

Summer 2007

Asylees in Wonderland: A New Procedural Perspective on America's Asylum System

Eliot Walker

Recommended Citation

Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 *Nw. J. L. & Soc. Pol'y.* 1 (2007).
<http://scholarlycommons.law.northwestern.edu/njlsj/vol2/iss1/1>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Asylees in Wonderland: A New Procedural Perspective on America's Asylum System

Eliot Walker

“But I don’t want to go among mad people,” Alice remarked.
“Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.”
“How do you know I’m mad?” said Alice.
“You must be,” said the Cat, “or you wouldn’t have come here.”¹

I. INTRODUCTION

¶1 Persons seeking asylum in the United States must, like Alice, descend into a world of rules, standards, and characters that seem increasingly mad. Before the asylum seeker lies a land of promise, held out by international human rights standards established a half-century ago.² Behind the asylum seeker looms the memory and prospect of persecutions of the most horrible varieties. But in between that promised land and memory is a wonderland of arbitrary processes the asylum seeker cannot possibly understand.

¶2 The decline of confidence in American asylum adjudication is now front-page material for major mainstream newspapers.³ The tide of resentment has been buoyed primarily by words from the federal judiciary. Judge Julio Fuentes, of the Third Circuit, recently condemned “the tone, the tenor, the disparagement, and the sarcasm” of one immigration judge to be “more appropriate to a court television show than a federal court proceeding.”⁴ Seventh Circuit Judge Richard Posner broadly declared that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”⁵ Other courts, similarly, have voiced concern over whether the Board of Immigration Appeals’s (BIA) streamlining process has transformed the BIA into a rubber-stamp machine.⁶ Finally, Attorney General Alberto Gonzales himself acknowledged the concerns.⁷ In memoranda issued to both immigration judges and the

¹ LEWIS CARROLL, ALICE IN WONDERLAND 51 (Donald J. Gray ed., Norton Critical 2d ed. 1992) (1865).

² Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 150.

³ See Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

⁴ Wang v. Att’y Gen. of the U.S., 423 F.3d 260, 269 (3d Cir. 2005) (reprimanding Immigration Judge Annie S. Garcy).

⁵ See *id.* (quoting Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005)).

⁶ See, e.g., Berishaj v. Ashcroft, 378 F.3d 314, 331 (3d Cir. 2004) (observing that the BIA “may have shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and current”). Former BIA Judge Lory Rosenberg has also voiced the concern, stating “[w]hen the BIA had a more active role, it would clean up decisions Now the BIA is a rubber stamp.” Pamela MacLean, *Immigration Bench Plagued by Flaws*, NAT’L L.J., Feb. 6, 2006, at 1 [hereinafter MacLean, *Immigration Bench*].

⁷ See Memorandum of Alberto Gonzales, U.S. Attorney General, to Immigration Judges (Jan. 9, 2006), available at <http://www.immigration.com/newsletter1/attgenimmjudge.pdf>; Memorandum of Alberto

BIA, Gonzales conceded that a “comprehensive review of the immigration courts” is in order.⁸

¶3 That the American asylum system has fallen into disrepute is no longer a significantly contested point of debate. What is less understood, however, is exactly why and how the system fell so far. This paper delves into that question, and argues that meaningful reform of the U.S. asylum system must step back and consider the system’s very structure.⁹ Meaningless evidentiary standards combine with minimal administrative and judicial review to result in a system that simply shrugs off material errors. Effective reform must go beyond token quick-fix gestures and instead adopt a new perspective that recognizes that the real problems are systemic.

¶4 The following sections analyze major procedural pitfalls the asylum seeker must navigate in American immigration courts. Upon review of the system and the recent responses it has engendered, this paper proposes new perspectives on reforming U.S. asylum adjudication. The proposals do not attempt a comprehensive prescription for U.S. asylum reform—that massive undertaking is left to other writings—but instead offers some alternative perspectives on how to reorient a system gone astray.

II. DOWN THE RABBIT HOLE: PROCEDURAL PITFALLS OF U.S. ASYLUM DETERMINATIONS

A. *At the Border: Expedited Removal*

¶5 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)¹⁰ marked a major shift in the United States’s treatment of non-citizens at our borders.¹¹ In the asylum context, Congress removed many asylum determinations from the judicial process entirely and replaced them with point-of-entry “expedited removal” determinations by asylum officers.¹² Under this procedure, arriving asylum applicants must convince an asylum officer that they have a “credible fear of persecution.”¹³ Notably, a credible fear determination entails not only determining that the applicant is

Gonzales, U.S. Attorney General, to Members of the Board of Immigration Appeals (Jan. 9, 2006), available at <http://www.immigration.com/newsletter1/attgenmembia.pdf>.

⁸ See sources cited *supra* note 7. The review has recently concluded. Press Release, Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. These new reforms were published after this article’s submission and are therefore not addressed in full here. The reforms, as noted *infra* Parts II.D & III.A, also do not consider the procedural issues that are the focus of this article. The article has been updated, however, where appropriate.

⁹ The view is not uncontested. Even Judge Posner’s scathing opinion in *Benslimane* states that its criticism is “not due to judicial hostility to the nation’s immigration policies.” 430 F.3d at 829-30. Similarly, Gonzales’s memos to immigration judges and the BIA narrowly address personnel problems of “intemperate or even abusive” judges, without regard to the system itself. See sources cited, *supra* note 7.

¹⁰ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹¹ See generally 1 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 2.04 (2005) [hereinafter GORDON ET AL.] (reviewing legislative history after 1952 and noting that the IIRIRA “wrought a major reconfiguring of the immigration law”); IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK 9 (8th ed. 2003) (reviewing the IIRIRA’s “new and far reaching grounds of inadmissibility”); PHILIP SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 225 (2000) (surveying the anti-immigrant political climate precipitating the IIRIRA).

¹² 8 U.S.C. § 1225(b) (2000).

¹³ *Id.* For a fuller review and discussion of expedited removal in the asylum context, see 3 GORDON ET AL., *supra* note 11, § 34.02.

“credible” in the colloquial sense of the word, but further that the applicant has a “significant possibility” of ultimately gaining asylum.¹⁴ Should the applicant fail to convince the asylum officer that his or her fear is credible, the applicant is immediately removed from the United States.¹⁵ The federal courts have no jurisdiction to review the officers’ decisions.¹⁶

¶16 The shift of authority over asylum determinations from immigration courts to asylum officers is easily criticized.¹⁷ By removing credibility determinations from trained immigration judges, asylum seekers subject to expedited removal are quite literally at the whim of whichever officer happens to stand at the border. Immigration officers at this phase can decide an asylum seeker’s fate completely free from the strictures of formal proceedings or judicial review.¹⁸ Reports consistently—and unfortunately—reveal that the officers have abused this discretion. In one case, immigration officials injured a refugee as they were attempting to remove him; the refugee was then returned to the airport, re-interviewed by different officers, and found to have a credible fear of persecution for his political beliefs in Guinea, where he had been tortured.¹⁹ A bipartisan study by the United States Commission on International Religious Freedom concludes that “the outcome of an asylum claim appears to depend not only on the strength of the claim, but also on which officials consider the claim, and whether or not the alien has an attorney.”²⁰ From the outset, the fate of an asylum seeker at the U.S. border may be less dependent on a measured consideration of facts than on hope and chance.

B. Into Immigration Court: Asylum Hearings

¶17 If the asylum seeker succeeds in making it past expedited removal, the applicant must present his or her claim in full before an immigration judge. This asylum hearing affords the asylum seeker an expanded opportunity to tell his or her story. Even here, however, the system is mired with subjectivity and a lack of accountability.²¹ Three

¹⁴ 8 U.S.C. § 1225(b)(1)(B)(v). For a closer look at expedited removal and the problems it entails, see generally CARRIE DAVENPORT, A “BRUTAL NEED”: HOW THE APPLICATION OF EXPEDITED REMOVAL TO POTENTIAL REFUGEES VIOLATES THE FIFTH AMENDMENT 8 (2005), available at http://www.aif.org/awards/dubroff_2005.pdf (noting that requiring the asylum officer to make an unreviewable determination of the applicant’s likelihood of success, based on present law, retards the advancement of U.S. asylum doctrine).

¹⁵ 8 U.S.C. § 1225(b)(1)(B)(iii).

¹⁶ *Id.* The applicant’s adverse credibility determination may be administratively reviewed, however, upon request by an immigration judge. *Id.*; 3 GORDON ET AL., *supra* note 11, § 34.02[3][a].

¹⁷ See, e.g., DAVENPORT, *supra* note 14; U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 50 (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february [hereinafter USCIRF REPORT]; Eric Schmitt, *When Asylum Requests Are Overlooked*, N.Y. TIMES, Aug. 15, 2001, at A16.

¹⁸ See generally 3 GORDON ET AL., *supra* note 11, § 34.02.

¹⁹ Susan Sachs, *I.N.S. Inspectors Are Judge, Jury and Deporter, Report Says*, N.Y. TIMES, Oct. 6, 2000, at B5.

²⁰ See USCIRF REPORT, *supra* note 17, at 4.

²¹ See, e.g., *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (surveying the Circuit Courts’ “concern about the immigration service’s chronic overreliance on [State Department] reports”); *Marcu v. INS*, 147 F.3d 1078, 1083 (9th Cir. 1998) (Hawkins, J., dissenting) (lamenting the INS’s success in denying an asylum claim by relying exclusively upon State Department reports); *Berishaj v. Ashcroft*, 378 F.3d 314, 324 (3d Cir. 2004) (noting, among other things, that “the [immigration judge’s] comments are not tethered to the record, owing what little support they have to hyperbole and appeals to popular culture—two utterly

problems distinguish themselves significantly. First, immigration judges have afforded the State Department's *Country Reports on Human Rights Practices* wildly varying degrees of deference.²² In the most extreme cases, the BIA has upheld asylum denials by relying exclusively upon generalized and conclusory State Department human rights reports as dispositive rejections of the asylum applicant's admittedly credible personal testimony.²³ Second, legislative reforms have increasingly shifted the burden of persuasion to the asylum seeker, in derogation of foundational norms of refugee law.²⁴ Third, the federal circuit courts have also personally called out immigration judges for simply unprofessional conduct.²⁵ The following sections review these problems and the legal framework that tolerates them.

1. Reliance on Country Conditions Reports: Abdicating Adjudicatory Responsibility

An applicant for asylum to the United States must prove that he or she has a well-founded fear of persecution in his or her country of origin.²⁶ To establish that the applicant's fear is well-founded, the applicant must show "that a reasonable person in his

inappropriate bases for an asylum decision"); *see also* Susan Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 *IND. J. GLOBAL LEGAL STUD.* 197, 197 (2000) ("United States immigration courts have tended to rely selectively, without reasoned analysis, on information bits that are decontextualized from what is known about a country of origin from the record as a whole."); Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 *U. COLO. L. REV.* 3, 3 (2000) (surveying the dissolution of procedural safeguards in asylum proceedings and pronouncing that "[t]he United States's commitment to protecting refugees is dying a slow death").

²² *See* U.S. Department of State, Country Reports, <http://www.state.gov/g/drl/hr/c1470.htm> (last visited May 24, 2007).

²³ *See, e.g.,* *Manzoor v. U.S. Dep't. of Justice*, 254 F.3d 342, 348 (1st Cir. 2001) (vacating the BIA's decision and reminding that "it is the Attorney General, not the Secretary of State, whom Congress has entrusted with the authority to grant asylum and because 'there is perennial concern that the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with.'" (quoting *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997)); *Marcu*, 147 F.3d at 1086 (Hawkins, J., dissenting) ("The majority's opinion allows the BIA to abdicate its fact-finding function by merely including a few citations and pithy quotes from the [State Department] country report in its analysis.").

²⁴ *See* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* ¶ 196 (rev. ed. 1992), *available at* <http://www.asylumsupport.info/publications/unhcr/handbook.pdf> [hereinafter UNHCR HANDBOOK] (explaining the asylum seeker's common difficulty of preserving evidence during his or her persecution, and the resultant obligation of the adjudicator to assist in factfinding and provide the applicant "the benefit of the doubt"); *see generally* 3 GORDON ET AL., *supra* note 11, § 34.02[9][A].

