Despite unquestionable improvements over the past two decades under the EOIR stewardship to create a judiciary that is competent and impartial, the Immigration Court remains a flawed institution subject to criticism from many perspectives. Whether the court can overcome the recent critical perceptions and realities of its performance while trying to function efficiently and fairly under a burdensome caseload continues to be a topic of concern and debate.

III. Reforms Initiated by the Attorney General

Since his 2006 announced reforms, Attorney General Gonzales has left office, and a new Director of the EOIR and a new Chief Immigration Judge have been appointed. Before leaving office, and not long after the embarrassing news broke about political appointments to the Immigration Court,[13] Gonzales reported to the Senate that he put into place a new hiring process for IJs and Board of Immigration Appeals (BIA) members that is more "routine, consistent, and transparent" and "developed extensive training programs for both new appointees and veteran immigration judges."[14] He also put into motion some of the initiatives described in detail below. Despite all of this external pressure and personnel turnover, or perhaps because of it, several positive steps have been taken, as reflected in the EOIR's recently published five-year strategic plan.[15] The EOIR commits to making improved efforts to achieve its core values: 1) Equal Justice Under the

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say is admissible if it is probative. *See* Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003); Morgano v. Pilliod, 299 F.2d 217, 219 (7th Cir. 1962, *cert. denied* 370 U.S. 924 (1962) ("It is . . . well settled that the rules of evidence covering judicial proceedings are not applicable to administrative deportation proceedings.").

11. Respondents in removal proceedings have the right to representation, but not the right to appointed counsel. 8 U.S.C. § 1229a (b)(4)(A), INA § 240 (b)(4)(A) (2006).

12. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 U.C.L.A. L. REV. 999, 1027 (2007) (describing how "vast portions" of an asylum seeker's hearing "transpired in the client's physical presence but mental absence" due to the lack of interpretation).

13. *See* Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1; Richard B. Schmidt, *Ex-Gonzales Aide Says She May Have "Crossed the Line,"* L.A. TIMES, May 24 2007, at A1; David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. TIMES, May 24, 2007, at A1.

14. *Hearing on Oversight of the U.S. Dep't of Justice Before S. Comm. on the Judiciary*, 110th Cong. 21-22 (2007) (written statement of Alberto R. Gonzales, Att'y Gen. of the United States).

15. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., FISCAL YEARS 2008-2013, STRATEGIC PLAN 1 (Jan. 2008), *available at* http://www.usdoj.gov/eoir/statspub/EOIR%20Strategic%20Plan%202008-2013%20Final.pdf (last visited Mar. 25, 2008).

Law; 2) Commitment to Excellence; 3) Honesty and Integrity; and 4) Teamwork.[16] Acknowledging the need to improve technology, to expand its workforce, to encourage and support *pro bono* representation, and to ensure a fair process, the EOIR has set four long-term goals:[17]

1 Adjudicate all cases in a timely manner while ensuring due process and fair treatment for all parties.
2 Deliver services to the public in a professional, courteous and timely manner.
3 Implement electronic filing to achieve excellence in management, administration and customer service.
4 Provide for a workforce that is skilled, diverse, committed to excellence and exhibits the highest standards of integrity.

These goals reflect important values that previously may have been unstated, unstressed, or unpracticed, but now are directly explicit. For example, Goal 2 requires better customer service that recognizes the diversity of people appearing in court or needing assistance. Goal 4 relates to promoting and monitoring lapses in appropriate judicial temperament, ethics training, and grievance procedures.

Some initiatives, such as enhanced training and reforms in the selection process have been announced, however since they are not particularly visible to the public, their implementation and impact are still uncertain. Other changes that have occurred appear to begin to move the court in positive directions, although not everyone would agree. Recently, the President of the NAIJ observed, "[T]he reality in the trenches at the Immigration Courts is that most Immigration Judges remain untouched by these lofty promised changes."[18]

A. Greater Oversight of Conduct on the Bench

When a judge misbehaves in connection with official duties, most courts have mechanisms for bringing a complaint. Although many complaints are baseless, the need for a disciplinary authority of some kind is beyond question. For example, by statute, individuals can lodge complaints against federal judges alleging prejudicial conduct or unfitness.[19] The Judicial Conference of the United States recently updated its rules to establish a detailed procedure for lodging and adjudicating complaints.[20]

In April 2001, the EOIR published an ethics manual which sets forth governing principles for all judicial officers and describes the complaint process for reporting allegations of professional misconduct

16. *Id.* at 4.
17. *Id.* at 7.
18. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDER'S IMMIGR. BULL. 3, 12 (2008).
19. Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 351(a) (1980).
20. Press Release, Judicial Conference Committee on Judicial Conduct and Disability, National Rules Adopted for Judicial Conduct and Disability Proceedings (Mar. 11, 2008) *available at* http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm (last visited Mar. 26, 2008).

to the Department of Justice's Office of Professional Responsibility (OPR).[21] Unlike the roster of disciplinary actions taken against immigration practitioners,[22] the OPR does not publish findings of misconduct concerning judges. In order to discover the frequency, nature and disposition of any complaints, members of the public have to file a Freedom of Information Act request.

