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REFORMING THE IMMIGRATION COURTS OF THE UNITED STATES: WHY IS THERE NO WILL TO MAKE IT AN ARTICLE I COURT?

*Leonard Birdsong**

I. INTRODUCTION

Immigration is a topic on the minds and tongues of many of our country's citizens and noncitizens alike. Anecdotally, it appears that almost every person in the country has an opinion about "immigration" and opinions about our United States immigration laws, but few have ever read the laws.¹ Fewer still have ever seen or participated in an immigration court proceeding.² Our immigration courts are very busy forums in which immigration judges make decisions concerning which noncitizens may be allowed to remain in the United States and which should be deported.³ Among their duties, immigration judges preside over asylum cases.⁴ The asylum provisions of our immigration law attempt to ensure humanitarian relief for victims of persecution.⁵ These provisions dictate that a noncitizen may be granted asylum if he or she can prove a well-founded fear of persecution if returned to his or her home country.⁶ Asylum is a form of relief from deportation known as "discretionary relief."⁷ Immigration judges are vested with broad discretion in deciding asylum cases.⁸

One such case that I wrote about in a previous article, typical of many, "involved Gramoz Prestreshi,⁹ an eighteen-year-[old] citizen of Kosovo who was stalked and beaten almost to death by a group of local [thugs] because he was a

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1. Our country's immigration laws are found in the Immigration and Nationality Act (INA) of 1952 as amended. The INA has been codified in the United States Code Annotated at 8 U.S.C. §§ 1101–1537 (1952).

2. This is a personal observation.

3. *EOIR at a Glance*, DEP'T OF JUSTICE (Sept. 9, 2010), <http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm> [hereinafter DEP'T OF JUSTICE].

4. *Id.*

5. See 8 U.S.C. § 1101(a)(42)(A) (1952); see also *id.*

6. 8 U.S.C. § 1158(b)(1)(A) (2005).

7. See 8 U.S.C. § 1158(b)(1)(A), (B) (2005).

8. DEP'T OF JUSTICE, *supra* note 3.

9. See Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution,"* 35 WM. MITCHELL L. REV. 197, 198 (2008).

homosexual.”¹⁰ Prestreshi was laughed at and was called names by the police to whom he reported the beating.¹¹ In the hospital emergency room he was made to “mop up his own blood.”¹² “He had photographs taken of his injuries” and complained to the press about the hostile environment homosexuals endure in Kosovo.¹³ His family later disowned him for his sexual orientation.¹⁴ “He joined a gay rights organization” and in 2007 was granted asylum in the United States on the grounds that his treatment in Kosovo amounted to persecution.¹⁵

The outcome in Prestreshi’s case was one of the favorable ones to come out of immigration court. Conversely, many noncitizens with meritorious claims are denied grants of asylum by the immigration courts.¹⁶ Recent research shows that the outcome of one’s asylum claim may depend upon arbitrary factors such as which immigration judge is randomly assigned to the case, whether the judge is a man or a woman, and whether an attorney represents the noncitizen.¹⁷ This begs the question: Is asylum adjudication fair and impartial within our immigration courts? I have personally concluded that often such adjudication is not fair and is not impartial. Justice may be being denied in many asylum cases due to the broad discretion given to immigration judges to issue discretionary relief in asylum cases.

Professors Ramji-Nogales, Schoenholtz, and Schrag of Georgetown Law School in their *Asylum Study* have described the differing outcomes in asylum decisions as “refugee roulette.”¹⁸ The study is a monumental piece of work that has been cited by scholars and others interested in refugee law.¹⁹ It analyzes databases of immigration decisions of over 133,000 cases over a six-year period.²⁰ Using cross-tabulations based on biographies, the *Asylum Study* also “explores correlations between sociological characteristics of individual immigration judges and their [asylum] grant rates.”²¹

When examining the workings of our immigration courts, one will find that they are really not courts as most people think of judicial tribunals set up under the

10. Pamela Constable, *Persecuted Gays Seek Refuge in U.S.*, WASH. POST, July 10, 2007, at A6.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Jaya Ramji-Nogales, Andrew Schoenholtz, & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 401 (2007) [hereinafter *Asylum Study*] (explaining that factors such as caseload may contribute to the denial of many asylum cases).

17. *Id.* at 296.

18. *Id.* at 295.

19. See, e.g., Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61 (2009); Kevin Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Stephen Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413 (2007); Margaret Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007); Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467 (2008); and Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009).

20. *Asylum Study*, *supra* note 16, at 296.

21. *Id.*

auspices of Articles I, III, or IV of the United States Constitution or those set up under the auspices of various state constitutions. Instead, the immigration courts of the United States are a branch of the United States Department of Justice known as the Executive Office for Immigration Review (EOIR).²² They are administrative tribunals devoted to hearing immigration matters, mainly deportations.

The Attorney General of the United States is the head of the EOIR and appoints immigration judges to the courts.²³ This method of judicial appointment has always appeared to me to create a conflict of interest. If the Attorney General appoints the immigration judges, can these judges be fair and impartial to asylum seekers when they owe their job to the Attorney General? In many cases, I believe the answer is no; they cannot divorce the political pressure they face from the Attorney General from the outcome of their asylum cases.

For those of us who have practiced in the immigration court system over the years, we understand there are many problems with asylum adjudication. To begin, most of the immigration judges have come from the former Immigration and Naturalization Service (INS)²⁴ and have a law enforcement background and mindset.²⁵ Until recently, there had been little training for immigration judges.²⁶ More often than not, immigration judges deny asylum claims.²⁷ Such denials most often involve noncitizen applicants who do not understand asylum law and are not represented by counsel.²⁸

The immigration judges are appointed by and serve at the pleasure of the Attorney General of the United States, the country's chief law enforcement officer.

22. DEP'T OF JUSTICE, *About the Office*, <http://www.justice.gov/eoir/orginfo.htm> (last visited Oct. 19, 2013).

The Executive Office for Immigration Review (EOIR) was created on January 9, 1983, through an internal Department of Justice (DOJ) reorganization that combined the Board of Immigration Appeals (BIA [or Board]) with the Immigration Judge function previously performed by the former Immigration and Naturalization Service (INS) (now part of the Department of Homeland Security). *Id.*

23. See 8 U.S.C. § 1101(b)(4):

The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

Id.

24. See DAVID A. MARTIN, T. ALEXANDER ALIENIKOFF, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, *FORCED MIGRATION: LAW AND POLICY* at xi (Thomson West 2007). INS—"until 2003, [as] a component of the Department of Justice, INS was the lead federal agency on immigration policy and operations. In 2003, INS was abolished [by Congress] and its functions were transferred to three separate units of the new Department of Homeland Security." *Id.* Those three separate units are the U.S. Customs and Border Patrol, the U.S. Immigration and Customs Enforcement, and the U.S. Citizenship and Immigration Services.

25. This is a personal observation gained through career experience as a U.S. State Department Foreign Service officer who sometimes worked closely with immigration enforcement officers. A few of them later moved on to serve as immigration judges.

26. DEP'T OF JUSTICE, *IMPROVING EFFICIENCY AND ENSURING JUSTICE IN THE IMMIGRATION COURT SYSTEM*, 121 (May 18, 2011), available at <http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf>.

27. See *Asylum Study*, *supra* note 16, at 340 (suggesting that asylum denial rates outweigh grant rates by at least 8.8% and that the absence of counsel contributes to a high denial rate).

28. *Id.*

There is no set term limit on the appointment of the immigration judges. In order to avoid disappointing their boss, the Attorney General, judges may intentionally avoid providing “too many” grants of asylum. Furthermore, because asylum grants are discretionary relief under the Immigration and Nationality Act (INA), a form of relief that grants immigration judges unlimited discretion in deciding asylum cases, only the Board of Immigration Appeals (BIA)²⁹ and the relevant federal circuit have jurisdiction to review.³⁰

Finally, there are problems and inconsistencies in asylum adjudications because certain statutory terms are ambiguously defined, including “persecution,”³¹ and there is a lack of precedent with respect to asylum decisions. “Very few [immigration] court decisions are published each year.”³² “As a result of the lack of published opinions, it is difficult to determine or analyze whether important precedents have been established in the system.”³³ Also, immigration judges do not have the power to hold attorneys or applicants that appear before them in contempt of court.³⁴ Any independent court system should grant contempt power to its judges as a weapon and/or tool to help control their court proceedings. As a result of some of these problems, noncitizen applicants and new legal practitioners often do not understand the immigration court system and, more often than not, may believe that the court is rigged to avoid grants of asylum.³⁵

Recent research, which will be discussed later in this article, indicates that the number of asylum filings in immigration court is down but that the rate of grants of asylum has risen.³⁶ This is a favorable development that validates my belief that our immigration court system is becoming more just in its asylum adjudications. My personal observations through recent visits to immigration courts in San Francisco and Orlando³⁷ affirm my belief that the courts are staffed by very hardworking, earnest judges and staffers that seek to do justice with respect to asylum seekers. However, there is still room for improvement as the immigration

29. The Board of Immigration Appeals (BIA) is a component of the Executive Office for Immigration Review (EOIR). DEP’T OF JUSTICE, *supra* note 3.

30. See 8 U.S.C. § 1158(a)(3) (1996).

31. See 8 U.S.C. § 1101 (lacking a definition of the word “persecution”).

32. Stuart Grider, *Sexual Orientation as Grounds for Asylum in the United States—In Re Tenorio, No. A72 093 558 (EOIR Immigration Court, July 26, 1993)*, 35 HARV. INT’L L.J. 213, 215 (1994).

33. Leonard Birdsong, “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .”: *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357 (2008).

34. See 8 U.S.C. § 1357 (2006) (implying a lack of authority of immigration judges to sanction contemptuous actions from its failure to mention such authority).

35. No court system is without some problems. Many of the problems so far outlined in this article may make the faint of heart want to run from practice in immigration court. But take heart, a practice dedicated to representing clients in immigration court can be some of the most important work a lawyer can perform because such work is part of a worldwide effort to assure humanitarian relief for victims of persecution. Asylum lawyers believe much of their work is helping to save the lives of those who may be sent back to a country where they might face harsh persecution and, in some cases, even death. There is much persecution in the world. Many of those fleeing persecution come to the United States.

36. See *infra* Part II.B.

37. The author spent May 30, July 16, and July 18, 2012, observing master calendar hearings and an asylum hearing in the Orlando Immigration Court. The author also visited the San Francisco Immigration Court and observed master calendar hearings on June 20, 2012.

courts could use more judges, law clerks, and interpreters that would help more asylum seekers like Mr. Prestreshi avoid persecution in their home countries.

