

2008

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Recommended Citation

Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 Brook. L. Rev. (2008).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol73/iss2/1>

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ARTICLES

Crisis on the Immigration Bench

AN ETHICAL PERSPECTIVE

Michele Benedetto[†]

I. INTRODUCTION

When Naing Tun walked into an immigration courtroom seeking to remain in the United States, he expected to plead his case before a neutral arbiter. Mr. Tun had painstakingly compiled documents and gathered witnesses to prove his claim for asylum. He had prepared himself to revisit difficult memories of the torture and abuse he had suffered under government officials in his home country, Burma.

Unfortunately for Mr. Tun, he appeared before an overworked immigration judge who personified the failures that exist in United States immigration courts. The immigration judge made a series of conclusions regarding Mr. Tun's testimony later found to be erroneous by an appellate court.¹ The judge also improperly excluded evidence and witness testimony submitted by Mr. Tun. Most alarmingly, the judge disregarded evidence showing that the court-appointed translator did not correctly translate Mr. Tun's testimony. The

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¹ *Tun v. Gonzales*, 485 F.3d 1014, 1027-29 (8th Cir. 2007).

judge then relied on the erroneous translation to deny Mr. Tun's claim for asylum.²

Mr. Tun possessed the resources to appeal the decision of the immigration judge. Without the intervention of the Eighth Circuit Court of Appeals, who criticized the conduct of the immigration judge, Mr. Tun would surely have been returned to Burma to face further persecution.³

Najah Georges Elias faced a similarly challenging experience in immigration court. Seeking to avoid removal to Iraq, where he believed he would be persecuted for his religion, Mr. Elias requested asylum in the United States. During his hearing, the immigration judge addressed Mr. Elias in a manner later described by the Sixth Circuit Court of Appeals as "argumentative, sarcastic, and sometimes arguably insulting."⁴ The court noted the immigration judge appeared to "badger" Mr. Elias at times during the hearing, "likely making [Mr. Elias] more nervous and affecting his testimony."⁵ As a result of the immigration judge's hostility and bias toward Mr. Elias, the court vacated Mr. Elias's removal order and remanded his case for consideration before a different immigration judge.⁶ As the court stated, "[Mr. Elias] was entitled to a fair hearing, but did not receive one."⁷

Mr. Tun's and Mr. Elias's experiences represent a widespread problem. Legal scholars, appellate judges, practitioners, and even the former United States Attorney General have expressed growing concern regarding the status of the immigration court system.⁸ As Judge Richard Posner noted in 2005, the adjudication of cases by immigration judges has "fallen below the minimum standards of legal justice."⁹ Later that year, the *New York Times* reported that federal

² *Id.* at 1030.

³ *Id.*

⁴ *Elias v. Gonzales*, 490 F.3d 444, 451 (6th Cir. 2007).

⁵ *Id.* at 452.

⁶ *Id.*

⁷ *Id.* at 452-53.

⁸ See, e.g., Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1; Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006); *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005); Memorandum to Immigration Judges from Attorney General Alberto Gonzales (Jan. 9, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>.

⁹ *Benslimane*, 430 F.3d at 830.

appeals courts “repeatedly excoriated” immigration judges for a “pattern of biased and incoherent decisions.”¹⁰

Scholars have accurately termed the situation a “crisis” and are calling for major structural reforms.¹¹ For example, in the *Georgetown Immigration Law Journal* in Fall 2006, Sydenham B. Alexander III outlined evidence showing that immigration courts are failing to properly apply the law.¹² Mr. Alexander proposed a political solution to the problem, suggesting the creation of a political campaign designed to “force needed changes to the immigration court system.”¹³ More recently, in a *Stanford Law Review* article, Professors Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag analyzed data from asylum offices, immigration courts, the Board of Immigration Appeals, and the United States Courts of Appeal showing remarkable inconsistencies in grant rates for asylum decisions among immigration courts, and even among judges in the same courthouse.¹⁴ Professors Ramji-Nogales, Schoenholtz, and Schrag were “troubled” by the ramifications of their findings, which indicated an asylum applicant’s case is “seriously influenced by a spin of the wheel” assigning his case to a particular judge.¹⁵

Additional evidence of the problem can be found in cases reviewed by the circuit courts.¹⁶ Many immigration judges appear to be determining cases in a haphazard manner, with decisions influenced more by personal preferences than by careful consideration of facts and law.¹⁷ As a result, litigants in immigration court can no longer be assured of ethical and

¹⁰ Liptak, *supra* note 8.

¹¹ Alexander, *supra* note 8, at 11; *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America’s Asylum System*, 2 NW J.L. & SOC. POL’Y 1, 1 (2007) (“That the American asylum system has fallen into disrepute is no longer a significantly contested point of debate.”); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481, 507 (2005).

¹² Alexander, *supra* note 8, at 11-36.

¹³ *Id.* at 45.

¹⁴ Ramji-Nogales et al., *supra* note 11, at 296, 332.

¹⁵ *Id.* at 378.

¹⁶ *See infra* Part III.E; *see also* cases cited *infra* note 149.

¹⁷ *See, e.g.*, Sun v. Bd. of Immigration Appeals, No. 05-4447, 2007 WL 2705601 at *3 (2d. Cir. Sept. 14, 2007) (removing an immigration judge from a case because her comments to the asylum applicant and her conduct during the hearing created “substantial uncertainty as to whether the record below was fairly and reliably developed”); *see also* Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken Off Case*, N.Y. TIMES, Sept. 20, 2007, at B1.

accurate decision-making when they present their case to an immigration judge. Scholars and reform advocates have extensively considered the causes of this problem and the resulting surge of appeals to the circuit courts: contributing factors include recent structural changes to the immigration court system, lack of resources for immigration judges, and pressure on judges to decide cases expeditiously.¹⁸ When an element of the American judicial system is consistently adjudicating cases using biased or legally incorrect reasoning, the result is indeed a “crisis.”

The purpose of this article is to suggest a new lens through which to examine the crisis in immigration courts: judicial ethics. Ethical considerations frequently play a decisive role in the resolution of immigration cases, in part because the outcomes for litigants in immigration courts can depend almost entirely on the attitude of the judge. Accordingly, the acknowledged crisis in immigration courts has severe implications for judicial ethics. Because the term “judicial ethics” encompasses a broad array of principles, this article will narrow its focus to bias and incompetence on the part of immigration judges in the courtroom.

Part II considers the unique structure of the immigration court, focusing on the current disciplinary procedures for immigration judges and Attorney General John Ashcroft’s “streamlining” reforms of 2003. Part III then discusses the existence of an ethical crisis through statistics showing inconsistent decisions and cases reviewed by circuit courts illustrating judicial bias and incompetence. Part IV next examines causes of such conduct and pending solutions to the problem. Part IV pays special attention to the Attorney General’s proposed “Codes of Conduct for Immigration Judges and BIA Members.” While some would argue the mere existence of this suggested standard of conduct is promising, Part IV explains that the new Codes of Conduct lack both specificity and enforceability.

¹⁸ The causes of the “surge” in appeals to the circuit courts have been much examined by legal scholars. See, e.g., Alexander, *supra* note 8, at 9-10; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y. L. SCH. L. REV. 13, 14-15 (2006-2007); Martin S. Krezalek, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA’s Ability to Affirm Without Opinion*, 21 GEO IMMIGR. L.J. 277, 289 (2007); Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005, 2005-07 (Dec. 19, 2005).

This article not only analyzes the existing crisis with an eye toward the ethical implications of the challenges facing immigration courts, but also offers proposals designed to encourage unbiased and competent behavior on the immigration bench. Accordingly, Part V recommends practical reforms in response to the ethical nature of this crisis. Implementation of these reforms will initiate the process of restoring the ethical integrity of the immigration bench.

II. THE STRUCTURE OF THE IMMIGRATION COURT SYSTEM

A. *The Players: Members of the Executive Branch*

Immigration judges and their courtrooms do not operate as members of the Judicial Branch of government. Because immigration issues often involve “especially sensitive political functions that implicate questions of foreign relations,”¹⁹ courts recognize that the decisions permitting or preventing foreign nationals from immigrating are “frequently of a character more appropriate to either the Legislature or the Executive [Branch] than to the Judiciary.”²⁰

Hence, the Executive Branch is responsible for the establishment of policy and procedures relating to immigration proceedings. This responsibility has been entrusted to the Department of Justice (“DOJ”) since 1940 and is delegated to the Attorney General.²¹ Currently, immigration judges are members of the Department of Justice’s Executive Office of Immigration Review (“EOIR”), an agency within the DOJ created in 1983.²²

Under authority delegated by the Attorney General, EOIR “interprets and administers” immigration law by “conducting immigration court proceedings, appellate reviews,

¹⁹ *INS v. Abudu*, 485 U.S. 94, 110 (1988); *see also* *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (noting that it is a sovereign power of government to “exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion”).

²⁰ *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *see also* Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches’ Settlement*, 5 ADMIN. L.J. 713, 716 (1991).

²¹ *See* Nationality Act of 1940, Pub. L. No. 76-853 § 327, 54 Stat. 1137, 1150-51 (1940); *see also* Alexander, *supra* note 8, at 8 n.45.

²² Executive Office of Immigration Review, U.S. Dep’t of Justice, Missions and Functions Statement [hereinafter DOJ Mission Statement], *available at* <http://www.usdoj.gov/jmd/mps/manual/eoir.htm#content> (signed by John Ashcroft Nov. 19, 2004).

and administrative hearings.”²³ EOIR includes the Office of the Director, the Board of Immigration Appeals, the Office of the Chief Immigration Judge (“OCIJ”), and the Office of the Chief Administrative Hearing Officer.²⁴

The OCIJ manages the fifty-three immigration courts located around the country.²⁵ Immigration judges (“IJs”) adjudicate individual immigration cases and their decisions are usually unpublished oral decisions recorded on tapes.²⁶ The Attorney General sets the qualifications and terms of office for IJs, who are paid salaries of \$109,720 to \$149,200.²⁷ The majority of judges appointed to the immigration bench in the initial years of EOIR’s existence fit the same profile: white, male judges in their forties, fifties, or early sixties, who nearly all formerly worked for the Immigration and Naturalization Service (“INS”) prosecuting immigration cases.²⁸

B. *The Appointment Process*

The appointment process for immigration judges differs widely from the process for federal, state, and administrative law judges. Federal judges are nominated by the President and appointed with the advice and consent of the Senate.²⁹ In addition to public confirmation hearings before members of the Senate, federal judicial nominees undergo investigations by the FBI, Department of Justice, and the American Bar Association (“ABA”).³⁰ Theoretically, this type of vetting process helps to ensure that only “ethical” persons become Article III judges, thus minimizing the occurrence of unethical behavior on the federal bench.³¹

²³ *Id.*

²⁴ *Id.*

²⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT (2006) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d06771.pdf>.

²⁶ Alexander, *supra* note 8, at 9.

²⁷ *Id.*

²⁸ Telephone Interview with anonymous former IJ, July 25, 2007 [hereinafter Former IJ Interview]. The current immigration bench is more diverse. *Id.*

²⁹ Fair and Independent Courts: A Conference on the State of the Judiciary, Appendix I: *Tiers of Federal Judges—Article III and Statutory Federal Judges, Their Numbers, Selection, and Tenure*, 95 GEO L.J. 1009, 1015 (2007).

³⁰ THOMAS E. BAKER, THE GOOD JUDGE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL JUDICIAL RESPONSIBILITY 52 (1989).

³¹ *Id.* (“[T]he appointment process performs double duty as a mechanism for keeping the already corrupt, infirm, or unable person off the bench and as a screen to

State judges can be either appointed or elected, depending on the process prescribed by the individual state.³² State judges generally do not undergo confirmation hearings, but appointed judges can be subject to approval by designated commissions.³³

The selection of administrative law judges (“ALJs”) to work in federal agencies is entrusted to the U.S. Office of Personnel Management. Candidates for ALJ positions must meet licensing and experience requirements, and must pass a competitive administrative law judge examination to qualify for an ALJ position.³⁴ To be considered, an applicant must be a licensed attorney with seven years of litigation or administrative trial experience.

In contrast, immigration judges are appointed by the Attorney General and act under his control and supervision.³⁵ Immigration judges traditionally are individuals with immigration law expertise, who are chosen through a competitive civil service process.³⁶ Those applying for the positions are vetted by EOIR, and EOIR’s recommendations are forwarded to the Office of the Deputy Attorney General, where they are usually approved.³⁷ Contrary to the procedure for federal judges, the appointment process for immigration judges is not subject to a broad system of checks and balances; rather, the Executive Branch alone is responsible for the appointment of immigration judges. Unlike administrative law judges, immigration judges historically have not been required to pass a competitive exam to be appointed to the bench.³⁸

select judges who are, at once, independent and committed to the separation of powers and federalism.”).

³² California state judges, for example, can be appointed by the governor and confirmed by the commission on judicial appointments, or can be elected through a nonpartisan election. See AMERICAN JUDICATURE SOCIETY, CALIFORNIA: CURRENT METHODS OF JUDICIAL SELECTION, available at http://www.ajs.org/js/CA_methods.htm (last visited Feb. 20, 2008).

³³ See AMERICAN JUDICATURE SOCIETY, SUMMARY OF INITIAL ELECTION METHODS, available at <http://www.ajs.org/js/SummaryInitialSelection.pdf> (last visited Feb. 20, 2008).

³⁴ U.S. OFFICE OF PERSONNEL MANAGEMENT, QUALIFICATION STANDARD FOR ADMINISTRATIVE LAW JUDGE POSITIONS, available at <http://www.opm.gov/qualifications/alj/alj.asp> (last visited Sept. 20, 2007).

³⁵ 8 U.S.C. § 1101(b)(4) (2006); see also GAO REPORT, *supra* note 25, at 1 n.2.

³⁶ See GAO REPORT, *supra* note 25, at 1 n.6.

³⁷ Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 28, 2007.

³⁸ Attorney General Gonzales recently directed the EOIR Director to “[a]dminister an examination for newly-appointed immigration judges . . . with respect to their familiarity with key principles of immigration law before they begin to

The appointment process for IJs changed under the leadership of Attorney General John Ashcroft and has been criticized in recent months for lacking public visibility.³⁹ The lack of transparency in the process is an especially important issue in light of recent revelations that the Bush administration has consistently appointed individuals with little or no immigration experience to the immigration bench.⁴⁰ There are allegations that Attorney General Ashcroft and his successor, Alberto Gonzales, politicized the appointment process and promoted the hiring of unqualified individuals, even though the DOJ explicitly requires seven years of relevant legal experience.⁴¹ While testifying before Congress for the Department of Justice, former aide to the Attorney General Monica Goodling acknowledged that she “evaluated candidates based on her perception of their political loyalties” and “asked inappropriate questions of many applicants for career jobs at the department,” including immigration judge positions.⁴²

One veteran immigration attorney, who was passed over for two judgeships in favor of political friends of the Bush administration, has even sued the DOJ for discrimination.⁴³ Responding to the lawsuit, the DOJ stated that “all but four immigration judges chosen . . . from late 2003 to 2006[] were hired without public competition.”⁴⁴ Half of the judges chosen since 2004 did not have any immigration experience.⁴⁵

In a recently publicized example, a newly appointed immigration judge in Lancaster, California, had minimal

adjudicate matters . . .” Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge [hereinafter Authorities Delegated to the Director], 72 Fed. Reg. 53,673, 53,677 (Sept. 20, 2007) (codified at 8 C.F.R. pt. 1003.0(b)(1)(vi) (2007)).

³⁹ See, e.g., Schwartz & McLure, *supra* note 37.