Furthermore, because the complaint process is centralized, there is no local administrative oversight of judicial behavior of any kind. Long distance policing cannot be very effective, and certainly does not signal to the public or the bench that anyone with oversight responsibility has any interest in the day-to-day conduct of the judges.

Spurred by the Attorney General Gonzales' recommendations, the EOIR has drafted a new Code of Judicial Conduct for Immigration Judges and published them for comment.[23] These provisions appear to address directly the criticisms about behavior and temperament voiced of many federal judges. Of particular interest are Canons V, VIII, X and XV which concentrate on competence, impartiality, professionalism and civility, and *ex parte* communications.[24]

The EOIR also has institutionalized an internal complaint process, along with providing for some more direct oversight of local courts. There is now an online complaint form.[25] Appropriately, the complaints are not made public, but to date, nor are results of investigations that may have discovered impropriety.

Surprisingly, individual Immigration Courts have no on-site administrative judges responsible for the daily functioning of the court. Even in larger jurisdictions where there are ten or more judges, no single judge oversees the court. In the absence of a hierarchy, judges are peers who cannot keep an eye on or interfere with each other's work. Moreover, local lawyers have no direct vehicle to discuss issues that might arise concerning courtroom behavior or management. Recently, the EOIR created the position of Assistant Chief Immigration Judge (ACIJ) to assist in the administration of the courts.[26] Each court is assigned to one of seven ACIJs. However, some are geographically so far away from the court they oversee that their effectiveness is questionable, and the availability and commitment of individual ACIJs to conscientious oversight is still unknown.

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21. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., ETHICS MANUAL, 4 (2001) *available at* http://www.usdoj.gov/eoir/statspub/handbook.pdf (last visited Feb. 18, 2008).

22. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., List of Disciplined Practitioners, *available at* http://www.usdoj.gov/eoir/profcond/chart.htm (last visited Mar. 25, 2008).

23. Notice, 72 Fed. Reg. 35510 (June 28, 2007).

24. *Id.*

25. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., Filing a Complaint Regarding an Immigration Judge's Conduct, *available at* http://www.usdoj.gov/eoir/sibpages/IJConduct.htm (last visited Mar. 25, 2008).

26. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., Office of the Chief Immigration Judge, *available at* http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Mar. 25, 2008).

B. Reassignment of Judges

The administration of the EOIR has proven slow to take action in reported cases of egregious misbehavior. While one-time criticisms of individual IJ performance may not accurately reflect that judge's performance record, repeated admonitions of particular IJs in the Second and Third Circuits reflect poorly on the supervision and integrity of the Immigration Courts.[27]

Bad publicity is not only embarrassing, but also it creates an impression of a much wider problem. Moreover, the recurrence of abuse and misconduct requires a systemic reaction. In the New York and Philadelphia courts, the offending judges were temporarily removed from the bench after multiple instances of offensive behavior had come before the Circuit Courts.[28] The problems presumably existed and were widely known long before critical decisions were handed down by federal appeals courts years after the original misbehavior. Keeping judges in place for so long and failing to take visible action in such egregious cases undermines the credibility of the court in the eyes of both the other judges and the public.

Expressing frustration with below standard decision making, at the conclusion of many opinions Circuit Court increasingly judges have recommended reassignment of the matter on remand because of the inability of the original judge to competently, fairly, and rationally assess the facts and credibility of the applicant.[29] This is a sorry commentary about the loss of faith in the quality of the judging at the original hearing. While there are no known reports tracking this recommendation, the Immigration Court would be loathe to ignore the strong views of the federal judges. But unless the offending judges are reassigned off the bench, or even removed, this solution only transfers burdens to other judges.