I believe that our immigration courts should become Article I Courts like the U.S. Bankruptcy Court and the U.S. Tax Court. This would make the immigration courts independent of the Department of Justice and immune from possible political pressure from the Attorney General. Immigration Judge Dana Leigh Marks, past president of the National Association of Immigration Judges, has advocated for making immigration courts an Article I Court:

Experience teaches that the review function [of the court] works best when it is well-insulated from the initial adjudicatory function and when it is conducted by decision makers entrusted with the highest degree of independence. Not only is independence in decision making the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review.³⁸

Immigration courts, as they are now situated as part of the EOIR do not provide the kind of judicial independence that is critical to the perception and reality of the fair and impartial review Judge Marks describes.

One of my purposes in writing this article is to strongly reaffirm my support for our use of asylum as a way of providing justice for those fleeing persecution from other countries.³⁹ My second purpose for writing this article is to help educate those interested in asylum law by providing some history and background on asylum. Part II of the article will briefly discuss the history of asylum; enumerate the eligibility requirements for asylum; describe court proceedings in asylum cases; recount recent statistics on grants of asylum; and also include a brief history of our immigration courts. Part III will examine the six significant problem areas our immigration courts have wrestled with during the last decade with respect to asylum caseloads. Part IV will examine a few of the proposals put forth over the last thirty years to transform the immigration court system into an Article I Legislative Court.

Perhaps, Congress will revisit the idea of separating the immigration judiciary from the Department of Justice. However, there seems to be little political will in Congress to accomplish this. Hopefully, this article will provide “food for thought” in that regard.

38. Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 21 (2008) (quoting Comm'n on Immigr. Reform, *Becoming an American: Immigration and Immigrant Policy* 174 (1997)).

39. The author has represented a goodly number of asylum seekers in immigration court over the years and has written two articles examining the phenomenon of persecution based on sexual orientation and gender violence as grounds for grants of asylum. In a previous article the author wrote that: “An integral part of our immigration law is the implementation of rules of human rights allowing those persecuted in their homeland to seek protection in the United States.” Birdsong, *supra* note 33, at 360. I also cited therein John A. Russ IV who maintains, “asylum and human rights doctrines are intertwined in that how a country defines persecution reflects its beliefs about what constitutes human rights violations.” *Id.* at 360 (citation omitted).

II. BACKGROUND ON ASYLUM

A. History

A brief history and background on asylum is required to appreciate how asylum came to be part of our immigration law. International norms for refugee protection are outlined in the 1951 United Nations Convention and the 1967 Protocol Relating to the Status of Refugees.⁴⁰ Under the Convention, the term “refugee” applies to:

Any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular group, or political opinion, is outside his country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country: or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear is unwilling to return to it.⁴¹

The 1951 Convention provided protection for World War II refugees.⁴² Future refugees were included in the 1967 Protocol.⁴³ The United States acceded to the Protocol in 1967, but Congress did not enact its own Refugee Act until 1980.⁴⁴ Our government codified the Protocol such that an applicant for asylum must have:⁴⁵ (1) a “well-founded fear of prosecution;”⁴⁶ (2) the fear must be based on past persecution or the risk of future persecution;⁴⁷ (3) the persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion;”⁴⁸ and (4) the persecutor must be the government or someone whom the government is unwilling or unable to control.⁴⁹

40. Convention Relating to the Status of Refugees, art. I, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention], reprinted in GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 573, 588 (3d ed. 2007).

41. Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 606 U.N.T.S. 267 (referring to the definition of “refugee” in the 1951 Convention), reprinted in GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 573, 588 (3d ed. 2007).

42. Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotyping in Sexual Orientation Asylum Cases*, 15 *LAW & SEXUALITY* 135, 139 (2006).

43. Protocol Relating to the Status of Refugees, Preamble and Article I, ¶ 2, Jan. 31, 1967, 606 U.N.T.S. 267. See GOODWIN-GILL, *supra* note 40, at 588.

44. Morgan, *supra* note 42, at 140.

45. 8 U.S.C. § 1101(a)(42) (1996); see also MARTIN ET AL., *supra* note 24, at 76–77.

46. 8 U.S.C. § 1101 (a)(42), An alien will be considered a refugee if she has suffered persecution in the past on account of one of the statutory grounds or if she can show an objectively reasonable fear of such persecution in the future. *Id.* See generally *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427–28 (1987). If the alien establishes past persecution, moreover, a rebuttable presumption arises in favor of granting asylum. *Draganova v. INS*, 82 F.3d 716, 722 (7th Cir. 1996). Yet that presumption may be overcome by evidence suggesting that conditions in the alien’s home country have changed to such an extent that she no longer is in danger of persecution there. *Id.* at 722. See also 8 C.F.R. § 208.16(b)(1)(i)(A) (2000).

47. 8 U.S.C. § 1101(a)(42).

48. *Id.*

49. *Id.*

B. Eligibility for Asylum

The legal remedy of asylum is available to noncitizens legally in the United States and to undocumented noncitizens seeking protection from persecution they faced or would face in their home country on account of one of the several specific protected grounds.⁵⁰ Thus, not all immigrants are protected from persecution.⁵¹ Rather, the persecution must have a connection to the specific protected characteristics, race, religion, nationality, political opinion, or membership in a “particular social group.”⁵² An asylum request is automatically considered as an application for an alternate claim of relief known as “withholding of removal.”⁵³ Both forms of relief require the claimant to demonstrate a certain quantum of persecution that the individual suffered in his or her home country or would suffer if returned there, and both require a “nexus” between the persecution and one of the protected grounds.⁵⁴ In 1996, an amendment to the INA mandated that a claim of asylum must be made within one year of arriving in the United States.⁵⁵

While the legal concepts of asylum and withholding of removal appear nearly identical, they have important differences. Asylum is subject to the discretion of the Secretary of the Department of Homeland Security or Attorney General of the United States.⁵⁶ Whereas, withholding of removal, if proven, is a mandatory form of relief.⁵⁷ A person granted asylum may be eligible for permanent residency.⁵⁸ Most litigants prefer asylum.⁵⁹ A grant of asylum will allow the applicant, after a one-year stay in the United States, to adjust his or her status to that of a legal permanent resident.⁶⁰ Withholding of removal guarantees only that the person will not be forcibly returned to his or her country of origin and does not preclude the possibility of being removed to a third country.⁶¹ The applicable standard of proof is also higher in a withholding of removal than in an asylum grant.⁶² In order to

50. See Joseph Landau, *Soft Immutability and Imputed Gay Identity: Recent Developments in Transgender and Sexual Orientation-Based Asylum Law*, 32 *FORDHAM URB. L.J.* 237, 239–40 (2005).

51. *Id.*

52. 8 U.S.C. § 1101(a)(42).

53. This provision of the law is found at 8 U.S.C. § 1231(b)(3)(A) (2006) and was formerly known as “withholding of deportation.” The amendments to the INA in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act replaced former hearings known as Deportation Hearings and Exclusion Hearings and renamed them both as Removal Hearings. Removal is synonymous with deportation. The concept of deportation is readily recognized by most people.

54. Landau, *supra* note 50, at 241.

55. 8 U.S.C. § 1158(a)(2)(B) (1996).

56. 8 U.S.C. § 1158(b)(1)(A). “The Secretary of Homeland Security or the Attorney General *may grant asylum* to an alien who has applied for asylum in accordance with requirements and procedures by the Secretary of Homeland Security or the Attorney General.” *Id.* (emphasis added).

57. 8 U.S.C. 1231(b)(3)(A). “The Attorney General *may not remove an alien* to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” *Id.* (emphasis added).

58. 8 U.S.C. § 1159(b) (2005).

59. Landau, *supra* note 50, at 241.

60. See 8 U.S.C. § 1159(b). A legal permanent resident is awarded what is known as “green card” status which allows them to remain in the United States indefinitely on good behavior.

61. DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 350 (6th ed. 2010).

62. *Id.*

obtain a withholding of removal, the claimant must show a clear probability of persecution.⁶³ The showing for asylum is only a well-founded fear of persecution.⁶⁴

There are only two types of applications for asylum; which are termed either “affirmative” applications or “defensive” applications. Asylum applicants, applicants for withholding of removal, and applicants seeking relief under the Convention Against Torture who are not currently under immigration deportation proceedings, but have a fear of persecution if they return to their homeland, may file an “affirmative” application by mailing a Form I-589⁶⁵ to a regional USCIS⁶⁶ service center under the auspices of the Department of Homeland Security (DHS).⁶⁷ A specialized corps of full-time professional asylum officers receives the applications and interviews the applicants. Asylum officers grant asylum in meritorious cases, which initially ran between fifteen and thirty percent, but in recent years have exceeded forty percent.⁶⁸ They do not deny the other cases; instead, asylum officers refer them to the immigration court, placing the cases in removal proceedings.⁶⁹ Once in removal (deportation) proceedings, those applicants who did not receive a grant of asylum with respect to their “affirmative” application may now renew their application for asylum by renewing their request for asylum as a “defensive” application.⁷⁰ The “affirmative” I-589 application becomes a part of the immigration court record. For those individuals placed in removal proceedings who never filed an “affirmative” application and who believe they may have a claim for asylum, withholding of removal, or a claim for relief under the Convention Against Torture, will be allowed to submit an application Form I-589 as a “defensive” application for relief.⁷¹

C. Immigration Court Proceedings, Appeal and Review

Immigration judges provide the initial evaluation of all “defensive” applications for asylum, withholding, and provide a second review of “affirmative”

63. *Id.*

64. *Id.*

65. Most applicants seeking some form of immigration benefit must file an immigration application or petition. The correct form for applicants seeking asylum, withholding of removal, or relief under the Convention Against Torture is Form “I-589.” Such application may be downloaded at no charge from the website of the U.S. Citizenship and Immigration Services. UNITED STATES CITIZENSHIP & IMMIGR. SERVS., *I-589, Application for Asylum and Withholding of Removal*, <http://www.uscis.gov/i-589> (last visited Oct. 22, 2013).

66. This is the abbreviation for the U.S. Bureau of Citizenship and Immigration Services, Department of Homeland Security. “Created in 2003, this bureau houses the principle services and adjudications functions inherited from the Immigration and Naturalization Service [(INS)], including asylum officers and the refugee corps.” MARTIN ET AL., *supra* note 24, at xi. *See also* UNITED STATES CITIZENSHIP & IMMIGR. SERVS., *Our History*, <http://www.uscis.gov> (follow “ABOUT US” hyperlink; then follow “Our History” hyperlink) (last updated May 25, 2011). It is sometimes referred to as CIS. *See* MARTIN ET AL., *supra* note 24, at xi.

67. *See* MARTIN ET AL., *supra* note 24, at 79.

