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TWO YEARS LATER, HOW FAR HAVE WE COME: A REVIEW OF THE 2006 MEASURES OF IMPROVEMENT TO THE IMMIGRATION COURTS AND BOARD OF IMMIGRATION APPEALS

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I. Introduction

Because David Ngaruri Kenney protested the Kenyan government’s inhumane treatment of tea farmers, he suffered dehumanizing torture and near execution at the hands of the Kenyan government.¹ He fled for his life and eventually applied for asylum in the United States. His application was denied. The immigration judge found that although Kenney had been tortured on previous occasions by governmental forces, his two-month return to Kenya [to save his brother from impending torture] meant that he could not reasonably have a well founded fear of persecution upon returning to Kenya. The Board of Immigration Appeals (BIA) affirmed the immigration judge’s decision.² Kenney’s application for asylum was then rejected by the Fourth Circuit Court of Appeals.³ He was ordered deported back to Kenya.⁴

Some critics of the United States immigration system, however, would argue that Kenney was not denied asylum because of his two-month return to Kenya. Those critics would argue that because of his bad luck in having his case assigned to an immigration judge with an extremely low asylum grant rate, he was ordered deported back to Kenya.⁵ While of course it cannot be proven that a different judge would have rendered a different result, the chances of being granted asylum would have been much greater before any other judge on that court.⁶ Further, Kenney’s claim was appealed to the Fourth Circuit Court of Appeals, the Circuit Court with the lowest average remand rate in years 2004 through 2005.⁷

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² Id. at 163, 199.
³ Id. at 310.
⁴ Id.
⁵ Id. at 307.
⁶ Id. at 307.
⁷ Id. at 311.
Last year I read the book, Asylum Denied, detailing Kenney’s story. The book was co-authored by Kenney and the attorney who guided him through the difficult asylum application process, Professor Philip Schrag of Georgetown University School of Law. Kenney’s story intrigued me. He recounted in detail being imprisoned in a “water cell”. Water cell torture subjects a person to hunger, thirst, fear and embarrassment by stripping a person of his clothing and locking him in a cold dark cell for a week straight. On the floor of the cell is a grate in which water rises and falls at varying intervals. Sleep would mean death if the water rose and he did not awake in time. I was disturbed by the brutality of Kenney’s torture and felt a sense of pride in his will to go on after suffering of that magnitude. Through the recount of his immigration trial I found myself hoping against all odds that his claim would be approved. When his claim was denied, my heart sank.

The comments made by Professor Schrag throughout the book disturbed me. He explained that large disparities in asylum grant rates existed between immigration judges. For example, in Arlington, VA “enormous and persistent variations make the outcomes of cases highly dependent on the identity of the judge.” The judge assigned to Kenney’s claim denied eight of eight asylum claims (0% asylum grant rate) in a four year period, while another judge on the same court granted asylum in four of six cases (67% asylum grant rate) during that same period. To me, it just did not seem fair that his claim had a 67% better chance of being approved if it were assigned to a different judge. Further, the BIA affirmed the trial court, with only a one paragraph opinion and the Circuit Court refused to hear his appeal.

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8 Id. at 9-10.
9 Id. at 307.
10 Id.
11 Id. at 199, 307.
I felt as though Kenney got shortchanged. By all accounts, it seemed as though his experiences were exactly those for which the humanitarian grant of asylum was intended. I chose this topic in hopes of finding out what was causing these large disparity rates and what should be done to improve fairness to all under the U.S. immigration court system.

II. Asylum Law

Any alien physically present in the United States may apply for asylum, regardless of whether or not he or she entered the country legally. An alien can apply for “affirmative” asylum where one, not already in removal proceedings, applies for asylum. An alien already in removal proceedings may claim asylum as a defense. All asylum applications (affirmative and defensive) will be randomly distributed between the judges in the local immigration court, “without regard to the merits of the cases or the strength of defenses to removal that may be asserted by the respondents.”

The alien must prove to the immigration judge that he or she is a “refugee” under the Immigration and Nationality Act. A refugee is a person who is outside of their home country, is unable or unwilling to return to their home country and is unable or unwilling to avail himself to the protection of the home country because of a well founded fear of persecution based upon race, religion, nationality, membership in a particular social group, or political opinion. If an applicant’s testimony is “credible… persuasive and refers to the specific acts sufficient to demonstrate the applicant is a refugee” then no other evidence is needed to prove the applicant’s

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13 INA § 207(a)(1).
15 Id. at 326.
16 INA § 207(b)(1)(B)(i).
17 INA § 101(a)(42)(a).
refugee status.\textsuperscript{18} However, there is no presumption of credibility of the applicant’s testimony and the immigration judge must make a discretionary decision as to the credibility of each applicant.\textsuperscript{19}

If an immigration judge denies an applicant’s claim for asylum, the applicant may appeal that finding to the Board of Immigration Appeals (BIA).\textsuperscript{20} The BIA is made up of 15 members who most often determine the merits of a case “on paper,” only occasionally hearing oral arguments in complex cases.\textsuperscript{21} To alleviate a large backlog of cases resulting from time consuming three-member panel reviews, Attorney General John Ashcroft, in 2002, issued a rule that made decisions by a single member of the BIA the standard.\textsuperscript{22} In addition, BIA members have been given the ability to affirm immigration court rulings with little explanation.\textsuperscript{23} All decisions of the BIA are binding on immigration judges.\textsuperscript{24} However, only a small portion of BIA decisions are published each year, so in practice, only a small portion of BIA decisions are truly binding on immigration judges.\textsuperscript{25}

An applicant can appeal an affirmation of the asylum denial and deportation order to the U.S. Court of Appeal. The Circuit Court reviews a BIA decision only under an abuse of discretion or ruling contrary to law standard.\textsuperscript{26} “The current uniform standard requires that circuits uphold findings of fact unless any reasonable adjudicator would be compelled to

\textsuperscript{18} INA § 207(b)(1)(B)(ii).
\textsuperscript{19} INA § 207(b)(1)(B)(iii).
\textsuperscript{20} \textit{Supra} note 13 at 309 (\textit{citing} 1-3Immigration Law and Procedure §3.05[2]).
\textsuperscript{21} http://www.usdoj.gov/eoir/biainfo.htm.
\textsuperscript{22} \textit{Supra} note 13 at 351.
\textsuperscript{23} \textit{Id.} at 352.
\textsuperscript{24} \textit{Supra} note 20.
\textsuperscript{25} Press Release, Department of Justice: Executive Office for Immigration Review, \textit{Office of Legislative and Public Affairs Fact Sheet} (September 8, 2008)
\textsuperscript{26} \textit{Supra} note 13 at 17.
conclude to the contrary”.27 Basically, the BIA is the “highest administrative body for interpreting and applying immigration laws.”28 As such, the circuits remand cases for reconsideration by the BIA and do not themselves grant an asylum application except is rare circumstances.29