C. Standardizing Immigration Court Practice

Some basic Immigration Court procedures for removal hearings are set forth in the Immigration and Nationality Act and the Code of Federal Regulations.[30] However everyday practice in individual Immigration Courts can be unpredictable and inconsistent between both particular courts and individual judges. Although empowered to develop local operating

27. *See, e.g.,* Aboubacar Ba v. Gonzales, 228 Fed. App'x. 7, 11 (2d Cir. 2007); Meizi Liu v. BIA 167 Fed. App'x. 871, 873 (2d Cir. 2006); Mahamed Ayenul Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006); Fiadjoe v. Att'y Gen., 411 F.3d 135, 137 (3d Cir. 2005); Cham v. Att'y Gen. of the U.S., 445 F.3d 683, 686 (3d Cir. 2006); Shah v. Gonzales 446 F.3d 429, 437 (3d Cir. 2006); Sukwanputra v. Gonzales, 434 F.3d 627, 637, 638 (3d Cir. 2006).

28. *See* Bernstein 1 & 2, *supra* note 3; Gaiutra Bahadur, *'Bullying' Immigration Judge Absent, Replaced*, Phila. Inq., June 2, 2006, available at http://findarticles.com/p/articles/mi_kmtpi/is_/ai_n16445432.

29. *See, e.g.*, ABOUBACAR BA v. Gonzales, 228 F. App'x 7, 11 (2d Cir. 2007); Lin v. Ashcroft, 385 F. 3d 748, 757-58 (7th Cir. 2004), Niam v. Ashcroft, 354 F.3d 632, 660 (7th Cir. 2004), Lian v. Ashcroft, 379 F.3d 457, 462 (7th Cir. 2004); Korytnyuk v. Ashcroft, 396 F. 3d 272, 287 n.20 (3d Cir. 2005), Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054-1060 (9th Cir. 2005).

30. 8 U.S.C. § 1229a, INA § 240; 8 C.F.R. § 1240, *et seq.* (2007); 8 U.S.C. § 1229 , INA § 239 (2006).

procedures (LOPs),[31] there has been little consistency between the various courts' rules, and some have none. Some judges have promulgated court rules governing their own courtrooms, but down the hall another judge may follow different rules or none at all.[32]

In February 2008, without any notice or period for comment, the EOIR published a comprehensive *The Immigration Court Practice Manual.*[33] The *Manual* provides detailed information on court procedures including how to file documents with the court, master calendar and merits hearing proceedings, motion practice, bond and detention, and attorney discipline. These rules appear to capture in one document both existing regulations and promulgate new rules. To the extent that they provide guidance to lawyers, judges, court staff, and other representatives, they are a welcome resource in aid of both consistency and transparency. Some particularly demanding aspects of the rules, however, immediately generated responses from advocates resulting in a postponement of their effective date for further study.[34]

While articulated formal practices are an important step in the right direction that hopefully will help make the court run more smoothly, their effect on the front lines is an open question. The new rules largely reiterate practices already on the books and do not account for entrenched customary practices. Unless bad habits are fixed, the contribution of these formal rules on the fairness and efficiency of the court will be lost.

Calendars are long and individual hearings can be delayed for months or years. Government lawyers have very few tools to remedy this overload. They have little authority or incentive to exercise discretion in particular cases in an effort to either reduce caseload or achieve a just result.[35] For the most part, Immigration and Customs Enforcement (ICE) attorneys and immigration judges have little time to prepare cases, instead relying on general information rather than individualized attention. Nothing in the *Manual* addresses how to manage the court's caseload to encourage pre-hearing preparation. In most litigation, parties are expected to conference a case in advance, hopefully to resolve certain issues or to narrow the evidence. In Immigration Court this rarely occurs despite some judges' individual efforts to require ad-

31. 8 C.F.R. § 1003.40 (2008).

32. *See* Regina Germain, *Putting the "Form" in Immigration Reform*, 84 DENV. U. L. REV. 1145, 1146 (2007)

33. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL (2008), *available at* http://www.usdoj.gov/eoir/vII/OCIJPracManual/ocij-page1.htm (last visited Feb. 29, 2008).

34. Press-= Release, U.S. Dep't of Justice, Exec. Office for Immigr. Rev., EOIR Extends Effective Date of Practice Manual (Mar. 13, 2008) *available at* http://www.usdoj.gov/eoir/press/08/OCIJPracManExtDeadlineMar08.htm.