68. *Id.*

69. *Id.*

70. UNITED STATES CITIZENSHIP & IMMIGR. SERVS., *Obtaining Asylum in the United States*, <http://www.uscis.gov> (follow “Humanitarian” hyperlink; then follow “Refugee Status & Asylum” hyperlink; then follow “Asylum” hyperlink; then follow “Obtaining Asylum in the United States” hyperlink) (last updated Mar. 10, 2011).

71. *Id.*

applications referred by asylum officers.⁷² In the latter situation, the immigration judge receives the pre-existing I-589, with its attachments, from the asylum officer, along with copies of the “charging document.”⁷³ Applicants are allowed to supplement their claim in immigration court and put on additional witnesses.⁷⁴ This allows the case to be heard in the more formal setting of the immigration court where witnesses may be examined and cross-examined by the asylum seekers’ counsel and Department of Homeland Security (DHS) counsel.⁷⁵ To be clear, if removal (deportation) proceedings are already underway, the applicants can apply for asylum or withholding only by presenting “defensive” applications that are heard exclusively by the immigration judges.⁷⁶

At the hearing, the claimant must present evidence to avoid removal (deportation). The DHS will present evidence and argument in support of its decision to refuse asylum.⁷⁷ Evidence presented must be relevant and conform to requirements of constitutional due process.⁷⁸ The burden of proof is on the applicant to establish that the applicant is a refugee within the meaning of the statute and that they will be persecuted because of one of the five protected grounds.⁷⁹ If the claimant persuades the immigration judge that she meets the statute’s asylum requirements, then the judge may grant asylum for an indefinite amount of time.⁸⁰ In addition, the claimant’s immediate family members who are still abroad may join her in the United States.⁸¹

However, if the immigration judge denies the asylum request, the applicant may appeal his or her case to the Board of Immigration Appeals (BIA).⁸² The BIA reviews all appeals from immigration courts throughout the United States.⁸³ The BIA is an administrative appeals tribunal that is part of the EOIR Review in the Department of Justice.⁸⁴ The BIA has never been recognized by congressional statute; it is entirely a creature of the Attorney General’s regulations, and the Attorney General appoints its members.⁸⁵ The BIA has several options with respect

72. MARTIN ET AL., *supra* note 24, at 81.

73. The “charging document” in an immigration case is called a “Notice To Appear.” It serves the purpose of advising the noncitizen what immigration laws he or she has violated and functions much like an indictment or information in a criminal case by providing the specifics, dates of, and sections of the immigration law violated.

74. See MARTIN ET AL., *supra* note 24, at 81.

75. *Id.* at 80. See *id.* x.: ICE – Bureau of Immigration and Customs Enforcement, Department of Homeland Security. Created in 2003, this bureau houses interior enforcement functions transferred from the former INS, including investigations, detention and removal, and the trial attorneys who represent the government in Immigration Court.

76. *Id.* at 80. Typically the alien makes known at the master calendar hearing (the first appearance in Immigration Court) her wish to seek asylum or withholding as a form of relief from removal, and the judge then grants a specified period of time for the completion of the Form I-589 to be filed with the Immigration Court.

77. See Alan G. Bennett, *The “Cure” That Harms: Sexual Orientation-Based Asylum and the Changing Definition of Persecution*, 29 GOLDEN GATE U. L. REV. 279, 284 (1999).

78. *Id.*

79. 8 U.S.C. § 1158(b)(1)(B) (2006).

80. See Bennett, *supra* note 77, at 284.

81. *Id.*

82. *Id.*

83. *Id.*

84. MARTIN ET AL., *supra* note 24, at 83.

85. *Id.*

to the appeals: it may reject the claim on appeal, remand a case to the IJ with instructions to follow an appropriate course of action, or it may grant asylum directly.⁸⁶ Although the BIA hands down a large volume of appellate decisions each year, only a small fraction are designated as precedential decisions each year for inclusions in official reports.⁸⁷

If the BIA rules against the claim, an applicant may appeal to the Federal Court of Appeals for the circuit in which the case originated.⁸⁸ The circuit court may then remand the case to the BIA with instructions for a ruling consistent with the circuit court's findings.⁸⁹ Furthermore, if a circuit adopts a different rule than the BIA, the new rule will be applied within the circuit court in future cases.⁹⁰ As a result, circuit splits have arisen because of inconsistent rulings among the circuit courts regarding the same legal issue.⁹¹

D. Recent Statistics on Grants of Asylum

The Department of Homeland Security discloses information about the numbers of asylum grants and denials but it does not disclose much information about the characteristics of asylum seekers.⁹² Currently, the number of asylum seekers in immigration court is declining slightly but more are being granted asylum.⁹³ In recent years, approximately forty percent of those seeking asylum through an affirmative filing are granted asylum.⁹⁴ Similarly, fifty percent of those who pursue their claim for asylum defensively receive grants of asylum.⁹⁵

The total number of persons who were granted asylum in the United States decreased from 22,832 in 2008, to 22,090 in 2009, and in 2010 the number of grants decreased again to 21,113.⁹⁶ The number of persons who were granted asylum affirmatively through USCIS decreased from 11,904 in 2009 to 11,244 in 2010.⁹⁷ The number of persons granted asylum defensively through an immigration court judge or the Board of Immigration Appeals of the EOIR decreased from 10,186 in 2009 to 9,869 in 2010.⁹⁸ The leading countries of origin for persons granted asylum in 2010 were China (32%), Ethiopia (5.2%), Haiti (3.9%),

86. See Bennett, *supra* note 77, at 285.

87. See MARTIN ET AL., *supra* note 24, at 83.

88. See Bennett, *supra* note 77, at 285.

89. *Id.*

90. *Id.*

91. *Id.*

92. See generally Daniel C. Martin & James E. Yankay, *Refugees and Asylees: 2012* (April 2013), available at http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf.

93. See TRAC SYRACUSE UNIV., *Asylum Denial Rate Reaches All Time Low: FY 2010 Results, a Twenty-Five Year Perspective*, TRAC Immigration (Sept. 2, 2010), <http://trac.syr.edu/immigration/reports/240> [hereinafter TRAC SYRACUSE UNIV., *All Time Low*].

94. See MARTIN ET AL., *supra* note 24, at 79.

95. *Id.* at 80.

96. See Daniel C. Martin, *Annual Flow Report: Refugees and Asylees: 2010*, DHS 5 (May 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2010.pdf.

97. *Id.*

98. *Id.*

Venezuela (3.1%), and Nepal (3%).⁹⁹ These five countries accounted for forty-seven percent of the persons granted asylum.¹⁰⁰ In 2010, the top three countries of nationality for affirmative asylum seekers were China (26%), Ethiopia (6.1%), and Haiti (5.9%) accounting for thirty-eight percent of all persons granted asylum affirmatively.¹⁰¹ The leading countries of nationality of persons granted defensive asylum in immigration courts were China (39%), Ethiopia (4.1%), India (2.4%), Colombia (2.4%), and Nepal (2.3%).¹⁰² Approximately fifty percent of defensive asylum seekers in 2010 were nationals of these five countries.¹⁰³

Demographic data from this same 2010 report only includes information concerning affirmative asylum seekers. Seventy-six percent of persons granted asylum affirmatively in 2010 were between the ages eighteen and forty-four.¹⁰⁴ Affirmative asylum seekers are, on average, younger than the native born U.S. population: the median age of persons granted affirmative asylum was twenty-nine,¹⁰⁵ while the median age for United States citizens is thirty-seven.¹⁰⁶ Fifty-two percent were male, and forty-four percent were married.¹⁰⁷

The Transactional Records Access Clearinghouse (TRAC), a data research and data distribution organization at Syracuse University, has issued several immigration reports based upon detailed studies of our immigration court system. Its 2010 report reveals that denial rates for asylum seekers have reached the lowest level in the last quarter of a century.¹⁰⁸ They report that twenty-five years ago, in fiscal year (FY) 1989, almost nine out of ten (89%) of the asylum requests were denied.¹⁰⁹ While the annual rates have gone up and down during the ensuing years, only fifty percent of the requests were denied during the first nine months of FY 2010, a record low.¹¹⁰

The TRAC report reveals that one factor contributing to the improved success of recent asylum seekers is that a higher proportion were represented by counsel.¹¹¹ It should also be noted that the number of those seeking asylum in court proceedings have fallen. What TRAC does not report is that the 1996 INA asylum amendments made it more difficult to apply for asylum. Among these changes was

99. *Id.*

100. *Id.* The largest percentages of individuals granted asylum in 2010 affirmatively were living in California (37%), New York (15%), and Florida (13%). *Id.* at 6. Approximately two-thirds of individuals granted affirmative asylum resided in these three states. Martin, *supra* note 96, at 6. Other major states included Virginia (4%), Maryland (3.5%), Washington (3.0%), and Illinois (2.5%). *Id.*

101. Martin, *supra* note 96, at 5.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. See Median Age: United States, The World Factbook, CENTRAL INTELLIGENCE AGENCY, http://www.indexmundi.com/united_states/median_age.html (last visited Apr. 26, 2014).

107. See Martin, *supra* note 96, at 5.

108. See TRAC SYRACUSE UNIV., *All Time Low*, *supra* note 93.

109. *Id.*

110. *Id.*

111. *Id.* TRAC reports that the latest FY 2010 figures reveal that more than nine out of every ten (91%) are now represented by counsel, up from just more than half (52%) twenty-five years ago in FY 1986. *Id.*

the one-year limitation rule.¹¹² Prior to this amendment, one could be in the United States legally or illegally for an unlimited time and apply for asylum. One must now file within one year of entry into the United States.¹¹³

Also, prior to the 1996 amendments, the law provided that one could apply for a work authorization sixty days after filing a claim for asylum. This led to a flood of specious and frivolous asylum claims by noncitizens seeking to work legally in the United States even though they had no genuine fear of persecution. The 1996 amendment extended the authorization period to six months after filing a claim for asylum and made the sanctions stricter for applicants who filed frivolous asylum claims.¹¹⁴

Another way to observe the total magnitude of defensive asylum filings and decisions comes to us from the EOIR. It measures immigration court statistics on a fiscal year basis which are divided into the following categories: “[r]eceived, [g]ranted, [d]enied, [a]bandoned, [w]ithdrawn or some [o]ther” disposition.¹¹⁵ In the fiscal year ending in 2011, the immigration courts received 48,226 asylum cases.¹¹⁶

Immigration judges granted asylum in 11,528 of these cases and denied asylum in 10,573 cases.¹¹⁷ Respondents abandoned 1,577 cases.¹¹⁸ Another 5,920 cases were withdrawn¹¹⁹ and a whopping 10,966 asylum cases were disposed of by other means.¹²⁰ Anecdotal experience in immigration court allows me to offer my opinion that the majority of the 10,966 asylum “[o]ther” cases involved applicants who were granted voluntary departure,¹²¹ the most frequently granted form of discretionary relief granted under the Immigration and Nationality Act.