III. Why is Change Needed?

The grant or denial of asylum can mean life or death for the applicant.30 As such, asylum adjudicators must be able to make a decision that is fair and in compliance with the current laws. There are two main reasons why, in 2006, some type of change was needed to the immigration system. One of the largest reasons for the need for change was the large disparities in the grant rates of asylum claims.31 In fact, it has been said that the most critical point of an asylum case is the instant in which the immigration judge is assigned to the case.32 Further, it has been said that the pick of the immigration judge is even more important than the facts of the asylum applicant’s claim.33 Second, there were reports that immigration judges were failing to “display temperament and produce work that meets the Department [of Justice’s] standards.34

Professors Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag compiled a comprehensive review of the disparities in asylum adjudication.35 The report, Refugee Roulette,

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27 Id. at 31.
28 Supra note 20.
31 Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Local and Nationality (September 27, 2007) available at www.trac.syr.edu/immigration/reports/183
32 Supra note 13 at 299
33 Supra note 30
34 Press Release, Department of Justice, Attorney General Alberto Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals 1 (August 9, 2006)
35 Supra note 13
brought to light the great variations in the way asylum claims were turning out. The study analyzed asylum decisions made by asylum officers, as well as 140,000 decisions by immigration courts in the years 2000-2004, 126,000 Board of Immigration Appeals (BIA) decisions for the years 1998-2005 and 4,215 United States Court of Appeals decision during 2004-2005. The average asylum grant rate for all immigration courts was also tracked and found to have remained close to 37% in the years 2002 through 2005. There was a notable increase in the average asylum grant rate for immigration courts to 45% in 2006 and again to 46% in 2007. An average asylum grant rate of a particular court that is more than 50% above or 50% below the national average asylum grant rate is considered statistically significant. Statistically significant means that the disparity rate is so large, that is cannot be attributed to chance.

Overall, the study revealed that there is an extraordinary variation in the rates at which asylum in granted between immigration courts, within immigration courts and between the US Courts of Appeal. Some differences in asylum grant rates can be expected between immigration courts, as different geographical locations may attract different populations of asylum applicants. However, judges within immigration courts are randomly assigned cases from the same applicant pool as the other judges on that court. Logically, the asylum grant rate is expected to remain fairly consistent within each immigration court. However, 27 of 39 studied immigration courts, including Dallas, Detroit, San Francisco, Philadelphia, and Orlando had

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36 Id.
37 Id. at 295.
38 Supra note 29 at 18.
40 Id. at 302.
41 Id. at 332.
42 Supra note 30.
statistically significant variations among its immigration judges. The disparities clearly stretch across the nation.\textsuperscript{43}

A Government Accountability Office study, released in September 2008, found that when considering characteristics of a judge individually, “caseload, gender, length of service, veterans preference, and prior experience doing work for a non-profit organization” all had significant effects on asylum decisions.\textsuperscript{44} The fact that decisions are being based on anything other than the facts and applicable law of the given situation does not comport with the American idea of “equal justice under the law”.\textsuperscript{45} “The fact that the outcome of a case appears to be strongly influenced by the identity or attitude of the… judge to whom it is assigned is particularly discomforting in asylum cases, because when a bona fide application is erroneously denied, the applicant is almost always ordered deported to a nation in which she will be in grave danger.”\textsuperscript{46}

Between five (5) immigration courts across the nation, Phoenix, Baltimore, Orlando, Seattle and Lancaster, one can see the vast differences in asylum denial rates between immigractions courts. The following chart examines the differences between the immigration judges with the highest asylum denial rate in their home court, the differences between the immigration judges with the lowest asylum denial rate in their local court and the median denial rate for each local immigration court. For example, an asylum applicant has a 57.7\% better chance of being granted asylum in Phoenix, Arizona than Lancaster, Pennsylvania.

Further, the immigration judge who denied asylum at the highest percentage in Phoenix actually denied asylum over six percent less than the immigration judge who denied asylum at

\begin{Verbatim}
\textsuperscript{43} Id. \\
\textsuperscript{45} Supra note 13 at 299. \\
\textsuperscript{46} Id. at 302.
\end{Verbatim}
the lowest rate in all the other immigration courts.\textsuperscript{47} In other words, if a Phoenix asylum applicant was lucky enough to have his case assigned to Judge A, the judge with the highest asylum grant rate in the entire court, he would still have a 6\% greater chance of being granted asylum if his application was filed in any other of the listed courts. That is even if he is unlucky enough to have his case assigned to the judge with the lowest asylum grant rate of any of those other courts.

Americans tend to like the idea that cases are decided on laws and not on the “predilections or personal preferences” of the immigrations judge with whom their case has been assigned.\textsuperscript{49} Although statistical significance in disparity rates alone cannot show that disparities are assuredly due to a judge’s temperament, preferences, lack of training or any other particular factor,\textsuperscript{50} it does show that something needs to be done to preserve the idea of “equal justice under law” as inscribed on the main entrance to the Supreme Court building.\textsuperscript{51}

\textsuperscript{47} \textit{Supra} note 30 - Collection of immigration judge denial rate percentages based on a review of all immigration judges who made at least 100 decisions on the merits for asylum seekers represented by an attorney during 2001-2006.

\textsuperscript{48} Id.

\textsuperscript{49} \textit{Supra} note 13 at 299


\textsuperscript{51} Id. at 299
As stated before, some disparities in asylum denial rates can be expected between immigration courts. However, disparities in denial rates within immigration courts are much less acceptable.52 As the following chart shows, the deviations in asylum denial rates are astounding within immigration courts as well. In the New York Immigration Court, Judge A denied asylum only 9.5% of the time, while Judge B, in the same court, who is randomly assigned cases from the same applicant pool as Judge A, denied asylum a whopping 91.6% of the time.53 That is an 82% better chance of having an applicant’s life saved from persecution, based on the judge to which the case was assigned.