⁴⁰ *Id.*

⁴¹ See Scott Horton, *Meltdown at DOJ: The Story of the Immigration Judge Scam*, HARPER’S, May 30, 2007, available at <http://www.harpers.org/archive/2007/05/hbc-90000186>; see also Dan Eggen, *Officials Say Justice Dept. Based Hires on Politics Before Goodling Tenure*, WASH. POST, May 26, 2007, at A2; David Johnston & Eric Lipton, *Bush Reaffirms His Support for Gonzales*, N.Y. TIMES, May 25, 2007, at A17.

⁴² Schwartz & McLure, *supra* note 37, at *2. Retired IJ Bruce Einhorn, noting the shift to politically motivated appointments, stated that “A lot of my colleagues in [the immigration] bar seemed to have applications pending for years without ever being interviewed while people with contacts at the White House were being appointed at warp speed.” *Id.* at *30.

⁴³ *Id.* at *50

⁴⁴ Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1.

⁴⁵ *Id.*

immigration experience when he was appointed to the immigration bench; in the nine years prior to his appointment, Judge Ted White had worked as a public defender and as an administrative law judge.⁴⁶ Judge White resigned shortly before his one-year probation period was completed but not before attorneys recognized that “he didn’t really understand the law. . . . He often seemed to rely on trial attorneys [i.e., government prosecutors] for guidance.”⁴⁷ In addition to raising serious questions about judicial competence, Judge White’s appointment highlighted the need for a more visible selection process for immigration judges.

Judges and immigration experts have sharply criticized the DOJ for these appointment practices. For example, a deputy director from the American Immigration Lawyers Association (“AILA”) voiced concern that “when we start seeing people who look like [they’re fulfilling] someone’s political debt get these positions, it starts to become disturbing.”⁴⁸

In response to such criticism, the Attorney General changed the appointment process. In April 2007, the DOJ implemented a new hiring program requiring “public announcements of open positions and detailed evaluations and interviews, with a final decision still in the hands of the Attorney General.”⁴⁹ An open appointment process will hopefully bring more experienced candidates to these positions, and will increase the transparency of the selection process.

C. *Immigration Proceedings*

A fair appointment process for immigration judges is particularly important because an IJ often makes the ultimate determination of an immigrant’s fate. An individual seeking relief from deportation usually enters the murky world of immigration law with a “removal proceeding” initiated by the U.S. Department of Homeland Security (“DHS”). If a foreign national is found to be removable, he may be eligible to apply

⁴⁶ Press Release, U.S. Dep’t of Justice, Immigration Judge Takes Oath in Lancaster (Sept. 28, 2006), available at <http://www.usdoj.gov/eoir/press/06/White.pdf>.

⁴⁷ Sandra Hernandez, *Immigration Judge’s Sudden Resignation Raises Eyebrows*, L.A. DAILY J., July 10, 2007, available at www.bibdaily.com/index.cgi (enter keyword “pistol” and search in titles for *Pistol-Packin’ IJ Abruptly Quits*). It was revealed after his resignation that Judge White kept handguns and ammunition in his judicial chambers, conduct that is prohibited by the DOJ. *Id.*

⁴⁸ Goldstein & Eggen, *supra* note 44.

⁴⁹ *Id.*

for various forms of discretionary relief, including voluntary departure, cancellation of removal, and asylum.⁵⁰ To avoid deportation through discretionary relief, an immigrant must prove that he is eligible for such relief under the law and that he “deserves such relief as an exercise in discretion.”⁵¹

Proceedings usually result in an evidentiary hearing held before an immigration judge, in which the IJ has discretion to determine whether the applicant is eligible to remain in the United States.⁵² This hearing is critical for the applicant seeking to avoid deportation. For many persons, the immigration court hearing represents their only chance to present evidence supporting their case.⁵³

Decisions made by immigration judges are not subject to the ordinary procedures of judicial review.⁵⁴ If either the foreign national or the United States disagrees with the immigration judge’s determination, they may petition for review with the Board of Immigration Appeals (“BIA”). The BIA serves as the second level of adjudicators within the Department of Justice, and issues unpublished but written decisions.⁵⁵ In 2002, Attorney General John Ashcroft restructured the BIA, which now has eleven members hearing appeals from decisions handed down by immigration judges.⁵⁶

BIA decisions may be further appealed to the U.S. Courts of Appeal. In theory, the Supreme Court could accept a petition for certiorari from an immigrant ordered to be removed. In practice, however, the Supreme Court has only accepted such review in a “handful” of cases.⁵⁷ Judicial impartiality and fair proceedings are therefore especially important, particularly for immigrants facing persecution in their home countries. A loss in immigration court resulting in

⁵⁰ For a description of these forms of discretionary relief, see Executive Office for Immigration Review, U.S. Dep’t of Justice, Fact Sheet: Forms of Relief from Removal (Aug. 3, 2004), available at <http://www.usdoj.gov/eoir/press/04/ReliefFromRemoval.htm>.

⁵¹ *Id.*

⁵² See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371-2 (2006); Ramji-Nogales et al., *supra* note 11, at 308-09.

⁵³ Ramji-Nogales et al., *supra* note 11, at 326.

⁵⁴ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”).

⁵⁵ Alexander, *supra* note 8, at 9.

⁵⁶ DOJ Mission Statement, *supra* note 22. For a more detailed discussion of Ashcroft’s reforms, see *infra* Part II.E.

⁵⁷ Ramji-Nogales et al., *supra* note 11, at 310.

removal could be a “death sentence for some asylum seekers whose cases are wrongly denied.”⁵⁸

D. Ashcroft’s Reforms: The Streamlining Regulations

In the late 1990s, the BIA’s delayed response in reviewing removal orders created concern that foreign nationals were filing appeals merely to remain longer in the United States.⁵⁹ In 2002 and 2003, Attorney General John Ashcroft implemented a series of reforms in an attempt to reduce the delays and the backlog of cases in the BIA.⁶⁰

One of Ashcroft’s reform measures altered the procedures of the BIA appellate process. The standard BIA process had operated in a style much like the federal appellate courts; BIA members decided cases as three-member panels and issued reasoned written opinions.⁶¹ Ashcroft’s streamlined regulations eliminated the BIA’s three-member panels except in a few categories of cases.⁶² Additionally, the BIA was ordered to cease writing opinions and instead issue a single-member affirmance without opinion if the IJ’s decision should be upheld.⁶³

As he proclaimed the importance of decreasing the BIA backlog, Ashcroft’s reforms went one step further. He decreased the number of positions on the BIA from twenty-three to eleven.⁶⁴ Although Ashcroft refused to explain what criteria he would use to determine which members would be removed, he was later criticized for selecting those BIA members most likely to rule in favor of foreign nationals for removal.⁶⁵ In fact, “liberal board members appear to have been

⁵⁸ *Id.* at 327.

⁵⁹ Alexander, *supra* note 8, at 11-12.

⁶⁰ Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3) [hereinafter Procedural Reforms].

⁶¹ Legomsky, *supra* note 52, at 375.

⁶² Procedural Reforms, *supra* note 60, at 54,880; *see also* Legomsky *supra* note 52, at 375.

⁶³ Procedural Reforms, *supra* note 60, at 54,885-86, *see also* Legomsky *supra* note 52, at 375.

⁶⁴ Ramji-Nogales et al., *supra* note 11, at 352.

⁶⁵ Legomsky, *supra* note 52, at 376. According to one board member who left shortly before the changes occurred, “It was a purge. They brought in people who have all worked from one side of the issue, the government perspective.” David Adams, *Courts Overwhelmed by Immigration Cases*, ST. PETERSBURG TIMES, May 25, 2006, available at http://www.sptimes.com/2006/05/29/Worldandnation/Courts_overwhelmed_by.shtml. This criticism is supported by data showing that the most “liberal” members

specifically targeted, as those are the ones that were removed.”⁶⁶ The majority of removed BIA members had prior work experience in private practice, immigration advocacy organizations, and academia.⁶⁷

Ashcroft’s reforms immediately created one desired effect: the BIA backlog has significantly diminished. In 2003, 17% of IJ decisions were appealed to the BIA.⁶⁸ The percentage of BIA appeals has decreased each year since the reforms were implemented, and only 9% of decisions were appealed to the BIA in 2006.⁶⁹ The number of “summary affirmances,” in which Board members affirm IJ decisions without stating whether they agree with the IJ’s reasoning, increased from 3% to 60% in a seven-month period during 2002.⁷⁰ Moreover, BIA members increasingly held in favor of the government and against

of the BIA were fired. Legomsky, *supra* note 52, at 376, 376 nn.38, 39 (citing Peter J. Levinson, *The Façade of Quasi-Justicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1164 (2004)).

⁶⁶ Telephone Interview with Dana Leigh Marks, President, Nat’l Ass’n of Immigration Judges (Sept. 14, 2007) [hereinafter Marks Interview]. (The National Association of Immigration Judges is a union.)

⁶⁷ Ramji-Nogales et al., *supra* note 11, at 353. Attorney General Alberto Gonzales announced in September 2006 that he would add four member positions to the BIA. Press Release, U.S. Dep’t of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. Notably, he “did not suggest that the members who had been appointed under a Democratic Administration and removed to other jobs . . . would be restored to the Board.” Ramji-Nogales et al., *supra* note 11, at 386-87.

⁶⁸ See OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2006 STATISTICAL YEARBOOK A2 (2007) [hereinafter 2006 YEARBOOK], available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> (last visited Feb. 25, 2008).

⁶⁹ *Id.* One reason for the decrease in appeals may be recognition on the part of litigants that appealing to the BIA will almost inevitably result in an affirmation of the IJ’s decision, requiring a subsequent appeal to the Circuit Courts. Without the resources to successfully appeal a decision to the Circuit Courts, litigants may be choosing not to appeal at all. See Cruz, *supra* note 11, at 508 (“[M]any immigrants lack the financial means to pursue an appeal to the circuit court, to file a motion to reconsider, and to litigate upon remand.”). This logic, of course, was part of the goal of the streamlining process.

⁷⁰ Alexander, *supra* note 8, at 12; DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 25 (2003), http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf; see also Martin S. Krezalek, Note, *How to Minimize the Risk of Violating Due Process Rights While Preserving the BIA’s Ability to Affirm Without Opinion*, 21 GEO. IMMIGR. L.J. 277, 279 (2007) (arguing that summary affirmances potentially violate the rights of foreign nationals).

foreign nationals; Board decisions granting relief to foreign nationals fell from 25% to 10%.⁷¹

However, the BIA still suffers from a heavy workload. In 2006, the eleven members of the BIA completed 41,479 appeals.⁷² According to Chief Judge of the Second Circuit John M. Walker, “For the BIA to keep current on its docket, even with streamlining so that the disposition is by a single judge, each judge must dispose of nearly 4,000 cases a year—or about 80 per week—a virtually impossible task.”⁷³

Ashcroft’s reforms have been heavily criticized for lessening the quality of work performed by the BIA.⁷⁴ Indeed, immigration judges themselves recognize the problems inherent in this limited review process. The President of the National Association of Immigration Judges, Dana Leigh Marks, noted that many immigration judges were trained to render oral decisions from the bench, with no need to “make it formal and pretty” because the BIA would serve as the “polishers” for the decisions.⁷⁵ Now, “the BIA is issuing all of these affirmances without opinion and we have no resources to do a top-notch job from the beginning.”⁷⁶

In addition to the structural impact of these reforms, the changes raise considerable ethical implications. For example, the task of reviewing both the decisions and the behavior of immigration judges has fallen on the circuit courts because BIA members are less able to thoroughly review IJ determinations. But circuit courts were not designed—and should not be required—to monitor ethical behavior. The

⁷¹ Alexander, *supra* note 8, at 13 (noting that “these changes increased by thousands the number of noncitizens whose administrative appeals were rejected without written explanation”).

⁷² 2006 YEARBOOK, *supra* note 68, at S2.

⁷³ Statement of Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, before the Senate Judiciary Committee, Apr. 3, 2006, at 3 [hereinafter Walker Statement], available at <http://www.aila.org/content/default.aspx?docid=18996> (last visited Feb. 25, 2007); see also *Albathani v. INS*, 318 F.3d 365, 378 (1st Cir. 2003) (board member decided 50 cases on October 31, 2002, a “rate of one every ten minutes over the course of a nine-hour day”); Alexander, *supra* note 8, at 21.

⁷⁴ See, e.g., Alexander, *supra* note 8, at 21. Immigration attorney Kerry Bretz remarked, “Motion practice at the BIA is a joke. I get denials where it’s clear they haven’t even read the motions.” Mark Hamblett, *Extraordinary Measures Reduce Circuit’s Immigration Case Backlog*, N.Y. L.J., June 5, 2007, at 1.

⁷⁵ Marks Interview, *supra* note 66.

⁷⁶ Alexander, *supra* note 8, at 12-13 (citing Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts: As Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, at 1).

potential for biased or incompetent behavior has significantly increased since circuit courts simply cannot review every immigration case for judicial misconduct.

Ashcroft's reforms can be credited for bringing the crisis in the immigration courts to light: the BIA is no longer "cleaning up" immigration judges' improper decisions, and appellate justices and the public are now more aware of the wide scope of the problem.⁷⁷ However, while the reforms may indeed raise public consciousness, unethical behavior is harming litigants on an ongoing basis.

E. Current Disciplinary Procedures for Immigration Judges

Neither the BIA nor the courts of appeal are designed to monitor complaints of ethical misconduct in immigration courts. In 2003 the EOIR Director established a procedure for evaluating behavioral complaints against immigration judges.⁷⁸ Under this system, EOIR and the Office of the Chief Immigration Judge are responsible for monitoring complaints, and complaint reports are "generated on a monthly basis for internal use only."⁷⁹ The reports are sent to the EOIR Director, and are intended to provide a "centralized and comprehensive compilation of written and oral complaints" regarding immigration judges' conduct on the bench, as well as the status of the complaints.⁸⁰ Pursuant to this structure, the EOIR Director has the responsibility to monitor the patterns of misconduct on the part of immigration judges.

Complaints about the conduct of individual immigration judges are brought to the OCIJ orally or in writing, and are usually sent to the OCIJ by the Assistant Chief Immigration Judge ("ACIJ") with supervisory authority over the judge in question.⁸¹ Beginning in 2007, complaints may also be sent to the individual serving in the newly created Assistant Chief

⁷⁷ Former IJ Interview, *supra* note 28.

⁷⁸ GAO REPORT, *supra* note 25, at 14. Although EOIR and the OCIJ established an "Immigration Court Evaluation Program" ("ICEP") in 1997 to evaluate court performance, the individual hearing decisions of judges are "the only aspect of court evaluation that are not evaluated." *Id.* at 13. The ICEP focuses instead on the "courts' organizational structure, caseload, and workflow processes to assess the efficiency of the court in accomplishing its mission." *Id.*

⁷⁹ *Id.* at 14.

⁸⁰ *Id.*

⁸¹ *Id.* at 15.

Immigration Judge for Conduct and Professionalism position.⁸² Complaints may be submitted by a variety of persons, including “immigrants, the immigrants’ attorneys, DHS trial attorneys, other immigration judges, other court staff, OCIJ headquarters staff, and others.”⁸³ The OCIJ notifies the EOIR Director of a complaint filed against an immigration judge, even before the OCIJ has an opportunity to verify the accuracy of the claim.⁸⁴ Thus, the EOIR Director is presumably well-informed: in addition to receiving monthly compilations of written and oral complaints, the EOIR Director is also notified of individual complaints as they arise.