E. The History of the Immigration Courts

As explained briefly above, in Part II.B and II.C of this article, our immigration courts are the “trial level” administrative bodies responsible for conducting removal hearings—that is, hearings to determine whether noncitizens may remain in the United States. For asylum seekers with attorneys, such hearings are

112. *Immigration Equality Asylum Manual: Section 5. Immigration Basics: The One-Year Filing Deadline*, available at <http://immigrationequality.org/issues/law-library/lgbth-asylum-manual/one-year-deadline/> (last visited Apr. 24, 2014).

113. 8 U.S.C. § 1158(a)(2)(B) (2006).

114. 8 U.S.C. § 1158(d)(6) (2006).

115. See Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *Immigration Courts FY 2011 Asylum Statistics*, U.S. DEP’T OF JUSTICE 7 (Feb. 2012), <http://www.justice.gov/eoir/efoia/FY11AsyStats-Current.pdf>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Voluntary Departure is a form of discretionary relief that allows immigration judges to grant otherwise removable aliens to depart the United States at their own expense. U.S. GOV’T ACCOUNTABILITY OFFICE, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* 16 n.16 (Sept. 25, 2008), <http://www.gao.gov/assets/290/281794.pdf> [hereinafter *U.S. Asylum System*]. They may be barred from reentering the United States for up to ten years and be subjected to civil and criminal penalties if they fail to depart or reenter without proper authorization. *Id.*

conducted like other court hearings, with direct and cross-examination of the asylum seeker, testimony from supporting witnesses where available, and opening and closing statements by both the government and the respondent.¹²² Approximately one-third of asylum seekers in immigration court are not represented by counsel.¹²³ Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply in immigration court.¹²⁴

Prior to 1956, “special inquiry officers,” who were the predecessors to immigration judges, held hearings only as part of a range of immigration duties that included adjudicating deportation proceedings.¹²⁵ These officers were retitled “immigration judges” in 1973.¹²⁶ Until 1983, immigration courts were part of the Immigration and Naturalization Service (INS), which was also responsible for enforcement of immigration laws and housed the INS trial attorneys who opposed asylum claims in court.¹²⁷ In January of 1983, the Executive Office for Immigration Review (EOIR) was created, placing the immigration courts in a separate agency within the U.S. Department of Justice.¹²⁸ In 2003, when the Department of Homeland Security was created, the trial attorneys became part of the new agency, but the immigration courts remained in the Department of Justice.¹²⁹

Asylum cases are assigned to immigration courts according to the asylum seekers’ geographic residence.¹³⁰ The administrators in each immigration court randomly assign cases to immigration judges to distribute the workload evenly among them and without regard to the merits of the case or the strength of defenses to removal that may be asserted by the respondents.¹³¹

F. Appointment of Immigration Judges and Qualifications

Immigration judges are attorneys appointed under Schedule A of the excepted service who are managed by EOIR.¹³² Schedule A is a civil service designation for an appointed career employee as provided in the Code of Federal Regulations.¹³³ Three processes have been used to hire immigration judges: (1) the Attorney General directly appoints the immigration judge, or directs the appointment without a recommendation by EOIR; (2) the immigration judge is appointed after directly responding to an announcement for an immigration judge and submitting the appropriate documentation; or (3) EOIR identifies a need and vacancies are

122. *See Asylum Study, supra* note 16, at 325.

123. *Id.*

124. *Id.*

125. *Id.* at 325 n.48.

126. *Id.*

127. *Id.* at 325.

128. *Asylum Study, supra* note 16, at 325–26.

129. *Id.* at 326.

130. *Id.*

131. *Id.* Unlike in federal court where the merits of certain cases may warrant that the case be assigned to a U.S. magistrate judge or to a senior judge, it has always been assumed in the immigration court system that each and every immigration judge has the knowledge and experience to properly apply his or her discretion in deciding any asylum case assigned.

132. *See U.S. Asylum System, supra* note 121, at 17 n.20.

133. *See id.* at 17 n.21.

filled from EOIR personnel or sitting immigration judges who requested and obtained the vacancy.¹³⁴ Except for direct appointment by the Attorney General, to be considered for the position of immigration judge, an applicant must meet certain minimal qualifications.¹³⁵

The applicant must have a law degree; be duly licensed and authorized to practice law as an attorney under the laws of a state, territory, or the District of Columbia; be a United States citizen and have a minimum of seven years relevant post-bar admission legal experience at the time the application is submitted, with one year experience at the GS-15 level in the federal service.¹³⁶ According to EOIR, the DOJ looks for experience in at least three of the following areas: substantial litigation experience, preferably in a high volume context; knowledge of immigration laws and procedure; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures.¹³⁷

III. THE IMMIGRATION COURTS AND THEIR PROBLEMS

A. Immigration Court Problems

While asylum decisions should always be fair and impartial, this is not always the case given the wide discretion immigration judges are given in deciding such cases, the lack of precedential decisions, and the fact that many of the immigration judges have come from the enforcement arm of the immigration service, and that are all hired by the Attorney General of the United States. These factors necessarily place the institutional role of immigration judges in conflict with expectations of fairness and impartiality in deciding asylum cases. Those who are new to immigration court practice and unacquainted with the workings of immigration court often fail to understand why the immigration courts function so differently than our Article III, Article I, and state courts. In order for a wider world to understand how the immigration courts function and why they should be converted into Article I courts, it is important to reveal and discuss some of the recent problems in the immigration courts.

During the last decade, our immigration courts have wrestled with disparate asylum outcomes, both among the various immigration courts, and within the same immigration courts, an immigration judge hiring scandal between 2004 and 2006 that left many immigration positions vacant; the implementation of a twenty-two point plan to improve the functioning of the immigration court; the backlog of the

134. *Id.* at 17.

135. *Id.* 5 C.F.R section 6.3(a) allows the head of an agency to fill excepted service positions by appointment of persons without civil service eligibility or competitive status. *Id.* at 17 n.21. Schedule A positions are “positions other than those of a confidential or policy determining character” and are considered career positions. The authority to appoint an Immigration Judge is vested in the Attorney General pursuant to 8 U.S.C. § 1101(b)(4). *Id.*

136. *U.S. Asylum System, supra* note 121, at 17 n.23.

137. *Id.*

immigration caseload beginning in 2005; and the perpetual need to standardize immigration court rules and procedures.

1. Disparate Asylum Outcomes

Immigration practitioners, such as myself, often believed that asylum seekers were not receiving proper justice because of the disparities in grants of asylum at the trial level in the various immigration courts. Moreover, there were often disparities in outcomes within the same immigration courts.¹³⁸ The drafters of the *Asylum Study* examined asylum outcomes in immigration courts from 2000 through 2004 for asylum seekers from what they consider Asylum Producing Countries (APC).¹³⁹ “They discovered that even for asylum seekers from countries that produce a relatively high percentage of successful asylees, there are serious disparities among immigration courts in the rates at which they grant asylum to nationals of five of those countries:” Albania, China, Ethiopia, Liberia, and Russia.¹⁴⁰

The drafters of the *Asylum Study* opine that the “explanation for the differences between the courts could be simply cultural”—some courts are more likely to grant asylum, while others may be especially tough on all asylum seekers.¹⁴¹ Also, differences from one region “may be due to differences in the populations of asylum seekers in different geographic locations.”¹⁴² An example may be that immigration judges in the Miami court may be more acquainted with the type of persecution alleged by asylum seekers from Venezuela and Colombia, while the same judge might not be as acquainted with or comfortable deciding persecution cases involving Ethiopians who seldom might appear in that court. Conversely, an immigration judge in the Chicago court may well be more acquainted with the type of persecution suffered by Ethiopian asylum seekers that often appear in that court, as opposed to Venezuelans and Colombians who seldom seek asylum in the Chicago immigration court.

These explanations may be true, but the question remains: is true justice being properly served with respect to asylum seekers, or are they being subjected to “refugee roulette?”

138. The *Asylum Study* examined disparities in outcome by immigration officers in affirmative filing cases, the immigration courts, the circuit courts of appeal, and the Board of Immigration Appeal. See *Asylum Study*, *supra* note 16. This article focuses only on the disparities among and within the immigration courts.

139. Asylum-producing countries in the *Asylum Study* were countries that had at least 5,000 asylum claims before the immigration courts in FY 2004, and a national grant rate of at least thirty percent. See *Asylum Study*, *supra* note 16, at 312. Asylum officer and immigration court judges have reached a consensus that many of the applicants from these countries are bona fide refugees. *Id.* The fifteen countries meeting these criteria were: Albania, Armenia, Cameroon, China, Colombia, Ethiopia, Guinea, Haiti, India, Liberia, Mauritania, Pakistan, Russia, Togo, and Venezuela. *Id.*

140. *Asylum Study*, *supra* note 16, at 328.

141. *Id.* at 331.

142. *Id.*

2. Possible Causes of Disparities Among Immigration Judges

Judging can be difficult in any forum. It is especially difficult with respect to asylum claims because the required persecution must have taken place in a foreign country and may have occurred a great while ago with few witnesses and little documentation. Furthermore, immigration judges are required to make credibility determinations in each case, and the applicants' credibility may be suspect.

The *Asylum Study* investigated grant rate disparities within the same immigration courts by looking at the eight largest courts by volume¹⁴³ and observing only judges who had decided 100 or more cases.¹⁴⁴ Only in the case of these judges did the study analyze discrepancies in grant rates for asylum seekers from APCs. "With the national APC mean of forty percent as a starting point, [they] determined for each court how many judges' APC grant rates were more than fifty percent deviant from the mean."¹⁴⁵

"The statistics revealed that the five largest courts [had] consistent outliers."¹⁴⁶ "From one-third to three-quarters of the judges on these courts grant asylum in [APC] cases at rates more than [fifty percent] greater or more than [fifty percent] less than the national average."¹⁴⁷ The authors of the study arrived at the conclusion that discrepancies in the grant rates between judges in the same court may be because of different geographic populations of asylum seekers in different regions.¹⁴⁸ It may also be that certain asylum seekers may come from certain ethnic groups that have similarly viable asylum claims.¹⁴⁹ By way of example, Ethiopia has three large ethnic groups, the Amhara, the Tigray, and the Oromo. Members of each ethnic group might seek asylum in one of our immigration courts. Much is known about Ethiopians in many immigration courts. The Amhara people have traditionally been the ruling class of the country for 2,000 years. An Amhara seeking asylum in the United States based on persecution because of race, religion,

143. *Id.* at 332. The eight courts are: the Baltimore, Chicago, Los Angeles, Miami, Newark, New York, Orlando, and San Francisco immigration courts. *Id.*

144. *Id.*

145. *Id.* at 332–33.