²⁵ *See, e.g.,* *Wang v. Att'y Gen. of the United States*, 423 F.3d 260, 268 (3d Cir. 2005) ("A disturbing pattern of immigration judge misconduct has emerged notwithstanding the fact that some of our sister circuits have repeatedly echoed our concerns."); Pamela A. MacLean, *Immigration Judges Come under Fire*, *NAT'L L.J.*, Jan. 30, 2006 [hereinafter MacLean, *Immigration Judges*] (surveying various cases of abuse of asylum seekers by immigration judges).

²⁶ 8 U.S.C. § 1158(b) (2000). The "well-founded fear" standard should not be confused with the "credible fear" standard used at initial asylum interviews. To show a credible fear, an asylum seeker must demonstrate "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." 8 U.S.C. § 1225(b)(1)(B)(v). If the applicant demonstrates a credible fear, the applicant must then show at his or her asylum hearing that the fear is well-founded and on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42) (2000). For a fuller discussion of the use of these standards and asylum procedures generally, *see generally* 3 GORDON ET AL., *supra* note 11, § 34.02.

circumstances would fear persecution.”²⁷ An applicant who demonstrates past persecution is afforded a presumptive well-founded fear of future persecution.²⁸ The government may rebut this presumption, however, if it can show by a preponderance of the evidence that the applicant’s home country conditions have changed or that the applicant could avoid persecution by relocating within his or her home country.²⁹ In any case, the applicant’s claim “cannot . . . be considered in the abstract, and must be viewed in the context of the relevant background situation.”³⁰ Country conditions reports, therefore, regularly play a central role in substantiating the objective reasonableness of an applicant’s subjective fear of persecution.³¹

¶9 Country conditions reports also play an important role in the immigration judge’s credibility determination of the applicant. An asylum applicant’s testimony sustains the applicant’s burden only where the immigration judge is satisfied that the applicant is credible.³² In making a credibility determination, the immigration judge may require the applicant to provide corroborating evidence, including country condition reports relevant to the applicant’s claim.³³ In practice, moreover, the BIA holds that “general background information about a country, where available, *must* be included in the record as a foundation for the applicant’s claim.”³⁴ Should the applicant fail to provide such background information, the applicant must offer an explanation for its absence.³⁵

¶10 An anonymous State Department report announcing to a bona fide asylum seeker that his or her testimony is no longer valid is indeed a difficult pill for the asylum seeker to swallow. Country conditions reports, regardless of their comprehensiveness or veracity, may be fatal to an asylum application where those reports contradict the asylum seeker in virtually any way.³⁶ While circuit courts have regularly held that generalized country condition reports are insufficient to rebut a presumption of well-founded fear based on past persecution,³⁷ near total deference to State Department reports is not uncommon in asylum decisions.³⁸ As the Seventh Circuit recently lamented, the

²⁷ *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (rejecting the BIA’s then-position that the “well-founded fear” requirement requires a “more likely than not” determination of future persecution, and instituting the current and less stringent “reasonable possibility” standard).

²⁸ 8 C.F.R. § 208.13(b)(1) (2006).

²⁹ 8 C.F.R. § 208.13(b)(1)(i).

³⁰ UNHCR HANDBOOK, *supra* note 24, ¶ 42.

³¹ *See* Kerns, *supra* note 21, at 197 (“Documentation related to a country’s political situation and human rights record is relevant, and often crucial, evidence regarding the objective reasonableness of an asylum seeker’s subjective fear of persecution.”).

³² 8 U.S.C. § 1158(b)(1)(B)(ii).

³³ 8 U.S.C. § 1158(b)(1)(B)(iii).

³⁴ *In re S-M-J-*, 21 I. & N. Dec. 722, 724 (BIA 1997) (emphasis added).

³⁵ *Id.* *But see* 3 GORDON ET AL., *supra* note 11, § 34.02[9][c][ii] (juxtaposing the BIA approach with the more relaxed approach of the Ninth Circuit).

³⁶ 8 U.S.C. § 1158(b)(1)(B)(iii) (“a trier of fact may base a credibility determination on . . . the consistency of [the applicant’s] statements with other evidence of record (including the reports of the Department of State on country conditions)”; 8 C.F.R. § 208.12(a) (“In deciding an asylum application, or in deciding whether the alien has a credible fear of persecution . . . the asylum officer may rely on material provided by the Department of State . . .”); Kerns, *supra* note 21, at 202. *See also infra* notes 62–63 (discussing REAL ID Act).

³⁷ *See, e.g.* *Manzoor v. U.S. Dept. of Justice*, 254 F.3d 342, 347 (1st Cir. 2001) (reversing BIA’s denial of asylum where BIA relied exclusively on a State Department report about lack of countrywide persecution); *KURZBAN*, *supra* note 11, at 301 (surveying many similar cases).

³⁸ *See, e.g.* *Marcu v. INS*, 147 F.3d 1078 (9th Cir. 1998) (upholding a BIA decision relying entirely upon

immigration courts are plagued by “chronic overreliance on [State Department] reports.”³⁹

¶11 The substantive reliability of State Department reports has also been a focus of circuit court disapproval for some time. In the oft-cited decision of *Gramatikov v. INS*,⁴⁰ Judge Richard Posner wrote: “[T]here is a perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with.”⁴¹ This concern, although difficult to substantiate conclusively, has been frequently reiterated in academic circles.⁴² Empirical studies, for example, have shown historically greater asylum acceptance rates from communist countries than from other countries that are less politically hostile to the United States.⁴³ These concerns, unfortunately, seem to echo indeterminably throughout the circuit courts without much consequence.⁴⁴ Notwithstanding complaints, immigration judges continue to rely on State Department reports without any formal restraints.⁴⁵

¶12 When the immigration courts treat State Department reports as “holy writs,” they are prone to making leaps of faith lacking reasoned or particularized analysis.⁴⁶ Immigration judges, as the critics charge, “selectively use individual pieces of country conditions information without regard to the nature of that information or how those ‘pieces’ relate to the record as a whole.”⁴⁷ State Department reports are, by nature, only

the State Department’s report). The Office of Immigration Litigation (OIL), of the Department of Justice, has reassured in its own bulletin that “no court has held that State Department reports do not constitute substantial evidence.” John Cunningham, *The Evidentiary Status of State Department Reports in Asylum Cases*, IMMIGRATION LITIGATION BULLETIN, Dec. 31, 2004, at 5-6 (noting also a “fundamental principle—that the court gives great weight to State Department reports because they concern matters within that agency’s area of expertise”). See also Margulies, *supra* note 21, at 17 (“Many recent decisions defer mechanically to State Department conclusions citing the results of single elections or changes in law ‘on the books’ as proof that refugees have nothing to fear.”).

³⁹ *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004). Judge Posner noted further concern that “the authors of these reports are anonymous and there is no opportunity for the asylum-seeker to cross-examine any of them.” *Id.* (citing *Gailius v. INS*, 147, F.3d 34, 46 n.7 (1st Cir. 1998)).

⁴⁰ 128 F.3d 619, 620 (7th Cir. 1997).

⁴¹ *Id.*

⁴² See Margulies, *supra* note 21, at 4 n.4 (surveying the literature); David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1331 (1990).

⁴³ Martin, *supra* note 42, at 1331. (“[E]ven a quick glance at the statistics in Table II raises serious questions about the high grant rates for [asylum] applicants from communist countries... and the strikingly low rates for El Salvador and Guatemala.”).

⁴⁴ See, e.g., *Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (“[T]he immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at issue.”); *Shah v. INS*, 220 F.3d 1062, 1069 - 70 (9th Cir. 2000) (quoting *Gramatikov v. INS*, 128 F.3d 619 (7th Cir. 1997)); *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998) (same); see also *Galina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000) (“The country report is evidence and sometimes the only evidence available, but the [BIA] should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ.”).

⁴⁵ See Kerns, *supra* note 21, at 197 (“No mechanism exists . . . to assure fundamental fairness in how country conditions information is utilized in the decision-making process.”); Cunningham, *supra* note 38, at 5 (OIL officer dismissing *Gramatikov*’s concern as “*dicta* in the purest sense,” and continuing to advocate reliance upon State Department reports).

⁴⁶ *Galina*, 213 F.3d at 959.

⁴⁷ See Kerns, *supra* note 21, at 215. See also *Galina*, 213 F.3d at 959 (“The [BIA]’s worst error, a rather astounding lapse of logic, remains to be mentioned. The [BIA] relied on the 1998 country condition report to show that the persecution by the Greens that drove Galina and her husband out of Latvia in 1994 is unlikely to recur. But we cannot find anything in the report that bears on that question.”); Margulies, *supra*

generalized summaries of recent country conditions.⁴⁸ Replacing particularized fact-finding with generalized reports puts the reports to a task they are poorly suited for,⁴⁹ regardless of their veracity, and further implicitly presumes that the applicant’s testimony is not credible. Foisting such a burden on the asylum seeker, who is generally without substantial means in the first place, violates international refugee standards as incorporated into U.S. law.⁵⁰ By careless deference to the reports, the immigration courts abdicate their fact-finding responsibilities to the State Department.⁵¹ For those seeking asylum from persecution, the result is a cold “jurisprudence of impatience.”⁵²

2. Shifting the Burden of Persuasion: Overturning the Foundations of Asylum Law

¶13

Although asylum applicants bear the ultimate burden of proof, asylum law recognizes the unique circumstances of asylum seekers and the resultant difficulties they may have in presenting their cases.⁵³ Asylum seekers can be expected to have difficulty speaking about traumatic events⁵⁴ or even trusting U.S. authorities.⁵⁵ The immigration court, moreover, almost always has significantly better resources than the applicant to obtain much of the background evidence.⁵⁶ As the Second Circuit has put it, “a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and

note 21, at 17.

⁴⁸ See generally U.S. Department of State, Country Reports, <http://www.state.gov/g/drl/hr/c1470.htm> (last visited May 24, 2007); Margulies, *supra* note 21, at 34 (“[S]tate Department reports are wholly unsystematic in their approach. At best, these reports amount to a grab bag of facts offering little insight into the risks faced by returning refugees. At worst, they offer an apologia for human rights abuses that is driven by U.S. foreign policy concerns rather than the safety of refugees.”).

⁴⁹ This is commonly deemed the “legislative/adjudicative” factual distinction, and is explored in full in David Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1280 (1990).

⁵⁰ See UNHCR HANDBOOK, *supra* note 24, ¶ 196 (explaining the oft-stated principle that the asylum seeker’s lack of resources warrants affording him or her “the benefit of the doubt”). The U.S. Refugee Act of 1980 brought the United States into compliance with international refugee standards as embodied under the 1967 United Nations Protocol Relating to the Status of Refugees, which the United States acceded to in 1968. U.S. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968) [hereinafter Refugee Protocol]; see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’s primary purposes was to bring United States refugee law into conformance with the 1967 Protocol Relating to the Status of Refugees . . .”). The Refugee Protocol also incorporates articles two through thirty-four of the 1951 United Nations Convention Relating to the Status of Refugees, in addition to its definition of “refugee” in article I. Refugee Protocol at art. I; Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

⁵¹ *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (stating that “it was improper for the BIA to rely on the State Department’s opinion in finding the [petitioner] not credible ‘because it is the Attorney General, not the Secretary of State, whom Congress has entrusted with the authority to grant asylum’” (quoting *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998))).

⁵² Margulies, *supra* note 21, at 19.

⁵³ See 3 GORDON ET AL., *supra* note 11, § 34.02(9)(d).

⁵⁴ See, e.g., *Fiadjoe v. Att’y Gen. of the U.S.*, 411 F.3d 135 (3d Cir. 2005), *reviewed infra* Part II.B.iii.

⁵⁵ See, e.g., *Senathirajah v. INS*, 157 F.3d 210, 218 (3d Cir. 1998) (“Given [the applicant’s] allegations of torture and detention, he may well have been reluctant to disclose the breadth of his suffering in Sri Lanka to a government official upon arriving in the United States . . .”).