![Asylum Denial Rates - New York City 2001-2006](chart.png)

David Kenney’s case was heard before the immigration judge in the Arlington Immigration Court with the lowest asylum grant rate in the Court. Had his case been assigned to a different judge in that court, he may not have had to journey to Madagascar and Tanzania to

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52 Supra note 30 at 332  
53 Id.  
54 Id.
avoid being tortured or killed by the Kenyan government.\textsuperscript{55} After criticisms of the immigration courts by the federal circuit and appellate courts, the Attorney General took action.\textsuperscript{56}

All statistics were obtained from the Transactional Records Access Clearinghouse (TRAC). TRAC is a “data gathering, data research and data distribution organization at Syracuse University.”\textsuperscript{57} Its goal is to collect information on governmental organizations and display that information in a way that the public can understand. TRAC has issued several immigration reports, which are based on detailed studies of immigration court system, including disparities in asylum grant rates.\textsuperscript{58}

IV. A Response to the Need for Change

In January of 2006, Attorney General Alberto Gonzales, directed the Director of the Executive Office of Immigration Review (EOIR) and Deputy Attorney General (DAG) to review the immigration court system and complete a report. The review would examine, among other things, TRAC’s previous report on the wide disparities in asylum denial rates which concluded that asylum denial rates for 208 judges ranged from a mere 10\% to a staggering 98\%.\textsuperscript{59} Based on that review and report, on August 9, 2006 the Attorney General issued a Press Release detailing 22 Measures of Improvement to the Immigration Courts and Board of Immigration Appeals (BIA). These 22 Measures composed a comprehensive reform package to tackle the major issues in immigration law.\textsuperscript{60} The changes were to bring transparency to the immigration

\textsuperscript{55} Supra note 30 at 265
\textsuperscript{57} http://trac.syr.edu/aboutTRACgeneral.html
\textsuperscript{58} http://trac.syr.edu/immigration/about.html
\textsuperscript{59} Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Local and Nationality (September 27, 2007) available at http://trac.syr.edu/immigration/reports/160/
\textsuperscript{60} Supra note 33.
system and rid the immigration courts of immigration judges whose temperament and work product were not consistent with the proposition of fair justice for all.

Seventh Circuit Court of Appeal Judge Posner once described an immigration judge’s deficient analysis of immigration law as just “one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum. We are mindful that immigration judges, and the members of the Board of Immigration Appeals, have heavy caseloads. The same is true, however, of federal district judges, and we have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think.”

I believe if the 22 Measures announced by Attorney General Gonzales were fully implemented and given a little time, there would at least be a noticeable difference in the large disparities in asylum grant rates. Yet over two years after the directive, many measures are still not implemented, some are still partially implemented and some are not implemented in compliance with the Attorney General’s directions.

V. The Implementation of Change

(1) Performance Evaluations

The Attorney General directed that the Director of the EOIR and the Deputy Attorney General develop and implement a process by which immigration judges and members of the BIA

61 Supra note 54 at 1.
62 http://trac.syr.edu/immigration/reports/194/include/Gonzales22ImprovementMeasures.pdf
63 Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004).
64 Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Local and Nationality (September 27, 2007) available at http://trac.syr.edu/immigration/reports/194/details.html
64 Supra note 13 at 299.
would have their work and performance reviewed.\textsuperscript{65} The reviews were to be used to detect those immigration judges and BIA members whose work “may need improvement while fully respecting his or her role as an adjudicator.\textsuperscript{66}

The then Director of EOIR, Kevin Rooney, stated in a memo to his staff in March of 2007 that the implementation of a review process for immigration judges and BIA members had been “fully implemented”.\textsuperscript{67} However, as of November 2008, no actual performance evaluations have taken place for either immigration judges or BIA members.\textsuperscript{68} On July 1, 2008, nearly two years after the Attorney General’s directive, the EOIR finalized a plan for annual performance evaluations for BIA members and targeted the first evaluations to be held in January 2009.\textsuperscript{69} Performance evaluations of immigration judges, however, are another story. The EOIR is currently in negotiations with the union representing immigration judges, the National Association of Immigration Judges (NAIJ).\textsuperscript{70} The concept of performance evaluations of immigration judges has been seen by NAIJ as an encroachment upon judicial discretion and therefore a “change in working conditions”.\textsuperscript{71} With performance evaluations for immigration judges still in negotiations and performance evaluation for BIA members hopefully starting in January 2009, it is hard to see how such performance evaluations have been “fully implemented.”

\textsuperscript{65} Supra note 60.
\textsuperscript{66} Id.
\textsuperscript{67} Memorandum from EOIR Director, Kevin Rooney to EOIR staff 1 (Mar. 2007) (on file with Department of Justice, Executive Office of Immigration Review).
\textsuperscript{68} Supra note 62.
\textsuperscript{69} Id.
\textsuperscript{70} Oversight of the Executive Office of Immigration Review: Hearings Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 110\textsuperscript{th} Cong. 2 (Sept. 23, 2008) (statement of EOIR Director, Kevin Ohlson).
\textsuperscript{71} Supra note 62.
(2) Evaluation During Two-Year Trial Period

Attorney General Gonzales announced that newly appointed immigration judges were now subject to the same two-year trial period of employment as other Department of Justice (DOJ) employees. During this two-year trial period, judges will be assessed by the Deputy Attorney General on their “temperament and skills for the job”. The Attorney General makes clear that the assessment will be done in a way that fully respects the adjudicator’s role.72

According to the DOJ, a system to regularly evaluate newly appointed immigration judges has been created and implemented.73 Current EOIR Director, Kevin Ohlson testified before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law that the two-year trial period assesses newly appointed immigration judges’ “necessary abilities, professionalism, and temperament on the bench.”74 In order to properly assess these factors EOIR “consults with court staff, peers, and interested parties”.75 Immigration judges failing to meet the Department’s standards can be subject to termination.76

TRAC attempted to obtain more information on this monitoring process, such as how judges are monitored and how many judges were found to have temperament problems. EOIR, however, would not release such information and released only “partial information on what disciplinary actions were taken”.77 Without more information about the monitoring process, it is

72 Supra note 60 at 1.
73 Supra note 24 at 1.
74 Supra note 68 at 3.
75 Id.
76 Id.
77 Supra note 62.
impossible to attempt to analyze the effectiveness of the new implementation. With asylum grant rate disparities still looming, it is difficult to say that the trial period has had any success.

(3) Examination on Immigration Law

The third measure of improvement directed all immigration judges and BIA members be required to take an exam on the principles of immigration law prior to adjudicating cases. This directive was to apply to every newly hired immigration judge and BIA member appointed after December, 31, 2006. Former EOIR Director, Kevin Rooney congratulated his staff on the full implementation of this objective in his March 2007 Memo and the DOJ reported in November 2007 that immigration exams had been implemented. According to the EOIR’s Measures Improvement – Progress Overview, however, immigration judges did not begin to be tested in April 2008 and BIA members in August 2008.

Although it took nearly two years after the Attorney General’s orders, the mandatory examination has finally been implemented. So what exactly does the exam consist of? In EOIR Director Kevin Ohlson’s testimony, he described the immigration exam to be “rigorous”. No sample exams have been released for public evaluation, although some states, such as Florida, have released outlines of what is tested on the exam. Without such information, it is difficult for the public to evaluate if the exam assures sufficient knowledge of the potential immigration judges. TRAC has noted that it appears that one judge that passed the exam, had “no

78 Supra note 24 at 1.
79 Supra note 60 at 2.
80 Press Release, Department of Justice: Executive Office for Immigration Review, Office of Legislative and Public Affairs Backgrounder (Nov. 5, 2007).
81 Supra note 24 at 1.
82 Id.
83 Supra note 68 at 3.
84 Supra note 62; http://trac.syr.edu/immigration/reports/194/include/FLABarImExamSpecs.pdf
immigration law experience in his career”.