146. *Id.* at 333.

147. *Asylum Study*, *supra* note 16, at 333. The authors of the study explain,

The fact that these judges' decisions are not necessarily inaccurate simply because their grant rates are discrepant with the nation average. It could be, for example, that a judge with an unusually high grant rate is deciding cases as fairly as possible, and that the average grant rate is inaccurate because a plethora of low granting judges are not deciding cases as fairly as the high granting outlier judge To be clear we are not advocating that judges be disciplined or otherwise sanctioned based solely on discrepant grant rates, but instead that the data may be a jumping off points for a more thorough examination of performance and professionalism in the courtroom.

Id. n.65.

148. *Id.*

149. *Id.* For example, Ethiopians may all have better claims for asylum because of the upheavals and changes in government in that country over the last thirty years. Likewise, asylum seekers from a country such as Sudan, where northern Sudanese have perpetrated atrocities of southern Sudanese over the last thirty years, persons from south Sudan would probably have more viable claims for asylum than those from the north of the country.

nationality, particular social group, or political opinion would more often than not have a more difficult time of proving such persecution. Whereas, an Oromo may well have a better claim for persecution based on one of the five grounds because they have traditionally been a disfavored ethnic group whom many in the country refer to as the “slave” class. Many Oromos are Muslim in a majority Christian country. Many Oromos disapprove of the present government in Ethiopia and many of them have sought secession to form their own country. In essence, Oromos might have similarly viable asylum claims that would make them better candidates for asylum than applicants of the Amhara or Tigray ethnic groups.

As a result of finding such discrepancies within the same court, the authors of the *Asylum Study* “performed a descriptive analysis ‘using cross-tabulations’ of decisions of the judges during” the time-frame of the study.¹⁵⁰ They “examined a number of variables to determine their impact on judges’ grant rates: whether the asylum seeker was represented [by counsel], the number of dependents the asylum seeker had, the gender of the judge, and the prior work experience of the judge.”¹⁵¹ The result of their analysis revealed that the single most important factor affecting the outcome of an asylum seeker’s case was whether she was represented.¹⁵² “Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times higher than the 16.3% grant rate for those without legal counsel.”¹⁵³ “The number of dependents that an asylum seeker brought with her to the United States played a . . . large role in increasing the chance of an asylum grant.”¹⁵⁴ Their analysis found that an asylum seeker with no dependents has a 42.3% grant rate,¹⁵⁵ and having one dependent increases the grant rate to 48.2%.¹⁵⁶ The authors opine it could be that asylum seekers who bring children in addition to a spouse appear more credible; in other cases, they opine some immigration judges are more sympathetic to asylum seekers who have a family to protect.¹⁵⁷

The authors found “that the gender of the judge had a significant impact on the likelihood that asylum would be granted.”¹⁵⁸ “Female immigration judges granted asylum at a rate of 53.8%, while male judges granted asylum at a rate of 37.3%.”¹⁵⁹ The statistical calculations show that an asylum seeker whose case is assigned to a female judge had a forty-four percent better chance of prevailing than if his or her case was assigned to a male judge.¹⁶⁰ This may be significant in that there are far fewer female immigration judges than male judges; approximately thirty-five percent of the 263 immigration judges are women.¹⁶¹

150. *Id.*

151. *Id.*

152. *Id.* at 340.

153. *Asylum Study*, *supra* note 16, at 340.

154. *Id.* at 341.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 342.

159. *Asylum Study*, *supra* note 16 at 342.

160. *Id.*

161. See *EOIR Immigration Court Listings*, U.S. Dep’t of Justice, www.justice.gov/eoir/sibpages/ICadr.htm (last visited Dec. 20, 2012). At the bottom of this web page are listed all of the immigration courts and the names

This may be because the majority of immigration judges have been involved with immigration enforcement work before becoming immigration judges. There have always been fewer women who have worked in immigration enforcement.¹⁶² Since the women who do become judges have usually not been involved in immigration enforcement, it is perceived that they are more prone to give an asylum applicant a more fair and impartial hearing. A practitioner who draws a female immigration judge in any asylum case may understand that statistically he or she has a better chance of prevailing and gaining a grant of asylum than with a male immigration judge.

It has been my anecdotal experience and observation that during the era of the old INS, women were either not interested in or were not encouraged to partake in the law enforcement work that entailed patrolling the border, deporting people, or interviewing, inspecting, and screening noncitizens at our ports of entry. It is not difficult for one to believe that many people who were involved with INS immigration enforcement work developed a mindset against asylum seekers. It begins in training wherein immigration officers and State Department consular officers are taught that many people wish to come to the United States for many reasons, and it is easier to say “no” to their visa, their entry, or their request for asylum if there is any doubt concerning their credibility, their documentation, or their motives for entry. I know this because I received the same such training before taking up my duties as head of the Nonimmigrant Visa Section at the United States Consulate in Hamburg, Germany.¹⁶³ It is a type of training that fosters a mindset of erring on the side of saying “no” much more often than saying “yes.” It is what I call a “law enforcement mindset.” Trainees are advised starting their first day that they will seldom be chastised for saying “no” to applicants about whom they may have a doubt, but if they issue a visa to a person who later turns out to be a terrorist or assassin, their job may well be jeopardized. I know well from our conversations that immigration officers with whom I have worked received the very same message in their training. It is difficult for me not to believe that many of those immigration officers who became immigration judges still operated with this “law enforcement mindset.” It is just easier to say “no” if one has a doubt. At the end of immigration officer training and State Department training, each officer is provided a document which confers on them executive power to make immigration and consular decisions as to who may be issued a visa for entry to our country; decisions as to who may be allowed to enter the country; and decisions as to who may be deported from the country. This document confers absolute executive officer power to make such immigration decisions without oversight by,

of each judge on each court. A count of the names reveals there are ninety-four female judges out of a total of 263 immigration judges.

162. As stated in note 25, this is a personal observation gained through the author’s earlier career experience as a U.S. State Department Foreign Service officer who sometimes worked closely with immigration enforcement officers. Most of the enforcement officers were men. Some went on to be immigration judges.

163. The author was the head of the Nonimmigrant Visa Section of the U.S. Consulate in Hamburg, Germany for 1986, 1987, and 1988, during which he oversaw the issuance of 330,000 U.S. nonimmigrant visas to citizens from approximately eighty different countries.

or appeal to, the courts of the United States.¹⁶⁴ In the U.S. State Department, the document that confers such executive power on consular officers is called an “exequatur.”¹⁶⁵ For some, this “law enforcement mindset” of being able to say “no” to any applicant at the executive level without judicial oversight is quite heady and, I believe, it carries over to the conduct and decision making of many former law enforcement officials who have become immigration judges.

Finally, in this regard, further examination by the authors of the *Asylum Study* found prior work experience by male and female judges was revealing. Among other things, the authors “found that prior work experience of all types had a significant impact on a judge’s grant rate.”¹⁶⁶ “Judges with prior government experience (excluding work for INS or DHS) granted asylum at a rate of 39.6%, contrasted with a grant rate of 47.1% for those with no prior government experience.”¹⁶⁷

3. The EOIR Hiring Scandal

In the early 2000s the case-loads of the country’s immigration courts were rising while the number of immigration judges was simultaneously declining.¹⁶⁸ The EOIR asked Congress for additional funding to hire more immigration judges.¹⁶⁹ However, the reputation of the EOIR was tarnished by the discovery of an illegal political hiring scandal that took place from Spring 2004 until December 2006.¹⁷⁰ “The Department of Justice’s Office of the Inspector General released a report on July 28, 2008 confirming that the [Bush Administration Justice Department] used an illegal [selection] process to exclusively appoint immigration judges who had been screened for their political or ideological affiliations during that time.”¹⁷¹ The report maintained, in relevant part that

[o]ne of the results of this tightly controlled selection process [by DOJ political appointees] was that it left numerous [immigration judge] vacancies unfilled for long periods of time when they could not find enough candidates, even when EOIR pleaded for more judges and told the [Office of the Attorney General] repeatedly that the EOIR’s mission was being compromised by the shortage of [immigration judges.]¹⁷²

164. This power of executive delegation in immigration matters was first recognized in the case of *Yamataya v. Fisher*, 189 U.S. 86, 99–100 (1903).

165. This author’s exequatur was issued on July 1985 and was signed by then President Ronald Reagan and Secretary of State George P. Shultz.

166. *Asylum Study*, *supra* note 16, at 345.

167. *Id.*

168. TRAC SYRACUSE UNIV., *Improving the Immigration Courts: Effort to Hire More Judges Falls Short* (July 28, 2008), <http://trac.syr.edu/immigration/reports/189/>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* The report found

“The report also [revealed] that the appointees frequently had little or no immigration law experience.”¹⁷³

Finally, an analysis of the asylum decisions by the sixteen judges who were appointed after consideration of their political credentials and who had decided at least 100 matters found that, on average, they were more likely to rule against asylum seekers than their colleagues on the same court who had been appointed according to the Justice Department’s politically neutral rule.¹⁷⁴

“The report covering the selection of immigration judges primarily blamed Kyle Sampson, a former top aide to the Attorney General, and two former White House liaisons to the Justice Department, Monica M. Goodling and Jan Williams,” for taking political affiliation into account when hiring immigration judges.¹⁷⁵ “When vetting applicants . . . Ms. Goodling asked them questions about their political beliefs and researched their campaign contributions.”¹⁷⁶ “She also conducted [i]nternet searches of their names and words like ‘asylum,’ ‘immigrant,’ and ‘border,’ as well as partisan terms, like abortion, Iraq, gay, and the names of political figures, to determine their views.”¹⁷⁷

Ms. Goodling “solicited and received résumés for [immigration judges] and BIA candidates from the White House, from Republican members of Congress, the Republican National Lawyers Association, the Federalist Society, and from others with Republican Party affiliations.”¹⁷⁸ There was “no evidence that she solicited candidates from any sources she thought had Democratic affiliations.”¹⁷⁹ “Evidence demonstrated that [Ms.] Goodling violated department policy and federal law, and committed misconduct, by considering political or ideological affiliations in the appointment of [immigration judges] and BIA members.”¹⁸⁰ “Goodling admitted in her congressional testimony that she ‘took political consideration into account’ in immigration judge hiring.”¹⁸¹ “She [also] stated that Sampson had told her that

[t]hat a hiring freeze went into effect in January, 2007, after DOJ civil division attorneys investigated the immigration hiring process, and a new hiring process was implemented on April 2, 2007. The report also quotes EOIR Director Kevin Ohlson as saying that ‘candidates have been selected, but not yet appointed, for [twenty-one] of the remaining [twenty-seven] vacancies.’

Id.