⁵⁶ *Yang v. McElroy*, 277 F.3d 158, 163 (2d Cir. 2002) (“The INS not only has [the burden of production] but also has greater access than does the alien—even an alien represented by counsel—to State Department documents and other sources of current data.”) (citation omitted).

extensive documentation.”⁵⁷ Given these considerations, international standards incorporated into U.S. law state both that the asylum applicant is to “be given the benefit of the doubt” and that “the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.”⁵⁸

¶14 While the law’s expression of sympathy for asylum seekers may be seen as a false promise,⁵⁹ recent legislative amendments to the Immigration and Nationality Act (INA) have removed the promise altogether. The 2005 REAL ID Act’s sweeping evisceration of procedural safeguards is alarming.⁶⁰ Among other things, the REAL ID Act requires asylum seekers to prove one “central reason” of their persecution.⁶¹ Prior case law, in consideration of the asylum seeker’s aforementioned evidentiary difficulties, required only that the asylum seeker demonstrate one of his or her persecutor’s motives. This was especially relevant in so-called “mixed motive” cases, where it was deemed unreasonable to expect the asylum seeker to essentially present his or her persecutor with a note asking, “are you *primarily* persecuting me on account of race, religion, nationality, political opinion, or membership in a particular social group, or do you have multiple or secondary reasons in mind?” The silver lining for asylum seekers is that the new requirement is so patently absurd and unworkable that it will likely be ignored in practice.

¶15 Other provisions of the REAL ID Act are similarly troubling. The act expressly invites immigration judges to base their credibility determinations not only on the internal consistency of the applicant’s testimony—which may itself be difficult for reasons of translation or trauma, among others—but also on consistency with State Department reports.⁶² An asylum seeker may suffer an adverse credibility determination simply for asserting a claim contrary to a State Department report, regardless of the materiality of the inconsistency.⁶³ The choice this can present to the asylum seeker is dizzying: either express the truth and risk a discretionary adverse credibility determination for inconsistency with a bureaucratic report, or lie for consistency’s sake but risk losing one’s claim for reason of fraudulent testimony.

¶16 The problems of the REAL ID Act go on, but the sentiment behind the amendments is consistent: asylum seekers must not be trusted. Even assuming *arguendo* that such xenophobia is warranted, a solution logically suited to the concern would attempt to discern between meritorious and non-meritorious asylum claims. A requirement that asylum seekers prove the central motive of their persecutor presents an obstacle that would be insurmountable for all asylum seekers, regardless of the merit of their claims. Such an imposition is not only cruel, not only arbitrary, but also increases the likelihood that bona fide refugees will be returned to countries where they will be persecuted,

⁵⁷ *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999); *see generally* Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Claims*, 01-10 IMMIGR. BRIEFINGS 1 (Oct. 2001).

⁵⁸ *In re S-M-J-*, 21 I. & N. Dec. 722, 725, 729 (BIA 1997) (quoting UNHCR HANDBOOK, *supra* note 24, ¶ 196); *Secaida-Rosales v. INS*, 331 F.3d 297, 306 (2d Cir. 2003) (“[T]he [immigration judge] has an affirmative obligation to help establish and develop the record in the course of [asylum] proceedings.”); *see also* sources cited *supra* note 50 (explaining how the U.S. 1980 Refugee Act was intended to bring U.S. refugee law into conformance with international standards).

⁵⁹ *See infra* Part I.B.3 (reviewing judicial misconduct and bias against asylum seekers in asylum hearings).

⁶⁰ REAL ID Act of 2005, Pub L. No. 109-13, 119 Stat. 231 (2005).

⁶¹ *Id.* § 101(a)(3)(B)(i).

⁶² *Id.* § 101(a)(3)(B)(iii).

⁶³ *Id.*

tortured, or even killed. By doing so, the United States violates its commitments under both domestic⁶⁴ and international law.⁶⁵

3. Abusing the Persecuted: Immigration Judges and Misconduct

¶17 To accuse a “jurisprudence of impatience” or lament the deterioration of refugee law is one thing. To outright call into question the competence of a specific judge is another. Yet time and time again, the federal courts have found themselves forced to do just that.⁶⁶ These criticisms focus not on evidentiary standards specifically, but rather on a professional concern that immigration judges and the BIA may care more about clearing their dockets than the asylum applicants before them.⁶⁷ Indeed, reports suggest that immigration judges and the BIA may have even consciously strayed from their responsibilities as neutral arbiters in asylum proceedings.⁶⁸ Considering the stakes at hand for asylum seekers, such cavalier abuses of authority deserve rebuke for more than academic purposes.

¶18 Examining a particular example of how an immigration judge can abuse authority illustrates the problem. In *Fiadjoe v. Attorney Gen. of the United States*, a Third Circuit decision, a Ghanaian asylum applicant alleged that her father enslaved and began raping her at age seven.⁶⁹ When the applicant fell in love and conceived a child with a Muslim man, her father beat her until she had a miscarriage.⁷⁰ When the man came to her home, her father beat him to death in front of the applicant.⁷¹ When the applicant eventually came to the United States, a psychologist found that she struggled to communicate or make any eye contact, and frequently dissociated due to her emotional trauma.⁷² At her asylum hearing, the applicant broke down and cried while attempting to testify about her abuse.⁷³ The following exchange between Immigration Judge Donald V. Ferlise and the applicant was typical of the entire hearing:

⁶⁴ INA § 241(b)(3), 8 U.S.C.A. § 1231(b)(3) (2006) (codifying the principle of *non-refoulement*); see also sources cited *supra* note 50.

⁶⁵ See sources cited *supra* note 50.

⁶⁶ See, e.g., *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (“The immigration judge’s analysis was so inadequate as to raise questions of adjudicative competence.”); *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (“The decision here on review is neither [reasonably sound nor reasonably current], and it is an embarrassment to the Agency on multiple levels.”); *Wang v. Att’y Gen. of the United States*, 423 F.3d 260, 267 (3d Cir. 2005) (“Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings.”); MacLean, *Immigration Judges*, *supra* note 25 (“There are judges who really have no business being judges. They are unfit and should be removed.”) (quoting immigration attorney and scholar Ira Kurzban).

⁶⁷ See, e.g., *Berishaj*, 378 F.3d at 331 (stating that the “natural—though surely unintended—consequence of the streamlining regulations” is summary affirmances that suggest the BIA has shirked its duties).

⁶⁸ See *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (“[N]o person [may] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”); *Wang*, 423 F.3d at 267-271 (surveying various instances of aggressive and patently biased brow-beating by immigration judges); see generally Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006) (discussing and criticizing Attorney General John Ashcroft’s allegedly conscious efforts to bias immigration judges) [hereinafter Legomsky, *Deportation*].

⁶⁹ 411 F.3d 135, 139 (3d Cir. 2005) (describing further how the abuse was part of local religious rituals, thus giving rise to her asylum claim).

⁷⁰ *Id.* at 140.

⁷¹ *Id.*

⁷² *Id.* at 141.

⁷³ *Id.* at 142-143.

Ferlise: Ma'am, you, you can cry, that's fine, but you're not making any sense, and the tears do not do away with the fact that you're not making any sense to me. Now, rather than crying, just answer the question. You said, your father raped you at age seven and he would beat you, correct?

Fiadjoe: Yes, but I didn't tell anybody.

Ferlise: I don't care if you did or not. At age seven, how long did this go on that he was raping you and beating you?

Fiadjoe: In fact, he was doing that to me when I cried to my auntie, I want to—

Ferlise: —Ma'am, I don't like it when someone beats around the bush, okay, when they don't answer me.⁷⁴

¶19 The Third Circuit found that Ferlise's adverse credibility determination was not supported by substantial evidence, and on remand he was removed from the case.⁷⁵

¶20 Instances like this might be regarded as mere unfortunate errors if they were isolated, corrected, and the abusive immigration judges ferreted out. Astonishingly, however, *Fiadjoe* is not atypical. Not only has the Third Circuit recently found Judge Ferlise to be improperly abusive in yet another case,⁷⁶ but his reckless attitude is evident in numerous other asylum determinations reviewed by the federal courts of appeal. As a study by the *National Law Journal* determined, "[a]t least 25 appellate opinions have criticized immigration judges' treatment of aliens during deportation and asylum hearings since 2003. In 13 of those cases, the panels found the conduct so egregious that they said the case should be assigned to a new judge."⁷⁷ The circuit courts have likewise surveyed the widespread nature of the abuse. In *Benslimane v. Gonzales*, the Seventh Circuit opened its decision by string-citing twelve cases of administrative incompetence, en route to declaring that "adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."⁷⁸ Immigration lawyers, for their part, have

⁷⁴ *Id.*

⁷⁵ *Id.* The Third Circuit decision reprints many such exchanges contained in the transcript, which are also worth review. In a subsequent different asylum case, the Third Circuit again reversed Immigration Judge Donald Ferlise's adverse credibility determination as wholly unsupported, and advised the BIA to assign the case to a different judge. *Sukwanputra v. Gonzales*, 434 F.3d 627 (3d Cir. 2006). In that case, Ferlise rebuked the applicant's testimony on cross-examination regarding her sister's desire to find a better job: "Look for a better job. Ma'am she has no right to be here. You have no right to be here. All of the applicants that are applying for asylum have no right to be here. . . . You have to understand, the whole world does not revolve around you and the other Indonesians It's not a world that revolves around you and your ethnic group." *Id.* at 638. (quoting asylum hearing transcript). The Third Circuit reflected "[w]e are deeply troubled by the [immigration judge]'s remarks, none of which had any basis in the facts introduced, or the arguments made, at the hearing. . . . This is not the first time we have been troubled by the conduct of [this immigration judge]." *Id.* at 638 & n.11.

⁷⁶ See *Sukwanputra*, 434 F.3d at 638.

⁷⁷ MacLean, *Immigration Bench*, *supra* note 6.

⁷⁸ 430 F.3d 828, 829 (7th Cir. 2005). Note further that Attorney General Alberto Gonzales has himself acknowledged the concern. See sources cited *supra* note 7.

further complained that some immigration judges manipulate the court record by turning the recording machine on and off, and intimidating applicants when off-record.⁷⁹ Notwithstanding occasional government protests to the contrary, the problem has become obvious and severe.⁸⁰

¶21 The root of the problem lies not in some inherent incompetence of immigration judges, but rather in the system itself. It must be said, in fairness, that most immigration judges discharge their duties ethically, meticulously, and respectfully. Unfortunately, the system has also tolerated and even encouraged those judges who do not. While the Executive Office of Immigration Review (EOIR) has published an ethics manual for immigration judges and the BIA,⁸¹ until recently the disciplinary system operated in secrecy and was seen as “not worth the paper it’s printed on.”⁸² Attorney General Gonzales has recently directed the creation of a formal Code of Conduct and performance evaluations performed by EOIR, however, based upon the results of the immigration court survey commenced in early 2006.⁸³ While these are clearly praiseworthy developments, some caution may be warranted until the substance and effect of these reforms is known.⁸⁴ Rumors of EOIR’s willful blindness to misconduct, and the condemning judgments of the federal circuit courts, leave an impression not easily erased.⁸⁵

¶22 Many critics trace the problem back to Attorney General John Ashcroft’s aggressive reforms of 2002 and 2003.⁸⁶ In January of 2002, the National Association of Immigration Judges (NAIJ) formally asked Congress to remove their courts from the control of the Department of Justice (DOJ).⁸⁷ The request was the culmination of a bipartisan congressional study by the United States Commission on Immigration Reform, which concluded that the immigration courts would best function free from “[t]he taint of

⁷⁹ MacLean, *Immigration Bench*, *supra* note 6.

⁸⁰ National Association of Immigration Judges President Denise Slavin, for example, stated “[t]here’s two circuits that have mentioned less than a handful of judges, and when you look at the volume of cases going up, I think we’re talking about just a very minor issue at this point.” Juan Castillo, *Review of Immigration Courts is Ordered; U.S. Attorney General Also Warns Judges to Treat Claims Fairly*, AUSTIN AM.-STATESMAN, Jan. 11, 2006, at A9 (Slavin was referring to the Ninth and Second Circuits). *But see, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (the Seventh Circuit surveying the problem); *Wang v. Att’y Gen. of the U.S.*, 423 F.3d 260, 267 (3d Cir. 2005) (the Third Circuit surveying the problem); *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005) (finding that the immigration judge exhibited “an arbitrary exercise of judicial fiat at the expense of a powerless alien whom the DHS had already found to have a credible fear of returning to Cuba”).

⁸¹ EOIR, ETHICS MANUAL (2001), available at <http://www.usdoj.gov/eoir/statspub/handbook.pdf> [hereinafter ETHICS MANUAL].