This would lead many to question the depth of immigration law knowledge needed to pass the exam. Could a law student, after taking Immigration Law 101 pass the exam?

(4) Improved Guidance and Training for EOIR Judges and Board Members

Recognizing the importance of training for immigration judges and Board members, the Attorney General directed a review of the then-current training procedures and requested a plan based upon that review be sent to the Deputy Attorney General. He further laid out three specific criteria to be addressed, (i) is expansion needed, (ii) continuing education, and (iii) proper training on crafting oral decisions.

The BIA held a training conference in October of 2006 and has since met with individual circuits in varying frequencies. Training for new immigration judges has been expanded by three weeks and immigration judges and BIA members have been given copies of the Immigration Court Practice Manual and Immigration Judge Benchbook, two sources of useful immigration information. The Benchbook even includes a list of mentors available to immigration judges who are available “for consultation at any time”. In addition, in 2007, a weeklong training conference was conducted for immigration judges and BIA members. More training sessions were planned for both BIA members and immigrations judges through 2008.

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85 Supra note 62.
86 Supra note 60 at 2.
87 Supra note 62.
88 Supra note 24 at 2.
89 Supra note 42 at 47.
90 Id.
A government report indicated that most immigration judges felt the EOIR’s enhanced training better prepared them to adjudicate asylum decisions. However, a majority of immigration judges felt a moderate or great need for additional continuing education on asylum issues, identifying fraud, assessing credibility and US Asylum law. Some critics believe that the quality of training has actually decreased. Susan Long, the President of TRAC, testified before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law that funds were unnecessarily being cut for training, resulting in cut backs on the quality of training conferences and up to date materials. For example, the 2007 annual immigration judge’s training conference was reduced to a virtual conference where judges did not leave their own courthouse and watched a video presentation of the conference materials. Both EOIR and NAIJ have recognized loss of “invaluable” learning experiences with the elimination of in person conferences. The EOIR has reported that it just does not have the “time nor funds to expand immigration judges’ opportunities to interact with each other outside their court locations.” With such a vital need for shared information between immigration judges, it is perplexing that training is not closer to the top of the appropriations list.

(5) Improved Training and Guidance for EOIR Staff

One measure that has been implemented with little criticism is the enhanced training for EOIR staff. BIA attorneys are now given monthly training, the Board distributes a monthly newsletter on developments in immigration law and a position has been created to oversee all

91 Supra note 29 at 34.
92 Id. at 36.
93 Id at 34; Supra note 54 at 6.
94 Supra note 54 at 6.
95 Supra note 29 at 37.
training procedures. In addition, there has been enhanced availability of reference materials for immigration attorneys.

(6) Improved On-Bench Reference Materials and Decision Templates

The Attorney General highly encouraged the EOIR Director to “promptly” form a committee to develop up to date reference materials for immigration judges. EOIR has developed enhanced reference materials for immigration judges including an Immigration Judge Benchbook, Immigration Court Practice Manual, as well as the new Virtual Law Library.

The Immigration Judge Benchbook consists of links to reference materials, as well as corresponding “up to date decision templates”. The Benchbook is not available to the public, as it is an “internal document”. The Immigration Court Practice Manual is an online database consisting of “best practices in establishing uniform procedures, requirements, and recommendations” for use in immigration courts. This database was made available to the public in July 2008 and can be accessed on the EOIR website. EOIR has also expanded its Virtual Law Library containing a larger variety of immigration law resources, giving judges an opportunity to research specific, new and complex issues. Further, the EOIR is making revision to its Ethics Manual “to provide detailed ethical guidance to Immigration Judges and Board Members”.

96 Supra note 65 at 1; Supra note 24 at 3.
97 Supra note 24 at 3.
98 Id. at 2-3.
99 Supra note 62.
100 Supra note 68 at 3.
101 Supra note 24 at 2; Supra note 68 at 3.
102 Supra note 68 at 3.
(7) Mechanisms to Detect Poor Conduct and Quality

The next implementation directly addresses the temperament and work product criticized by the federal circuit and appellate courts. AG Gonzales directed the development of procedures designed to report judges with poor temperament and work quality. In addition, he directed that the Chief Immigration Judge and the Chairman of the Board keep statistics “that may signal problems in temperament or quality.” Such areas to be statistically tracked include “unusually high reversal rates, unusually frequent or serious complaints, and unusually significant backlogs.” No statistics have yet been released to the public.

The Government Accounting Office published a report stating that the Chief Immigration Judge “referred 14 immigration judges for additional or ameliorative training, of whom 6 were referred for additional training.” No information has yet been released regarding the elements of “ameliorative training” or how it is designed to combat “unusually high reversal rates, unusually frequent or serious complaints [or] unusually significant backlogs.”

(8) Analysis and Recommendations Regarding Disparities in Asylum Grant Rates

The Attorney General acknowledged that TRAC’s finding that showed large disparities between courts and even within courts’ asylum grant rates. AG Gonzales directed the EOIR Director and Acting Chief Immigration Judges to review the TRAC study and provide recommendations to alleviate the large disparities in asylum grant rates to the Deputy Attorney General. According to the EOIR Director, Kevin Rooney in 2007, such recommendations

103 Supra note 33 at 1; Supra note 24 at 3.
104 Supra note 24 at 4.
105 Supra note 42 at 46.
106 Supra note 24 at 4.
107 Supra note 60 at 3.
included enhanced training, an immigration judge mentorship program, and “close” supervision of judges having “unusually high or low asylum grant rates”.  

The EOIR has not, however, released information on how those judges are monitored or for how long. It also has not disclosed how “unusually high or low asylum grant rates” are calculated. The lack of information provided by the EOIR’s efforts to improve disparities in asylum grant rates has left many questions open. Would the New York Judge A’s 9.5% asylum denial rate qualify as unusually low? How about the New York Judge H’s 91.6% asylum denial rate; would that be unusually high? What would happen after the monitoring process has ended? Would either judge be reprimanded, suspended, subjected to enhanced training, or discharged? At what point is disciplinary action appropriate and what type?

In an effort to develop uniformity in asylum decisions, one reform focuses on educating immigration judges and BIA members by enhancing asylum training during conferences. In August 2008, a training program was held for immigration judges and BIA members focusing on disparities in asylum grant rates. In addition, immigration judges complete continued online training on asylum law. The BIA underwent asylum training in June 2007 and has subsequently held several training sessions.