35. Despite the policy memorandum issued on November 17, 2000 by former INS Commissioner Doris Meissner, encouraging the use of prosecutorial discretion, ICE attorneys seem to exercise discretion rarely. Memorandum from Doris Meissner, Comm'r of INS to Regional Directors, et al. 1 (Nov. 17, 2000) *available at* http://www.shusterman.com/pdf/ins-pdmemo1100.pdf (last visited Mar. 26, 2008).

vance consultation. Even if evidence is submitted 30-days in advance, as required,[36] at the Office of the District Counsel where lawyers are assigned at best only a few weeks before the hearing, few lawyers are in a position to, or even willing to, assess a case sufficiently in advance to have any effect on narrowing the issues of the hearing. This creates inefficiencies and delays, and often results in significant burdens placed upon the respondent.

Similarly, the *Manual's* Rule 1.7(e) prohibiting *ex parte* communications applies to all parties.[37] It is striking that this admonition had to be articulated at all. The practice of ICE attorneys talking to a judge about a case, whether about substantive or administrative issues, is rampant. Whether this rule will break this habit remains to be seen. Lawyers for the government are in court on a daily basis and become familiar with the judges and other judicial personnel. This clubby environment always has risked blurring role boundaries for the sake of convenience or even expedience. Written rules are a major improvement, but vigilance about changing unwritten customs that may compromise the rules is critical to effectuate any real transformation.

IV. ReNorming The Court

As the stalled or failed proposals and legislative initiatives have demonstrated, the difficulties in changing immigration adjudication are enormous. The recent effort BIA streamlining reform of 2002[38] was intended to make the Board more efficient, to clear up its backlog, and to expedite final orders of removal. The unintended consequence however, has been to transfer the immigration litigation burden to the federal circuit courts,[39] while simultaneously eroding the stature of both the immigration adjudication and the BIA. Streamlining perversely may have also caused inefficiencies by increasing the number of matters remanded from the federal courts to the BIA.[40] Criticism of the streamlining regulations has been so widespread that even the DOJ itself is questioning its wisdom,[41] and every

36. MANUAL, *supra* note 34, at 33 (Rule 3.1).

37. *Id.* at 13 (Rule 1.7).

38. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

39. A five year comparison of federal appeals filed nationwide shows an increase in proceedings originating from the BIA from 4,449 in 2002 to 11,911 in 2006. That latter figure represents 17.8% of all appeals filed and 90.9% of all appeals from administrative agencies. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2006, tbl.B-3 (Mar. 31, 2007), *available at* http://www.uscourts.gov/judbus2006/appendices/b3.pdf (last visited Mar. 26, 2008). For a detailed analysis of the skyrocketing rate of appeal after April 2002, *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, 4, 43-48 (2005). .

40. Remanded cases go through the system at least twice. In 2006, 1,798 cases were remanded to the BIA. *See* YEAR BOOK, *supra* note 11, tbl.16 at T1-T2, *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

41. Press Release, U.S. Dep't of Justice, Exec. Office for Immigr. Rev., Fact Sheet, *BIA Restructuring and Streamlining Procedures* (Mar. 9, 2006) *available at* http://www.usdoj.gov/eoir/press/06/BIAStreamliningFact-

bill in Congress restored some or all of the pre-streamlining features.

Mindful of the negative consequences of the discredited streamlining reform effort, and wary about the difficulties attendant in enacting new laws, I have sketched out a variety of non-legislative options that would re-norm the Immigration Court. I have started with proposals that would require few actual resources, though they would demand a serious commitment to revising business-as-usual. I then proceed to suggest new norms that would require an infusion of additional resources or might entail structural reorganization. Though more costly and somewhat disruptive of the status quo, these improvements would likely produce benefits that far exceed their costs.

A. Changes Calling for Personal and Institutional Commitments

1. Standardize Rules of Evidence

Immigration Court occupies a world apart from mainstream litigation where minimal procedural and evidentiary rules are a way of life. Many of the judges and lawyers practicing there have known no other form of law practice. While informal procedures benefit efficiency and decrease the stress of administrative adjudication, the absence of clear rules about procedures and evidence in the Immigration Court actually decreases its efficiency by allowing for sloppy, unprofessional lawyering leaving the judges without tools to manage their courtrooms.