⁸² MacLean, *Immigration Judges*, *supra* note 25 (quoting Susan Akram, immigration and human rights associate professor at Boston University School of Law).

⁸³ *See* Press Release, Department of Justice, *supra* note 8.

⁸⁴ *See* Christina Velez, *Rolling the Dice: Is the DOJ Proposal Adequate to Correct Problems in Our Immigration Courts?*, IMMIGRATION NEWS, Oct. 12, 2006, <http://www.ilw.com/articles/2006,1012-velez.shtm>.

⁸⁵ *See supra* notes 75-80 and accompanying text.

⁸⁶ *See, e.g.* Legomsky, *Deportation*, *supra* note 68, at 370; *Morning Edition: Complaints Prompt Government Review of Immigration Courts* (NPR Radio broadcast Feb. 9, 2006) (“Lawyer Ira Kurzban traces [the problems] to changes former Attorney General John Ashcroft made at the Board of Immigration Appeals.”).

⁸⁷ Nat’l Ass’n of Immigration Judges, *An Independent Immigration Court: An Idea Whose Time has Come* (Jan. 2002) (unpublished position paper, on file with author) [hereinafter NAIJ Proposal]; *see generally* Lisa Getter, *Immigration Judges Call for Independent Court*, L.A. TIMES, Jan. 31, 2002, at A1 (providing a narrative account).

inherent conflict of interest caused by housing the Immigration Court within the DOJ.”⁸⁸ The concern stemmed from, among other reasons, repeated instances of intervention in immigration cases by colluding INS and DOJ officials seeking to bypass the adjudicatory process.⁸⁹

¶23 Attorney General Ashcroft responded quickly—but in the manner opposite to what NAIJ had hoped. In 2002 he announced his intention to reduce the number of judges on the BIA, and in March 2003 he gutted the BIA from twenty-three to just eleven judges.⁹⁰ As data compiled by longtime House Judiciary Committee legal staff member Peter Levinson revealed, Ashcroft removed exclusively those members with the most “liberal” records.⁹¹ Ashcroft also promulgated new regulations which subtly redefined the role of the BIA members. Whereas the Code of Federal Regulations governing the BIA previously began “Board Members shall exercise their independent judgment and discretion in cases coming before the Board,” upon Ashcroft’s amendments the sentence was replaced thus: “The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.”⁹² While Ashcroft’s reformation of the immigration bench was a top-down process, immigration judges are as vulnerable to discretionary “reassignment” as the purged BIA members.⁹³ As Professor Stephen Legomsky put it, “[t]he message was simple: ‘You rule against the government at your personal peril.’”⁹⁴

¶24 What the Seventh Circuit has deemed “adjudication . . . below the minimum standards of legal justice,”⁹⁵ in other words, may have been precisely Ashcroft’s brand of justice all along. The glimmer of hope such a realization provides is that a system so consciously destroyed may likewise be consciously repaired. As the following sections demonstrate, however, meaningful reform must look beyond the trial level and individual immigration judges. Just as immigration judges are insulated by seemingly toothless ethical standards, immigration decisions are insulated by extraordinarily deferential review.

C. Up for Review: Administrative and Federal Courts

¶25 Despite the foregoing review, perhaps the most glaring fault of the current procedural system has been its deficiencies on appeal. The problem is two-fold: first on administrative appeal to the BIA, and second on federal appeal to the circuit courts. As the following sections demonstrate, the problems generally trace back once again to the Ashcroft reforms of 2002.

⁸⁸ NAIJ Proposal, *supra* note 87, at 8.

⁸⁹ See Legomsky, *Deportation*, *supra* note 68, at 373

⁹⁰ *Id.* at 376.

⁹¹ *Id.* (citing Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1164 (2004), available at http://www.rightsworkinggroup.org/files/peter_article.pdf).

⁹² Compare 8 C.F.R. § 3.1(a)(1) (2002) with 8 C.F.R. § 3.1(a)(1) (2003). Ashcroft’s version remains in the current Code of Federal Regulations. 8 C.F.R. § 1003.1(a)(1) (2006). Ashcroft did not remove the language regarding decisional independence entirely, but diluted and buried it deeper in the regulations, rather than give them top billing as before. See 8 C.F.R. § 1003.1(d)(1)(ii).

⁹³ See Legomsky, *Deportation*, *supra* note 68, at 373-74 and sources cited therein.

⁹⁴ *Id.* at 370.

⁹⁵ *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

1. The Board of Immigration Appeals

¶26 “When the BIA had a more active role, it would clean up decisions Now the BIA is a rubber stamp.”⁹⁶ So said former BIA Judge Lory Rosenberg recently to the *National Law Journal*, voicing a not uncommon charge.⁹⁷ Judge Rosenberg referred to Attorney General Ashcroft’s expansion of BIA “streamlining,” which is a process by which a single BIA member may affirm an immigration judge’s decision without any issued opinion.⁹⁸ Streamlining, however, is not the only problem. Deferential factual review and continued misuse of country conditions reports also plague BIA decisions. These latter considerations set the stage for the downfalls of streamlining, and are thus reviewed first.

i) *Administrative Factfinding: From De Novo Review to No Review*

¶27 Prior to 2002, the BIA exercised independent authority in reviewing immigration judges’ decisions de novo, for both issues of fact and law.⁹⁹ Despite this authority, the BIA’s review of factual determinations was distinctly deferential, keeping in mind the unique position of the immigration judge to hear the applicant’s testimony personally.¹⁰⁰ To strike the appropriate balance, the BIA would parse the factual determinations of the immigration judge to ensure reasonableness, but would err on the side of deference.¹⁰¹ This brand of de novo review protected asylum applicants from the sort of reckless abuse reviewed *supra* Part II.B., while also recognizing and respecting the function of the immigration courts.

¶28 The BIA no longer may conduct de novo factual review, and instead must adopt the immigration judge’s factual determinations only unless they are “clearly erroneous.”¹⁰² Ashcroft’s reforms also expressly prohibit the BIA from engaging in any factfinding of its own.¹⁰³ In practice, this generally means that immigration judges’ factual determinations, either for or against the individual, are insulated from any review whatsoever.¹⁰⁴ While a “clearly erroneous” standard of factual review is not uncommon in appellate review, the BIA is an uncommon body reviewing uncommon adjudicative deficiencies with uncommonly severe ramifications.¹⁰⁵ What administrative efficiency

⁹⁶ MacLean, *Immigration Bench*, *supra* note 6.

⁹⁷ *See id.*

⁹⁸ 8 C.F.R. § 1003.1(e)(4); *see generally* John R.B. Palmer, Stephen Yale-Loehr, Elizabeth Cronin, *Why Are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 23 (2005).

⁹⁹ *See* 8 C.F.R. § 3.1(d)(1) (2001); *see also* In re A-S-, 21 I. & N. Dec. 1106, 1109 (BIA 1998) (“It is axiomatic that the Board has the authority to employ a de novo standard of appellate review in deciding the ultimate disposition of a case.”) (citations omitted).

¹⁰⁰ *See* Kerns, *supra* note 21, at 204 and sources cited therein.

¹⁰¹ *See, e.g.* In re A-S-, 21 I. & N. Dec. at 1109-12 (parsing the factual record, but ultimately determining that the immigration judge’s findings were “supported by specific and cogent reasons,” and that therefore “we will not substitute our judgment for that of the Immigration Judge”).

¹⁰² 8 C.F.R. § 1003.1(d)(3).

¹⁰³ 67 Fed. Reg. 54,878, 54,902, 54,905 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1(d)(3)).

¹⁰⁴ *See, e.g.*, In re Francisco de Assis, A29274116, 2003 WL 23521839 (BIA Nov. 3, 2003) (unpublished decision) (denying review of respondent’s protests regarding notice of hearings and voluntary departure); In re Hung Phuoc Nguyen, A44233829, 2005 WL 3802171 (BIA Dec. 6, 2005) (unpublished decision) (affirming the immigration judge’s grant of asylum based on credibility and country conditions findings, despite DHS’s protests, because these are non-reviewable findings of fact).

¹⁰⁵ *See supra* Part II.B; *see also* In re A-S-, 21 I. & N. Dec. at 1114 (Schmidt, J., dissenting).

may be accomplished by preserving immigration judges' factual determinations should be tempered by considering the potential harm to asylum applicants or to the government.

ii) *Administrative Notice: How to Reject Credible Refugees*

¶29 Rather than keeping immigration judges' overreliance upon State Department reports in check, the BIA has gone even further by taking uncontested administrative notice of the reports.¹⁰⁶ Although the BIA may not engage in factfinding, the applicable regulations grant the BIA an exception to take administrative notice of "the contents of official documents."¹⁰⁷ In practice, the BIA will take administrative notice of any country report, assuming the BIA deems it useful. While country reports may be a useful tool for the represented asylum applicant, for the pro se applicant the effect may be to perfunctorily reject credible testimony without affording the applicant even the opportunity to respond.¹⁰⁸

¶30 The problem is one of contestability. Not only does administrative notice of country reports rely on an unknown and un-present author,¹⁰⁹ it also lacks the asylum applicant's perspective entirely.¹¹⁰ Some federal courts, moreover, have upheld the BIA's refusal to even provide the individual an opportunity to argue against administrative notice.¹¹¹ Considering that the BIA has never been required to "independently specify its reasons for rejecting every piece of evidence,"¹¹² affording the BIA such additional latitude opens the door for patently superficial analysis to the detriment of defenseless refugees. In *In re E-P-*, for example, the BIA relied on a State Department report in making the now-laughable determination that the 1997 U.S. involvement in Haiti had restored democracy, human rights, and stability to the troubled country.¹¹³ The decision acknowledged but ignored reports of continuing paramilitary threats, and their specific relevance to the asylum applicant's claims.¹¹⁴ The applicant was not afforded an opportunity to testify in response, and was ordered removed to Haiti—where, in 2004,

¹⁰⁶ See, e.g., *Kaczmarczyk v. INS*, 933 F.2d 588, 593 (7th Cir. 1991) (upholding administrative notice of changed country conditions in asylum claims).

¹⁰⁷ 8 C.F.R. § 1003.1(d)(3)(iv).

¹⁰⁸ See, e.g., *Matter of H-M-*, 20 I. & N. Dec. 683, 690 (BIA 1993) (taking administrative notice of changed country conditions to rebut petitioner's presumption of well-founded fear based on past-persecution); see generally ANNA MARIE GALLAGHER, 2 IMMIGRATION LAW SERVICE § 10.107 (2d ed. 2005) (discussing generally the administrative notice of changed country conditions).

¹⁰⁹ See *Niam v. Ashcroft*, 354 F.3d 652, 658-59 (7th Cir. 2004) ("[T]he authors of these reports are anonymous and there is no opportunity for the asylum-seeker to cross-examine any of them. . . . [T]he evidentiary infirmities of the country reports are important in placing in perspective a startling evidentiary ruling of which the [applicants] complain."):

¹¹⁰ See Katherine J. Strandburg, *Official Notice of Changed Country Conditions in Asylum Adjudication: Lessons from International Refugee Law*, 11 GEO. IMMIGR. L.J. 45, 69 (1996) ("[A] court attempting to review the BIA's determination of changed circumstances is left entirely without the benefit of the applicant's perspective on the effect of changed circumstances on his or her claim. Since substantial evidence review must be based on consideration of both supporting and opposing evidence, meaningful review of such a stunted record is impossible."):

¹¹¹ See *Kaczmarczyk*, 933 F.2d at 597 (holding that the discretionary motion to re-open provides the petitioner sufficient procedural safeguards under the Refugee Act and Due Process Clause), reviewed by Margulies, *supra* note 21, at 19 n.46.

¹¹² *Petrovic v. INS*, 198 F.3d 1034, 1038 (7th Cir. 2000).

¹¹³ *In re E-P-*, 21 I. & N. Dec. 860, 862-63 (BIA 1997).