But have these enhancements in immigration judge and BIA member training had any effect on the disparities in asylum grant rates? Susan Long testified that reviewing the most

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108 Supra note 65 at 5.
109 Supra note 62.
110 Supra note 24 at 4.
111 Id.
recent statistics, ending in 2007, the EOIR has failed to make any improvement in the large disparities in asylum grant rates.\footnote{112}{Supra note 54 at 1.}

\textit{(9) Pilot Program to Deploy Supervisors to Regional Office}

The Acting Chief Immigration Judge was charged with selecting one or more Assistant Chief Immigration Judges to be placed in regional offices rather than in the EOIR headquarters. The goal was to determine if management effectiveness increased with local supervisory positions.\footnote{113}{Supra note 60 at 3.} As early as the Rooney Memo, four out of six planned Assistant Chief Immigrations judges had been placed within the court which they supervise.\footnote{114}{Supra note 65 at 2.} By 2008, all six had been placed within the court of supervision with an additional five Assistant Chief Immigration Judges being assigned to supervise a “subset of immigration courts”.\footnote{115}{Supra note 68 at 2.}

After an initial review, EOIR has determined that regional supervisor’s were effective in “monitoring, mentoring, and managing the Immigration Judges in the Immigration Courts.” The EOIR also recommended to the Deputy Attorney General that the program be made permanent.\footnote{116}{Supra note 62.} When the 2008 statistics come out, it will be interesting to see if the asylum grant rate disparities in any of those six cities have decreased. If so, the rest of the immigration courts should implement regional supervisors.

\textit{(10) Code of Conduct}

The Attorney General directed the Director of EOIR to draft a Code of Conduct that would apply to immigration judges and BIA members. The completed Code would be available

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\footnote{112}{Supra note 54 at 1.}
\footnote{113}{Supra note 60 at 3.}
\footnote{114}{Supra note 65 at 2.}
\footnote{115}{Supra note 68 at 2.}
\footnote{116}{Supra note 62.}
electronically for those appearing before the immigration courts and BIA. A Code of Conduct would give reason to terminate an immigration judge or BIA member that was displaying “bad temperament”.

The Rooney Memo discloses that a draft Code of Conduct was complete and would be available to the public for comment with implementation planned for Spring of 2007. A proposed rule was issued June 28, 2007. According to the last EOIR statement, however, no Code of Conduct will be issued. According to its correspondence with TRAC, EOIR has stated that it has abandoned its efforts to devise a rule, but it will incorporate the Code into the existing ethics manual. As of the EOIR’s Progress Overview, “revisions to the Ethics Manual are [still] forthcoming”. However, this is not the implementation which the Attorney General directed.

(11) Complaint Procedures

The Director of the EOIR was charged with reviewing the current system for reporting complaints about immigration judges and BIA members. After the review, the Director was told to devise a plan focused on (i) standardizing complaint intake procedures, (ii) creating a process for delineating responsibility in handling complaints and (iii) ensuring a fair and timely response.

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117 Supra note 60 at 3.
118 Supra note 65 at 6.
119 Supra note 62.
120 Id.
121 Supra note 24 at 4.
122 Supra note 60 at 3-4.
By 2007, the EOIR had created a new position of Assistant Chief Immigration Judge for Conduct and Professionalism.\textsuperscript{123} In addition, immigration judge supervisors are “trained on conduct issues”. There is now even a public access website in which members of the public can file complaints against immigration judges.\textsuperscript{124} The Immigration Court Manual provides more information of the different ways of filing a complaint against an immigration judge, including a direction to the above-mentioned website.\textsuperscript{125} According to EOIR Director Kevin Ohlson, all complaints are taken seriously, investigated and referred to either the Office of Professional Responsibility or the Office of the Inspector General. He concludes that immigration judges will be disciplined “as circumstances warrant”.\textsuperscript{126} Again, there is no specific information about the disciplinary procedures that have been used, or even the disciplinary procedures that are available.

(I2) Improvements to Streamlining Reforms

Although the idea has been promoted by some in immigration law, the Attorney General does not find it “feasible” to resort back to a three-member panel BIA review of immigration appeals without recreating the enormous backlog that had haunted the BIA in past years. However, the Attorney General did find that some changes were needed to streamline the appeals process.\textsuperscript{127} AG Gonzales first recognized the importance of encouraging written opinions to point out the use of a flawed analysis. In addition, discretion to use three-member panels were now allowed on a limited basis if the issues are extremely complex. The Attorney

\begin{footnotes}
\item[123] Supra note 65 at 2.
\item[124] Supra note 24 at 4.
\item[125] Supra note 62.
\item[126] Supra note 68 at 2.
\item[127] Supra note 60 at 4.
\end{footnotes}
General did leave open the possibility that some rules may need to be adjusted with the need of the Board and parities who are heard before the Board.\(^\text{128}\)

The EOIR has reported a number of improvements to streamlining the appeals process. First, the issuance of summary affirmances has dropped from 30% in 2004 to under 10% in 2008. Summary affirmances allow a single BIA member to affirm an immigration judge’s opinion without a written opinion or explanation.\(^\text{129}\) Single member review panels are usually less favorable to asylum applicants, but are more time efficient.\(^\text{130}\) Prior to the 22 Measures of Improvement, the BIA was restricted to using single member review panels, but now it has much more discretion in its ability to use three-member panels.\(^\text{131}\) In addition, on June 18, 2008, a proposed regulation was published in the Federal Registrar, mandating more three-member panel reviews and increases the number of published precedent BIA decisions.\(^\text{132}\) The final rule has still yet to be implemented.\(^\text{133}\)

Second, the Attorney General directed that a rule be drafted to allow more precedent BIA decisions be published.\(^\text{134}\) Prior to 2006, very few BIA decisions were published as those which needed to be followed by immigration courts.\(^\text{135}\) Professor Leonard Birdsong, of Barry University School of Law has recognized that with such a “lack of published opinions, it is difficult to determine or analyze whether important precedents have been established in the system.”\(^\text{136}\) Further, because so few asylum denials are appealed, “outdates procedures persist

\(^\text{128}\) Id.
\(^\text{129}\) Id.
\(^\text{130}\) Supra note 42 at 51.
\(^\text{131}\) Supra note 62.
\(^\text{132}\) Supra note 24 at 5.
\(^\text{133}\) Supra note 42.
\(^\text{134}\) Supra note 60 at 4.
\(^\text{135}\) Supra note 1 at 141-42.
and dictate the outcome of most cases.” The EOIR has been able to increase the number of precedent BIA decisions published from 12 in 2005 to 45 in 2007.

If the BIA would have produced more binding decisions in 2000, David Kenney would have had a better chance of being granted asylum. Prior to Kenney’s case, the BIA had overturned an immigration judge who held that a short trip home barred an asylum claim. As such, that same immigration judge who heard Kenney’s claim, would not have been able to use that same reasoning, as it was already rejected by the BIA.  