Despite the monitoring role of the EOIR Director, and the newly created advisory role of the ACIJ for Conduct and Professionalism, the ACIJ with supervisory authority over the judge is directly responsible for addressing most complaints.⁸⁵ In an August 2006 report, the Government Accountability Office (“GAO”) disclosed that between fiscal years 2001 to 2005, the OCIJ received 129 complaints against IJs.⁸⁶ The OCIJ had taken 134 actions in response to 121 complaints as of September 30, 2005.⁸⁷

[A]bout 25 percent (34 [complaints]) were found to have no merit; about 25 percent resulted in disciplinary actions against the judges that included counseling (18), written reprimand (9), oral reprimand (3), and suspension (4); about 22 percent (29) were referred to DOJ’s Office of Professional Responsibility or Office of the Inspector General or EOIR’s office of General Counsel for further review; and the remaining 28 percent (37) resulted in various other actions such

⁸² This position, created in 2007 as part of Attorney General Gonzales’s reforms, is designed to “review[] and monitor[] all complaints against immigration judges” and help “ensure that investigations of complaints are concluded as efficiently as possible.” AILA-EOIR Liaison Meeting Agenda Questions, Apr. 11, 2007, at 3 [hereinafter AILA-EOIR Liaison Agenda], available at <http://www.usdoj.gov/eoir/statspub/eoiraila041107.pdf> (last visited Feb. 25, 2008). Notably, however, the ACIJ for Conduct and Professionalism does not hold disciplinary authority over IJs. *See id.* (listing the position’s responsibilities as monitoring, reviewing, and tracking all complaints).

⁸³ GAO REPORT, *supra* note 25, at 27.

⁸⁴ *Id.* at 28.

⁸⁵ *Id.* An exception exists for complaints concerning allegations relating to the “exercise of the authority of an attorney to investigate, litigate, or provide legal advice.” *Id.* Such complaints are referred directly to the Office of Professional Responsibility, which is responsible for handling such allegations. *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* The remaining eight complaints were still under review. *Id.*

as informing complainants of the Office of Professional Responsibility process or their appeal rights to BIA.⁸⁸

In light of recent publicity highlighting the prevalence of unethical conduct on the part of IJs,⁸⁹ the fact that only 129 complaints were filed over a four-year period is somewhat startling. In reality, however, EOIR's administrative complaint procedure suffers from several weaknesses.⁹⁰ These limitations may explain the low number of reported complaints. Also, recent reforms to the judicial review process for immigration cases may have encouraged litigants to file appeals of their cases in circuit courts,⁹¹ rather than filing disciplinary complaints that have no effect on the substantive outcome of a litigant's case. Individuals suffering from biased, incompetent, or otherwise unethical behavior on the part of immigration judges should have a more effective means of recourse than appealing to the circuit courts or relying on the inadequate IJ disciplinary process.

III. THE EXISTENCE OF AN ETHICAL CRISIS

A. *Judicial Ethics Generally*

The American judicial system is premised upon the ability of judges to be ethical and fair. Judges are held to the highest standards of professional behavior because of the powerful positions they hold.⁹² The American Bar Association published a revised "Model Code of Judicial Conduct" in February 2007.⁹³ This Code applies to "anyone who is authorized to perform judicial functions;" the newly revised code specifically includes justices of the peace, magistrates, court commissioners, and members of the administrative judiciary within that definition.⁹⁴

⁸⁸ GAO REPORT, *supra* note 25, at 28-29.

⁸⁹ *See infra* Part III.D-E.

⁹⁰ *See* discussion *infra* Part IV.C.2.

⁹¹ *See generally* sources cited *supra* note 18.

⁹² JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.01 (3d ed. 2000).

⁹³ AM. BAR ASS'N, ABA MODEL CODE OF JUDICIAL CONDUCT (2007) [hereinafter ABA JUDICIAL CODE], available at http://www.abanet.org/judiciaethics/ABA_MCJC_approved.pdf.

⁹⁴ *Id.*, para. I(B) of "Application" section, at 6. The National Conference of Administrative Law Judges endorsed a "Model Code of Judicial Conduct" for Federal Administrative Law Judges in February 1989.

As part of their ethical duties, all judges must make competent decisions in an impartial manner, free from personal bias or prejudice.⁹⁵ Even so, judges work with varying degrees of competence and are generally somewhat involved in the affairs of society at large.

A judge's involvement in the "outside world" is not necessarily a negative characteristic, for such involvement can "enrich[] the judicial temperament and enhance[] a judge's ability to make difficult decisions."⁹⁶ In reality, the balance between the ideal of judicial impartiality and the reality of personal preferences can be difficult to strike. This problem of personal bias or prejudice becomes even more nuanced when it is held against groups of people; unlike business or financial interests, personal bias is subjective and difficult to identify.⁹⁷

According to the ABA, the term "bias" is commonly understood to indicate favoritism or opposition by a judge to a concept or idea, while the term "prejudice" suggests "specially favoring or opposing individuals."⁹⁸ The ABA Model Code of Judicial Conduct specifically prohibits actions manifesting either bias or prejudice in the performance of judicial duties.⁹⁹

The determination of a judge's competence can be easier to identify than bias. The ABA declared in the 2007 Model Code of Judicial Conduct that judicial competence "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office."¹⁰⁰ One state supreme court established the test for incompetence as "whether the conduct at issue establishes that the [judge] lacks the requisite ability, knowledge, judgment, or diligence to consistently and capably discharge the duties of the office he or she holds."¹⁰¹ Regardless of jurisdiction, judges are expected to bring a basic level of neutrality, knowledge, skill, and dedication to the cases brought before them.

⁹⁵ SHAMAN ET AL., *supra* note 92, § 4.01.

⁹⁶ *Id.*

⁹⁷ *See id.* § 4.04.

⁹⁸ AM. BAR ASS'N, REPORTER'S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT, 2007, Rule 2.3, Explanation of Comments, cmt. [1], at 16. This article will use the term "bias" and "prejudice" in accordance with the ABA definitions.

⁹⁹ ABA JUDICIAL CODE, *supra* note 93, Rule 2.3.

¹⁰⁰ *Id.* Rule 2.5, cmt. [1].

¹⁰¹ *In re Baber*, 847 S.W.2d 800, 803 (Mo. 1993) (en banc); *see also In re Hunter*, 823 So. 2d 325, 336 (La. 2002) (adopting the definition of judicial competence used in *In re Baber*).

Accordingly, federal rules, case law, and ethical codes of conduct seek to ensure judicial competence, professionalism, and impartiality.¹⁰² For example, most judges are required to disqualify themselves if they hold personal antagonism against a party, or hold “[a]nimosity or irrational bias, such as racial prejudice,” against a particular group.¹⁰³ Such beliefs would obviously affect the ability of a judge to decide a case impartially based only on facts and law, and would undermine the judicial system.

B. Ethical Codes of Conduct for Immigration Judges

Immigration courts in the United States are distinct from other courts, and the fact that immigration judges do not operate under the judicial branch has serious ethical implications. As a unique body of adjudicators, immigration judges must follow several codes of conduct. Because they are employees of the executive branch, IJs are subject to the Standards of Ethical Conduct for Employees of the Executive Branch.¹⁰⁴ In addition, IJs and BIA members must follow the Department of Justice Codes of Conduct,¹⁰⁵ the EOIR Ethics Manual,¹⁰⁶ and management policies of both EOIR and the DOJ. The DOJ also recently proposed “Codes of Conduct for the

¹⁰² See, e.g., 28 U.S.C. § 455(a), (b) (2000) (requiring a federal judge to disqualify himself in any case in which his impartiality might reasonably be questioned); ABA JUDICIAL CODE, *supra* note 93, Rule 2.11 (same). Of course, the laws and rules governing judicial conduct also address issues of conflicts of interest, ex parte communications, and financial disclosures, among other things. Because a thorough examination of each of these issues as they relate to IJs is beyond the scope of this Article, the focus here is on the issues of bias and competence.

¹⁰³ SHAMAN ET AL., *supra* note 92, § 4.04.

¹⁰⁴ These standards are codified at 5 C.F.R. pt. 2635 (2007) and 5 C.F.R. pt. 3801 (2007).

¹⁰⁵ The Regulations provide:

Employees of the Department of Justice are subject to the executive branch-wide Standards of Ethical Conduct at 5 C.F.R. part 2635, the Department of Justice regulations at 5 C.F.R. part 3801 which supplement the executive branch-wide standards, the executive branch-wide financial disclosure regulations at 5 C.F.R. part 2634 and the executive branch-wide employee responsibilities and conduct regulations at 5 C.F.R. part 735.

28 C.F.R. § 45.1 (2007).

¹⁰⁶ The Ethics Manual, distributed in 2001, is designed for members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review. See Executive Office for Immigration Review, U.S. Dep’t of Justice, Ethics Manual [hereinafter EOIR Ethics Manual], available at <http://www.usdoj.gov/eoir/statspub.htm> (last visited Feb. 20, 2008).

Immigration Judges and Board Members,” which are not yet in final form.¹⁰⁷ As an attorney, an IJ is also subject to the rules of professional conduct in the state(s) where the IJ is a member of the bar and in the state where she performs her duties.¹⁰⁸

Notably, the ABA Model Code of Judicial Conduct, which is used as a model for most state judicial codes of conduct, is not binding on IJs and members of the BIA; rather, the ABA Model Code is intended to be “aspirational” for IJs and BIA members.¹⁰⁹ In addition, the Code of Conduct for United States Judges is not binding on IJs or BIA members because they are not members of the judicial branch.¹¹⁰

C. *The Special Need for Ethical Behavior in Immigration Court*

Given so many applicable rules of conduct, the existence of an ethical crisis in immigration courts may seem surprising. After all, with six to seven sets of rules potentially serving as guidance, how could an immigration judge fail to act in an ethical manner?

¹⁰⁷ The proposed text of the IJ Codes is published in the *Federal Register*. U.S. Dep’t of Justice, Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510-13 (June 28, 2007).

¹⁰⁸ *Id.* These various codes of conduct have many parallels, including prohibitions against bias and prejudice, conflicts of interest, impropriety and the appearance of impropriety, and restrictions on extra-judicial activities such as political activities. The codes also require a minimum level of competence on the part of judges. Cf. THE STATE BAR OF CALIFORNIA, RULES OF PROFESSIONAL CONDUCT, available at http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158 (last visited Feb. 20, 2008); ABA JUDICIAL CODE, *supra* note 93; and CODE OF CONDUCT FOR UNITED STATES JUDGES (2002) [hereinafter CODE FOR U.S. JUDGES], available at <http://www.uscourts.gov/guide/vol2/ch1.html> (last visited Feb. 20, 2008).

¹⁰⁹ EOIR Ethics Manual, *supra* note 106, at 1 n.1 (“[T]he Model Code of Judicial Conduct is not binding on EOIR Judges, but its canons and commentary present aspirational goals.”). The ABA, which published an updated version of the Model Code for Judicial Conduct in April 2007, intended the Model Code to apply to members of the “administrative law judiciary.” ABA JUDICIAL CODE, *supra* note 93, Part I(B). Moreover, IJs are not subject to state judicial ethics codes governing state judges. While extension of state judicial ethics codes on federal IJs is arguably valid under the McDade Amendment, it would add more standards of conduct to the already considerable number of codes applicable to them. See 28 U.S.C. § 530B (2008). As an alternative, EOIR should focus on consolidating the ethical guidelines of IJs into one comprehensive standard of conduct. See *infra* Part V.B.

¹¹⁰ The Code of Conduct for United States Judges applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. CODE FOR U.S. JUDGES, *supra* note 108, ch. I. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have also adopted this Code. *Id.*

In reality, the number of applicable codes is itself indicative of a problem: Immigration judges do not have the time or resources to review multiple codes of conduct on a regular basis. Moreover, actual training in ethics-related issues is substantially lacking for immigration judges. One former IJ reported that EOIR's training conferences for immigration judges would occasionally include an hour or so related to ethics, but there was "certainly no local training of judges on ethics issues."¹¹¹ In fact, training conferences for immigration judges were completely suspended for several years due to budgetary constraints.¹¹² During those years, immigration judges did not receive any formal ethical training at all. The DOJ again suspended training conferences for immigration judges in February 2008 due to "budget constraints."¹¹³

In addition, the heavy workload of immigration judges leaves no time for discussions regarding ethical conduct. When asked whether immigration judges spoke with each other about ethical codes of conduct, a former IJ replied, "Nobody even talked about it. The judges I served with didn't know about [ethical codes of conduct]. Their whole focus was on their calendar, wondering 'how am I going to get through these five merits hearings I squeezed in today?'"¹¹⁴ With the pressures of a busy calendar, guidelines relating to ethical conduct are considered a low priority.

Immigration judges undeniably face a great number of challenges in their daily work. With limited resources, they are expected to make determinations which are often life-or-death decisions for the litigants before them.¹¹⁵ Many cases coming

¹¹¹ Former IJ Interview, *supra* note 28.

¹¹² Denise Slavin, President of the National Association of Immigration Judges, commented in 2006, "We [IJs] are so low on funds. We haven't had a break off the bench for three years. . . . We have had no training conferences, no cultural sensitivity training." Adams, *supra* note 65. For recommendations regarding formal ethics training for IJs, see *infra* Part V.B.

¹¹³ Letter from Dana Leigh Marks, President, & Denise Noonan Slavin, Vice President, National Association of Immigration Judges to Chief Judge David L. Neal, Office of the Chief Immigration Judge (Feb. 19, 2008) [hereinafter NAIJ Letter] (on file with author). Immigration judges protested the cancellation of training for IJs, noting that the decision "will impact adversely on the quality of our work" because "[c]ontinuous training is essential to maintain any kind of expertise, which we are expected to have, in this area of the law." *Id.*

¹¹⁴ Former IJ Interview, *supra* note 28.

¹¹⁵ As the U.S. Government Accountability Office recognized, IJs must balance "adjudicating their caseload (all cases awaiting adjudication) in a timely manner while at the same time ensuring that the rights of the immigrants appearing before them are protected." GAO REPORT, *supra* note 25, at 2.

before immigration judges involve complex legal or factual issues, but, in 2006, only 35% of litigants were represented by counsel.¹¹⁶ Relevant evidence is often unavailable, including witnesses or documents that could prove persecution in a home country.¹¹⁷ Also, only 11.6% of immigration court proceedings in the 2006 fiscal year were conducted in English.¹¹⁸ As a result, it can be difficult for immigration judges to identify relevant issues or make “credibility determinations” to decide whether a litigant is telling the truth. The latter point is arguably the most important: since immigration judges are responsible for the crucial determinations of a litigant’s credibility that often decide the case, a litigant’s courtroom demeanor can have a substantial impact on the success of his claim.¹¹⁹

Ashcroft’s streamlining reforms, minimizing judicial review of an immigration judge’s opinions, place an even greater emphasis on a foreign national’s initial proceeding before the IJ. Unless a litigant is financially and practically able to appeal a removal order to the circuit courts, a foreign national’s ability to stay in the United States essentially lies in the hands of the immigration judge.

For this reason, fair and competent adjudication in immigration court proceedings is critical. Indeed, “trivial mistakes [in immigration court] can unwittingly lead to flawed decisions with grave consequences.”¹²⁰ Individuals seeking relief before an immigration judge must therefore be guaranteed

¹¹⁶ See 2006 YEARBOOK, *supra* note 68, at A1.

¹¹⁷ Alexander, *supra* note 8, at 19 (noting that the “ability to gather evidence may be blocked by the very government alleged to be the persecutor”).