¹¹⁴ *Id.* at 863.

paramilitary forces captured towns and cities during a violent uprising, President Aristide was forced into exile, and retributive and political killings escalated.¹¹⁵

¶31 Just as immigration judges might lazily rely upon legislative reports for adjudicative factfinding, the BIA may likewise uphold such deficiencies and provide perfunctory factual determinations itself. What is being considered, what weight it is given, and what its veracity may be is indeterminable and uncontestable.¹¹⁶ Whether one is pro- or anti-immigration, the failure to diligently discern between meritorious and non-meritorious claims should be alarming for any serious immigration reformist.

iii) *BIA “Streamlining:” Letting Go Completely*

¶32 The problems of administrative appeal reviewed thus far are but mere details when compared to BIA streamlining. In 2002 Attorney General Ashcroft finalized BIA streamlining, a procedure whereby a single BIA member must affirm an immigration judge’s decision without opinion (“affirm without opinion,” or AWO), if that BIA member concludes the initial decision was correct and that any errors were harmless.¹¹⁷ AWO is mandatory, not discretionary.¹¹⁸ Prior to 2002, BIA decisions were arrived at by a three-member panel, except in certain circumstances designated by the Board Chairman under an experimental and limited version of streamlining.¹¹⁹ As the regulations now make clear, one-member affirmances without published opinion are the new norm.¹²⁰ In 2004, the eleven members of the BIA decided 48,707 cases, approximately ninety-three percent of which were issued by a single board member.¹²¹

¶33 It is often said that there are four goals of any administrative process: accuracy, efficiency, acceptability, and consistency.¹²² The streamlining regulations, and the curiously concurrent purge of BIA members, violate all of these goals. Streamlining

¹¹⁵ See *Timeline: Haiti*, BBC NEWS, Feb. 16, 2006, available at <http://news.bbc.co.uk/1/hi/world/americas/1202857.stm> (detailing the country’s descent into violence after Aristide’s rigged election); see also U.S. Dep’t of State, *Haiti*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005 (2006), <http://www.state.gov/g/drl/rls/hrrpt/2005/61731.htm> (“The government’s human rights record remained poor. . . . [R]etribution killings and politically motivated violence continued throughout the country.”).

¹¹⁶ E.g., *Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992) (upholding BIA decision “apparently based . . . solely on the change of government in Nicaragua, without any examination of how that change related to [the applicant’s] particular claims”). For a full discussion of different courts’ treatment of country condition reports, see GALLAGHER, *supra* note 108; cf. Kerns, *supra* note 21, at 205 (“The BIA has provided no explicit guidance for assessing the evidentiary weight of differing pieces of country conditions information . . .”).

¹¹⁷ 8 C.F.R. § 1003.1(e)(4).

¹¹⁸ *Id.* (“The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct . . .” (emphasis added)).

¹¹⁹ See Palmer et al., *supra* note 98, at 23-27.

¹²⁰ The regulations enumerate six limited circumstances under which review by a three-member panel, rather than the single-member standard, is permissible. 8 C.F.R. § 1003.1(e)(6).

¹²¹ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2004 STATISTICAL YEARBOOK at U1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>.

¹²² See Stephen Yale-Loehr, Am. Immigr. Law. Ass’n (AILA), Statement Before the House Committee on the Judiciary Subcommittee on Immigration and Claims (Feb. 6, 2002), available at <http://judiciary.house.gov/legacy/yaleloehr020602.htm> [hereinafter Yale-Loehr Statement]; see generally Stephen Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986) (reviewing the concept’s creation by Roger Crampton and its adoption and refinement by others over time) [hereinafter Legomsky, *Forum Choices*].

decreases accuracy by diminishing meaningful review.¹²³ Streamlining decreases efficiency because, although the BIA may succeed in initially clearing its backlog, the level of adjudicative accuracy is so low that the circuit courts have been forced to remand a vastly increased percentage of cases for repeated hearings.¹²⁴ A system that routinely remands cases for repeated hearings, quite plainly, is one that institutionalizes inefficiency.¹²⁵ Streamlining decreases acceptability,¹²⁶ as demonstrated factually by the widespread revolt of the immigration community.¹²⁷ As a comprehensive study published in the *Georgetown Immigration Law Journal* determines, “[m]any lawyers have lost faith in the BIA and are now concentrating their energy and resources on the federal courts of appeal instead.”¹²⁸ Streamlining also decreases consistency, because the elimination of written opinions diminishes institutional memory and the development of legal doctrine through case law.

¶34

Administrative notice of country conditions reports and a distinct lack of meaningful factual review, as reviewed *supra*, had already sent the BIA down a dangerous path notwithstanding streamlining. With the reduction of the size of the BIA and the enactment of one-member affirmations without opinion—often performed not even by a BIA member directly, but rather by administrative staff¹²⁹—the BIA has been restructured to abandon its adjudicative duties completely. The result is a system that tolerates immigration judges’ faulty decisions, replaces meaningful administrative review with a rubber stamp, and leaves the federal courts of appeal with an administrative record bearing little meaningful relation to the petitioner’s claim.¹³⁰

¹²³ See, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (“[By AWO], the BIA may have shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and reasonably current. The decision here on review is neither, and it is an embarrassment to the Agency on multiple levels.”).

¹²⁴ The Seventh Circuit, for example, reversed a staggering forty-eight percent of appeals from the BIA in the last year. *MacLean, Immigration Bench, supra* note 6; *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (“In the year ending on the date of the argument, different panels of this court reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.”).

¹²⁵ Yale-Loehr Statement, *supra* note 122 (“Any system that routinely involves remands for purposes of clearer decisions in the courts below cannot be said to achieve any type of efficiency; rather, such a system would institutionalize inefficiency.”).

¹²⁶ Legomsky defines acceptability as “having a procedure that the litigants and the general public perceive as fair.” Legomsky, *Forum Choices, supra* note 122, at 1313 (citations omitted).

¹²⁷ See generally *MacLean, Immigration Bench, supra* note 6 (citing complaints). Loud criticism has emerged from every conceivable segment of the relevant legal community, including lawyers, scholars, Congresspersons, immigration judges, and former Board Members. See generally *Palmer et al., supra* note 98, at 5. An unsuccessful Administrative Procedures Act suit was even brought in the U.S. District Court for the District of Columbia, arguing that the Department of Justice acted arbitrarily and capriciously in promulgating the 2002 reforms. *Capital Area Immigrants’ Rights Coalition v. U.S. Dep’t of Justice*, 264 F. Supp. 2d 14 (D.D.C. 2003).

¹²⁸ *Palmer et al., supra* note 98 at 88. The federal courts of appeal, for their part, are in agreement. E.g., *Iao v. Gonzales*, 400 F.3d 530, 533-35 (7th Cir. 2005) (noting the BIA’s “disturbing” practice of affirming “either with no opinion or with a very short, unhelpful, boilerplate opinion, even, as in this case, the immigration judge’s opinion contains manifest errors of logic.”); see generally *Liptak, supra* note 3 (quoting, among others, Judge John M. Walker, Chief Judge of the Second Circuit, as stating “[w]e’re the first meaningful review that the [immigrant] petitioner has.”).

¹²⁹ See *Palmer et al., supra* note 98, at 25 (“In practice, streamlining relied heavily on the BIA’s team of staff attorneys and paralegals. This staff was involved in not only recommending outcomes and drafting opinions, but also determining which cases would be sent to single Board Members for summary affirmance.”).

¹³⁰ As indicated throughout this section, see *Palmer et al., supra* note 98, for a comprehensive analysis of

2. The Federal Courts of Appeal

¶35 By the time an asylum case arrives at a federal court of appeals, the administrative record may be so confusing that it is no longer of any use at all.¹³¹ Initial credible fear determinations are made by officers on the spot, with no development or consideration of the factual record.¹³² Subsequent immigration judge decisions may be distempered, careless, or simply unintelligible.¹³³ The BIA may summarily affirm such decisions without explanation.¹³⁴ The federal circuit courts, faced with this mess, may be forced to pronounce a brand of justice that is as illusory as the administrative record it is predicated upon.¹³⁵

¶36 Federal courts considering BIA findings are obligated to exercise review with extreme deference.¹³⁶ A BIA finding of no credible fear of persecution must stand, upon the closed factual record,¹³⁷ unless the evidence is “so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.”¹³⁸ This “compelling evidence” standard sets a bar that has been construed as higher than the typical “substantial evidence” standard of administrative review, despite the “benefit of the doubt” supposedly afforded to asylum seekers.¹³⁹ Among other shortcomings, this standard of review forecloses virtually any meaningful evaluation of the agency’s factual determinations and use of country reports.¹⁴⁰

¶37 In one illustrative case, the Third Circuit in *Berishaj v. Ashcroft* found itself facing an administrative record so deficient that the court simply admitted that it could not exercise meaningful review.¹⁴¹ The initial adverse determination by the immigration judge had no apparent relation to the record.¹⁴² The factual administrative record, including country condition reports, was more than four years out of date.¹⁴³ The BIA affirmed the immigration judge’s decision without opinion, neither supplementing nor expressing an evaluation of the administrative record.¹⁴⁴ The result, the court chided, was an “embarrassment to the Agency on multiple levels.”¹⁴⁵ Not only was the immigration judge’s initial opinion “open to ridicule,”¹⁴⁶ but the BIA’s failure to supplement or review

BIA streamlining.

¹³¹ See, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (“We therefore call on the BIA to adopt . . . policies that will avoid the Court of Appeals having to review administrative records so out-of-date as to verge on meaningless.”).

¹³² See *supra* § II.A.

¹³³ See *supra* § II.B.

¹³⁴ See *supra* § II.C.i.

¹³⁵ *Berishaj*, 378 F.3d at 317.

¹³⁶ Kerns, *supra* note 21, at 206.

¹³⁷ 8 U.S.C. § 1252 (b)(4)(A) (2000); *Berishaj*, 378 F.3d at 328 (“It is a salutary principle of administrative law review that the reviewing court act upon a closed record.”).

¹³⁸ *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992), reviewed by *Berishaj*, 378 F.3d at 322-23. The *Elias-Zacarias* standard is codified at 8 U.S.C. § 1252(b)(4)(B).

¹³⁹ Kerns, *supra* note 21, at 214.

¹⁴⁰ See, e.g., *Petrovic v. INS*, 198 F.3d 1034, 1037 (7th Cir. 2000); Kerns, *supra* note 21, at 206-07.

¹⁴¹ *Berishaj*, 378 F.3d at 317.

¹⁴² *Id.* at 324 (deriding the immigration judge’s discussion as being “not tethered to the record, owing what little support they have to hyperbole and appeals to popular culture”).

¹⁴³ *Id.* at 317.

¹⁴⁴ *Id.* at 317, 331.

¹⁴⁵ *Id.* at 331.

¹⁴⁶ *Id.*

the record suggested an indifferent “not our problem” attitude.¹⁴⁷ Given the Third Circuit’s limited scope of review, moreover, the court could not compensate for the decision’s deficiencies by supplementing the record itself.¹⁴⁸

¶38 The Court thus turned directly to Congress and the Executive, and issued the following plea:

[W]e call on Congress, the Department of Justice, the Department of Homeland Security, and the BIA to improve the structure and operation of the system, so that all may have the confidence that the ultimate disposition of a removal case bears a meaningful connection to the merits of the petitioner’s claim(s) in light of contemporary world affairs.¹⁴⁹

D. Through the Looking Glass (and what the courts, administration, and legislature found there)

1. Circuit court response

¶39 An unintended consequence of BIA streamlining has been the widespread rousing of the circuit courts.¹⁵⁰ Since the enactment of streamlining in 2002, the immigration caseload of the circuit courts has expanded from just below 200 cases per month to nearly 1,200.¹⁵¹ Yet, without procedural reform, there is little the circuit courts can do but complain. The extremely limited scope of review afforded the circuit courts prevents them from significantly intervening in the merits of asylum adjudication.¹⁵² Cases involving “cookie-cutter” determinations or abusive judges are typically remanded to work their way once again through the immigration courts.¹⁵³ There is, unfortunately, no procedural guarantee that an order to “do it again” means that it will be done right.

¶40 Judicial responses to the problem of inadequate administrative records, as reviewed in *Berishaj*, have been strained and divided. The Seventh Circuit has instituted the practice of taking “judicial notice of post-final-agency-determination developments, in the form of new country reports, and at times rests its disposition on these

¹⁴⁷ *Id.* (noting further that “[o]utdated administrative records *are* the BIA’s problem”).

¹⁴⁸ *Id.* at 328.

¹⁴⁹ *Id.* at 317. The court directed the clerk to send a copy of the opinion to a wide variety of relevant government officials. *Id.* at 331-32.