Not only are the Federal Rules of Evidence generally inapplicable in Immigration Court proceedings, other evidentiary rules regarding the authentication of documents,[42] the formalities of direct and cross-examination, and admission of oral or written evidence are honored inconsistently depending on the particular judge, and even the particular case. Sometimes the absence of evidentiary hurdles is helpful to the respondent particularly in asylum cases where the applicant may have no way of producing official documents to substantiate the allegations of persecution, or where hearsay testimony is the only evidence about certain events or states-of-mind. For example, respondents might be permitted to testify about hearsay threats, offer an opinion about the intentions of putative persecutors, or introduce corroborating materials such as affidavits or even letters without worrying about hearsay barriers. Written submissions and testimony are usually admitted into evidence and given appro-

Sheet030906.pdf ("It is possible that eliminating BIA adjudication delays has increased the incentive to file petitions for review in federal courts in order to postpone deportation and remain in the United States for as long as possible."). On December 7, 2006, the EOIR issued a regulation at 8 C.F.R, § 1003.1 to increase its members from its 2003 low of 11 to 15, still much lower than the 23 pre-streamlining members in 2001. 8 C.F.R. § 1003.1 (2007).

42. 8 C.F.R. § 1287.6 (2007). *See* Virgil O.Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability in Asylum Cases*, *in* IMMIGRATION & NATIONALITY LAW HANDBOOK (AILA 2006-07, ed.).

priate weight, a subjective determination that may or may not be explained in the judge's decision.

The lack of rules or even standards for weighing the probative value of proffered evidence means that individual judges are free to make evidentiary rulings according to their personal impression of the case and the witness. Moreover, some judges routinely take an aggressive role in questioning witnesses without any evidentiary constraints, an intimidating tactic when vulnerable asylum seekers are testifying. Sometimes this usurpation is beneficial because the judge is compensating for inadequate counsel. More often, the interfering judge is impatient to get to what he or she perceives is the heart of the case regardless of the attorney's questioning strategy or case theory. Objections from counsel to aggressive questioning by a judge are fraught with risk of alienating the judge at the all-important hearing which may be the applicant's only chance of obtaining relief.

Clear regulations regarding the admission and use of evidence would standardize hearings nationwide and reduce subjectivity and bias in adjudication. Those rules could take into account some of the benefits from the current system's relative informality, and would increase uniformity and thus fairness, and reduce the impression of *ad hoc* rule making. Moreover, lawyers will know what to expect and prepare accordingly without having to guess which evidence might be excluded or discounted.2. Encourage and FacilitateProfessionalism and Pride

2. Encourage and Facilitate Professionalism and Pride

Federal judges, the media, and their own boss, the Attorney General have found fault; it would not be not surprising, therefore, if immigration judges are demoralized. The unremitting disparagement likely exacerbates the very problems it exposes. The court, therefore, should seek ways to improve morale. Raising expectations of professionalism, and identifying and supporting ways for judges to take pride in their work could address this issue, while enhancing performance to the benefit of all parties and the system.

a. Build in time for training and reflection into the job

Immigration court practice is complex, technical, and demanding, but no more so than many other legal practices such as family or criminal law where courts have equally disturbing cases, large caseloads, and involve similarly difficult decisions with huge human impact. To assert that the Immigration Court is more stressful than other high-volume, high-pressure courts overstates the case.[43] It is true that given the large number of asylum cases, judges work with life-and-death facts that relate to violations of international human rights. However this huge responsibility should motivate rather than debilitate. An im-

43. *See* Lustig, et al., supra note 10.

migration judge is part of a worldwide effort to assure humanitarian relief for victims of persecution. The responsibility can be extremely nerve-wracking, and requires concentration, dedication to a search for the truth, as well as enormous patience and compassion. Their job is to do justice, a result that is possible despite the burdens and pressures of this court.

Given these facts, IJs should be proud of their work, not impatient or insensitive. Attorney General Gonzales promised better training[44] which should include more than legal updates, but also intellectual stimulation, an opportunity to exchange ideas, exposure to new approaches, and to feel part of a larger mission. IJs require some care and feeding in order to retain pride and motivation, but such nourishment should come from a sense that their work is important not only to the individual before them but also to humanity.

b. Author and Publish Written Decisions

Immigration judges rarely write opinions. Thus, their discussions are not published nor made public unless the lawyers do so. Some cases are decided with a so-called "short order" in which the IJ does not state the reasons for the result. Most regular decisions are delivered orally from the bench leaving no public record unless the case is appealed. In light of the reports of disparities, IJs should make their written decisions available to the public. While not precedential, information sharing would create a culture of respect for each other and educate others on the bench about country conditions, credibility assessments, methods of legal analysis, and modes of expression. Judges can and should be a resource to each other and should take pride in well-reasoned decisions while being open to constructive criticism.