¹¹⁸ 2006 YEARBOOK, *supra* note 68, at F1. In fiscal year 2006, 252 different languages were spoken in immigration court proceedings, a nineteen percent increase in language diversity since fiscal year 2002. *Id.*; see also Walker Statement, *supra* note 73 (discussing the “unique nature of immigration hearings,” wherein “[a]llies frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien”).

¹¹⁹ This is an especially important issue in light of the passage of the REAL ID Act of 2005, which added a provision to the asylum statute instructing IJs to “evaluate demeanor and consistency of statements to determine credibility.” Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005. Div. B (REAL ID Act of 2005), Pub. L. No. 109-13, § 101(a), 119 Stat. 231, 303 (amending 8 U.S.C. § 1158(b)(3)(B)(iii) (Supp. 2005)); see Katherine E. Melloy, Note, *Telling Truths: How the REAL ID Act’s Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 640 (2007).

¹²⁰ *Ming Shi Xue v. BIA*, 439 F.3d 111, 115 (2d Cir. 2006) (“[I]t is not surprising that the position of overburdened immigration judges and overworked courts has become a matter of wide concern.”).

certain procedural rights, including the opportunity to present evidence on their behalf in removal proceedings.¹²¹ Additionally, a person seeking withholding of removal or relief under the Convention Against Torture is entitled to a fair hearing under the Due Process Clause of the Fifth Amendment of the Constitution.¹²² In order to ensure the fairness of a removal proceeding, the arbiter must be neutral, meaning “one who has not pre-decided the case and who is not predisposed to disregard a witness’s testimony”¹²³

In addition to neutrality, immigration judges must maintain a basic level of competence in immigration law. This is especially true in light of the unique and difficult nature of immigration cases. Denise Slavin, former President of the National Association of Immigration Judges, noted, “Immigration law is very complex. So generally speaking, it’s very good to have someone coming into this area with [an] immigration background. It’s very difficult, for those who don’t, to catch up.”¹²⁴ Also, immigration law changes often, and IJs must be able to apply the most current laws to each case.

Unfortunately, in recent years the ability of immigration judges to render competent decisions, and to set aside their personal biases or prejudices against litigants, has come into question.¹²⁵ Indeed, the very fact that Attorney General Alberto Gonzales proposed a new set of codes of conduct indicates the government’s acknowledgment that a crisis exists in immigration court.¹²⁶

¹²¹ 8 U.S.C. § 1229a(b)(4)(B) (2006).

¹²² *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007); *see also* *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (“The Fifth Amendment’s due process clause mandates that removal proceedings be fundamentally fair.”).

¹²³ *Tun*, 485 F.3d at 1025; *see also* *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1056 (9th Cir. 2005) (Due Process violation existed because IJ refused to hear relevant testimony because of a prejudgment about the credibility of the witness).

¹²⁴ Goldstein & Eggen, *supra* note 44, at A1.

¹²⁵ *See* sources cited *supra* note 11.

¹²⁶ *See infra* Part IV.B. Alberto Gonzales resigned from office in August 2007, and his last day in office was September 17, 2007. Remarks of Attorney General Alberto R. Gonzales Announcing His Resignation, Aug. 27, 2007, available at http://www.usdoj.gov/archive/ag/speeches/2007/ag_speech_070827.html. Gonzales’s reform directives have not changed since his resignation. *See* Kent B. Alexander, *The Future of the Justice Department*, WASH. POST, Aug. 28, 2007 (noting that the Department of Justice will continue its work even if there are changes among political appointees). On September 17, 2007, President George W. Bush nominated Judge Michael Mukasey to replace Attorney General Gonzales. Michael Abramowitz & Dan Eggen, *With Justice Pick, Bush Hopes to Avoid a Fight*, WASH. POST, Sept. 18, 2007. The United States

D. *Statistical Inconsistencies*

Considering the importance of the IJ's decision-making process, it is especially alarming to note that scholars conducting recent statistical analyses have revealed evidence of inconsistent decisions made by immigration judges.¹²⁷ Despite the fact that EOIR's mission statement guarantees "uniform application of the nation's immigration laws in all cases," studies assessing the grant and deny rates of immigration judges in the same type of case show that "immigration courts are failing to meet this fundamental standard."¹²⁸

A recent study on this issue by Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag, published in the *Stanford Law Review* ("Ramji-Nogales study"), identified disturbing inconsistencies in the adjudication of immigration law claims.¹²⁹ Their analysis of immigration courts throughout the country revealed "remarkable variation in decision-making" among different immigration officials, regions, judicial circuits, and years.¹³⁰ For example, a Chinese asylum seeker in the Atlanta Immigration Court had a seven percent chance of winning asylum, compared to a seventy-six percent chance of winning asylum for a Chinese applicant in the Orlando Immigration Court.¹³¹ The study also examined grant rate disparities between judges from the same immigration court.¹³² Incredibly, the study found that three out of four immigration courts housed judges with large grant rate disparities from other judges, meaning they were "out of step with the other judges in their courthouse."¹³³ Indeed, asylum applicants who

Senate confirmed Judge Mukasey as Attorney General on November 8, 2007. Laurie Kellman, *Mukasey Confirmed as Attorney General*, ASSOCIATED PRESS, Nov. 9, 2007.

¹²⁷ Ramji-Nogales et al., *supra* note 11, at 372. This 2007 study parallels results discovered in a 2000 study published by the *San Jose Mercury News*. See Fredric N. Tulskey, *Asylum Seekers Face Capricious Legal System; Some Judges Grant Asylum in Only 1 in 20 Cases, Others in 1 in Every 2; Former Government Immigration Lawyers Are Toughest Asylum Judges; Rulings Vary Widely, Even for Applicants with Similar Stories*, SAN JOSE MERCURY NEWS, Oct. 18, 2000, at A1. For data results, see TRAC, *Judges Show Disparity in Denying Asylum*, July 31, 2006, available at <http://trac.syr.edu/immigration/reports/160> (last visited July 22, 2007). For an excellent analysis of this data and its implications, see Alexander, *supra* note 8, at 21-25.

¹²⁸ Alexander, *supra* note 8, at 21 (citing DOJ Mission Statement, *supra* note 22).

¹²⁹ Ramji-Nogales et al., *supra* note 11, at 296.

¹³⁰ *Id.* at 302.

¹³¹ *Id.* at 330-31.

¹³² *Id.* at 333.

¹³³ *Id.* at 333-34.

appeared before the highest granting judge were nearly thirty times more likely to win their claims than applicants appearing before the lowest granting judge.¹³⁴ These statistics are critically important, for they indicate that immigration law is not being applied in a uniform manner. As the study's authors point out, the outcome of a refugee's asylum claim depends most on the identity of the judge assigned to hear his case.¹³⁵

Disparities in the grant rates of immigration judges were successfully correlated to differences in biographical information of the judges.¹³⁶ For example, the study found that female immigration judges granted asylum in 53.8% of asylum cases, while male judges granted relief in only 37.3% of asylum cases.¹³⁷ In addition, immigration judges with prior work experience on the prosecutorial side of immigration proceedings were 24% less likely to grant asylum than those with no prior government experience.¹³⁸ Notably, all judges with immigration law backgrounds appointed by the Bush administration since 2001 had prosecutorial experience.¹³⁹

These statistics cannot be relied upon to show unethical behavior per se on the part of individual judges. However, scholars have suggested the mere fact that such inconsistencies existed within a court is some "evidence that the process is inaccurate and unfair."¹⁴⁰ Indeed, the Ramji-Nogales study's authors concluded that the great deviation in grant rates for some immigration judges suggests that an adjudicator could be "imposing his or her own philosophical attitude (or personal level of skepticism about applicants' testimony) to the cases under consideration."¹⁴¹ The study's authors believed their data raised "serious questions about whether the results of cases are excessively influenced by personal characteristics of the judges."¹⁴² Similarly, Mr. Alexander cited statistics showing

¹³⁴ Ramji-Nogales et al., *supra* note 11, at 330-32.

¹³⁵ *Id.* at 296.

¹³⁶ *Id.* at 296.

¹³⁷ *Id.* at 342.

¹³⁸ *Id.* at 345-46.

¹³⁹ Goldstein & Eggen, *supra* note 44, at A1.

¹⁴⁰ Alexander, *supra* note 8, at 29; *see also* Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 773 (2005) ("[A] practical method of proof [to show judicial bias] is by examining multiple decisions—either statistically or in some other systematic manner.").

¹⁴¹ Ramji-Nogales et al., *supra* note 11, at 378.

¹⁴² *Id.* at 304. Similar concerns existed regarding grant rates for asylum officers: "officers who adjudicate asylum applications in some of the eight regional

disparities among immigration judges' decisions as "evidence of unfairness and inaccuracy" and an "indicator of the immigration court crisis."¹⁴³

While all judges bring their personal experience to the bench, ethical standards exist to ensure that judges do not rely too heavily on their own preferences when making decisions. Evidence of disparities in decision-making signifies that judges' personal preferences may unduly influence their decisions in court, since "inconsistency among judges suggests that bias and prejudice are influencing the outcomes."¹⁴⁴ For example, as the Ramji-Nogales study noted, "immigration lawyers have sometimes complained that after an immigrant judge is lied to several times by nationals of a particular country, the judge tends to suspect that all nationals of that country are liars."¹⁴⁵ The notion that judges are basing their determinations on personal preferences rather than on the law epitomizes bias on the bench. Thus, in addition to calling for structural reform to respond to the crisis in immigration courts, the Ramji-Nogales study highlights the need for uniform ethical standards and strict enforcement of such standards for immigration judges.

Unfortunately, with diminished monitoring of individual judges and courtrooms, it is more difficult to identify potentially problematic behavior.¹⁴⁶ In reality, the burden of reprimanding immigration judges has fallen to the only persons thoroughly reviewing their conduct: federal appellate judges.

E. Circuit Court Frustration

The frustration of circuit court judges, who are faced with the onerous task of reviewing opinions from immigration judges that are usually summarily affirmed by the BIA, is rising. Since the 2003 reforms eliminating internal review procedures for immigration cases went into effect, appeals to the circuit courts have increased exponentially. For example, while the Ninth Circuit received 11,238 petitions for review in the thirty years between April 1, 1972 and April 1, 2002, it

offices of the Department of Homeland Security's asylum office appear to have grant rates that reflect personal outlooks rather than an office consensus." *Id.* at 375.

¹⁴³ Alexander, *supra* note 8, at 21.

¹⁴⁴ See Alexander, *supra* note 8, at 25.

¹⁴⁵ Ramji-Nogales et al., *supra* note 11, at 381-82.

¹⁴⁶ EOIR does have procedures for complaints against IJs, but those procedures are inadequate. See discussion *infra* Part IV.C.2.a.

received an incredible 18,263 petitions for review in just three years between April 1, 2002 and October 1, 2005.¹⁴⁷

The sheer number of petitions is not the only problem plaguing circuit courts. In an influential 2005 opinion voicing the concerns of appellate judges, Judge Posner of the Seventh Circuit cited an extensive pattern of judicial bias and inappropriate behavior on the part of immigration judges.¹⁴⁸ Circuit judges following Judge Posner's lead are increasingly reprimanding immigration judges for problematic behavior.¹⁴⁹ In 2007, the Second Circuit took the highly unusual step of singling out an individual immigration judge for egregious behavior on the bench, and recommending the Justice

¹⁴⁷ Palmer, *supra* note 18, at 14 n.3. Similarly, the Second Circuit received only 2360 petitions for review between April 1, 1972 and April 1, 2002, but received 7723 petitions for review between April 1, 2002, and October 1, 2005. *Id.* at 14 n.2.

¹⁴⁸ Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005). Judge Posner's list of circuit cases rebuking the conduct of IJs and the BIA includes Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005) ("The IJ's opinion is riddled with inappropriate and extraneous comments . . ."); Ssali v. Gonzales, 424 F.3d 556, 563 (7th Cir. 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case . . ."); Sosnovskaia v. Gonzales, 421 F.3d 589, 594 (7th Cir. 2005) ("The procedure that the IJ employed in this case is an affront to [petitioner's] right to be heard."); Soumahoro v. Gonzales, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (finding the IJ's factual conclusion to be "totally unsupported by the record"); Grupee v. Gonzales, 400 F.3d 1026, 1028 (7th Cir. 2005) (finding the IJ's unexplained conclusion to be "hard to take seriously"). Noting that "[o]ther circuits have been as critical," Judge Posner cited cases from different circuits, including Wang v. Attorney Gen. of the U.S., 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's finding to be "grounded solely on speculation and conjecture"); Fiadjoe v. Attorney Gen. of the U.S., 411 F.3d 135, 154-55 (3d Cir. 2005) (noting that the IJ's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credibility.'"). *Id.*

¹⁴⁹ See, e.g., Elias v. Gonzales, 490 F.3d 444, 452 (6th Cir. 2007) (noting that the IJ's "intemperate" manner and sarcasm with petitioner "raised substantial questions as to his bias and hostility toward" the asylum applicant); N'Diom v. Gonzales, 442 F.3d 494, 500 (6th Cir. 2007) (Martin, J., concurring) (noting the "significantly increasing rate at which adjudication lacking in reason, logic, and effort from . . . immigration courts is reaching the federal circuits"); Sholla v. Gonzales, 492 F.3d 946, 952 (8th Cir. 2007) (IJ denied asylum even though "the record compels any reasonable factfinder to conclude that [the applicant] suffered past persecution on a protected ground"); Mece v. Gonzales, 415 F.3d 562, 572 (6th Cir. 2005) ("The Board's failure to find clear error in the immigration judge's adverse credibility determination leaves us, we are frank to say, more than a little puzzled."); Iao v. Gonzales, 400 F.3d 530, 533 (7th Cir. 2005) ("The immigration judge's opinion cannot be regarded as reasoned . . ."); Recinos de Leon v. Gonzales, 400 F.3d 1185, 1193-94 (9th Cir. 2005); Zahedi v. INS, 222 F.3d 1157, 1166-68 (9th Cir. 2000). See generally Pasha v. Gonzales, 433 F.3d 530 (7th Cir. 2005).

Department review each of this judge's decisions.¹⁵⁰ The judge was later removed from the bench.¹⁵¹

Immigration lawyers practicing in immigration court believe that biased and incompetent behavior is widespread on the immigration bench.¹⁵² Anecdotal evidence of this type of unethical conduct is plentiful in immigration cases recently reviewed by the circuit courts. Two 2007 cases particularly highlight the problems of bias and incompetence in immigration court.

1. The Biased Immigration Judge: *Tun v. Gonzales*

To understand the impact of bias on the bench, we return to the story of Naing Tun, a Burmese citizen seeking asylum in the United States. In May 2007, in response to Tun's appeal of the IJ's and BIA's denials of his asylum claim, the Eighth Circuit addressed the issue of bias in immigration courtrooms.¹⁵³ As a member of a minority group in Burma, Tun filed an application for asylum claiming torture, past persecution, and a fear of future persecution. Tun alleged he had been arrested, interrogated, and beaten due to his political activities.¹⁵⁴ He further claimed he had been incarcerated for three years and forced to do hard labor.¹⁵⁵

To prove his claims, Tun submitted two expert opinions. The first was a report by a recognized expert on conditions in Burma. Despite the expert's strong qualifications in the field and his report speaking to a "critical, contested issue in the case,"¹⁵⁶ the IJ concluded that the expert's document would "not be given any weight" because the government was unable to cross-examine him.¹⁵⁷ The second expert opinion, also excluded by the immigration judge, was a medical report submitted as evidence of the residual trauma Tun endured due to torture at the hands of Burmese authorities.¹⁵⁸ Notwithstanding the

¹⁵⁰ Ray Rivera, *Court Urges Review of New York Judge's Immigration Cases That Are on Appeal*, N.Y. TIMES, Feb. 15, 2007, at 1.