¹⁵⁰ See Liptak, *supra* note 3, at A1 (quoting Second Circuit Judge John Walker: “[Ashcroft] just moved the problem from one court to another court. . . . We’re the first meaningful review that the petitioner has”); see also Ming Shi Xue v. Board of Immigration Appeals, 439 F.3d 111, 113-14 (2d Cir. 2006) (“Asylum petitions . . . are not games. . . . [D]espite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention—by immigration judges, in the first instance, and by federal judges, on appeal—to which all litigants are entitled. We should not forget, after all, what is at stake. For each time we wrongly deny a meritorious asylum application, concluding that an immigrant’s story is fabricated when, in fact, it is real, we risk condemning an individual to persecution. Whether the danger is of religious discrimination, extrajudicial punishment, forced abortion or involuntary sterilization, physical torture or banishment, we must always remember the toll that is paid if and when we err.”).

¹⁵¹ Palmer et al., *supra* note 98, § IV.A.

¹⁵² See *supra* Part II.C.ii.

¹⁵³ *E.g.*, Paramasamy v. Ashcroft, 295 F.3d 1047, 1054 (9th Cir. 2002) (remanding a boilerplate adverse credibility determination that, upon review of the transcript, actually bore no relation to the asylum applicant); Iao v. Gonzales, 400 F.3d 530, 533-35 (7th Cir. 2005) (succinctly reviewing typical errors of immigration determinations and remanding the case).

developments.”¹⁵⁴ This practice clearly violates Supreme Court precedent, however, that the federal courts must base their review of administrative agency determinations “purely on the basis of the reasons offered by, and the record compiled before, the agency itself.”¹⁵⁵ Indeed, even the Seventh Circuit itself has voiced apprehension regarding introduction of administrative and judicial notice in asylum proceedings.¹⁵⁶ Not only does taking judicial notice risk depriving the applicant of the opportunity to be heard,¹⁵⁷ it also “carries with it the potential for wholesale relitigation of many immigration-law claims.”¹⁵⁸ The Third Circuit, for this reason, simply returns the claim for administrative rehearing when it determines the record is deficient beyond reasonable use.¹⁵⁹ As noted earlier, however, such remands decrease efficiency and confidence in the immigration courts,¹⁶⁰ and provide no assurance that the system’s procedural faults will right themselves. With these concerns in mind, the circuit courts remain divided concerning the use of judicial notice.¹⁶¹

2. Administrative response: The Attorney General and the Office of Immigration Litigation

¶41

Attorney General Gonzales concluded his review of the immigration courts and BIA on August 9, 2006, by announcing the implementation of twenty-two reforms.¹⁶² Highlights of the reforms include establishment of a code of conduct for immigration judges and the BIA, a performance evaluation process for immigration judges and the BIA, increasing the size of the BIA, and direction to prepare a plan seeking budget increases for the immigration courts and BIA.¹⁶³ Conversely, however, the reforms also entail preservation of BIA streamlining and increase sanction authorities for immigration judges “to control their courtrooms.”¹⁶⁴ The reforms do not seem to affect procedural rules of the immigration courts, however, and the substance of the proposed code of conduct is yet unknown. Praising or criticizing the effectiveness of the reforms, therefore, may still be premature.

¹⁵⁴ *Berishaj v. Ashcroft*, 378 F.3d 314, 330 (3d Cir. 2004) (citing *Pelinkovic v. Ashcroft*, 366 F.3d 532, 540-41 (7th Cir. 2004)).

¹⁵⁵ *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

¹⁵⁶ *See, e.g., Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (finding that the BIA misapplied the doctrine of administrative notice, which “[l]ike its more familiar cousin, judicial notice . . . authorizes the finder of fact to waive proof of facts that cannot seriously be contested”).

¹⁵⁷ *See supra* Part II(d)(i); *see generally* Strandburg, *supra* note 110, at 68.

¹⁵⁸ *Berishaj*, 378 F.3d at 330.

¹⁵⁹ *Berishaj*, 378 F.3d at 316 (“We leave it to the Agency to make a proper determination in the first instance of the merits of [the applicant’s asylum] claims.”).

¹⁶⁰ *See supra* Part II.C.i.3.

¹⁶¹ *Compare* *Pelinkovic v. Ashcroft*, 366 F.3d 532, 540-41 (7th Cir. 2004) (approving notice), *with* *Berishaj*, 378 F.3d at 330 (disapproving notice).

¹⁶² Department of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), available at http://www.cyrusmehta.com/related/DOJ_Memo_dt_08_09_06.pdf [hereinafter DOJ Reforms].

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¶42 In a limited response to *Berishaj*,¹⁶⁵ the Office of Immigration Litigation (OIL)¹⁶⁶ also enacted a new policy designed to screen asylum appeals with stale administrative records.¹⁶⁷ This new policy, as described in the appendix to *Ambartsoumian v. Ashcroft*,¹⁶⁸ establishes that “as a matter of prosecutorial discretion” the government should screen out and seek to remand cases involving outdated records.¹⁶⁹ To effectuate this, the Director of OIL has informed all attorneys under his supervision to bring cases to his attention when those cases favor remand. In determining whether a case favors remand, the attorney should consider such factors as “(1) whether there have been pertinent, intervening events in the country of removal; and (2) whether the issues on review are ‘time sensitive’ in that changes in conditions over time may affect the resolution of the cases.”¹⁷⁰ The policies have yet to elicit much response from the federal courts or commentators.¹⁷¹

3. Legislative Response: REAL ID Act

¶43 The REAL ID Act of 2005¹⁷² neither holds itself out to be nor effects a response to the concerns reviewed herein, but its provisions are quite significant. The reforms, designed explicitly to “prevent[] terrorists from obtaining relief from removal,” raise the burden of proof for asylum seekers and broaden the discretion of immigration judges to deny asylum.¹⁷³ While some Congresspersons have criticized the 2002 reforms,¹⁷⁴ the REAL ID Act is the only relevant enacted legislation since then. As a review,¹⁷⁵ the Act’s most relevant provisions are the following:

- Require an applicant to establish that a “central reason” of his or her persecution was one of the enumerated protected grounds for asylum;¹⁷⁶

¹⁶⁵ *Berishaj v. Ashcroft*, 378 F.3d 314 (3d Cir. 2004).

¹⁶⁶ OIL, acting under the Attorney General, has jurisdiction over all civil immigration litigation. *See generally* Office of Immigration Litigation, <http://www.usdoj.gov/civil/oil/> (last visited May 24, 2007).

¹⁶⁷ *See Ambartsoumian v. Ashcroft*, 388 F.3d 85, 94 (3d Cir. 2004).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 94-95.

¹⁷⁰ *Id.*

¹⁷¹ *But see Kamara v. Att’y Gen.*, 420 F.3d 202, 218 (3d Cir. 2005). (noting the new policy’s failure to resolve the outdated record in that case).

¹⁷² Pub L. No. 109-12, 119 Stat. 231.

¹⁷³ *See supra* Part II.B.ii.

¹⁷⁴ Senator Patrick Leahy, for example, recently published a statement that “[i]f the Attorney General wants to reduce the immigration workload of our federal courts, he should restore the fair appeals process within the Justice Department that his predecessor diminished through his misguided restructuring of the Board of Immigration Appeals.” Patrick Leahy, U.S. Senator (D – Vt.), Comments on Attorney General Alberto Gonzales’s Remarks at the Hoover Institution (Feb. 28, 2005), *available at* <http://leahy.senate.gov/press/200502/022805b.html>.

¹⁷⁵ The provisions of the REAL ID Act are reviewed and criticized, in part, in *supra* Part II.B.ii.

¹⁷⁶ REAL ID Act of 2005, Pub L. No. 109-12, 119 Stat. 231, § 101(a)(B)(i) (2005). Caselaw until the REAL ID Act held that the applicant in a “mixed motive” case need not show the exact motivation for the persecutor’s actions, so long as the actions were motivated simply in part by one of the enumerated grounds. *See In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996); *see generally* KURZBAN, *supra* note 11, at 297 (surveying mixed motive cases).

- Allow immigration judges to base credibility determinations on demeanor alone;¹⁷⁷
- Allow immigration judges to base credibility determinations on the consistency of the applicant's statements internally, or with other evidence of record, including State Department reports;¹⁷⁸ and
- Allow immigration judges to deny asylum based on lack of corroborating evidence, even if the applicant presents otherwise credible testimony.¹⁷⁹

¶44 The faults of these specific provisions have already been addressed, in part, in the preceding sections.¹⁸⁰ The REAL ID Act's shortcomings, however, cannot be adequately discussed by narrowly focusing on the act's provisions individually. The real problem is one of perspective.

III. CRITIQUE: A NEW PERSPECTIVE

¶45 "It is wrong from beginning to end," said the Caterpillar, decidedly; and there was silence for some minutes.¹⁸¹

A. *The First Step: Admitting the Problem*

¶46 The American asylum system has become a wonderland of arbitrary procedures yielding arbitrary results. The problems of the U.S. asylum system are not singularly discrete, but rather are interrelated symptoms of a process poorly understood and becoming increasingly wayward. Meaningless evidentiary standards, arbitrary assertions of judicial fiat, and institutionalized indifference have turned the administrative system on its head. For Congress, however, it may as well all be the fictional Wonderland of Lewis Carroll. It is remarkable how distinctly opposite Congress's reforms run to the criticisms levied by the judiciary, practitioners, and academics. The greatest hurdle in reforming the asylum system lies not in finding solutions,¹⁸² but rather in simply appreciating the problems. The two most recent government reforms are critiqued below.

1. Administrative Reforms: The Attorney General and OIL

¶47 Attorney General Gonzales's twenty-two reform directives are a welcome response to judicial abuse in the immigration courts. The deliberate creation of a code of conduct and an oversight process managed by EOIR directly respond to the criticisms of the Circuit Courts and immigration commentators. The reforms also, however, leave much unresolved. Most pointedly, the reforms propose a mechanism to police the immigration system without actually reforming the system itself. Both the prosecution and

¹⁷⁷ REAL ID Act of 2005 § 101(a)(B)(iii).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* § 101(a)(B)(ii).

¹⁸⁰ *Supra* Part II.B.ii.

¹⁸¹ CARROLL, *supra* note 1.

¹⁸² Many have already been proposed. *See, e.g.,* Martin, *supra* note 130; Kerns, *supra* note 21; Strandburg, *supra* note 110. *See infra* Parts III.B. and III.C.

adjudication of immigration claims, for example, continue to be determined by the Executive branch, maintaining an inherent conflict of interest. The reforms' provision of additional sanction power to immigration judges, above and beyond pre-existing sanction power,¹⁸³ also provides immigration judges with further means to intimidate asylum applicants. Finally, as of this writing, the "code of conduct" itself and the oversight procedures it entails have yet to be drafted and implemented. The perspective necessary to evaluate the reforms, therefore, will not exist for some time.

¶148 OIL's reforms are also largely indeterminable, albeit for different reasons.¹⁸⁴ The only evidence of OIL's supposed response to *Berishaj* is found in *Ambartsoumian v. Ashcroft*, where the court appended the government's explanation of its new policy.¹⁸⁵ One is left with the impression that the court's generous transparency was intended to satisfy curious readers, unable to find any record of the policy elsewhere. Indeed, it appears that even the Third Circuit has little knowledge of the workings of the policy. In *Kamara v. Att'y Gen.*, the only post-*Ambartsoumian* decision considering the OIL policy, the court could only offer one sentence in review of OIL's determination: "DHS states that '[t]his case has been screened pursuant to this policy,' and it has deemed remand inappropriate."¹⁸⁶ This cryptic pronouncement only invites speculation.

¶149 Speculation regarding OIL's stance on State Department reports, moreover, only begets more speculation. Since *Berishaj*, the only official mention OIL has given regarding its reliance on these reports has been in its December 2004 issue of its *Immigration Litigation Bulletin*.¹⁸⁷ An article by OIL officer John Cunningham goes to great lengths to dismiss courts' dissatisfaction with reliance upon State Department reports as "*dicta* in its purest sense."¹⁸⁸ Instead, Cunningham forcefully advocates deference to State Department reports "because they concern matters within that agency's area of expertise."¹⁸⁹ Cunningham concludes by asserting that "no court has held that State Department reports do not constitute substantial evidence."¹⁹⁰

¶150 Regardless of the substantive quality of Cunningham's assertions, the thrust of the article provides insight into OIL's position on State Department reports: not only may they be relied upon, but they ought to be relied upon. Never mind that the Department of Justice has been entrusted to adjudicate immigration and asylum claims—these are matters "within [the State Department's] area of expertise."¹⁹¹ This position contradicts broad reformist judicial and academic sentiment against mechanical deference to the State Department by stubbornly insisting upon the status quo. Hope for progressive reform from OIL seems naïve.