173. TRAC SYRACUSE UNIV., *Bush Administration Plan to Improve Immigration Courts Lags* (Sept. 8, 2008), <http://trac.syr.edu/immigration/reports/194/>.

174. *Id.*

175. Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES, Aug. 23, 2008, at A17, available at www.nytimes.com/2008/08/24/washington/24judges.html?.

176. *Id.*

177. *Id.*

178. OFFICE OF PROF’L RESPONSIBILITY, OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL* 121 (July 28, 2008), available at <http://www.justice.gov/opr/goodling072408.pdf>.

179. *Id.*

180. *Id.*

181. *Id.*

[immigration judge] hiring was not subject to civil service laws, and that she ‘assumed’ those laws did not apply to BIA member hiring.”¹⁸² The Department of Justice report suggests that the patronage-style selection for immigration judges was illegal.¹⁸³

The immigration judge hiring scandal was unfortunate. It is my sincere hope that politically neutral guidelines and a new crop of immigration judges will help restore the integrity of the immigration court judiciary. The scandal of hiring immigration judges for their political position or political belief does disservice to the idea of a court that is to be fair and impartial when making decisions concerning applicants who are fleeing persecution. Such judges should be above reproach.

4. The Attorney General’s 2006 Plan for Reform

In the wake of the hiring scandal and criticism from several federal circuit court rulings that sharply criticized the immigration courts, former Attorney General Alberto Gonzalez issued a twenty-two point plan for improving the operation of the immigration courts.¹⁸⁴ It is not the objective of this article to delve deeply into the implementation of the entire reform effort, but the article will briefly examine some of the positive changes that have emerged from its implementation and discuss what else could be done.¹⁸⁵

On June 5, 2009, the EOIR produced a Fact Sheet detailing measures to improve the EOIR.¹⁸⁶ According to the 2009 Fact Sheet, fifteen of the twenty-two proposed reforms had been enacted. These included: obtaining funding to hire additional immigration judges and field supervisors for immigration courts;¹⁸⁷ drafting an immigration examination for all new judges;¹⁸⁸ installing digital

182. *Id.* at 122.

183. *See* Savage, *supra* note 175.

184. Press Release, DEP’T OF JUSTICE, Attorney General Alberto R. Gonzalez Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at <http://www.justice.gov/opr/goodling072408.pdf>.

185. A summary of the reforms by number may be found at, TRAC SYRACUSE UNIV., *Supporting Details: Implementation of the 22 Improvement Measures* (Sept. 8, 2008), <http://trac.syr.edu/immigration/reports/194/details.html>.

The Proposed Reforms by Number: (1) Performance Evaluations for IJ’s; (2) New IJ Judge Evaluations; (3) Immigration Law Exam for new IJ’s; (4) Improved training for Judges; (5) Improved training for EOIR staff; (6) Improved Reference Material; (7) Detecting Poor Conduct/Quality; (8) Asylum Rate Disparities; (9) Deploying Supervisors to the Field; (10) Code of Conduct; (11) Complaint Procedures; (12) Streamlining Reforms; (13) Practice Manual; (14) Sanction Authority for IJ’s; (15) Sanction Authority for BIA; (16) Additional Judges and Staff; (17) Increase Size of BIA; (18) Digital Recording System; (19) Improved Transcription; (20) Improved Interpreters; (21) Fraud and Abuse; and (22) Pro Bono Programs.

Id.

186. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, *Fact Sheet: EOIR’s Improvement Measures—Update* (June 5, 2009), available at <http://www.justice.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf>.

187. *Id.* at 4. This included 5 million dollars in FY 2009 to hire more judges and field supervisors. *Id.*

188. *Id.* at 1.

recording services in most, but not all, the immigration courtrooms;¹⁸⁹ and producing an online practice manual for the immigration court.¹⁹⁰ The reforms also included training for new judges and additional training for current judges.¹⁹¹ As of July 2012, no sanctions have been granted to the immigration judges or the judges of the BIA to hold attorneys or parties in contempt.¹⁹²

The training plans consisted of expanded training for new immigration judges on legal and procedural issues, a mentoring program for new judges, and periodic training on management.¹⁹³ For the first time there was a joint legal conference in 2009 for immigration judges and BIA members.¹⁹⁴

The Code of Conduct had been implemented in 2011 under the Obama Administration as well as the completion of installation of digital audio recording systems in all of the immigration courtrooms.¹⁹⁵

There is statistical evidence that the reforms have helped. “The central finding of [a 2009 TRAC] report [contends] that judge-by-judge asylum disparities in the Immigration Courts are down.”¹⁹⁶ Court data shows that disparity rates have declined in ten of fifteen immigration courts that decide the bulk of all asylum matters.¹⁹⁷ In New York, the disparity rate among judges in asylum cases has dropped by a quarter, and in Miami the range among judges in their denial rates dropped almost two-thirds from their previous levels.¹⁹⁸ This indicates that justice is being better served for asylum seekers in these busy immigration courts.

If disparity rates have declined in ten of the fifteen immigration courts that hear the bulk of asylum claims, this is real progress toward a fairer and more impartial system. Training for new immigration judges and the judicial mentoring programs have helped many new judges take their cases more seriously. It is my understanding, from visiting the two immigration courts in Summer 2012,¹⁹⁹ that new judges are now allowed to visit other immigration courts and to sit in on asylum cases to observe how they are adjudicated—a form of judicial education

189. *Id.* at 4.

190. *Id.* at 3.

191. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, *supra* note 186, at 1.

192. *Infra* note 197. Telecom with Kathryn Mattingly in the office of Legislative and Public Affairs of the EOIR.

193. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, *supra* note 186, at 1.

194. *Id.*

195. Interview with Kathryn Mattingly, Office of Legislative Public Affairs of the EOIR (June 29, 2012). The author spoke by telephone with Kathryn Mattingly who was not able to provide any further update to the June 5, 2009 Fact Sheet. However, on August 1, 2012, Ms. Mattingly emailed the author with follow up information which provided that in 2010 the EOIR completed improvement measure 18, Digital Audio Recording for all immigration courtrooms, and in 2011 measure 10, the Code of Conduct for Immigration Judges was completed (a copy of the Press Release concerning the Digital Audio Recording and a copy of the Code of Conduct is on file with the author). Ms. Mattingly further responded that the following improvement measures have not been implemented: measure 12 (streamlining of reforms), measure 14 (sanction authority for immigration judges), and measure 15 (sanction authority for BIA judges).

196. TRAC SYRACUSE UNIV., *Latest Data from Immigration Court Show Decline in Asylum Disparity* (Jun. 22, 2009), <http://trac.syr.edu/immigration/reports/209/>.

197. *Id.*

198. *Id.*

199. The author visited the Orlando and San Francisco immigration courts during the summer of 2012 and had the opportunity to speak with immigration judges concerning some of the training new immigration judges are now receiving.

which did not occur before implementation of the twenty-two point plan. However, this drop in disparity rates may well also be caused by better lawyering. We know that an applicant has a better chance of succeeding if represented by counsel, so the implementation of the reforms of the twenty-two point plan may not necessarily be totally responsible for the drop in asylum disparity rates.²⁰⁰

5. The Immigration Court Backlog

Our immigration courts are backlogged, which denies swift justice for asylum seekers. There is a backlog of approximately 300,000 cases awaiting adjudication.²⁰¹ “The growing immigration court backlog is not a recent problem . . . but has been steadily growing since at least 2005.”²⁰² One important cause for this problem was the Bush Administration’s failure to “fill vacant and newly-funded Immigration Judge positions” during the period of the political hiring scandal.²⁰³ “Government filings seeking deportation orders increased between FY 2001 and FY 2008 by [thirty] percent while the number of immigration judges on the bench saw little increase and for some periods . . . fell.”²⁰⁴ “Subsequent hiring . . . to fill these vacancies during the Obama [Administration] has not been sufficient to handle [all] the cases that await attention.”²⁰⁵

Although there is still a backlog in the immigration courts, the Obama Administration instituted two initiatives to help clear the backlog. During the first quarter of 2012, “immigration courts issued 2,429 fewer deportation orders than in the” fourth quarter of 2011.²⁰⁶ Thus, the proportion of cases resulting in an order of deportation fell slightly to 64.1%.²⁰⁷ In more than a third of all cases, the individual was allowed to stay, at least temporarily, in the United States.²⁰⁸

This historic drop in deportations began in August of 2011 when the Obama Administration initiated a review of its 300,000 court-case backlog.²⁰⁹ “The stated goal of the Immigration and Customs Enforcement (ICE) review was to better prioritize and reduce the backup of pending matters that had led to lengthy delays in [i]mmigration [c]ourt proceedings of noncitizens [it] wanted to deport.”²¹⁰ “To

200. See *Asylum Study*, *supra* note 16, at 340.

201. See TRAC SYRACUSE UNIV., *Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases*, (Apr. 24, 2012), <http://trac.syr.edu/immigration/reports/279/>; see also TRAC SYRACUSE UNIV., *Backlog in Immigration Cases Continue to Climb*, (Mar. 11, 2011), <http://trac.syr.edu/immigration/reports/225/>; see also TRAC SYRACUSE UNIV., *Immigration Case Backlog Still Continues To Grow*, (Aug. 12, 2010), <http://trac.syr.edu/immigration/reports/235/>; see also TRAC SYRACUSE UNIV., *Immigration Case Backlog Still Growing*, (May 24, 2010), <http://trac.syr.edu/immigration/reports/232/>.

202. TRAC SYRACUSE UNIV., *Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases*, *supra* note 201, at 3.

203. *Id.*

204. *Id.* at 3–4.

205. *Id.* at 4.

206. *Id.*

207. *Id.*

208. TRAC SYRACUSE UNIV., *Historic Drop in Deportation Orders Continues as Immigration Court Backlog Increases*, *supra* note 201, at 4.