(13) Practice Manual

The EOIR Director was charged with the responsibility of working with immigration judges to form a manual of “best practices” to be available online to immigration judges, counsel and litigants. The Immigration Court Practice Manual was released on February 2008. It “became effective on July 1, 2008.”

A Practice Manual in place at the time of David Kenney’s asylum hearing may have produced a different result in his case. The immigration judge used flawed reasoning by using inapplicable international law. In fact, that same judge had previously been overruled by the BIA for using that same international rule If the immigration judge in Kenney’s case would have had knowledge of, or access to, the asylum officer practice manual, which states that the

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138 Supra note 24 at 5.  
139 Supra note 1 at 141-42.  
140 Supra note 60 at 5.  
141 Supra note 24 at 5.  
142 Id. at 141.
law is interpreted so that short trip home under extreme circumstances did not destroy the asylum claim, Kenney’s case would have turned out much differently.\textsuperscript{143}

\textit{(14)} Updated and Well Supervised Sanctions Authorities for Immigration Judges for Frivolous or False Submissions and Egregious Miscount; and

\textit{(15)} Updated Power Sanctions for the Board

The Attorney General recognized the importance of an immigration judges’ ability to “control their courtrooms” as well as protect the entire judicial system from fraud and abuse.\textsuperscript{144} The Director of EOIR was directed to draft a rule that would provide sanction authority for immigration judges and BIA members to impose for “false statements, frivolous behavior, and other gross misconduct”.\textsuperscript{145} The Attorney General also proposed a rule giving sanction authority to immigration judges and BIA members for conduct in “contempt of an immigration judge’s proper exercise of authority” by civil monetary penalties.\textsuperscript{146} The Attorney General also recognized the importance of oversight in the use of such sanctions, as such a punishment should not be expected to be used very often.\textsuperscript{147}

According to the EOIR’s Project Overview, the EOIR has published a proposed regulation in the July 30, 2008 version of the Federal Register. The proposed rule expands the reasons for which attorneys before an immigration judge or BIA member can be disciplined, including “…diligence, competence, negligence, and client communications…”\textsuperscript{148} That power, however, is held by the Office of General Counsel and not the immigration judges or BIA members. “This proposed rule does not provide civil monetary sanction authority or any direct

\textsuperscript{143} Id.
\textsuperscript{144} Supra note 60 at 5.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Supra note 24 at 5.
sanction authority at all to immigration judges or BIA members”. The EOIR has responded to TRAC’s questions on the issue by merely stating “the proposed rules are being considered by the Justice Department.”

(16) Seek Budget Increases

The EOIR was directed to seek budget increases starting in 2008 to hire more immigration judges, law clerks, and BIA staff attorneys. In 2007, Congress appropriated the funds for 120 new positions. In 2008 appropriations to fund another 120 positions was requested but denied. There was a reported 22 immigration judges hired between 2006 and 2008; and 20 new law clerk were hired in 2007. Amazingly, however, there are reportedly less immigration judges today than in 2006. Despite funding for the positions, there were 28 vacant immigration judge positions as of July 24, 2008. As of May 2008 there were only 216 immigration judges on board to handle all immigration cases across the nation. With such large caseloads, 87% of immigration judges (of those surveyed) felt that an additional law clerk would improve their ability to carry out judicial responsibilities.

With many immigration judge positions vacant, other immigration judges must add to their already overwhelming caseload. “[In 2007], immigration judges decided over 350,000 matters or roughly 1,520 matters per judge…” That would mean, each immigration judge

149 Supra note 54 at 9.
150 Supra note 62.
151 Supra note 60 at 6.
152 Supra note 62.
153 Supra note 24 at 5.
154 Supra note 54 at 1.
155 Supra note 62.
156 Supra note 42 at 17.
157 Supra note 29 at 126.
158 Supra note 54 at 4 (quoting Federal Ninth Circuit Court of Appeals Judge Carlos T. Bea in August 10, 2007 speech to immigration judges).
would have to hear over five cases per day if working five days a week, every week of the year. Considering that asylum issues can be complex, several hours may be needed to weed through the issues.\textsuperscript{159} \textsuperscript{77\%} of immigration judges who responded to a GAO survey reported that “managing their caseload was moderately or very challenging.”\textsuperscript{160} In addition, immigration judges are expected to find time to familiarize themselves with the continually updated immigration law reference materials called for by the Attorney General.\textsuperscript{161} This can only lead to frustrated immigration judges who are not up to date on the law. This, I believe, is one of the major elements in the lack of uniformity in asylum grant rates.

\textit{(17) Increase in Size of the Board}

EOIR was directed to propose a rule to increase size of the Board of Immigration Appeals from 11 permanent members to 15 permanent members.\textsuperscript{162} On December 7, 2006 a proposed rule was published in the Federal Registrar. On June 16, 2008, the final rule was published.\textsuperscript{163} In May 2008, the EOIR reported on the appointment of five new BIA members. However, that only brought the total BIA membership to 13. As such, the BIA remains two permanent members short of the Attorney General’s directive.\textsuperscript{164} It seems logical that the more BIA members on Board, the more time efficient the Board will become. As such, BIA members can spend more time concentrating on the facts of each case, rather than concentrating on getting a minimum number of cases heard to reduce backlog. With the additional two member positions open and funded, it is hard to figure out why, after two years, the BIA membership is still short of the Attorney General’s directives.

\textsuperscript{159} Supra note 29 at 125.
\textsuperscript{160} Id. at 8.
\textsuperscript{161} Supra note 54 at 5.
\textsuperscript{162} Supra note 60 at 6.
\textsuperscript{163} Supra note 62.
\textsuperscript{164} Id.
(18) Updated Recoding System and Other Technologies

The Attorney General requested that a plan be devised to implement a Digital Audio Recording (DAR) in place of the current tape recording technology in immigration courtrooms. The Attorney General directed that a pilot program be implemented within a year and national implementation as soon as possible.\(^{165}\)

The pilot program was initiated in 59 courtrooms, within 21 immigration courts across the nation, including Orlando, Phoenix, and Seattle.\(^{166}\) The Department of Justice has requested an additional $8.3 million in 2009 to fully implement DAR by the end of 2010.\(^{167}\) The quality of recordings in immigration courts is important because there is no court reporter like in a usual courtroom. Transcriptionists rely on the audio transcripts recorded during a hearing or trial to compile a written transcript of the hearing or trial. That paper is can then be used for the appeals process.