¹⁸³ Compare DOJ Reforms, *supra* note 162, with 8 C.F.R. §§ 1003.101-1003.109.

¹⁸⁴ See *supra* Part II.D.ii. for a summary of the policy.

¹⁸⁵ *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 94 (3d Cir. 2004).

¹⁸⁶ *Kamara v. Att'y Gen.*, 420 F.3d 202, 218-19 (3d Cir. 2005). Note that the court in fact disagreed with the determination. *Id.*

¹⁸⁷ See Cunningham, *supra* note 38. The bulletin is available online in PDF format http://www.usdoj.gov/civil/oil/immigration_bulletin.htm.

¹⁸⁸ Cunningham, *supra* note 38, at 5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* But see *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) (criticizing deference to State Department reports because, in part, it is the Attorney General and not the Secretary of State who is entrusted to make asylum determinations); *supra* Part II.B.i.

¶51 Whatever OIL’s actual position on the current evidentiary system may be, it is likely not the ideal administrative body to resolve problems of fairness and accountability.¹⁹² By internalizing the problem, OIL further cloaks the asylum process in uncertainty. Perhaps more pointedly, OIL’s procedural reforms apparently do not even involve the asylum applicant. Rather than affording the applicant an opportunity to be heard, the reforms merely attempt to shift decisions regarding country conditions away from the courts and internalize them. Even assuming OIL’s reforms are sincere, they neither succeed nor inspire confidence by virtue of their opacity.¹⁹³

2. REAL ID Act

¶52 The primary problem with the evidentiary system in asylum proceedings is that it tolerates poorly reasoned determinations.¹⁹⁴ The issue is not whether more or less asylum seekers ought to be admitted as an aggregate whole; it is simply that our asylum system ought to accurately determine which asylum applicants qualify under our current laws and which do not. Our current system falls well short of this goal.¹⁹⁵

¶53 The REAL ID Act further removes this goal from the realm of possibility. The Act simultaneously increases the petitioner’s burden¹⁹⁶ while decreasing the immigration judge’s obligation to tether his or her determinations to the factual record.¹⁹⁷ Meanwhile, the Act offers no response to concerns regarding streamlining procedures that turn the BIA into a rubber-stamping machine, or the problem of deficient administrative records. Indeed, the Act gives immigration judges greater latitude to issue decisions that are based more on feeling than factual record,¹⁹⁸ and explicitly endorses reliance upon State Department reports.¹⁹⁹ The REAL ID Act is, in short, an affront to Judge Becker’s pleas in *Berishaj* as echoed by other courts and academics throughout the country.²⁰⁰

¶54 The far-reaching nature of the REAL ID Act suggests that Congress was more concerned with political pandering on terrorism than judicial function. An early version of the Act, for example, incorporated a second bill that would have restricted all judicial review, including habeas corpus, in all removal proceedings, including asylum.²⁰¹ Article One of the U.S. Constitution provides that “The Privilege of the Writ of Habeas Corpus

¹⁹² See *supra* note 130 and accompanying text.

¹⁹³ Early reports from the case-law already confirm the concern. See, e.g., *Kamara v. Att’y Gen.*, 420 F.3d 202, 218 (3d Cir. 2005) (“[D]espite the new policy implemented by the Attorney General, we again are faced with an administrative record which appears woefully outdated.”).

¹⁹⁴ See Kerns, *supra* note 21, at 197 (“United States immigration courts have tended to rely selectively, without reasoned analysis, on information bits that are decontextualized from what is known about a country of origin from the record as a whole. . . . Such distortions of the record go unchecked by an extraordinarily deferential standard of judicial review.”).

¹⁹⁵ See *supra* Part II.

¹⁹⁶ See REAL ID Act of 2005, Pub L. No. 109-12, 119 Stat. 231, § 101(a)(B)(i) (2005) (requiring a showing of the persecution’s “central reason”).

¹⁹⁷ *Id.* §§ 101(a)(B)(ii), (iii).

¹⁹⁸ *Id.* § 101(a)(B)(iii) (stating that the trier of fact may base his or her credibility determination on *any* one of a number of factors).

¹⁹⁹ *Id.*

²⁰⁰ See generally *supra* Part II.C.ii.

²⁰¹ See Citizens and Legal Immigration Act, H.R. 100, 109th Cong. (1st Sess. 2005), reviewed by Am. Immgr. Lawyers Ass’n., *A Sad Day for America, H.R. 418 Is Fatally Flawed: The Senate Needs to Repudiate it and Focus on Comprehensive Immigration Reform*, Feb. 11, 2005, <http://www.aila.org/content/default.aspx?docid=12332>.

shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”²⁰² The habeas writ has not been suspended since the Civil War.²⁰³ The House sent the REAL ID Act to the Senate, moreover, as part of a “must pass” appropriations measure for the war in Iraq and tsunami relief.²⁰⁴ Title I of the final version, more obviously, is titled “Amendments to Federal Laws to Protect Against Terrorist Entry.”²⁰⁵ The REAL ID Act, ostensibly, was making someone look tough.

¶155 What the Act does little to contemplate, however, is what it contributes to pre-existing laws that already bar terrorists from entry.²⁰⁶ By increasing immigration judges’ discretion to grant or deny asylum regardless of the record as a whole, and by failing to address increasingly obvious procedural deficiencies, the REAL ID Act diminishes the reliability of the asylum system by blurring its standards. Such a system may well result in fewer successful asylum applications, but the aggregate decrease has no discernable relationship to terrorism.²⁰⁷ A hasty immigration judge, in fact, may use the REAL ID Act’s endorsement of unreviewable discretion to admit more asylum seekers by relying on such factors as demeanor and State Department reports, instead of an individualized assessment of the record.²⁰⁸

¶156 The problem with these reforms is perspective—they presume that the problems stem from asylum applicants themselves and thereby are blind to real systemic deficiencies. A more reliable approach would be to increase the resources of the immigration courts and set down solid evidentiary rules that require careful and particularized consideration of the facts. These requirements could then be ensured by restoring meaningful administrative and judicial review. Whatever the specific reforms may be, they must recognize that the procedural problems are real.

B. *The Second Step: Applying a Solution*

¶157 Of the most frustrating aspects of the regression of U.S. asylum procedural law is the available-but-ignored wealth of solutions. Solutions do exist—indeed, they are abundant. Professor Peter Margulies, for example, offers a multifaceted “dynamic view”

²⁰² U.S. CONST. art. 1, § 9, cl. 2, *reviewed by* INS v. St. Cyr., 533 U.S. 289, 301 (2001).

²⁰³ Am. Immgr. Lawyers Ass’n, *supra* note 201.

²⁰⁴ ACLU Urges Congress to Remove “Real ID” From Funding Measure; Proposal Attacks the Persecuted, Harms Immigrants, Apr. 26, 2005, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=18112&c=206>.

²⁰⁵ REAL ID Act of 2005, Pub L. No. 109-12, 119 Stat. 231, tit. I (2005).

²⁰⁶ See 8 U.S.C. § 1182(a)(3) (2000) (aliens who fall under the broad statutory definition of “terrorist” are inadmissible); see generally Nat’l Immigration Forum, *Real ID Act of 2005 (H.R. 418)*, LEGISLATIVE ANALYSIS, May 4, 2005, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=701#Info>.

²⁰⁷ See *supra* Part II.B.ii (noting that the REAL ID Act’s “central reason” requirement presents a daunting obstacle to all asylum applicants regardless of the merit of their claims).

²⁰⁸ See, e.g., *In re Hong Phuoc Nguyen*, No. A44233829, 2005 WL 3802171 (BIA Dec. 6, 2005). The decision is by no means incorrect, but illustrates the discretionary latitude immigration judges may exercise in overcoming BIA review. The BIA, in an unpublished opinion, held:

The Immigration Judge found that the respondent provided credible testimony establishing that he suffered past persecution in Vietnam. The Immigration Judge also found that conditions in Vietnam for persons such as the respondent have not changed so substantially that the respondent no longer has a fear of returning. On this record, we are not left with the definite and firm conviction that the Immigration Judge’s finding is clearly erroneous. See 8 C.F.R. § 1003.1(d)(3)(i) (2005); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Thus, we decline to set aside the Immigration Judge’s finding that the respondent sustained the burden of proof applicable to withholding of removal.

Id.

of evaluating legislative and adjudicative facts in asylum proceedings.²⁰⁹ While Margulies’s approach specifically addresses the issue of country conditions, his theory is well-suited as a comprehensive reorientation of factfinding. The approach would require the immigration judge to carefully analyze “on the ground” conditions relevant to the asylum seeker’s claim by applying four elements:

a) [P]lacing the burden of proof on changed country conditions on the [immigration agency] in all cases, not merely those involving proven instances of past persecution; b) requiring specific findings of fact by adjudicators regarding the crucial elements of institutional repertoire, inclusiveness, and redress; c) requiring independent authority, beyond State Department reports, to justify a finding of changed country conditions; and d) requiring the Immigration Judge to conduct the asylum hearing fairly, specifically by allowing the asylum-seeker an opportunity to tell her story.²¹⁰

¶58 The first of these requirements would not only cease the logically problematic distinction between cases of past persecution and future persecution,²¹¹ but would also reflect a more realistic balancing of the applicant’s and government’s roles. Requiring an asylum seeker to prove unchanged country conditions, despite credible personal testimony, puts a heavy burden on the applicant that arguably exceeds both international and U.S. standards.²¹² More practically, the government generally has better resources than the applicant to provide legislative facts.²¹³ Requiring the government to bear the burden of proof with regards to legislative country conditions evidence would be more consistent with the roles of the applicant and government in asylum proceedings.²¹⁴

¶59 The second requirement of specific factfinding ensures that immigration judges must base their decisions on evidence on the record, rather than speculation or conjecture.²¹⁵ While Margulies’s three factors of institutional repertoire, inclusion, and redress, need not necessarily be exclusive, they lay an important foundation.²¹⁶ Experience has proven that immigration judges, unfortunately, do not always produce carefully measured asylum decisions.²¹⁷ By establishing specific and meticulous factfinding standards, deficient decisions may and will be overturned—rather than rubber stamped—upon review.

²⁰⁹ Margulies, *supra* note 21, at 35.

²¹⁰ *Id.*

²¹¹ *See id.* at 35-36 (illustrating how past persecution, as a matter of chance, becomes a windfall to asylum applicants—while those who acted upon their well-founded fear and evaded persecution enjoy no such advantage).

²¹² *See supra* notes 53-59 and accompanying text (noting, among other things, that “a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation”) *Abankwah v. I.N.S.*, 185 F.3d 18, 26 (2d Cir. 1999).

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *See Berishaj v. Ashcroft*, 378 F.3d 314, 324 (3d Cir 2004).

²¹⁶ For a fuller discussion of these factors and their inclusion in the “dynamic approach,” see Margulies, *supra* note 21, at 35.

²¹⁷ *See generally supra* Part II.B.

¶160 Margulies’s final two requirements help enforce the immigration judge’s factfinding obligations by rooting out two common problems directly. Under Margulies’s third requirement, rote citation to State Department reports would be declared *per se* insufficient.²¹⁸ Margulies would not declare that State Department reports are necessarily unreliable; rather, Margulies would only require that their assertions be checked against other available independent sources.²¹⁹ While the State Department’s report would be heeded, the asylum applicant would be appropriately safeguarded against hasty judicial abdication to them.