¹⁵¹ Nina Bernstein, *Immigration Judge Is Reassigned to a Desk Job*, N.Y. TIMES, Mar. 13, 2007, at B1.

¹⁵² Interviews with anonymous immigration law practitioners, S.F., Calif., July and August 2007 (notes on file with author).

¹⁵³ *Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007).

¹⁵⁴ *Id.* at 1018.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1017-18.

¹⁵⁷ *Id.* at 1019.

¹⁵⁸ *Id.* at 1019-20.

physician's extensive experience treating victims of trauma and volunteer medical work in numerous war-torn countries, the IJ concluded the physician was not a qualified expert, in part because she had not personally been to Burma.¹⁵⁹

These actions on the part of the IJ demonstrate an unwillingness to consider properly proffered evidence submitted by an asylum applicant.¹⁶⁰ However, the bias of this immigration judge against Tun became even more apparent as his hearing continued. The IJ and the attorneys involved in the case questioned Tun through a Burmese interpreter.¹⁶¹ Tun provided detailed testimony of his arrest, beatings, and other forms of mistreatment caused by the Burmese government for his political activities. However, there were "at least a dozen instances" where Tun indicated that he did not understand the translator, and "at least a dozen other instances" where Tun's responses, as provided to the court by the translator, were "confusing or not directly responsive to the questions originally asked in English."¹⁶² A native Burmese speaker present in the courtroom interrupted the proceedings to inform the immigration judge that "the official translator was not correctly translating the questions and answers."¹⁶³ After the hearing, the IJ declined Tun's request to reopen the record or hold a new hearing based on translation errors.¹⁶⁴ Relying on Tun's allegedly "inconsistent" testimony, the IJ concluded that Tun lacked credibility.¹⁶⁵ Based on her adverse credibility determinations, the immigration judge denied Tun's request for asylum.

The BIA affirmed the IJ's decision and dismissed Tun's appeal, holding that the record provided examples to support the IJ's finding of inconsistencies.¹⁶⁶ Upon review, the Eighth Circuit disagreed with the IJ's and BIA's conclusions. In doing so, the court considered the IJ's exclusions of the expert's

¹⁵⁹ *Tun*, 485 F.3d at 1020.

¹⁶⁰ Immigration judges are required to advise a litigant that "he or she will have a reasonable opportunity to examine and object to the evidence against him or her," and "to present evidence in his or her own behalf." 8 C.F.R. § 1240.10(a)(4) (2007).

¹⁶¹ *Tun*, 485 F.3d at 1020.

¹⁶² *Id.* at 1022. The Eighth Circuit quoted the improper translation in detail in the opinion. *Id.* at 1022 n.2.

¹⁶³ *Id.* at 1017.

¹⁶⁴ *Id.* at 1024.

¹⁶⁵ *Id.* at 1030-31.

¹⁶⁶ *Id.* at 1025.

reports and evaluated the alleged inconsistencies in Tun's testimony.

Regarding the testimony of the Burmese expert, the court held the expert was undoubtedly qualified to report on country conditions in Burma. Moreover, the court noted that the presence of an author of a report and his availability for cross-examination are not "absolute requirements" for submission of the report in immigration proceedings.¹⁶⁷ The court found the IJ's decision to "exclude the report of a facially unobjectionable expert without any explanation as to why cross-examination was needed" was "unfair and unsupportable."¹⁶⁸

The court similarly found that the second expert, a physician, was clearly qualified to offer "critical corroborating testimony."¹⁶⁹ As such, the court determined that the exclusion of Dr. Frye's report affected the outcome of the proceedings, since the IJ "completely ignored the most valuable corroborating evidence of [Tun's] torture."¹⁷⁰ The court noted that the IJ's desire to conclude the hearing in time to allow the court translator to "make a six o'clock flight" later that day seemed to have substantial weight in the IJ's decision to exclude Dr. Frye's testimony.¹⁷¹ Significant from an ethical perspective, the court recognized that the IJ's actions suggested she "may not have acted as a neutral arbiter."¹⁷²

Lastly, the court was "troubled by the lack of consideration given by the IJ and the Board" to the issue of translation error, especially since all "indicia of erroneous translation were present" in Tun's case.¹⁷³ The errors performed by the IJ went beyond simply ignoring evidence of erroneous translation. The IJ also improperly relied on the resulting erroneous portions of the transcript to find that Tun lacked credibility, and focused on "minutia in the effort to find inconsistencies" in Tun's testimony.¹⁷⁴ Together, the court found

¹⁶⁷ *Id.* at 1028.

¹⁶⁸ *Id.* at 1028-29.

¹⁶⁹ *Id.* at 1027.

¹⁷⁰ *Id.* at 1028.

¹⁷¹ *Id.* at 1026.

¹⁷² *Id.* at 1027.

¹⁷³ *Id.* at 1029-30.

¹⁷⁴ *Id.* at 1030. The court noted that "we can have no confidence that the answers relayed by the interpreter to the IJ and the attorneys accurately reflected what [Tun] answered." *Id.*

these errors added to the “overall prejudice” against Tun.¹⁷⁵ Accordingly, the court remanded the case with specific instructions to the IJ to ensure adequate translation and to consider specific evidence submitted by Tun.¹⁷⁶

Tun v. Gonzales represents the substantive effects of a biased judge in immigration proceedings. As the court noted, the immigration judge’s combined errors were “sufficiently pervasive that we must conclude they may have had an effect on the outcome” of the case.¹⁷⁷ Unlike other IJs reprimanded by circuit courts, the immigration judge in *Tun* did not vocalize her bias by yelling or speaking in an improper manner.¹⁷⁸ Rather, the IJ’s bias against Tun took a more subtle form, exemplified by her refusal to consider the adequacy of the translation services provided to Tun during his hearing.

The IJ was certainly alerted to the translation problem. But even with knowledge of potentially erroneous translation occurring in her courtroom, the IJ took no action to ensure the reliability of Tun’s translated testimony. Without the presence of a native Burmese speaker in the courtroom, Tun may never have known his words were not being properly conveyed to the judge. Although Tun successfully convinced the Eighth Circuit that the translation problem affected the outcome of his case, a more disturbing question remains: why would an IJ fail to ensure an applicant’s testimony is being properly translated?

Surely immigration judges are aware that federal law requires proper translation in immigration hearings.¹⁷⁹ Thus, the problem was not the result of the IJ’s lack of knowledge. Rather, the IJ’s refusal to ensure adequate translation services to Tun suggests the presence of bias against an asylum applicant. Essentially, the IJ’s actions indicated to Tun that his own words were irrelevant; if she was not going to consider his testimony anyway, why bother to translate his words accurately? In this way, the IJ’s bias impacted her decision-

¹⁷⁵ *Tun*, 485 F.3d at 1030.

¹⁷⁶ *Id.* at 1031.

¹⁷⁷ *Id.*

¹⁷⁸ Immigration judges have been reprimanded for yelling at litigants, using sarcastic language, and otherwise displaying blatantly inappropriate behavior on the bench. *See, e.g.*, *Elias v. Gonzales*, 490 F.3d 444, 452 (6th Cir. 2007); *Wang v. Attorney Gen. of the U.S.*, 423 F.3d 260, 269 (3d Cir. 2005).

¹⁷⁹ Federal law requires that interpreters in a hearing before an IJ be “sworn to interpret and translate accurately.” 8 C.F.R. § 1240.5 (2007). However, interpreters in immigration courtrooms are “of mixed ability.” *Ramji-Nogales et al.*, *supra* note 11, at 383.

making process and had a significant negative effect on Tun's case. Despite the difficulties inherent in identifying this type of unethical conduct, this case represents the importance of eliminating bias from the immigration bench.

2. The Incompetent Immigration Judge: *Tadesse v. Gonzales*

In addition to biased conduct, judicial incompetence in immigration courts is raising increased concerns in the circuit courts. In July 2007, the Seventh Circuit reprimanded the incompetent conduct of an immigration judge in *Tadesse v. Gonzales*.¹⁸⁰ Ejigu Tadesse was an Ethiopian citizen of half Eritrean descent.¹⁸¹ After a cease-fire was declared ending the war between Ethiopia and Eritrea, Tadesse tried to travel to Ethiopia to learn what had happened to her immediate family.¹⁸² She was detained at the airport by Ethiopian policemen, who accused her of being an Eritrean spy due to her ethnic heritage. Tadesse claimed the policemen severely beat her and that two of the officers raped her. They then ordered her to leave the country.¹⁸³ Tadesse sought medical treatment and stayed with a family friend for two months before leaving Ethiopia. She eventually arrived in the United States and sought asylum.

The immigration judge denied Tadesse's application for asylum, holding that she included fraudulent documents in her application for asylum and finding Tadesse's testimony "implausible and inconsistent."¹⁸⁴ The BIA affirmed the IJ's decision and Tadesse sought relief in the circuit courts.

The IJ first concluded that Tadesse submitted fraudulent documents as part of her asylum application. During the merits hearing, the government submitted a report concluding that Tadesse's Ethiopian deportation order was fraudulent.¹⁸⁵ Tadesse objected on the grounds that she had not been given an opportunity to study the report in advance of the hearing.¹⁸⁶ The IJ did not give Tadesse an opportunity to review

¹⁸⁰ 492 F.3d 905, 912 (7th Cir. 2007).

¹⁸¹ *Id.* at 906.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 907. Ms. Tadesse was represented before the IJ by attorney Nancy Vizer, who provided additional insight into this case.

the report, but promised to allow Tadesse to present her own expert in rebuttal.¹⁸⁷

At the next hearing, Tadesse offered an affidavit and expert testimony of an “eminent scholar” of Ethiopian politics and culture who had written extensively about Ethiopia.¹⁸⁸ However, the IJ refused to accept the expert’s affidavit or testimony because he was not “an expert as to the issuance of documents.”¹⁸⁹ In the first of a series of rebukes to the immigration judge, the appellate court held the IJ’s rejection of this evidence was “arbitrary” and “prejudicial,” because the expert testimony was “directly on point [to the authenticity of the deportation order] and went to the very heart of Tadesse’s claim.”¹⁹⁰

The IJ also discounted the evidence offered by Tadesse in the affidavit of her torture counselor, reasoning that “although [the counselor] is a ‘therapist’ she is not a psychologist or psychiatrist.”¹⁹¹ However, the counselor’s affidavit noted that she held a master’s degree in psychology and expected to receive her Ph.D. in clinical psychology nine months prior to the IJ’s date of decision. Thus, the “IJ’s comment was therefore incorrect as well as inappropriate.”¹⁹² Regarding Tadesse’s post-torture symptoms, the IJ’s opinion came to a conclusion that was “completely at odds with [the counselor’s] affidavit.”¹⁹³ Such discrepancies led the Seventh Circuit to conclude that the IJ had not properly reviewed the evidence, for the “IJ could not have carefully reviewed [the counselor’s] findings and reached this conclusion.”¹⁹⁴ The appellate court’s frustration with the IJ’s inadequate judicial performance was quite evident: the court complained that “[t]his portion of the opinion, like so much else, is not supported by cogent reasons and cannot stand.”¹⁹⁵

Although the IJ further concluded that portions of Tadesse’s testimony related to her return to Ethiopia and her choice to seek asylum were “implausible,” the court reprimanded the IJ for such conclusions, which were “unsupported

¹⁸⁷ *Tadesse*, 492 F.3d at 907.

¹⁸⁸ *Id.* at 908.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 909.

¹⁹¹ *Id.* at 911.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

by substantial evidence.”¹⁹⁶ The court ultimately determined the IJ’s opinion was “riddled with systematic and obvious errors.”¹⁹⁷ As a result of the IJ’s erroneous opinion, the court found that Tadesse did not receive a fair hearing in immigration court and therefore granted Tadesse’s petition for review and remanded her case.¹⁹⁸

The IJ hearing Tadesse’s claim acted incompetently in several ways. First, her failure to allow Tadesse to offer expert evidence in rebuttal was legally improper, since “an IJ may not bar whole chunks of material evidence favorable to [Tadesse].”¹⁹⁹ At a minimum judicial competence requires “legal knowledge.”²⁰⁰ By failing to properly follow the law permitting an applicant to present evidence on her own behalf, the IJ displayed a lack of “legal knowledge” necessary to properly decide this case.

Second, the IJ’s obvious failure to carefully review an affidavit submitted by Tadesse is disturbing. Although judicial competence requires “thoroughness” and “preparation,”²⁰¹ the IJ deciding Tadesse’s case did not adjudicate the case in a thorough manner. Moreover, if immigration judges are not reviewing evidence put forth by applicants, the competency and integrity of the entire hearing is undermined.

Not surprisingly, given that the IJ did not properly consider Tadesse’s written evidence, the IJ also inexplicably refused to believe portions of Tadesse’s testimony. Certainly it is within the discretion of an immigration judge to determine whether an applicant is lying, but the circuit court found that this IJ’s credibility determinations were unsupported by substantial evidence—that is, she had no logical reason to believe Tadesse was lying.

These issues point to a larger and inescapable ethical conclusion: the immigration judge was either legally incompetent, or was actively biased against Tadesse. Either of these possibilities is contrary to the American concept of justice. Even in the face of limited resources and time constraints, a “neutral” arbiter should follow the rules of

¹⁹⁶ *Id.* at 910.

¹⁹⁷ *Id.* at 912.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 909; *see also* Boyanivskyy v. Gonzales, 450 F.3d 286, 294 (7th Cir. 2006) (finding IJ’s exclusion of asylum applicant’s corroboration witnesses to be prejudicial error); Zolotukhin v. Gonzales, 417 F.3d 1073, 1077 (9th Cir. 2005) (same).

²⁰⁰ ABA JUDICIAL CODE, *supra* note 93, Rule 2.5, cmt. [1].

²⁰¹ *Id.*

evidence and should be reasonably prepared for a hearing. Without the assurance of unbiased and competent behavior on the bench, the immigration system cannot reasonably promise litigants they will receive a fair hearing. In this way, active bias or legal incompetence on the part of immigration judges skews the system itself; if an immigrant's claim is ultimately decided through an unfair proceeding, the reliability of the entire adjudicatory process is threatened. In light of these far-reaching consequences, evidence showing judicial bias and incompetence raises the next question: what are the causes of unethical conduct on the immigration bench?

IV. CAUSES AND PENDING SOLUTIONS

A. *Causes of Unethical Conduct*

Several potential causes of unethical behavior on the part of immigration judges emerge through analysis of recent cases. One reason, discussed in Part III.C, *supra*, is the difficult and unique nature of immigration cases. Another contributing factor—analyzed often by scholars and practitioners—is the lack of time and resources available to immigration judges.²⁰²

Immigration judges are certainly overworked; in 2006, the nation's 215 immigration judges completed a total of 365,851 cases.²⁰³ Each judge must therefore adjudicate 1,700 cases a year, or nearly seven cases each business day, to stay current with her docket.²⁰⁴ Although Second Circuit Chief Judge Walker urged Congress to double the existing number of immigration judges, Congress has yet to do so.²⁰⁵

Without the ability to take time to consider each case, immigration judges are bound to make mistakes—often serious mistakes with critical implications for the immigrants appearing before them.²⁰⁶ A judge without the time or resources

²⁰² Alexander, *supra* note 8, at 19-20; Melloy, *supra* note 119, at 666-67; Ramji-Nogales et al., *supra* note 11, at 383.

²⁰³ 2006 YEARBOOK, *supra* note 68, at B2; Alexander, *supra* note 8, at 19.