(19) Improved Transcription Services; and

(20) Improved Interpreter Selection

The Director of the EOIR was instructed to review and develop a plan to enhance transcription services and interpreter selection. The Director was to focus on strengthening transcription of oral opinions and timeliness. The Director was to also focus on ways to improve screening, hiring, certification and evaluating the interpreters that are hired by the Department. In addition, similar enhancements were directed for contract interpreters.\(^{168}\)

\(^{165}\) Supra note 60 at 6.
\(^{166}\) Supra note 24 at 6.
\(^{167}\) Supra note 62.
\(^{168}\) Supra note 60 at 6.
The Rooney Memo announced improvements in both timeliness and quality of oral decision transcriptions. The transcription backlog that had plagued courts has been eliminated in part by contracting with an additional transcription service. Transcriptions can now usually be returned in five days for detained cases.169 There is no available information on the turn-around rate for non-detained cases. The NAIJ, though recognizing improvements in timeliness, have been critical of the quality of transcription services.170 It has even raised the possibility that the increase in timeliness is a “dubious factor” in actually decreasing the quality of transcription services.171

The need for quality in interpretation services is essential. An asylum applicant’s credibility can make or break their claim for asylum. Many applicants do not speak English fluently enough to sufficiently recount their lives leading up to the asylum application. If an interpreter translates the wrong information, an applicant will not look credible. Without credibility, the applicant will need to produce documentary evidence that is often impossible to find.172

The Rooney Memo also outlined a plan to have government interpreters be certified by an agency-approved testing facility. The plan included mandatory continuing education and regular assessments of interpreters.173 However, after a review of the testing process, the EOIR has decided that the cost would outweigh the benefit. In the alternative, the EOIR developed a plan to “improve interpreter services [by enhancing] internal interpreter hiring, training and

169 Supra note 65 at 9; Supra note 24 at 6; Supra note 62.
170 Supra note 62.
171 Id.
172 INA § 208(b)(1)(B)(ii).
173 Supra note 65 at 10.
assessment[s]…..”\textsuperscript{174} Also, like the weblink to file complaints against immigration judges, there is a weblink for the public to report complaints about interpreting services.\textsuperscript{175}

(21) Referral of Immigration Fraud and Abuse

That Director of EOIR was charged with developing a procedure for immigration judges and BIA members to report fraud or abuse so that it may be properly investigated.\textsuperscript{176} Because violations of immigration law can also produce criminal penalties, cases also may be referred to the U.S. Attorney’s Office.\textsuperscript{177} The Rooney Memo reports that as of March 2007 a new plan had been implemented which requires that every employee report “suspicious conduct”.\textsuperscript{178} An Anti-Fraud Officer would review those reports, “identify fraud and coordinate interagency responses.”\textsuperscript{179}

According to the Rooney Memo, “a substantial number of referrals have been made under this program already”. However, EOIR has advised “that number of referrals of fraud and abuse made to investigative agencies is not readily available.”\textsuperscript{180} It has been reported, however, that a total of 132 referrals were received. Twenty-six of those referrals were made by immigration judges.\textsuperscript{181} A DOJ Press Release in November of 2007 reported that aggressive education efforts were being undertaken to educate immigration judges and BIA members of the EOIR Fraud Program.\textsuperscript{182}

\textsuperscript{174} Supra note 24 at 7; Supra note 62.
\textsuperscript{175} Supra note 62.
\textsuperscript{176} Supra note 60 at 7.
\textsuperscript{177} Id.
\textsuperscript{178} Supra note 65 at 10.
\textsuperscript{179} Supra note 24 at 7.
\textsuperscript{180} Supra note 62.
\textsuperscript{181} Supra note 29 at 70.
\textsuperscript{182} Supra note 78 at 2.
(22) Expanded and Improved EOIR-sponsored Pro Bono Programs

The last measure of improvement which Attorney General Alberto Gonzales directed in 2006 was the development of a pro bono committee. The committee was to be “composed of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar, and any other participants whom the Director deems necessary.”183

The first open committee meeting was held on November 29, 2006.184 It made 17 recommendations in the summer or 2007 to expand and improve the Pro Bono programs of the EOIR to assess the current system and implement enhancements. EOIR reports that the Committee consulted with “federal and non-governmental agencies, as well as the private bar.”185 However, this is not what the Attorney General directed. Measure 22 says that the Committee will be “composed of …the private immigration bar…” not that the Committee would “consult with” the private immigration bar. TRAC solicited a response on the discrepancy from EOIR, who responded that “the decision was made because of “legal concerns raised… [and] EOIR determined that it would not be appropriate to include non-governmental organizations and private individuals as members of the Committee, per se.”186 In addition, requests for full copies of the Committee’s recommendations were denied by EOIR, stating it “was an internal document and not publicly available.”187

EOIR has, however, reported a number of new initiatives. For example, the Legal Orientation Program’s sites doubled, there were increased efforts to reach out to federal courts,

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183 Supra note 60 at 7.
184 Supra note 65 at 10.
185 Supra note 24 at 7.
186 Supra note 54 at 7.
187 Id.; Supra note 62.
the best practices procedures to promote pro bono representation manual was established and pro bono legal services to non-detainees had been expanded.\textsuperscript{188} EOIR has developed a comprehensive report available to the public on their website titled, “EOIR to Expand and Improve Pro Bono Programs.” In addition, to improve the quality of pro bono attorneys, measures are being taken to “strengthen” the requirements for an attorney’s name to be listed on the EOIR’s List of Free Legal Services Providers.”\textsuperscript{189} A report from the Vera Institute of Justice published in May 2008 found that there were “faster immigration court processing times for aliens who were detained and more favorable case outcomes for aliens who represented themselves in removal hearings” among those participating in the Legal Orientation Program.\textsuperscript{190}

VI. What Else Needs to Be Done?

It has been suggested that forcing a judge to raise or lower his judge asylum grant rate would create more unfairness than it would solve.\textsuperscript{191} However, the disparities cannot just be accepted. We would be accepting unequal justice under the law. With many of Attorney General Gonzales’s 22 Measures still not fully implemented in compliance with the directives and large asylum disparity rates still ringing clear, there is still more that needs to be done.

I propose that first, that the Attorney General’s 22 Measures be fully implemented in full compliance with the Attorney General’s directives. Second, there is a need for the Attorney General to conduct a detailed and comprehensive review of all initiatives that have been implemented as a result of Attorney General Gonzales’s 22 Measures of Improvement. If a

\textsuperscript{188} Supra note 24 at 7.
\textsuperscript{189} Id.
\textsuperscript{190} Supra note 42 at 19 (taken from Legal Orientation Program Evaluation and Performance Outcome Measurement Report, Phase II).
program is not performing as expected or not implemented as directed, the Attorney General needs to direct that the program be either amended or cancelled. Lastly, I propose that the EOIR be more transparent when it comes to implementation of immigration policies and procedures.\textsuperscript{192}

1. Implement the Rest of the Attorney General’s 22 Measures of Improvement.

Attorney General Gonzales’s 22 Measures of Improvement to the Immigration Courts and Board of Immigration Appeals is a comprehensive approach at tackling the problems within the immigration system. The US immigration court system cannot be fixed by implementing a few of the Attorney General’s directives, implementing the EOIR’s own version of some more, and leaving others still “under consideration” or untouched. For example, to enhance immigration judge’s knowledge of immigration law and recent decisions, immigration judges and BIA members need better training, up-to-date training materials, and time to review provided continuing education materials. If immigration judges only received training, but it is not up-to-date, what was the point? And if state of the art training and reference materials are available, what good are they if immigration judges do not have time to review them?