¶161 Fourth and finally, Margulies would require that the immigration judge grant the applicant an adequate opportunity to tell his or her story.²²⁰ As reviewed *supra* Part II.B.3, complaints of plainly unprofessional conduct by immigration judges have increased dramatically.²²¹ By adopting conduct-specific requirements, inappropriate conduct would cease to slip by the lax standard of review afforded asylum decisions.²²² Such an assurance is of great importance not only to the fidelity of the administrative process, but also to the overwhelmed asylum seeker.²²³

¶162 These are not radical ideas. Traditional asylum law already imposes an evidentiary “duty to inquire”²²⁴ on immigration courts, which “reflects the government’s obligation to place justice and international refugee law ahead of adversarial proclivities.”²²⁵ Under this duty, the government and the court are obligated to assist in fully developing the factual record.²²⁶ Codifying the elements proposed by Margulies would merely force the immigration judge to fulfill his or her role as originally conceived.²²⁷ The BIA and federal courts could then apply these same elements upon review to assure that asylum determinations are adequately thorough.

¶163 Another writer’s approach would more clearly delineate “legislative and adjudicatory” facts,²²⁸ require particularized and “on the ground” assessment of country conditions, and relax the standard of judicial review so that federal courts may reverse decisions that rest on “faulty assumptions or factual foundations.”²²⁹ The first two proposals are essentially repackaged versions of Professor Margulies’s factors;²³⁰ the last proposal, however, goes beyond Margulies’s model. Affording the federal courts a less

²¹⁸ See Margulies, *supra* note 21, at 39-40.

²¹⁹ *Id.*

²²⁰ *Id.* at 40.

²²¹ See, e.g., *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998) (“Throughout the proceedings, the [immigration judge] acted with impatience and hostility towards Garrovillas, bullying and haranguing him from the inception of the hearing to its conclusion.”).

²²² See *supra* Part II.C.

²²³ See 3 GORDON ET AL., *supra* note 11, § 34.02(9)(A) (“[A]sylum applicants may be mistrustful or apprehensive of U.S. authorities, given the experiences that cause them to flee, so they may have difficulty speaking freely or giving full accounts of their cases.”).

²²⁴ See United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, U.N. Doc. HCR/IP/4/Eng/Rev.1, 42 (1992).

²²⁵ 3 GORDON ET AL., *supra* note 11, § 34.02; *supra* Part II.B.ii.

²²⁶ See sources cited *id.*

²²⁷ See *In re A-S-*, 21 I. & N. Dec. 1106, 1126-27 (BIA 1998) (Rosenberg, J., dissenting) (lamenting the substantial abandonment of this principle).

²²⁸ Kerns, *supra* note 21, at 216; Martin, *supra* note 42, at 1280-85.

²²⁹ Kerns, *supra* note 21, at 220.

²³⁰ Compare, e.g., Kerns, *supra* note 21, at 219 (noting “the country of origin’s power structure,” among other things, as a necessary element of an “on the ground” factual assessment), with Margulies, *supra* note 21, at 37-38 (discussing “institutional repertoire” as a necessary element of specific factual findings).

deferential standard of review would help remedy the widespread lack of confidence they express in the administrative record of asylum determinations.²³¹ While statutorily codifying Margulies's recommendations would substantially accomplish the same effect, reinforcing this approach with heightened review would directly restore the system's accountability.

¶64 BIA and federal appeals court policy on taking notice of country conditions, moreover, ought not to continue in diverging confusion. One possible solution, as advocated by Katherine Strandburg, would be to grant motions to re-open as of right, transforming them into a mechanism whereby the asylum applicant would be assured an opportunity to rebut administrative notice of changed country conditions.²³² Reviewing courts would be afforded the opportunity to draw from contemporary country reports by taking notice, and the asylum applicant would be guaranteed an opportunity to challenge the reports if he or she desired.²³³ Such an approach would not solve deficiencies at the initial asylum hearing, but they would do much to rectify the false pretense that reviewing courts are deciding upon a complete administrative record. What problems exist at the initial hearing, moreover, could be resolved by resorting to the previous proposals discussed herein.

C. A New Perspective: Considering the Proposals in Whole

¶65 Common among these proposals is a recognition that sincere asylum reform ought to focus on effectively discerning between meritorious and non-meritorious claims. What is less important is whether the asylum system simply admits more or less applicants as an aggregate whole. Unfortunately, this latter consideration appears to be the one Congress has seized upon. While the federal courts complain of administrative records so deficient that they are in practice outright meaningless,²³⁴ Congress unfortunately responds by relaxing evidentiary standards and reducing judicial review. Legislation being considered on the eve of this paper's submission, moreover, affirms and continues this trend.²³⁵ Clearly, something is amiss. Before effective asylum reform can occur a new legislative perspective is necessary.²³⁶

²³¹ See *supra* Part II.C.ii.

²³² Strandburg, *supra* note 110, at 71-82. Strandburg's approach has already been adopted by the Fifth Circuit. See *Wondimu v. Ashcroft*, 48 Fed. Appx. 102, 2002 WL 31016464, at *5 (5th Cir. 2002) (unpublished decision) (citing *Rivera-Cruz v. INS*, 948 F.2d 962, 968 (5th Cir. 1991)). The Fifth Circuit noted, however, that without statutory guidance this approach rests on the precarious good-faith of the immigration agency. *Id.* at 968 n.5.

²³³ Strandburg's argument concerned specifically administrative notice at the BIA, but her logic seems equally relevant to federal judicial notice. See, e.g., *Pelinkovic v. Ashcroft*, 366 F.3d 532, 540-41 (7th Cir. 2004) (taking post-BIA determination notice of changed country conditions).

²³⁴ See *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004).

²³⁵ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §§ 801-08 (2d Sess. 2005) [hereinafter Border Protection] (addressing perceived "Immigration Litigation Abuse," by, among other things, reducing judicial review); but see Editorial, *The Gospel vs. H.R. 4437*, N.Y. TIMES, Mar. 3, 2006, at A1. The editorial reads, in part:

It has been a long time since this country heard a call to organized lawbreaking on this big a scale. Cardinal Roger Mahony of the Roman Catholic Archdiocese of Los Angeles, the nation's largest, urged parishioners on Ash Wednesday to devote the 40 days of Lent to fasting, prayer and reflection on the need for humane reform of immigration laws. If current efforts in Congress make it a felony to shield or offer support to illegal immigrants, Cardinal Mahony said, he will instruct his priests—and faithful lay Catholics—to defy the law. . . .

¶66 Once the faults of the procedural system emerge from the bloodshot haze of 9/11, however, necessary reform should become clear. First, meaningful review must be restored to both the BIA and the federal courts. The reforms of 2002 discussed herein, including streamlining, are now obvious failures. In promulgating streamlining, Attorney General Ashcroft expressly declined waiting for the results of a Congressional study and instead cursorily observed that preliminary forms of streamlining yielded only a 0.7% federal remand rate.²³⁷ In the past year, the Seventh Circuit reversed 48% of appeals from the BIA.²³⁸ We now know that Ashcroft was wrong, that the reforms of 2002 are a failure,²³⁹ and we ought not dwell on it further. Restoring confidence in the U.S. asylum system must begin by casting aside these disasters and replacing them with review that ensures that errors will not be tolerated.

¶67 Once meaningful review has returned to the courts, an evidentiary system with meaningful standards may be contemplated. The substance of these standards is secondary; what is most important is that immigration judges and the BIA are subject to explicit procedural rules that guide their decisionmaking and thereby also provide standards for review. The proposals reviewed herein are informative. Margulies's reforms would correct many of the deficiencies in initial asylum hearings, while Strandburg's reforms would provide appellate courts the means to conduct meaningful review. These reforms need not be the beginning or the end of reforming the asylum process. Margulies's quite specific factfinding proposals,²⁴⁰ for example, provide a framework that need not be adopted wholesale to effectuate their purpose. None of the proposals, further, address the evidentiary infirmities of expedited removal. What they do offer, however, is a reliable administrative structure that reflects the underpinnings of refugee law.

IV. CONCLUSION

¶68 This paper set out to identify the procedural deficiencies of American asylum adjudication, and offer perspective for reform. It is, however, an incomplete story. Future legislators, advocates, judges, and writers bear the burden of seeing reform effectuated. In order for that chapter to begin, a new perspective is necessary. Reform must look past individual instances of error and instead consider how the system's very structure has failed.

.....
 Cardinal Mahony's declaration of solidarity with illegal immigrants, for whom Lent is every day, is a startling call to civil disobedience, as courageous as it is timely. We hope it forestalls the day when works of mercy become a federal crime.

Id.

²³⁶ Admittedly, however, attempts to shift legislative perspective have already been unsuccessfully made. *See, e.g.*, Martin, *supra* note 42 (offering a comprehensively overhauled approach to asylum law).

²³⁷ Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (stating that the Department does not have "the luxury of waiting for the results of such a study").

²³⁸ MacLean, *Immigration Bench*, *supra* note 6, at 18.

²³⁹ *See supra* notes 123-131 and accompanying text.

²⁴⁰ *See Margulies supra* note 21 and accompanying text.

¶69 Whether the political climate is ripe for such a shift is questionable. In Congress today, xenophobia is unmistakable.²⁴¹ “Xenophobia,” of course, is only the newest politically correct euphemism for racism.²⁴² Attorney General Alberto Gonzales’s reform directives to the immigration courts, however, appear generally to be a step in the right direction. The judiciary, finally, is well ahead of the curve in its incisive critiques of the immigration courts. How the immigration courts decide to apply the REAL ID Act is also unclear. When *INS v. Elias-Zacarias* seemingly sounded the death-knell of the doctrine of imputed political opinion,²⁴³ for example, the BIA nonetheless found enough exceptions in the Supreme Court’s opinion to safely revive the doctrine.²⁴⁴ An assessment of the effects of the REAL ID Act on asylum proceedings may similarly be premature.

¶70 Reform will also cost money. There is no question that restoring meaningful adjudicative process to the U.S. asylum system also requires meaningful funding, which is always a four letter word in political discussions of immigration.²⁴⁵ The 2002 streamlining reforms and BIA reduction, however, have done the government no favor. Not only do they destroy the immigration agency’s ability to take its job seriously, they also cost money by institutionalizing inefficiency through endless loops of litigation.²⁴⁶ Eleven BIA judges deciding 48,000 cases per year simply defies all notions of common sense, although it does inspire sympathy.²⁴⁷ In the end, Congress must admit that readiness to take immigration seriously means readiness to commit adequate resources.

¶71 All the meanwhile, however, refugees wait in detention centers and prison cells across the United States. They appear before immigration judges who may or may not abuse them, depending on their luck. They appeal to phantom administrative bodies from whom they never see nor hear. They await appeal before federal courts that have minimal authority to help them. They fear persecution and death upon removal. The Wonderland they know was not familiar to Alice.

²⁴¹ See Border Protection *supra* note 235 and sources cited therein.

²⁴² Compare Michael Powell & Michelle Garcia, *Views as Diverse as New York; Concerns About Terrorism, but also About Xenophobia*, WASH. POST, Feb. 25, 2006, at A3, with Gideon Rose, *Racism is Behind the Furor over DP World’s Port Deal*, FINANCIAL TIMES (London), Feb. 27, 2006, at 17.

²⁴³ *INS v. Elias-Zacarias*, 502 U.S. 478, 483. (“Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so . . .”).

²⁴⁴ See, e.g., *Morales v. INS*, 208 F.3d 323, 331 (1st Cir. 2000).

²⁴⁵ See generally MacLean, *Immigration Bench*, *supra* note 6 (Immigration Judge Dana Marks states “[t]he increasing caseload and continuing lack of resources creates far more stress on judges. . . . Part of the pickle we’re in is that this is not an issue that gets a lot of money directed toward it.”); Sam Ryan, *International Refugees Wait as U.S. Dithers*, ORLANDO SENTINEL, Sep. 18, 2005, at G1 (reviewing budget cuts to refugee assistance while costs simultaneously rise); Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC’Y REV. 1041, 1046-55, 1057, 1060 (1990) (discussing the political deadlock resulting from a push for meaningful immigration enforcement standards on one hand, and the economic incentives behind immigration non-enforcement on the other hand); Yale-Loehr Statement, *supra* note 122 (“Existing [BIA] backlogs are not the result of inefficiency but reflect a lack of resources.”).

²⁴⁶ See *supra* notes 124-125 and accompanying text.

²⁴⁷ See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2004 STATISTICAL YEARBOOK, at U1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>. As per Attorney General Gonzales’s recent direction, however, the Director of EOIR is to draft a proposal to increase the Board to 15 members. DOJ Reforms, *supra* note 162.