²⁰⁴ The former President of the National Association of Immigration Judges, Denise Slavin, reported in 2005 that she had 1,000 cases on her docket at one time. Liptak, *supra* note 8; *see also* Alexander, *supra* note 8, at 19-20. Immigration judges in busy districts must manage disproportionately larger caseloads; “while the average immigration judge hears four cases a day, immigration judges on the Texas border hear at least ten.” Melloy, *supra* note 119, at 666.

²⁰⁵ Walker Statement, *supra* note 73.

²⁰⁶ *See* Alexander, *supra* note 8, at 19 (noting that IJs “simply do not have enough time to do their jobs well”).

to adequately review changes in the law, or to properly consider fact-intensive cases, may slip into a pattern of errors. In this way, an overworked judge can quickly become an incompetent judge.²⁰⁷ For example, Tadesse's IJ may have failed to adequately read Tadesse's affidavit due to time constraints; Tadesse's case was likely only one of many merits hearings heard by the IJ that day. Also, an immigration judge feeling pressure to complete a large caseload may lose the ability to recognize where personal bias enters the decision-making process.

However, even if the reasons for bias or incompetence on the part of immigration judges can be understood in the context of difficult cases and understaffed courts, such behavior violates the norms of judicial ethics. Judicial neutrality and competence must be prioritized over expedient resolution of cases. As the Seventh Circuit noted in 2004, litigants seeking to remain in the United States "should not bear the entire burden of adjudicative inadequacy at the administrative level."²⁰⁸ Fortunately, the government now recognizes the importance of ensuring ethical conduct in immigration courts.

B. The Response of Attorney General Gonzales: The EOIR Codes of Conduct

The growing cry for reform—from immigration practitioners, circuit court judges, and immigration judges themselves²⁰⁹—finally reached the ears of Attorney General Alberto Gonzales. In January 2006, Gonzales announced that he received reports of conduct on the part of immigration judges which "can aptly be described as intemperate or even

²⁰⁷ Immigration judges are under extreme pressure to complete cases expeditiously, to the point where some Assistant Chief Immigration Judges actually visit IJs in person to encourage them to move cases more quickly. Marks Interview, *supra* note 66. In this type of environment, judges are "less inclined to sit and listen to a case, or to give it the time it needs." Former IJ Interview, *supra* note 28.

²⁰⁸ *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004) ("[W]e have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think."); *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.").

²⁰⁹ *See generally* Liptak, *supra* note 8.

abusive.”²¹⁰ Following a “comprehensive review,” Gonzales proposed a set of reforms in August 2006.²¹¹

These “key reforms” included performance evaluations for immigration judges, an immigration law exam, sanctioning powers allowing immigration judges to sanction litigants and counsel for “false statements, frivolous behavior, and other gross misconduct,”²¹² increased resources, and technological improvements.²¹³ On the issue of judicial ethics, Gonzales promised to draft a new code of conduct for immigration judges and BIA members, impose “mechanisms to detect poor conduct and quality by immigration judges and Board members,” and improve complaint procedures for inappropriate conduct by adjudicators.²¹⁴

Gonzales’s reform measures were initially hailed as a large step in the right direction.²¹⁵ However, it soon became apparent that implementation of these reforms would not be an expedited or simple task. More than a year after Attorney General promised reforms, immigration judges had not seen any “changes on the ground.”²¹⁶

It took nearly a year after the reforms were announced for EOIR to release the promised “Codes of Conduct of the Immigration Judges and Board Members” (“EOIR Codes”).²¹⁷

²¹⁰ Memorandum from Attorney General Alberto Gonzales to Immigration Judges (Jan. 9, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>.

²¹¹ Press Release, U.S. Dep’t of Justice, Attorney General 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.

²¹² Allowing IJs to sanction litigants could enable these judges to control potentially unethical behavior on the part of immigration lawyers in their courtrooms. However, given the persistence of unethical behavior on the part of IJs themselves, this particular reform idea will not remedy the ethical crisis on the bench.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Melloy, *supra* note 119, at 667 n.228.

²¹⁶ Pamela A. Maclean, *Mixed Signals from the DOJ Immigration Bench Reforms: Implemented, or Not?*, NAT’L L.J., Apr. 16, 2007, at 1; see also NAIJ Letter, *supra* note 113. (“[As of February 2008], there has been no implementation [of] what we consider to be the two key measures [in Attorney General Gonzales’s reform proposal] to improve the Immigration Court system. Indeed, we have lost ground.” (endnote omitted)).

²¹⁷ U.S. Dep’t of Justice, Codes of Conduct for Immigration Judges and Board Members, 72 Fed. Reg. 35,510 (proposed June 28, 2007) [hereinafter EOIR CODES]. The Codes were released for public comment from June 28, 2007 to July 30, 2007; final publication is pending. There is a separate set of codes for IJs and for members of the BIA, but their provisions are substantially similar and the references herein generally apply to both.

The EOIR Codes, proposed in June 2007, are intended to supplement the personnel disciplinary rules, ethics rules, and management policies of EOIR and the DOJ, and are designed to “preserve the integrity and professionalism of the immigration court system” and the BIA.²¹⁸ EOIR has not announced when the Codes are expected to be published in final form and the process of editing the Codes is “internal” to the DOJ.²¹⁹

The proposed EOIR Codes are similar to those already in place for other judges. For example, like the recently revised ABA Model Code of Judicial Conduct, the EOIR Codes require IJs/BIA members to avoid impropriety and the appearance of impropriety.²²⁰ The Codes require an IJ/BIA member to comply with the codes of professional responsibility where the IJ/BIA member is a member of the bar, as well as the state in which the IJ/BIA member performs his/her duties.²²¹ This rule could provide a significant basis for disciplinary procedures against IJs or BIA members who fail to comply with ethical guidelines as attorneys.

The EOIR Codes demonstrate a renewed emphasis on professionalism for IJs and BIA members, perhaps acknowledging the effects of inappropriate judicial conduct on the perceived integrity of the immigration structure. As the Commentary to the EOIR Codes recognizes, “an 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.”²²² The EOIR Codes require immigration judges and BIA members to “act in a professional manner toward the parties and their representatives before the court, and toward others with whom the immigration judge deals in an official capacity.”²²³ Like the ABA Code of Judicial Conduct, the EOIR Codes also require that IJs/BIA members act “impartially” and avoid any actions that “in the judgment of a reasonable person, would create the appearance that he or

²¹⁸ *Id.* pmb. (capitalization removed).

²¹⁹ Telephone Interview with official from EOIR Office of Legislative and Public Affairs (Aug. 18, 2007).

²²⁰ EOIR CODES, *supra* note 217, pmb.; ABA JUDICIAL CODE, *supra* note 93, Rule 1.2.

²²¹ EOIR CODES, *supra* note 217, Canon III.

²²² *Id.* Commentary.

²²³ *Id.* Canon X.

she is violating the law or applicable ethical standards.”²²⁴ IJs and BIA members must therefore “refrain from any conduct, including but not limited to financial and business dealings, that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge’s official position.”²²⁵

Furthermore, the EOIR Codes address the issue of bias and incompetence in the courtroom. Like other types of judges, immigration judges and BIA members must adhere to the law and “maintain professional competence in it.”²²⁶ In addition to this basic requirement of competence, EOIR now requires that an immigration judge “shall be patient, dignified, and courteous to litigants, witnesses, lawyers, and others with whom the judge deals in his or her official capacity.”²²⁷ Although this point should be a matter of simple professional courtesy, the behavior of the IJs hearing Tun’s and Tadesse’s cases sadly demonstrates the necessity for this rule.

On the issue of bias, both immigration judges and BIA members are informed they “shall not, in the performance of official duties, by words or conduct, *manifest bias or prejudice*.”²²⁸ This critical provision is clearly a response to concerns of biased and prejudiced behavior by IJs and BIA members against litigants. The burden lies on the judges themselves, who must be “*alert to avoid* behavior, to include inappropriate demeanor, that may be perceived as prejudicial.”²²⁹ While these statements should be heralded as long overdue and promising developments for ethical standards, they also highlight the limitations of such Codes of Conduct.

The EOIR Codes fail to adequately address the unique nature of immigration court. The Codes do not acknowledge the language challenges, credibility issues, and fact-intensive inquiries conducted by immigration judges. One immigration judge, speaking off the record, noted that the Codes do not provide any real guidance, since they do not contain anything

²²⁴ *Id.* Canons VI, VII.

²²⁵ *Id.* Canon XI.

²²⁶ *Id.* Canon V.

²²⁷ *Id.* Canon IX.

²²⁸ *Id.* (emphasis added). For a discussion of the limitations of this provision, see *infra* Part IV.C.1.

²²⁹ *Id.* Commentary (emphasis added).

“different from what all of us [should] try to do in the first place.”²³⁰

Specific shortcomings undermine the ability of the EOIR Codes to effectively remedy unethical conduct on the part of immigration judges. For example, the Codes lack both specificity and effective enforcement mechanisms. At this time, neither existing ethical guidelines nor EOIR’s complaint procedures are adequately protecting litigants from unethical judicial behavior. Without a more effective method of monitoring and enforcement, the newly created EOIR Codes of Conduct are merely words on paper.

C. *Weakness in the EOIR Codes of Conduct*

1. Lack of Specificity

Unlike the ABA Model Code of Judicial Conduct, the current proposed EOIR Codes fail to define key terms necessary for proper implementation. The most alarming example is the EOIR Codes’ failure to define the terms “bias and prejudice.” The drafters did provide an explanatory test to determine whether an “appearance of impropriety” exists, but offered no guidance on what types of behavior may “manifest bias” or “impair [the proceeding’s] fairness.”²³¹

In contrast, recognizing that “[a]n independent, fair and impartial judiciary is indispensable to our system of justice,”²³² Rule 2.3 of the 2007 ABA Model Code of Judicial Conduct specifically addresses “Bias, Prejudice, and Harassment.” Contrary to the EOIR Codes, the Model Code specifically outlines prohibited behavior.²³³ For example, Rule 2.3(B), the black letter portion of the Code, provides a judge shall not manifest bias or prejudice, by words or conduct, on the basis of

²³⁰ Telephone Interview with anonymous IJ (July 31, 2007).

²³¹ According to the EOIR Codes, the test to determine the appearance of impropriety 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 is impaired.” EOIR Codes, *supra* note 217, Commentary. The AILA agrees that the EOIR Codes lack specific guidance. See Comments to Proposed Codes of Conduct for Immigration Judges and BIA Members, July 30, 2007, available at <http://www.aila.org/content/default.aspx?docid=23005>. The National Association of Immigration Judges also took the position that the Codes lack relevant guidance for IJs and drafted a more thorough “Code of Conduct” for EOIR’s consideration, closely based on the ABA Model Code of Judicial Conduct. Marks Interview, *supra* note 66.

²³² ABA JUDICIAL CODE, *supra* note 93, pmbl.

²³³ See, e.g., *id.* Rule 2.3.

factors “including but not limited to” race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.²³⁴ Likewise, the Codes of Conduct for United States Judges impose the responsibility to “avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias...on the basis of personal characteristics like race, sex, religion, or national origin.”²³⁵

Moreover, the Comment to ABA Model Rule 2.3 is even more helpful. Comment 2 to Rule 2.3 presents “examples of manifestation of bias or prejudice,” including but not limited to “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.”²³⁶ In addition, the Comment notes that “[e]ven facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias and prejudice.”²³⁷ Accordingly, the Model Code requires that a judge “must avoid conduct that may reasonably be perceived as prejudiced or biased.”²³⁸

The specific examples were added to the 2007 Model Code after witnesses urged the ABA Commission to provide illustrations of bias, and “to better inform judges of what bias entails and what some of the most common bias-related problems are.”²³⁹ By enumerating factors and offering examples of biased behavior, these codes of conduct provide greater guidance for judges to “check themselves” for hidden bias or prejudice in the courtroom.

Based on the recently reported behavior of immigration judges, the ABA “examples of manifestation of bias and prejudice” are common occurrences in immigration courts.²⁴⁰ Yet the EOIR Codes of Conduct fail to list even one factor or example of manifested bias or prejudice. This simple omission

²³⁴ ABA JUDICIAL CODE, *supra* note 93, Rule 2.3(B).

²³⁵ *Id.* Rule 2.3, cmt. 2.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* The Code of Conduct for United States Judges would benefit from similar enumerated examples.

²⁴⁰ *See supra* note 149.

has broad ramifications, for every individual has a different view of what the term “bias” can entail.

Similarly, the EOIR Codes order immigration judges and BIA members to “maintain professional competence” in the law.²⁴¹ However, the EOIR Codes fail to specifically define the term “competence” for immigration judges. As noted above, the ABA defines judicial competence as requiring “the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.”²⁴² As an aspirational set of rules, the ABA definition could easily be applied to immigration judges and BIA members.

But competence might have a broader meaning for immigration judges and BIA members, who must stay abreast of the constantly changing world of immigration law and face unique challenges in their daily work. Certainly, knowledge and skills in immigration law are absolutely necessary for immigration judges; in response to reports of judicial incompetence, the Attorney General is implementing “immigration law exams” for judges appointed after December 2006.²⁴³ But the Attorney General also will require “performance evaluations” of immigration judges, which will include an assessment as to whether new appointees “possess the appropriate judicial temperament . . . for the job.”²⁴⁴ This assessment suggests that “temperament” is a significant component of competence in the Attorney General’s view.

Given these developments, EOIR should utilize its proposed Codes of Conduct as an opportunity to expand upon the ABA definition of judicial competence. For example, judicial competence should include the concept of “proper judicial temperament,” in addition to knowledge of applicable law and preparation for individual cases. The term “competence” could also be clarified by requiring *all* immigration judges to pass a substantive immigration law exam annually as part of formal training; such a requirement would send a clear signal to immigration judges that judicial competence requires more than merely expediting completion of cases. In short, the terms

²⁴¹ EOIR Codes, *supra* note 217, Canon V.

²⁴² ABA JUDICIAL CODE, *supra* note 93, Rule 2.5, cmt. [1].

²⁴³ DOJ Press Release, *supra* note 211. Because the exams will apply only to judges appointed after December 31, 2006, existing judges are apparently exempt from the immigration law exam. *Id.*

²⁴⁴ *Id.*

“bias” and “competence” must be more clearly defined, particularly in an ethical scheme asking judges to regulate their own behavior.

2. Lack of Enforcement Mechanism

The efficacy of the EOIR Codes of Conduct is further limited by its reliance on self-regulation of ethical conduct. How can an immigration judge or BIA member, who may have years of ingrained frustrations resulting in biases against litigants in immigration courts, “be alert to avoid” her own behavior or accustomed demeanor?²⁴⁵ In light of the egregious behaviors outlined in the cases and statistics above, an ethical scheme relying on judges to identify their own incompetence, or minimize their own biases, is problematic.²⁴⁶ Thus, another limitation of the EOIR Codes, and arguably the most damaging, is the lack of an effective external enforcement mechanism.

Theoretically, the EOIR Codes may be enforced by the current procedure for complaints of misconduct, for the Codes provide that any disciplinary action must come from within the Department of Justice. The Commentary states, “This Code does not create any rights or interests for any party outside of the Department of Justice, nor may violations furnish the basis for civil liability, injunctive relief or criminal prosecution.”²⁴⁷ This provision ostensibly places responsibility on the DOJ, rather than third parties, to monitor and enforce the Codes.²⁴⁸ However, such a structure will likely be ineffective, for the DOJ’s current disciplinary structure for IJs suffers from several weaknesses.

²⁴⁵ EOIR Codes, *supra* note 217, Commentary.

²⁴⁶ See generally Randy Lee, *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?*, 11 WIDENER J. PUB. L. 69 (2002).