Even if they do not write decisions, the judges could regularly engage in collective self-education by sharing information about cases and explaining to each other the bases for decision making.[45] As the authors of the recent article on disparities in asylum decisions suggest, it might benefit the individual judges, and help to overcome isolation, if they conferred with each other. But this conversation should extend beyond trying to understand their differences to examine legal and factual premises. The medical model of "grand rounds" might work well for immigration judges. Setting aside enough time and creating an environment of greater collaboration could be very beneficial to the intellectual life of the judges.

c. Increase Self-Awareness and Self-Monitoring

Where are the diligent, hard working judges when a colleague is falling off the deep end, or even behaving with less than ideal judicial conduct? The court suffers today from the embarrassment of public

44. Gonzales Memorandum, *supra* note 1.

45. Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 382 (2007) [hereinafter *Refugee Roulette*].

exposure of its weak links. Yet its steady, reliable, conscientious judges are reluctant to intervene or share responsibility for the behavior of their colleagues. While changing interpersonal mores is always difficult, a culture of ignoring serious temperamental and emotional problems does not advance the cause of respect for the court. Other judges should be concerned about their own integrity and the reputation of the Immigration Court when a circuit court judge describes "analysis . . . far below the minimum required to support an administrative decision,"[46] behavior as "argumentative, sarcastic, impolite, and overly hostile,"[47] or "the tone, the tenor, the disparagement, and the sarcasm of the IJ [is] more appropriate to a court television show than a federal court proceeding."[48] Although it is difficult for outsiders to know how much peer support may already be taking place, concern for the court's reputation as an institution and their own as its members should move the IJs to action.

B. Changes Requiring Resources and Formal Implementation

1. Fixed Renewable Terms with Articulated Standards and a Transparent Process

A bench packed with career government lawyers is not truly neutral. Although purportedly a diverse group,[49] in reality, immigration judges overwhelmingly have roots in the government, and almost all have worked for Department of Homeland Security (or the legacy Immigration and Naturalization Service), or the DOJ in their earlier careers. Given the job qualifications,[50] it is not surprising that most immigration judges come from these ranks, particularly since this job is an upward career step for a government employee in the immigration field, and it is a job that promises considerable respect, security, and a decent salary.

It is striking how many of the traditional criteria associated with judicial selection are missing from the DOJ list.[51]

46. Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004).

47. Mahamed Ayenul Islam v. Gonzales, 469 F.3d 53, 55 (2d Cir. 2006).

48. Qun Wang v. Att'y Gen. of the U.S., 423 F.3d 260, 269 (3d Cir. 2005).

49. *See* CREPPY, ET AL. *supra* note 5, at 89.

50. The minimum qualifications require admission to the bar of any state or territory or the District of Columbia with at least seven years of practice, along with substantial knowledge of the INA, its regulations, substantial litigation experiences and knowledge of judicial practices and procedures, *inter alia*. The salary range is $109,720 to 149,200 a year. *See* USAJOBS, the government's official source of job information posted on May 30, 2003 for a vacancy on the New York Immigration Court, *available at* http://jsearch.usajobs.opm.gov/ftva.asp?OPMControl+IN8567 (online posting expired). This salary is competitive with the 2005 salaries of U.S. District Court judges at $162,100 and federal Bankruptcy and Magistrate Judges at $149,142. CRS REPORT FOR CONGRESS, SALARIES OF FEDERAL OFFICIALS: A FACT SHEET, (2005), *available at* http://www.senate.gov/reference/resources/pdf/98-53.pdf (last visited Mar. 25, 2008).

51. The ABA *Standards on State Judicial Selection* (2000) identify the principal criteria as 1) a minimum of 10 years legal experience; 2) high moral character and a reputation in the community for honesty, industry and diligence; 3) professional competence including intellectual capacity, professional and personal judgment, writing and analytical ability, knowledge of the law and breadth of legal experience.; 4) judicial temperament including courtesy, civility, open-mindedness and compassion; and 5) service to the law and a commitment to

Notably absent are factors such as character, demeanor, experience with and sensitivity about cross-cultural communications, experience or training in interacting with victims of abuse or torture, or expertise in historical, political, or current events. Furthermore, unlike other judicial appointment processes, there seems to be little or no public input, either from lawyers (adversaries or colleagues), judges, or members of the public. Nor is there any independent judicial screening process or input from the profession like that which might occur at a bar association or other civic group to evaluate the fitness of candidates for judicial office.

a. Establish Fixed Terms with Clear Retention Standards

Immigration judgeships are anomalous. Immigration judges are employees of the EOIR with as much job security as that dependent relationship and civil service protections allow. Yet, they also have no fixed term of office. In essence, they are life-time DOJ civil service jobs. Thus, their dependency on the hand that feeds them, the Attorney General, makes them vulnerable to a boss who is the chief law enforcement officer in the country. But their status also immunizes them against other forces such as immigrant groups, the immigration bar, and the public in general. They cannot be voted off the bench, nor can a non-partisan review find them unqualified. Without a term of appointment they are not subject to any meaningful periodic performance review in order to retain their jobs, providing little external incentive to worry about the quality of their judging, their demeanor, or the opinion of anyone outside the EOIR hierarchy. To the extent that there is any performance review by the EOIR administration, it tends to focus on productivity, or possibly politics, rather than quality of their work.