209. *Id.*

210. *Id.*

achieve this longer-term objective, ICE attorneys assisted by [court clerks, law clerks, and paralegals] had been redirected in a [dramatic] effort—part of the prosecution discretion initiative—to review all 300,000 cases to prioritize which to focus on.”²¹¹ A consequent drop in overall case dispositions occurred while these reviews were being carried out.²¹² As a result, overall court dispositions during the first quarter of 2012 fell to 50,489—the lowest level since 2002.²¹³

Another Obama Administration initiative has resulted in fewer deportations. On June 15, 2012, the President announced a policy to grant young undocumented noncitizens a chance to work and study in the United States without fear of deportation.²¹⁴ Under the new policy, ICE would stop attempting to deport these undocumented noncitizens “who are under [thirty years of age], came to the United States as children, and are otherwise law abiding.”²¹⁵ It has been estimated that “[a]s many as 800,000 [such] undocumented residents [now] in the United States could qualify for this new legal status.”²¹⁶

6. Need for Standardizing Immigration Court Rules

The final problem this article will explore is the need for standardized rules and procedures for the immigration courts. As of the time of writing, there are now fifty-nine immigration courts spread across twenty-seven states of the United States, Puerto Rico, and in the North Mariana Islands with a total of 263 sitting immigration judges.²¹⁷ However, there are no set or standardized rules of procedure for the immigration courts.²¹⁸ One scholar has commented on the twenty-two point plan for improvement of the immigration courts contending, “[t]he proposed reforms, while greatly needed, fall short because they fail to include one of the basic tenants of our American court system – rules [sic].”²¹⁹ It is hard to play by them, invoke them, or enforce them if there are none.”²²⁰ Some basic immigration court procedures are set forth in the INA and the Code of Federal Regulations.²²¹

211. *Id.*

212. *Id.*

213. *Id.*

214. S.A. Miller, *President Obama Moves to Allow Young Illegal Immigrants to Work and Study in the US*, July 16, 2012 at 5, available at [www. http://nypost.com/2012/06/16/president-obama-moves-to-allow-young-illegal-immigrants-to-work-and-study-in-the-us](http://nypost.com/2012/06/16/president-obama-moves-to-allow-young-illegal-immigrants-to-work-and-study-in-the-us).

215. *Id.*

216. *Id.* The new policy provides:
Illegal immigrants qualify if they: [c]ame to the US before age [sixteen]; [a]re under [thirty] years old; [h]ave continuously resided in the US for at least five years preceding the new policy; [a]re in school, graduated from high school, earned a GED or were honorably discharged from the US Coast Guard or Armed Forces; [a]nd [h]ave not been convicted of a felony, a significant misdemeanor or multiple misdemeanors or do not pose a threat to national security or public safety. Qualifying illegals would be eligible for: [i]ndefinite deferral of removal from the US; [a] two-year work permit; and [n]o limit on the number of renewals for work permits.

Id.

217. See *EOIR Immigration Court Listings*, *supra* note 161.

218. See Regina Germain, *Putting the “Form” in Immigration Court Reform*, 84 DENV. U. L. REV. 1145 (2006–07).

219. *Id.*

220. *Id.*

221. Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 91 (2008).

Yet, in everyday practice in different immigration courts one will find locally accepted, but unpublished, procedures that are inconsistent with respect to when exhibits must be filed,²²² marking exhibits, and how much hearsay will be allowed at an asylum hearing.²²³ Each immigration court seems to have its own set of entrenched customary practices.²²⁴

In 2008, the EOIR published a comprehensive online *Immigration Court Practice Manual*.²²⁵ The manual was published without any notice or period for public comment.²²⁶ A period for public comment would have allowed the American Immigration Lawyers Association and individual immigration practitioners to send in comments that might have been helpful in providing suggestions, that may have helped to ensure more fairness and impartiality with respect to adjudication of asylum claims. The *Manual* does provide information on such court procedures as; filing documents with the court, master calendar proceedings, motion practice, bond and detention, and attorney discipline.²²⁷ However, the *Manual* does not have information concerning evidentiary rules for the court and fails to encourage pre-hearing preparation, which might narrow the available evidence in asylum trials.²²⁸ Standardized rules of evidence for the immigration court would greatly enhance their efficiency.²²⁹

IV. ARTICLE I COURT PROPOSALS AND BILLS

Again, no court is without some problems. Over the last thirty years there have been a number of suggestions as to how to remedy the shortcomings of the immigration courts as they are now constituted. The first suggestion judges, scholars, and practitioners have made is to take the immigration courts out of the Department of Justice and make them an independent court.²³⁰ The immigration courts, situated as they are within the Executive Branch, seem to present a blatant conflict of interest. The EOIR is part of a law enforcement agency that oversees the

222. *Id.*

223. These observations are based on the author's experience in trying asylum cases over a ten-year period in the Baltimore and Arlington immigration courts.

224. *See* Caplow, *supra* note 221, at 92.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 87. Rules of Evidence in immigration courts:

Fed. R. Evid. 1101. The rules of evidence are relaxed in immigration hearings. 8 C.F.R. § 1240.7 (2008) ("The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any person during any investigation, examination, hearing, or trial.") *See also*, Matter of Wadad, 19 I. & N. Dec. 182, 188 (BIA 1984). Hearsay is admissible if it is probative. *See* Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003); Morgano v. Pilliod, 229 F.2d 217, 219 (7th Cir. 1962, cert. denied[sic] 370 U.S. 924 (1962) ("It is . . . well settled that the rules of evidence covering judicial proceedings are not applicable to administrative deportation hearings.")).

Caplow, *supra* note 221, at 87.

230. *See Asylum Study*, *supra* note 16, at 387.

adjudication of cases of possible immigration law breakers. It is difficult to avoid the perception that immigration judges can be partial. Because immigration judges are chosen by the Attorney General, and serve at his or her pleasure, they do not have the independence to truly see that due process and meaningful justice are served.

Unlike Article III judges, immigration court judges do not have life-time tenure.²³¹ As a matter of fact, there is no term of office for an immigration judge.²³² They serve at the pleasure of the Attorney General and may be removed from the bench by the Attorney General for any reason whatsoever.²³³ My anecdotal experience with the immigration judges has led me to understand that most of the judges come from the enforcement side of the immigration service or from other positions within the Department of Justice where they may have served between ten and twenty years. Often their appointment as an immigration judge is the crowning achievement of their career where they may serve another ten to twenty years and then retire.²³⁴

The next most cited suggestion for immigration reform is to transform the immigration courts into an Article I Legislative Court.²³⁵ “[T]he Supreme Court has recognized Congress’ power to create ‘legislative courts’ under Article I of the [U.S.] Constitution.”²³⁶ Under Article I, Section 8, Clause 9 of the Constitution, Congress may “constitute Tribunals inferior to the Supreme Court.”²³⁷ “Article I Courts may be staffed with judges who lack life tenure because they do not exercise ‘core’ judicial functions for which the federal Constitution requires that judges be insulated from politics.”²³⁸ The Court of Veteran’s Appeals, the Court of Federal Claims, and the U.S. Tax Court are Article I Courts.²³⁹ Often these courts handle technical and specialty matters beyond the ken of expertise of other practitioners and judges. Although the judges on these courts lack life-time tenure, such courts provide a modicum of independence and transparency that is missing from the EOIR based immigration court system.

Maurice A. Roberts’s²⁴⁰ thesis states that decision-making under the immigration laws was faulty due, in part, to the frequently conflicting roles of the

231. *See id.*

232. *Id.*

233. *Id.* at 386.

234. Again, this is a personal observation from a former Foreign Service Officer who has worked with immigration enforcement officers who went on to become immigration judges.

235. *See Asylum Study*, *supra* note 16, at 386; *See also* Caplow, *supra* note 221, at 87; and *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 452 (2007).

236. David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101, 103 (2005).

237. *Id.* at 104.

238. *Id.* at 105.

239. *Id.* at 146.

240. Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980–1981). At the time of writing the article, Mr. Roberts had retired as Chairman of the Board of Immigration Appeals. *Id.* He served as Chairman of the BIA from 1968 through 1974. *Id.* Prior to his chairmanship, he served as Head of the Immigration Litigation Unit, Criminal Division, U.S. Department of Justice from 1965 to 1968. *Id.*

INS and the immigration court system.²⁴¹ He argued that the adjudication of deportation proceedings should be removed from INS, so that the adjudicators could be situated in an independent setting where they could decide “cases fairly and promptly, free from dependence” or influence from enforcement officials.²⁴² He proposed that both the BIA and the immigration courts be transferred to a new specialized Article I Court.²⁴³

Roberts’s proposed law is simple, consisting of a three-and-one-half-page appendix to his article containing ten succinct sections.²⁴⁴ Section one provides that the court would be comprised of an appellate division with seven judges and a trial division with fifty judges.²⁴⁵ There would be chief judges for both the appellate division and trial division to be appointed by the President, “with the advice and consent of the Senate, for terms of fifteen years.”²⁴⁶ The judges of the appellate and the trial divisions would also be chosen by the President, “with the advice and consent of the Senate,” and would also serve fifteen-year terms.²⁴⁷

Sections two and three, respectively, mandate compensation for judges and procedures for removing judges for incompetency, misconduct, or neglect of duty.²⁴⁸ Section four mandates that the appellate division “promulgate rules of court governing practice and procedure” in both the appellate division and in the trial divisions.²⁴⁹ This would solve the problem of lack of standard procedures in the immigration courts as they now exist. Section five mandates appellate division administration; Section six mandates appellate division jurisdiction; Sections seven and eight mandate trial division administration and trial division jurisdiction respectively.²⁵⁰ Section nine is a “savings” provision.²⁵¹ This means, that if one section of the court proposal is invalidated or found to be unconstitutional, then the remainder of the court would remain viable. Section ten discusses and defines “Finality” of decisions in the two courts.²⁵² In this context a final decision of the appellate division would be binding on all judges of the trial division and on all officers of the United States.²⁵³ Such “finality” would also be subject to review only by the “Supreme Court of the United States on a petition for certiorari.”²⁵⁴ Unfortunately, the Roberts proposal did not provide that the Article I immigration judges be granted the authority to sanction lawyers or respondents for contempt of court. All judges of every court should be granted contempt power to ensure

241. *See id.* at 2.

242. *Id.* at 11–12.

243. Roberts, *supra* note 240, at 18.

244. *See id.* at 22–25.

245. *Id.* at 21.

246. *Id.*

247. *Id.*

248. *Id.*

249. Roberts, *supra* note 240, at 21.

250. *Id.* at 22–23.

251. *Id.* at 23.

252. *Id.* at 24. This section provides that, “a final decision of the appellate decision shall be binding on all judges of the trial division and on officers of the United States, and shall be subject to further review only by the Supreme Court of the United States on petition for certiorari.” *Id.*

253. *Id.*

254. Roberts, *supra* note 240, at 24.

efficient operation of the court and prevent frivolous or disruptive behavior by lawyers or applicants.

Again, the Roberts proposal is simple but anachronistic. This proposal was written just before the Refugee Act of 1980 took effect.²⁵⁵ It was this 1980 Act that made it necessary for the then existing INS to start holding asylum trials.²⁵⁶ There was then an increase in immigration court hearings once respondents were allowed to seek asylum from persecution. Today the idea of an immigration trial division with only fifty judges is unimaginably small—but this was a good start. Some thirty years later we have 263 immigration judges sitting in fifty-nine trial division courts.²⁵⁷ The proposal, if passed by Congress, would have made the immigration courts more independent and, perhaps, fairer. Alas, it seems the proposal gained no traction and went nowhere.