²⁴⁷ EOIR Codes, *supra* note 217, Commentary.

²⁴⁸ The EOIR Codes Commentary indicates that “[v]iolations of these canons may serve as the basis for disciplinary action, but may not be used in any other proceeding, and may not be used to challenge the rulings of an Immigration Judge.” EOIR Codes, *supra* note 217, Commentary. The EOIR Codes should instead provide an “extra layer” of oversight to prohibit conduct that might not affect the substantive outcome of the proceeding, but is nonetheless inappropriate and detrimental to the integrity of the immigration system.

a. Current Disciplinary Procedures Are Inadequate to Ensure Compliance with Ethical Codes

The current disciplinary structure for immigration judges does not adequately enforce ethical conduct on the bench. On its face, the disciplinary process is limited by the lack of external review. Complaints of misconduct are directed to the Assistant Chief Immigration Judge who holds supervisory authority over the judge in question.²⁴⁹ Unless referral to the Office of Professional Responsibility is deemed warranted,²⁵⁰ the complaint stays with the ACIJ; while the Office of the Chief Immigration Judge and the EOIR Director are made aware of the complaint, it is the ACIJ who is responsible for handling the complaint.

If the supervisor determines the complaint lacks merit, the process ends there. Unfortunately, as members of the immigration court system, ACIJs suffer from the same working pressures as IJs. Moreover, if the ACIJ has a strong working relationship or is friendly with the IJ, the ACIJ may be less likely to take disciplinary action. The individual filing a complaint has no method of appeal, meaning the determination of the ACIJ can effectively end the complaint process. The OCIJ does not disclose whether action, if any, is taken against an employee in response to a complaint.²⁵¹

EOIR's complaint process has been criticized as murky and bureaucratic by immigration experts outside of EOIR. Immigration practitioners complain about the "uncertainty as to what actions OCIJ takes on such complaints" as well as "what types of complaints are likely to be of concern to OCIJ."²⁵² As a result, some practitioners believe that it does "no good to complain because nothing ever happens."²⁵³ The issues of underreporting and the determination of whether immigrants and practitioners are discouraged from filing complaints against IJs are worthy of further study.

Concern also exists that the disciplinary procedure for immigration judges is used for political purposes, rather than

²⁴⁹ See *supra* Part II.D.

²⁵⁰ See discussion *supra* note 85.

²⁵¹ EOIR/AILA Liaison Meeting Agenda Questions, March 7, 2002, Question 4, Response, available at <http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm>.

²⁵² *Id.* Question 4.

²⁵³ *Id.*

used to remedy actual misconduct. EOIR holds the power to “reassign” immigration judges to different job titles or job duties as a “matter of management discretion.”²⁵⁴ Reassignment in such cases is not deemed “disciplinary in nature if there is no loss of pay or grade”—even if a judge is removed from the bench.²⁵⁵ Similarly, the Attorney General may also reassign or remove immigration judges at any time.²⁵⁶ Given recent examples of political removals, such as Ashcroft’s removal of BIA members who were more likely to favor immigrants, immigration judges are left with an “emerging fear that ruling against the government in a deportation case can be hazardous to one’s job.”²⁵⁷

The Attorney General recently attempted to implement another layer of ethical review with the creation of a new position: Assistant Chief Immigration Judge for Conduct and Professionalism.²⁵⁸ As noted, the person holding this position is essentially an ACIJ serving an advisory role in issues of ethics.²⁵⁹ The implementation of a position focused on conduct and professionalism could represent a promising step in the area of ethical monitoring, as it indicates EOIR’s renewed dedication to ensuring ethical behavior on the part of immigration judges. However, because the ACIJ for Conduct and Professionalism appears to be merely an advisory position,²⁶⁰ ethical monitoring in EOIR would benefit from the implementation of a multi-member panel (in the form of the

²⁵⁴ Legomsky, *supra* note 52, at 373.

²⁵⁵ *Id.* at 373-74.

²⁵⁶ *Id.*

²⁵⁷ *Id.* For this reason, many IJs, scholars, and advocates are calling for the removal of the immigration courts from the Department of Justice. See Legomsky, *supra* note 52, at 373 n.14 (citing Nat’l Ass’n of Immigration Judges unpublished position paper calling for an independent immigration court), 404 (“In view of the events of 2002 and 2003, the adjudicators can never again feel confident that they can safely rule against the Department”); see also Ramji-Nogales et al., *supra* note 11, at 386-87 (proposing independence for immigration courts from the Department of Justice).

²⁵⁸ AILA-EOIR Liaison Agenda, *supra* note 82, at 2-3. Notably, there is no description of this position on EOIR’s website.

²⁵⁹ See *supra* note 82.

²⁶⁰ AILA-EOIR Liaison Agenda, *supra* note 82, at 3; see also discussion *supra* note 82. The author attempted to clarify the role of the ACIJ for Conduct and Professionalism in a telephone interview with an official from EOIR Office of Legislative and Public Affairs. EOIR Office of Legislative and Public Affairs, *supra* note 219. The official confirmed the existence of the ACIJ for Conduct and Professionalism, which is listed on EOIR’s website and referenced in the April 11 AILA-EOIR Liaison Agenda notes, but refused to elaborate on the actual role or duties of this ACIJ because the position is “new.” *Id.*

Ethics Review Board discussed in Part V.C and D, *infra*) to actually handle the complaints.

The current disciplinary structure is therefore unsatisfactory on several levels. Because it lacks both transparency and methods for appeal, the structure is not sufficient to monitor ethical behavior on the part of IJs. Immigration judges working in fear of losing their jobs if they rule against the government will be less inclined to focus on ethics, and more inclined to focus on job security. Several additional reforms are necessary to monitor and ensure ethical judicial behavior in immigration courts.

V. RECOMMENDATIONS

The crisis on the American immigration bench is evidenced by appellate court opinions condemning the conduct of immigration judges, studies demonstrating statistical inconsistencies in immigration decisions, and recurring stories of injustice reported by individual litigants.²⁶¹ From an ethical perspective, this crisis has serious repercussions. In particular, biased and incompetent conduct on the part of immigration judges negatively impacts the lives of individuals seeking to remain in the United States. A larger issue is also at hand: without significant ethical reforms to ensure proper judicial conduct, the entire system of immigration adjudication is flawed.

Together with circuit court judges, immigration judges are calling for increased resources to assist with their heavy workload.²⁶² Legal scholars have also recommended specific changes designed to improve the structure of the immigration court system. For example, Sydenham Alexander suggested a campaign to publicly identify the “worst” IJs in order to remove them from the bench.²⁶³ Alexander’s campaign hopes to “change substantially the system that those judges will leave behind.”²⁶⁴ In addition, Professors Ramji-Nogales, Schoenholtz, and Schrag presented numerous recommendations focused on structural change. These suggestions included (1) bringing immigration adjudicators together to discuss the vast inconsistencies in asylum outcomes, (2) increased training for

²⁶¹ See sources cited *supra* notes 8, 11, 149.

²⁶² See Maclean, *supra* note 216.

²⁶³ Alexander, *supra* note 8, at 45-46.

²⁶⁴ *Id.* at 46.

immigration judges with a focus on judicial temperament, (3) more rigorous hiring standards for EOIR, (4) more resources for immigration courts, including an increase in the number of immigration judges, and (5) appointed counsel provided by the government for any indigent asylum applicant litigating in immigration court.²⁶⁵ Each of these ideas has merit, and this author supports these scholars in calling for structural reform.

Recognizing the urgency, Attorney General Gonzales promised reforms to address judicial misconduct in immigration courts. Many of the Attorney General's initiatives are "internal,"²⁶⁶ and it is possible that significant changes are being implemented without publicity. Observers should closely watch EOIR and the DOJ to guarantee completion of these improvements.

However, even if these changes are successfully implemented, additional reforms will remain necessary to resolve the crisis on the immigration bench. Because the focus of this article is judicial ethics, the reforms proposed herein are intended to specifically diminish judicial bias and incompetence. First, EOIR should recognize the ethical duty of overworked immigration judges to refrain from taking on new cases. In addition, EOIR should improve ethics training and create an Ethics Review Board to work in conjunction with the structural reforms discussed above. All three proposals would be cost effective and fairly simple to implement, in hopes that Justice Department officials will use them to continue reorganizing the structure of EOIR.²⁶⁷

A. *Ethical Obligation to Avoid Case Overloads*

The EOIR Codes of Conduct could serve as a means of support for immigration judges whose competence on the bench is negatively impacted by excessive workloads. The ABA recently declared that lawyers representing indigent criminal cases have an ethical obligation to refuse accepting new clients if an excessive caseload "prevents a lawyer from providing

²⁶⁵ Ramji-Nogales et al., *supra* note 11, at 380-89.

²⁶⁶ EOIR Office of Legislative and Public Affairs, *supra* note 219; *see also* Authorities Delegated to the Director, *supra* note 38, 72 Fed. Reg. at 53,674 (stating that the Attorney General's directives "are being implemented through internal management changes within EOIR").

²⁶⁷ Some of these reform suggestions were submitted to the DOJ as public comments for the proposed Codes of Conduct on July 27, 2007.

competent and diligent representation to existing clients.”²⁶⁸ Admittedly, this ABA Code provision is intended to apply to lawyers in advocacy positions, a role very different from the job of a neutral arbiter. However, the EOIR Codes of Conduct indicated EOIR’s intent to hold immigration judges accountable under the same standards of conduct as all attorneys in their state of license or in the state in which they sit on the bench, despite the fact that immigration judges and attorneys serve very different roles in the adversarial system.²⁶⁹

If immigration judges are to be held to the same standards of conduct as attorneys, the EOIR Codes of Conduct should draw an analogy from the ABA rules: the EOIR Codes should provide that an overworked immigration judge without the time or resources necessary to decide cases in a thorough and competent manner has an *ethical* obligation to avoid taking on new cases.

This provision would certainly be controversial in light of political and practical pressure to decide immigration cases expediently. Indeed, such action might require organization on the part of immigration judges themselves, much like public defenders going on strike to highlight their lack of resources.²⁷⁰ If immigration judges refused to take more cases than they could fairly and adequately handle, their action would have two immediate effects: it would signal to the federal government that the problem of inadequate judicial resources is closely aligned with judicial competence, and it would empower immigration judges to publicly value ethical decision-making.²⁷¹ In this way, the proposed EOIR Codes of Conduct could potentially serve as catalysts inspiring further ethical reform.

²⁶⁸ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006); *see also* ABA MODEL RULES OF PROF’L CONDUCT Rule 1.3 cmt. 2 (2002) (“A lawyer’s workload must be controlled so that each matter can be handled competently.”).

²⁶⁹ EOIR CODES, *supra* note 217, Canon III.

²⁷⁰ *See* Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL’Y REV. 533 (2007), available at <http://www.hlrponline.com/vol1no2/buskey.pdf>.

²⁷¹ The potential effectiveness of this reform strategy is worthy of further consideration. Note that IJs employing this technique would need to ensure their actions are interpreted as a justified cry for reform, rather than as an outright rebellion jeopardizing their job security.

B. *Improved Ethics Training*

As it revises its code of conduct, EOIR must clarify the applicable ethical rules for immigration judges. It is simply unrealistic to expect an overworked group of judges to continuously follow changes in multiple sets of rules and guidelines. Strictly defining applicable ethical rules will enable judges to follow a clearer standard of conduct.

This unified standard should be enhanced by improving training for immigration judges and BIA members on ethics-related issues. Budgetary concerns have limited training conferences in recent years, including 2008,²⁷² but the crisis in immigration courts demonstrates a renewed need for formal ethics training.

At a minimum, immigration judges are currently required to attend one hour of training per year on ethics issues.²⁷³ EOIR recognized the need for additional training for immigration judges, and indicated its intent to provide “extended training” for immigration judges on “substantive legal issues” and “professionalism.”²⁷⁴ The EOIR Director’s job responsibilities now include providing “comprehensive, continuing training” for immigration judges to “promote the quality and consistency of adjudications.”²⁷⁵

Assuming that a more specific version of the Codes of Conduct is in place, immigration judges should be trained to appreciate the importance of each of these codes. In addition to the training on judicial temperament suggested by Professors Ramji-Nogales, Schoenholtz, and Schrag,²⁷⁶ IJs should be reminded that neutrality, competence, and general adherence to judicial ethics rules are critical parts of their jobs on the bench.

²⁷² See discussion *supra* notes 112, 113. Immigration judges were “shocked and disappointed” to learn that the 2008 training had been cancelled and warned that “the results of this [cancellation], without some accommodations, would be disastrous.” NAIJ Letter, *supra* note 113.

²⁷³ 5 C.F.R. § 2638.704 (2007).

²⁷⁴ AILA-EOIR Liaison Agenda, *supra* note 82, at 2.

²⁷⁵ Authorities Delegated to the Director, *supra* note 38, at 53,677 (codified at 8 C.F.R. § 1003.0(b)(1)(vii) (2007)). Notably, the cancellation of the 2008 training conference for immigration judges “is in direct contravention to the measure of improved training announced by the Attorney General.” NAIJ Letter, *supra* note 113.

²⁷⁶ See Ramji-Nogales et al., *supra* note 11, at 382 (recommending training for IJs to include “counseling on impartiality, avoiding stereotyping, and not taking personally the misconduct that the judges sometimes encounter from people who are desperate to remain in the United States”).

Training need not only occur on the national level. Local offices should offer seminars on judicial ethics, much like continuing legal education training for practicing attorneys. In addition to the value for individual judges, the DOJ would gain valuable public relations benefits. In short, the implementation of improved formal ethics trainings would be a low-cost, but highly advantageous, reform for immigration judges.

C. Creation of an EOIR Ethics Review Board

In 2006, as part of his ongoing structural reforms in immigration courts, the Attorney General announced he would address the failings of the IJ disciplinary process by implementing “improved complaint procedures for inappropriate conduct by adjudicators.”²⁷⁷ To adequately repair this process, the Attorney General should create an “Ethics Review Board” (“ERB”) to supervise the courtroom conduct of immigration judges. Using the clarified EOIR Codes of Conduct as a governing standard, the Ethics Review Board could hear complaints of inappropriate behavior brought by litigants, practitioners, circuit court judges, or members of the public. The ERB could then act to discipline judges for unethical behavior, with the understanding that a behavioral complaint will not impact the substantive outcome of an immigration judge’s decision.²⁷⁸

D. Structure of the Ethics Review Board

The ERB structure would consist of a panel of reviewers, with a system for appeals if either party disagrees with the ERB determination. The ERB structure would also provide for public accountability in the form of public reports. Useful analogies for this structure can be found in the process for adjudicating disciplinary complaints against federal judges and California state judges.

²⁷⁷ DOJ Press Release, *supra* note 211. The Attorney General delegated this duty to the EOIR Director. *See Authorities Delegated to Director, supra* note 38, at 53,677 (to be codified at 8 C.F.R. Part 1003.0 (b)(viii)).

²⁷⁸ The proper avenue for review of inappropriate behavior that substantially affects the outcome of the case is a legal appeal to the circuit courts. The ERB focus will be inappropriate judicial conduct unrelated to an applicant’s substantive claim. Similarly, the disciplinary structure for federal judges provides for dismissal if a complaint is “directly related to the merits of a decision or procedural ruling.” 28 U.S.C. § 352 (b)(1)(A)(ii) (2006).