In addition, without increased funding, none of the above can be possible. Consistency is vital to establishing a predictable format to ensure justice for all.\textsuperscript{193} Judges cannot be consistent if they do not know what other judges are doing with regard to the same issues. It is inexplicable to perceive why the EOIR did not seek increased funding in 2009.\textsuperscript{194} Out of a requested 240 additional positions, only 120 have been funded, yet additional funding for the positions has not even been requested.\textsuperscript{195} The EOIR needs to seek additional finances to fund at a minimum the

\textsuperscript{192} Supra note 54 at 9.
\textsuperscript{193} Supra note 190 at 423.
\textsuperscript{194} Supra note 54 at 4.
\textsuperscript{195} Supra note 24 at 5; Supra note 62.
remaining 120 requested additional positions. The Attorney General should also review immigration judge’s current caseload and propose the need for more positions, if necessary. Overloading judges with cases leaves little time for them to keep current on new developments in immigration law. Such a lack of thorough knowledge, I believe, is a major factor in the disparities in asylum grant rates.

2. Comprehensive Review of Implemented Procedures

I propose that the Attorney General direct a comprehensive review of all of the 22 Measures that currently are claimed to be implemented. I propose, not just a study about how the measures are being implemented, but, a study that determines how effective each implementation is working out to be. If a Measure is found to have no effect on improving the immigration court system, the implementation needs to be adjusted or eliminated. There is no sense is spending money on programs that are not producing positive results. Some suggested focuses include: (a) additional funding (b) the immigration law exam and its effect on newly hired immigration judges and (c) the mechanisms to detect poor quality and conduct of immigration judges and BIA members. The key to this review is that in addition to reviewing the programs, the Attorney General should direct a detailed process as to how each implementation should take place.

(a) The EOIR also needs to request additional funding for training conferences and resources. In person conferences are vital.\textsuperscript{196} Immigration judges and BIA members, in addition to periodic electronic conferences, should be ensured funding to conduct one in person conference each year. During that conference immigration judges and BIA members should go through intense training in current developments in immigration law, current interpretations of

\textsuperscript{196} Supra note 62.
statutes, asylum law, credibility determinations, and accessibility of continuing resources. In addition, I believe immigration judges and BIA members should conduct in person roundtables to discuss current issues in immigration laws and be given the opportunity to brainstorm ideas to combat those issues. The suggestions of the immigration judges should then be seriously considered by the Attorney General.

(b) I also suggest a correlative study of immigration judges who took the new immigration law exam prior to hearing immigration cases. There needs to be a test to evaluate if a higher score on the exam is indicative of higher job performance. If so, I propose that all current immigration judges be required to pass an immigration law exam, including questions on current and especially recent immigration law. If it is found, however, that there is no indication that a judge’s score on the immigration exam is indicative of job performance, the exam needs to be altered to assure a significant amount of immigration law knowledge is required to pass the exam.\textsuperscript{197} There needs to be assurance that passing the pre-employment exam bears a positive relationship to a judge’s performance.

(c) Although there is currently a referral system in place for the public to report instances of poor conduct of immigration judges, more needs to be done. The EOIR needs to track statistics relating to factors of poor judicial temperament or quality, such as high reversal or remand rates. In addition, there are no statistics kept of complaints against specific judges. Aside from general figures, EOIR cannot determine how many complaints have been filed against judges or how those complaints were disposed of (ie. dismissed, sanctions, etc.) Keeping track of reversal rates, asylum denial rates, and multiple complaints against a specific immigration judge are important factors in assessing temperament and skills. The EOIR needs to take steps to track these types of factors to help in such assessment.

\textsuperscript{197} \textit{Cf. Brunet v. City of Columbus}, 1 F.3d 390 (6th Cir. 1993).
3. More Transparency in Immigration Court System

On many occasions it has been difficult to evaluate the effectiveness of the Attorney General’s 22 Measures of Improvement because of the EOIR. On several occasions EOIR has denied requests for information, claiming that such information is internal documentation. It is understandable that some information must remain classified, such as information that would pose security concerns. However, it is hard to find the reasoning behind prohibiting the release of documents such as specific information on how immigration judges’ temperament and skills are monitored and assessed. It is difficult to determine why the EOIR is being secretive when it comes to immigration policy implementation. In fact, TRAC has reported that in 12 out of 22 Measures of Improvements, information about implementation was either misrepresented or withheld by the EOIR.

Susan Long of TRAC has testified that DOJ and EOIR not only have “taken steps to provide as little information to the public as possible about the implementation of the improvements…” but have also “…at times attempted to misrepresent the manner of their implementation.” In the American legal system, it is unacceptable for a governmental organization to cover up governmental policy or regulations.

VII. Conclusion

Leading up to 2006, immigration courts and the BIA faced many troubles. The immigration court system was recovering from a illegal hiring scandal, disparities in asylum grant rates were staggering, and lack of uniformity between immigration judge’s decisions were

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198 Supra note 62.
199 Id.
200 Supra note 54 at 7.
evident. Attorney General Gonzales’s 22 Measures of Improvement to the BIA and immigration courts were meant to combat those issues. Over two years after Attorney General Gonzales directed the improvements, there is still so much to be done to effectuate a real change in bettering the immigration court system.

With fewer immigration judges on the bench, a decrease in the quality of immigration judge training and Attorney General Gonzales’s 22 Measures not fully implemented, there is again, if not always has been, a need for change. The best hope for change is, as explained, a three-part process. First, the 2006 22 Measures of Improvement need to be implemented in their entirety. Second, there needs to be a comprehensive review of the 22 Measures of Improvement to determine which programs are effective and which are not. Lastly, there needs to be more transparency in the EOIR with regard to immigration policy and procedure implementations.

If even some of these initiatives were in place in 2000 when David Kenney faced the immigration judge in his asylum hearing, his fate may very well have been different. If immigration judges were kept more up to date on immigration law, Kenney’s immigration judge may have held, like many other courts, that a short trip back to the home country under extreme circumstances did not bar a claim to asylum. If judicial monitoring were in place, it is possible that Kenney’s immigration judge would have faced advanced training because of her very low asylum grant rates. If the 2006 Measures of Improvement to the Immigration Courts and Board of Immigration Appeals were fully implemented in 2000, it is very possible that David Kenney would have been granted safety from the Kenyan government and given a chance to live his life with his wife and child in a country of freedom, opportunity and equal justice under the law.