Fixed-term appointments are important checks on performance. It is not hard to imagine that such a grueling routine can lead to fatigue and cynicism that manifests in deteriorating demeanor, sloppy reasoning, impatience, or insensitivity.[52] Until the recent spate of federal court decisions, intemperate judges could conduct their daily business almost invisibly with virtual impunity. They had no real expectation of being reversed by the BIA, no sense that their legal and personal judgments had any consequences other than to the parties, and no objective standards against which their decision making or deportment would be measured. Without a performance review mechanism with public input prior to reappointment, there is no external incentive to achieve the highest judicial standards. Apparently internal incentives are inadequate in some instances.

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improving the availability of justice. ABA Standing Comm. on Judicial Independence Comm'n on State Judicial Selection Standards, *Standards on State Judicial Selection* 7 (2000).

52. Lustig, et al., *supra* note 10.

b. Create and Apply Clear and Public Performance Standards

Immigration judges are not Administrative Law Judges, thus, the Administrative Procedure Act prohibition against performance review as a means to protect their independence actually does not apply to them.[53] In a system of fixed-term appointments, reappointment and performance, however, standards would have to be promulgated. Since many states, as well as the American Bar Association, have either adopted or proposed adoption of performance evaluation standards that are sufficiently broad and well established, some more job-specific standards for IJs surely can be articulated.

In most jurisdictions, standards for retention focus on qualitative performance factors.[54] These may be framed somewhat generally, but they set important aspirational goals. Most jurisdictions also have either adopted or proposed adoption of performance evaluation standards that are sufficiently broad and well established. Some job-specific standards for IJs surely can be articulated as well.

Performance reviews, coupled with peer conversations and support, would assist to regularize factors considered in the more subjective aspects of IJ decision making involving credibility assessments and the exercise of discretion, and perhaps avoid some of the extremes of inconsistency. Immigration judges routinely make credibility assessments and draw factual inferences, determinations that are subject to a very deferential standard of review both in the BIA[55] and in federal court.[56] Yet, to read circuit court decisions excoriating many irrational decisions, IJs sometimes lack commonsense and logical reasoning. This characterization is extremely troubling in light of the high standard of review so that each remand on this basis should be analyzed and made part of the education process.

Additionally, IJs routinely exercise discretion, another highly subjective determination, without many clear standards or rules to guide them.[57] Thus, the values and norms of the individual immigration judge may determine an essentially unreviewable outcome. Or as Maurice Roberts noted, "[T]he fact re-

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53. ALJs are considered to be Afunctionally comparable@ to judges in the district courts and benefit from similar tenure. In order to preserve their independence from the parent agency, federal ALJs historically have been exempted from formal performance evaluation despite repeated efforts to subject them to review. The APA allows removal of ALJs for cause, but protects them from discharge or lesser penalties for political or arbitrary reasons. Administrative Procedure Act of 1946, 5 U.S.C. § 7521 (2000); 5 C.F.R. § 1201.137 (2007).

54. For example, the ABA *Standards on State Judicial Selection* 2000 identify five retention criteria: 1) preparation, attentiveness and control over judicial proceedings; 2) judicial management skills; 3) courtesy to litigants, counsel and court personnel; 4) public disciplinary sanctions; and 5) quality of judicial opinions. *Standards on State Judicial Selection*, *supra* note 51 (Part A, Standard A.2). *See also*, *Standards Relating to Court Organization* § 1.27 (1990).

55. 8 C.F.R. § 1003.1(d)(3)(i) (2007).

56. 8 U.S.C. § 1252 (b)(4), INA § 242 (b)(4) (2006).

57. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Defense in U.S. Immigration Law*, 71 TUL. L. REV. 703, 761-767 (1997); *see also* Maurice A. Roberts, *The Exercise of Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 158-163 (1975).

mains that [discretionary decision making] is exercised by impressionable and fallible human beings at all levels of the administrative hierarchy."[58] Comparing the evidence and factors that go into an exercise of discretion to break down its constituent elements would be instructive and make IJs feel less isolated.