Federal judges, state judges and administrative law judges differ from immigration judges in notable ways, including the procedural differences in the appointment processes as discussed in Part II.B, *supra*. In addition, unlike judges working within the Judicial Branch, immigration judges operate under the Executive Branch of government. Despite these differences, federal judges, state judges, administrative law judges, and immigration judges all assume the role of a “neutral arbiter” in adjudicatory proceedings. Thus, specific elements of the federal and state judicial disciplinary structure could serve as effective models for the disciplinary structure for immigration judges.²⁷⁹

1. Analogy: Disciplinary Structure for the Federal Judiciary

Federal judges must comply with the Code of Conduct for United States judges. The ethical standards embodied in the Code, which are intended to have a “preventive” effect, offer affirmative guidelines for appropriate judicial behavior.²⁸⁰ Although the drafters of the Code did not intend that disciplinary action would be appropriate for every violation of the Code’s provisions, this Code “may provide standards of conduct for application” in disciplinary proceedings against federal judges.²⁸¹

The procedure to file complaints against federal judges for misconduct is governed by the “Judicial Councils Reform and Judicial Conduct and Disability Act.”²⁸² Elements of this procedure serve as excellent models for a similar system for

²⁷⁹ An administrative law judge may be disciplined by his or her employing agency only for “good cause.” 5 U.S.C. § 7521(a) (1989). To discipline an ALJ, the employing agency must initiate formal proceedings with an independent agency, the Merit Systems Protections Board. *Id.*

²⁸⁰ *In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. 1995).

²⁸¹ CODE FOR U.S. JUDGES, *supra* note 108, Canon 1, Commentary. The standard for disciplinary procedures under the Act is whether a judge’s conduct was “prejudicial to the effective and expeditious administration of the business of the courts,” or whether a “federal judge is unable to discharge all the duties of office by reason of a mental or physical disability.” 28 U.S.C. § 351(a) (2007). This disciplinary structure could be strengthened by specifically including violations of the Codes of Conduct for United States Judges as a basis for discipline. However, extended analysis of the disciplinary structure for the federal judiciary is beyond the scope of this article.

²⁸² TERRY EASTLAND ET AL., ETHICS IN THE COURTS: POLICING BEHAVIOR IN THE FEDERAL JUDICIARY 1 (National Legal Center for the Public Interest) (1990). Nine years later, Congress enacted the “Ethics Reform Act,” which regulates the extrajudicial conduct of judges. *Id.* The Act is now codified in Title 28 of the United States Code.

immigration judges, particularly regarding the methods of appeal for persons filing complaints and multi-member panels of reviewers addressing complaints.

Under the Act, a person wishing to bring a charge against a federal judge under this standard may file a complaint with the clerk of the court of appeals, who then reports the complaint to the chief judge of the circuit.²⁸³ The initial responsibility to investigate complaints lies with the chief judge, who must review all complaints and may conduct a “limited inquiry.”²⁸⁴ After reviewing the complaint, the chief judge may dismiss the complaint, resolve it informally, or appoint a special committee to investigate the allegations.²⁸⁵

This procedure is similar to the current disciplinary procedure for immigration judges, in which an ACIJ with supervisory authority reviews and acts upon allegations of misconduct. Unlike the current IJ procedure, however, the disciplinary inquiry for federal judges does not end with a single individual’s determination. Rather, if either party disagrees with the chief judge’s resolution of a complaint, review is available to the Judicial Council of the circuit.

The Judicial Council may then act in a number of ways, including ordering additional investigation, dismissing the complaint, ordering that no new cases be assigned to the misbehaving judge, and censuring or reprimanding the judge either publicly or privately.²⁸⁶ A party disagreeing with the action taken by the Judicial Council has yet another layer of appeal, for any party may petition the Judicial Conference of the United States to hear the case.²⁸⁷ In addition, members of the Judicial Council may themselves refer a complaint to the

²⁸³ 28 U.S.C. § 351 (2000). This provision applies to circuit judges, district judges, bankruptcy judges, and magistrate judges. *Id.* § 351(d). Congress mandated that the Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit establish similar procedures for the filing of complaints “with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints.” 28 U.S.C. § 363 (2000).

²⁸⁴ 28 U.S.C. § 352(a) (2000).

²⁸⁵ *Id.* §§ 352, 353.

²⁸⁶ 28 U.S.C. § 354 (2000). Notably, § 354 details various actions which may be taken by the Judicial Council, but imposes limits on the Judicial Council regarding removals. *Id.* § 354(a)(3). The Judicial Council does not have the power to remove an Article III judge from the bench. *Id.* § 354 (a)(3)(A).

²⁸⁷ *Id.* § 357.

Judicial Conference of the United States if the case requires further disciplinary action.²⁸⁸

Thus, a disciplinary complaint against a federal judge may be subject to several layers of appeal. Congress's clearly organized procedures relating to the investigation of misbehaving federal judges indicates its concern about judicial ethics. In contrast to the ambiguity experienced by complainants filing behavioral allegations against immigration judges, complaints and investigative procedures for the federal judiciary are well developed and opinions of Judicial Councils are publicly available.²⁸⁹ Accordingly, the disciplinary process for federal judges serves as a useful model to reform EOIR's complaint procedures.

2. Analogy: Disciplinary Process for California State Judges

Article III judges enjoy life tenure, which places them in a different situation than both state judges and immigration judges. Thus, while certain components of the disciplinary procedure for Article III judges should be applied to immigration judges, the disposition of complaints against judges should be handled differently. California's judicial disciplinary process adjudicates complaints against state judges in a manner placing a premium on accountability, a method which should be adopted by EOIR.

The State of California Commission on Judicial Performance ("CJP") receives complaints from "anyone"—including litigants, lawyers, members of the public, other judges, and court staff.²⁹⁰ Unlike the complaint process at EOIR, every person who files a complaint with the CJP will receive notification in writing of the CJP's action on a complaint.²⁹¹ After the CJP investigates a complaint, "the Commission has several options."²⁹² If the investigation revealed no misconduct on the part of the judge, the CJP will

²⁸⁸ *Id.* § 354(b)(1). If the Judicial Council determines that a judge's action may constitute grounds for impeachment, or is not amenable to resolution by the Judicial Council, the Council must refer the case to the Judicial Conference. *Id.* § 354(b)(2).

²⁸⁹ *See, e.g., In re Charge of Judicial Misconduct*, 62 F.2d 320 (9th Cir. 1995).

²⁹⁰ State of Cal. Comm'n on Judicial Performance, How to File a Complaint, <http://cjp.ca.gov/filingacomp.htm> (last visited Jan. 22, 2008).

²⁹¹ *Id.*

²⁹² State of Cal. Comm'n on Judicial Performance, Action the Commission Can Take, <http://www.cjp.ca.gov/2001cases.htm> (last visited Jan. 22, 2008).

close the case and notify the complainant of the dismissal.²⁹³ If minor misconduct was discovered on the part of the judge, the CJP could “issue an ‘advisory letter’ to the judge,” advising caution or expressing disapproval of the conduct at issue.²⁹⁴ For more serious misconduct, the CJP may issue a “private admonishment,” which is designed “to bring problems to a judge’s attention at an early stage in the hope that the misconduct will not be repeated or escalate.”²⁹⁵ These confidential proceedings are not released to the public.

For very serious misconduct, the California judicial disciplinary process uses public disclosure to hold judges accountable. Cases involving persistent and pervasive misconduct may result in a “public admonishment,” or the more serious “public censure.”²⁹⁶ Public admonishments and public censures are both notifications describing the conduct and the CJP’s findings, which are sent to the judge and also made available to the press and the public.²⁹⁷ This system emphasizes public accountability: since state judges are public officials, the public has the right to know when judges are misbehaving.

A similar public accountability system should be instituted for immigration judges accused of serious misconduct. Public admonishment or public censure for immigration judges engaging in egregious unethical behavior would add an effective layer of accountability to EOIR’s judicial structure, particularly in light of renewed public attention on judicial misconduct.

E. Proposed Disciplinary Structure for Immigration Judges

The creation of an Ethics Review Board adopting elements of the disciplinary process for federal judges and California state judges would provide much-needed clarity to EOIR’s disciplinary process. First, the standards of ethical conduct for immigration judges should be simplified: complaints should be based upon violations of revised and more specific Codes of Conduct. Persons wishing to allege violations

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* Judges have the right to ask the California Supreme Court “to review an admonishment, censure, removal or involuntary retirement determination.” *Id.*

of the Codes may file a complaint with the EOIR Ethics Review Board. To remedy the concerns raised by allowing one person with supervisory authority to review and dismiss a complaint, the ERB should consist of a five to nine member panel. In this way, enforcement of the Codes of Conduct would be the responsibility of a third-party panel. A panel review with a detached group of individuals is a more appropriate method of handling complaints, since a “panel is less likely to make a mistake than is a single [individual].”²⁹⁸

The members of the ERB would conduct an investigation similar to the inquiry undertaken by a federal chief judge in response to a complaint. Based on this inquiry, following California’s model, the ERB could have several options for disposition of the complaint. The ERB could (1) dismiss the complaint, (2) resolve the complaint informally through mediation or another form of alternative dispute resolution, (3) take action on a complaint through an advisory letter or private admonishment, or (4) reprimand an IJ for serious misconduct through public admonishment or public censure.

Regardless of the ERB’s determination, two factors must be present. First, if either party disagrees with the ERB’s resolution, appeal must be available. Like the petition for review of a federal chief judge’s decision to the Judicial Council, the ERB’s resolution should be appealable to the EOIR Office of General Counsel. This process deliberately skips the current evaluators of complaints against immigration judges (the ACIJ, OCIJ, and EOIR Director), since their failure to adequately enforce proper behavior on the immigration bench has contributed to the current ethical crisis. The EOIR Office of General Counsel may refer a complaint alleging misconduct to the DOJ Office of Professional Responsibility or the Office of the Inspector General. Alternatively, either party seeking a final review should file an appeal to the Office of the Attorney General, who holds ultimate responsibility for the actions of immigration judges.

Second, to alleviate the uncertainty of the current process for complainants, the ERB must create a written record of its investigation and decision-making process. This detailed record need not be made available to the public, but should be

²⁹⁸ Cruz, *supra* note 11, at 507.

accessible to the complaining party and the judge whose conduct is in question.

If the ERB chooses to reprimand an IJ through public admonishment or public censure, much like California's disciplinary system, the names of these judges should be available on the EOIR website. In addition, a statistical report regarding complaints of unethical misconduct against immigration judges must be made public for accountability purposes. This public report could take the form of California's CJP statistics, which compile the numbers of new complaints considered by the CJP, investigations commenced, and ultimate dispositions of cases.²⁹⁹ California also compiles summaries of actions taken against state judges describing the details of misconduct resulting in discipline.³⁰⁰ These annual summaries are useful for judges concerned about avoiding discipline for similar behavior. Privacy concerns could prevent the full, detailed investigation record of the ERB from being publicly released. At a minimum, however, public reports should include information regarding how many complaints of ethical misconduct are filed each year against immigration judges, examples of the types of complaints filed, and how such complaints are resolved.

F. Benefits of Ethics Review Board

The creation of an Ethics Review Board would provide several benefits to the DOJ. Like the complaint procedure for federal judges under the Judicial Councils Act, this system offers several methods of appeal and multiple reviewers for each complaint filed, ensuring that complaints are handled properly. Also, IJs will be aware that unethical behavior, particularly biased behavior against litigants, will have public consequences. The mere possibility of public accountability could be enough to deter some judges from acting in an unethical manner, for the threat of public embarrassment will likely encourage most IJs to act more carefully on the bench. As judicial performance improves, litigants may be less inclined to file appeals to the BIA and circuit courts. In this

²⁹⁹ See CJP, 10-Year Summary of Commission Activity, <http://cjp.ca.gov/TenYearStats.htm> (last visited Jan. 22, 2008).

³⁰⁰ See CJP, 2006 Private Discipline Summaries, <http://www.cjp.ca.gov/2001privdisc.htm> (last visited Jan. 22, 2008); CJP, 2006 Public Discipline, <http://www.cjp.ca.gov/commcases.htm> (last visited Jan. 22, 2008).

way, a more ethical judiciary at the IJ level could help alleviate the “surge” in the circuit courts.³⁰¹

Perhaps more importantly, those IJs who continue to act improperly will actually be held accountable for their behavior. Rather than relying on the circuit courts, reporters, or legal scholars to identify “bad apples” among IJs and BIA members, EOIR and the DOJ could recognize, discipline, and remove biased or incompetent judges before their behavior impacts large numbers of applicants. As a result, the ethical integrity of immigration judges and BIA members would noticeably improve.

In addition, this improved layer of accountability serves a separate purpose for the Justice Department: sorely needed public relations benefits. Creating an Ethics Review Board, in addition to enhanced ethics training for judges, would demonstrate the DOJ’s renewed commitment to ensuring ethical conduct. Moreover, if litigants entering immigration courts know they will be guaranteed a “professional manner”³⁰² and “impartial treatment,”³⁰³ and also know that a systematic method for complaints is available if they encounter otherwise, a more positive public perception of EOIR and its judges could be restored.

Creation of an Ethics Review Board would also be cost effective. There is no need to hire large numbers to staff the ERB; indeed, a five- to nine-member panel would be sufficient as a start. Lawyers from the DOJ Office of Government Ethics, who are trained in ethics standards and advise attorneys throughout the department on ethical issues, would be well suited for the position. Alternatively, the ERB could consist of a variety of members—including practitioners or advocates from both sides of the immigration debate—to assure a balanced consideration of complaints. Also, members would serve one to two-year terms on the ERB, to minimize the time commitment required for each member. The low-cost creation of a small board, guaranteeing accountability for judges’ violations of EOIR’s own Codes of Conduct, will go a long way toward restoring the fairness and integrity of the immigration system.

³⁰¹ Seipp & Feal, *supra* note 18, at 2012 (circuit courts are taking time to “graphically expose the unfortunate number of glaringly defective decisions” rendered by IJs). With more ethical behavior on the bench, the number of “glaringly defective” decisions will hopefully decrease, freeing the circuit courts to consider more substantive legal issues.

³⁰² EOIR Codes, *supra* note 217, Canon X.

³⁰³ *Id.* Canon VI.

VI. CONCLUSION

The crisis in the immigration courts warrants examination from the perspective of judicial ethics. Increasing reports of biased or incompetent conduct on the immigration bench raise particular concerns about the ability of the immigration court system to properly adjudicate cases. But these pervasive ethical problems also present an unparalleled opportunity for reform.

The Attorney General's pending proposals to redress improper conduct on the part of immigration judges indicates recognition of the problem and government willingness to improve. However, some of the pending reforms, such as the EOIR Codes of Conduct, suffer from significant flaws undermining their power to ensure unbiased and competent behavior on the immigration bench.

Numerous effective reform proposals have been articulated in recent months, and this author joins legal scholars, appellate judges, and practitioners in supporting structural changes.³⁰⁴ To reframe the ongoing discussion from an ethical perspective, this article proposes three practical reforms designed to actively promote ethical conduct for immigration judges. For a start, the EOIR Codes of Conduct could be used as a springboard to address challenges facing immigration judges, such as excessive caseloads. Genuine improvement will also require the investment of more time and money for training courses on judicial ethics. Additionally, a panel of reviewers in the form of an Ethics Review Board will develop accountability and consequences for judicial misconduct. The ERB will take responsibility for monitoring complaints away from a single individual, and place the burden more fairly on a multi-member panel. Such changes would benefit not only individuals litigating in immigration court, but would also signify the Department of Justice's renewed commitment to ethical conduct in the courtroom. It is hoped that expanded recognition of the ethical repercussions of this crisis will soon translate into meaningful change—for litigants like Mr. Tun and Mr. Elias, and for immigration judges seeking to do their jobs well.

³⁰⁴ See sources cited in *supra* note 11; see also *supra* Part V.