In the late 1990s there were actually three bills put forth in Congress by Representative Bill McCollum to establish the United States Immigration Court as an Article I Court.²⁵⁸ All three of the bills were similar and each was referred to the House Committee on the Judiciary. Each of the bills died in committee and never became law.²⁵⁹ Nevertheless, we will analyze the basics of the 1998 bill, which represents what Representative McCollum proposed in each bill for an Article I Immigration Court.

In 1998, in the 105th Congress, the bill H.R. 4107 was drafted and referred to the Committee on the Judiciary.²⁶⁰ The bill would have established an Article I Immigration Court consisting of an immigration trial court and an appellate division.²⁶¹ The appellate court would consist of a chief judge and eight other judges appointed by the President “with advice and consent of the Senate.”²⁶² They would serve terms of fifteen years.²⁶³ The appellate judges would sit and hear cases as a panel of three judges to decide appeals.²⁶⁴

The trial division would “be composed of a chief immigration trial judge and other immigration trial judges, appointed by the Chief Immigration Appeals

255. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

256. *Id.*

257. *EOIR Immigration Court Listings*, *supra* note 161.

258. To be more accurate, parts of the same bill were put forth three times. In 1996, Representative McCollum put forth H.R. 4258. This bill sought to make the immigration courts an Article I court, but it also sought to amend asylum procedures under the INA. The bill was sent to the Judiciary Committee and died in the committee. In 1998 Representative McCollum put forth H.R. 4107, a bill to create the immigration court as an Article I court which was very similar to his 1996, H.R. 4258 with the asylum provisions removed. H.R. 4107 was referred to the Judiciary Committee and died in committee. In 1999, Representative McCollum filed bill number H.R. 185 put forth as a proposal to make the immigration courts an Article I Court. This bill was essentially the same as H.R. 4107 that had been filed a year earlier. This last bill, H.R. 185, was referred to the Judiciary Committee only to again die in committee.

259. United States Immigration Court Act of 1996, H.R. 4258, 104th Cong., GOVTRACK.US, <http://www.govtrack.us/congress/bills/104/hr4258>; United States Immigration Court Act of 1998, H.R. 4107, 105th Cong., GOVTRACK.US, <http://www.govtrack.us/congress/bills/105/hr4107>; United States Immigration Court Act of 1999, H.R. 185, 106th Cong., GOVTRACK.US, <http://www.govtrack.us/congress/bills/106/hr185>.

260. United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998).

261. *Id.* at 2.

262. *Id.* at 3.

263. *Id.*

264. *Id.* at 4.

Judges.²⁶⁵ The bill further provided that all immigration judges serving at the time of enactment of the bill would be appointed Article I Judges by the Chief Immigration Judge.²⁶⁶ Such trial judges would serve fifteen-year terms and could be removed for cause, including “incompetency, misconduct, or neglect of duty.”²⁶⁷ Judges of each division of the court would have the power to punish lawyers or respondents for contempt of court, either by fine or imprisonment.²⁶⁸ The McCollum bill makes it easier than the Roberts proposal to remove judges from the immigration court, but the bill would confer contempt power on the trial and appellate judges. This would allow judges to sanction disruptive or frivolous behavior by lawyers and applicants.

The bill clearly articulated the authority of the trial and appellate judges.²⁶⁹ Section 115 provides that “[t]he appellate division shall promulgate rules of court . . . governing . . . the appellate division and trial division.”²⁷⁰ The section provides further that, “only such selected provisions of the Federal Rules of Evidence and the Federal Rules of Civil Procedure as the appellate division deems appropriate for inclusion in the rules of the Immigration Court shall apply to proceedings in Immigration Court.”²⁷¹ The bill also spells out rules for retirement.²⁷² The bill also limits judicial appeals.²⁷³ The current system allows a respondent who loses an appeal in the BIA to appeal the decision to the federal circuit court in the district where the immigration court is situated. Representative McCollum’s H.R. 4107 would limit appeals of such cases only to the Court of Appeals for the Federal Circuit that sits in Washington, D.C.²⁷⁴ These are the crucial provisions of the bill.

It appears that Representative McCollum may have used Roberts’ proposal for an Article I Court as a blueprint and then expanded upon it. The two basic differences between the Roberts proposal and the McCollum bill is that, first, H.R. 4107 would confer contempt sanctioning power on both appellate and trial judges of the Article I Immigration Court. Second, the Roberts proposal made the decisions of the new appellate court final, but they would be subject to review by the Supreme Court on a petition for certiorari.²⁷⁵ H.R. 4107 would make the final

265. *Id.* at 6.

266. United States Immigration Court Act of 1998, *supra* note 260, at 6.

267. *Id.* at 4–9.

268. *Id.* at 14.

269. *Id.* at 9. Authority of Judges:

Immigration trial judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the aliens and any witnesses. Immigration trial judges may take depositions, issue subpoenas requiring the attendance and testimony of witnesses and the production of documentation or other evidence from any place in the United States or any territory or possession thereof, order the taking of depositions, and order responses to written interrogatories.

Id.

270. *Id.* at 13.

271. United States Immigration Court Act of 1998, *supra* note 260, at 13.

272. *Id.* at 15.

273. *Id.* at 19.

274. *Id.*

275. Roberts, *supra* note 240, at 24.

review after the appellate division only to the Federal Court of Appeals for the Federal Circuit.²⁷⁶ This sounds unworkable, for there is only one Federal Court for the Federal Circuit which is in Washington, D.C., and it is unlikely that this one court could handle all of the appeals of asylum cases which are now spread out over eleven federal circuit courts.

Although it was not a proposal made in either a law review article like Roberts's or a bill like Representative McCollum's, the National Association of Immigration Judges advocated for an independent immigration court in a January 2002 position paper.²⁷⁷ The Association favored the creation of an Article I Court.²⁷⁸ In their position paper they cite the work of Maurice Roberts.²⁷⁹ The position paper argued that an independent immigration court would promote more efficiency, accountability, and impartiality in the workings of the immigration courts.²⁸⁰

Unfortunately, we still have no Article I Immigration Court independent of the Department of Justice. There may be two reasons we have no such court. Some argue that there may be no political will in Congress to appropriate the type of money to transform the immigration judiciary into an independent Article I Court. However, such argument may be without merit. It already costs millions of dollars to maintain the EOIR within the Justice Department. However, the EOIR is not really in the Justice Department building on Pennsylvania Avenue in Washington, D.C.; it is housed in a separate facility in Arlington, Virginia.²⁸¹ If such a change was made it would not be much more expensive than the status quo, since the change would be more formalistic than substantive. The same structure that is the existing courts, judges and staff would remain in existence but under a different name and under standardized rules and procedures promulgated and put in place. The headquarters of the new court could even remain in the EOIR's present facilities in Arlington.

Also going forward, pursuant to the McCollum bills, the Chief Appellate Judge and the eight other appellate judges would be chosen by the President of the United States, with the advice and consent of the Senate. The chief judge of the trial division and the trial division judges would be chosen by the chief appellate judge. It appears that there could be an almost seamless transition from the EOIR to the Article I Court for little more money than is now used to fund the courts as part of the Department of Justice.

The second reason we may not have an Article I Court may be because agencies in the administrative state may be loath to abandon power to another entity. In essence, no sitting Attorney General would voluntarily relinquish the power and responsibility of running the EOIR, for it would result in loss of his

276. United States Immigration Court Act of 1998, *supra* note 260, at 20.

277. See, Hon. Dana Marks Keener and Hon. Denise Noonan Slavin, *An Independent Immigration Court: An Idea Whose Time Has Come*. A Position Paper by the National Association of Immigration Judges. January, 2002 (on file with *Barry Law Review*).

278. *Id.* at 15.

279. *Id.* at 20 n.57.

280. *Id.* at 15.

281. *EOIR Immigration Court Listings*, *supra* note 161.

stature as well as a considerable amount of the Attorney General's budget. There appears to be no political will on the part of the Attorney General to see an Article I Court created.

V. CONCLUSION

I have written this article partially to reaffirm my support for our use of asylum as a means of providing justice for those fleeing persecution, for noncitizens like Gramoz Prestreshi, and partially to educate those interested in asylum concerning the workings of our immigration courts. Our immigration courts are busy tribunals wherein appointed immigration judges must decide in many cases who should be granted asylum and who should be denied. It should be a system that strives to be fair and impartial in its decision-making concerning those fleeing persecution. More often than not, the immigration courts do not appear to be fair and impartial in their decisions.

In examining recent statistics on asylum, it is heartening to learn that asylum case filings are down. However, grants of asylum are higher than they have been in the last twenty-five years. This is a wonderful trend. Nevertheless, over the years there have been disparities in grants of asylum among various immigration courts, as well as disparities in such decisions between judges on the same court. The *Asylum Study* findings that I have cited in this article serve to reinforce and give statistical support to what I and other immigration court practitioners have often believed: while an ideal court system should be fair and impartial, more often than not, a request for asylum by a noncitizen becomes a game of "refugee roulette" in our current immigration court system.

The outcome of the case might depend more upon arbitrary factors such as the judge to whom the case is assigned, whether one has counsel, and the ethnic and gender identity of the judge, instead of the facts of the particular claim.

Research shows that since the imposition of the Attorney General's twenty-two point plan to improve the Immigration Court in 2006, disparities in asylum outcomes among the various immigration courts and among immigration judges on the same court have been declining. The 2007 immigration judge hiring scandal led to a return to politically neutral hiring measures and better training and oversight for immigration judges. There are now fifty-nine immigration courts spread over twenty-seven states of the United States, Puerto Rico, and the Northern Mariana Islands, staffed by a total of 263 sitting judges.

I examined proposals of what an Article I Immigration Court system could look like. A two division court—an appellate division and a trial division—where the chief judge of the appellate division and eight other appellate judges would be appointed by the President of the United States and with the consent of Congress, would sit for a fifteen-year term. The chief of the appellate division would appoint the chief judge of the trial division and the trial judges who would also sit for fifteen-year terms, on good behavior. The structure is already in place. It would not necessarily be much more costly to run such an Article I Immigration Court than it is to pay the costs of operating the immigration courts as part of the EOIR.

I believe that an independent Article I Immigration Court would be better for asylum seekers because a court free of oversight by the Attorney General would offer better independence and impartiality for asylum seekers.

Yet, there seems to be no political will from Congress to create such a court. Nor does it appear that the United States Attorney General is anxious to relinquish his oversight of the immigration courts. It is the author's hope that this article might convince Congress to consider Article I Court proposals that have been put forth over the last thirty years.

Due process for asylum seekers demands that there be fairness and impartiality in an independent immigration court. An Article I Immigration Court promulgated by an act of Congress would provide for such a fair and impartial court.