2. Guarantee Legal Representation to All Indigent Asylum Seekers and Children

Respondents in removal proceedings have the right to representation and may be represented by counsel, by accredited representatives, by law students, and even by "reputable individuals."[59] There is no right to court-appointed counsel so the court frequently must extend time, sometimes over many months, to obtain a lawyer.[60] While many respondents somehow do obtain counsel, the system ultimately seems to force the majority of respondents to contest their removal *pro se* and certainly encourages people to *find any* representative, often drawn from a pool known for its substandard skills and ethics.[61] And representation matters: It is well documented that representation improves an individual's chance of success.[62] Yet, in 2006 only 35% of all persons appearing in Immigration Court were represented.[63]

Unquestionably, representation, even by the least skilled, is preferable to having individuals with limited or no English language proficiency presenting evidence and arguing their own cases. Although the reputation of the immigration bar is not high, testimony and evidence organized by a qualified representative usually will provide a clearer basis for the judge's decision. When confronted by an unrepresented individual, the IJ will probably grant multiple continuances to obtain counsel rather than force a *pro se* hearing, an inefficiency that would try the patience of any judge. A system for subsidizing appointed counsel would have the advantage of fewer delays as well as better prepared cases. There are any number of appointed counsel systems in federal, state, and local criminal cases which could serve as a model for a system in Immigration Court, particularly in categories of cases in which the facts and law are most complex, the respondents the most vulnerable, and the stakes the highest: asylum relief and the adjudication of children's status.

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58. Roberts, *supra* note 57, at 147.

59. 8 U.S.C. § 1229a, INA § 240 (b)(4); 8 C.F.R. §§ 292.1, 292.2 (2007).

60. Lin v. Ashcroft, 356 F. 3d 1027, 1043-45 (9th Cir. 2004).

61. Many immigration practitioners are substandard, and some even corrupt or criminal. *See* Matt Hayes, *Corrupt Lawyers Aid Immigration Woes*, FoxNews.com, Apr. 29, 2002, http://www.foxnews.com/story/0,2933,72149,00.html; Alisa Solomon, *Bad Counsel: The Arrest of an Immigration Lawyer Charged With Smuggling Turns Up the Heat on the INS*, VILLAGE VOICE, Oct. 10, 2000 *available at* http://www.villagevoice.com/news/0041,fsolomon,18869,1.html (last visited Mar. 27, 2008).

62. Andrew I. Schoenholtz & Jonathon Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIG. L.J. 739, 765 (2002) (reporting that represented individuals are four to six times more likely to be granted relief).

63. YEAR BOOK, *supra* note 9, at G1.

Scholars and practitioners have urged a system of appointed counsel for indigent asylum seekers, at least in non-frivolous asylum cases.[64] The judges themselves should be supporting this reform rather than relying on *pro bono* counsel on the one hand and questionably competent practitioners on the other. Indeed, the presence of a qualified lawyer would so enhance the presentation of the case—fewer delays, better prepared papers, better researched claims, clearer legal theories—that there would be far fewer adjournments, the hearings would be conducted more efficiently and smoothly, and the outcomes would be more reliable since the claim for relief had been fully presented. An improved immigration bar would make the job of the IJ easier resulting in less stress and frustration.

V. Conclusion

Immigration judges have a job that allows them to make a life-altering decision, often involving people who are very worthy, who have truly suffered and been abandoned by their own countries, or who have earned the right to stay in this country though time, stakes, contributions, and character. Every time an IJ grants asylum or other forms of relief to a genuinely deserving person, the job should feel like the best job imaginable. This happened in 45% of all asylum cases in 2006.[65] So, almost half of the time, an IJ should experience great job satisfaction. As for the rest of the time, if the judges are fairly, impartially, and respectfully assessing facts, applying the law correctly, drawing logical and rational inferences, and behaving prudently and judiciously, then the other half of their work should also be satisfying, albeit extremely challenging and demanding.

64. *See, e.g., Refugee Roulette*, *supra* note 45, at 384; Schoenholtz, *supra* note 62, at 753-54; Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 449-50 (2007).

65. YEAR BOOK, *supra* note 9, at K2-K3. The court completed 84,280 cases in which applications for relief were filed. *Id.* at N1. Of those, asylum was granted in 13,343 cases. Other forms of relief, including withholding or removal, cancellation of removal, adjustment of status, amounting to 19,105 cases, were also granted in 2006. *Id.* at M1, R3.