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## Refugee Roulette: Disparities in Asylum Adjudication

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# REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION

Jaya Ramji-Nogales,\* Andrew I. Schoenholtz,\*\* and Philip  
G. Schrag\*\*\*

*Addressing consistency in the application of the law, former Attorney  
General Robert Jackson told Congress in 1940: "It is obviously repugnant to*

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Much of the research in this Article is based on data provided to the authors by  
government agencies, which we have analyzed and presented graphically. This Article,  
including graphics, is available on the *Stanford Law Review's* website,  
<http://lawreview.stanford.edu>. The databases, full color versions of our graphics, and other  
related materials are available on a website that supplements this Article,  
<http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

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*one's sense of justice that the judgment meted out . . . should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition." Yet in asylum cases, which can spell the difference between life and death, the outcome apparently depends in large measure on which government official decides the claim. In many cases, the most important moment in an asylum case is the instant in which a clerk randomly assigns an application to a particular asylum officer or immigration judge.*

*This study analyzes databases of decisions from all four levels of the asylum adjudication process: 133,000 decisions involving nationals from eleven key countries rendered by 884 asylum officers over a seven-year period; 140,000 decisions of 225 immigration judges over a four-and-a-half-year period; 126,000 decisions of the Board of Immigration Appeals over a six-year period; and 4215 decisions of the U.S. courts of appeals during 2004 and 2005. The analysis reveals amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country. For example, in one regional asylum office, 60% of the officers decided in favor of Chinese applicants at rates that deviated by more than 50% from that region's mean grant rate for Chinese applicants, with some officers granting asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases. Similarly, Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building. Half of the Miami judges deviated by more than 50% from the court's mean grant rate for Colombian cases.*

*Using cross-tabulations based on public biographies, the paper also explores correlations between sociological characteristics of individual immigration judges and their grant rates. The cross-tabulations show that the chance of winning asylum was strongly affected not only by the random assignment of a case to a particular immigration judge, but also in very large measure by the quality of an applicant's legal representation, by the gender of the immigration judge, and by the immigration judge's work experience prior to appointment.*

*In their conclusion, the authors do not recommend enforced quota systems for asylum adjudicators, but they do make recommendations for more comprehensive training, more effective and independent appellate review, and other reforms that would further professionalize the adjudication system.*

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INTRODUCTION

We Americans love the idea of “equal justice under law,” the words inscribed above the main entrance to the Supreme Court building. We want like cases to come out alike. We publish tens of thousands of judicial decisions and have enshrined the concept of stare decisis in order to reduce the likelihood that Jane’s case, adjudicated in December 2006, will come out very differently from Joe’s very similar case adjudicated in January 2007. We have adopted sentencing guidelines in the hope that the punishment meted out to offenders depends on their offenses and prior records rather than on the whims, personalities, or ideologies of the sentencing judges. We use pattern jury instructions in both civil and criminal cases to guide lay adjudicators to apply the same law to similar disputes. When civil juries depart significantly from established norms, judges use remittitur to reduce awards, enter judgments that are at odds with the jury’s verdict, or grant new trials.

Americans don’t love consistent decision making merely because we think that fairness to the parties requires that similar cases should have similar outcomes. We also like the predictability that stare decisis offers. Most disputes can be settled without all-out litigation when the results of formal adjudication can be predicted in advance with reasonable certainty. In addition, and perhaps most pertinent, we don’t like the idea that litigants’ lives, liberty, or property could be determined by the predilections or personal preferences of the individual men and women who happen to judge their cases. The very essence of the rule of law, embodied in the Due Process Clause of the Fifth Amendment, is that individual cases should be disposed of by reference to

standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.

In recent years, however, the public and the press have become skeptical about the extent to which American judging reflects only the law and not the predilections of the adjudicators. Judges (and entire courts) are commonly referred to in the press as liberal or conservative, and many lawyers believe that although they cannot predict the outcome of a trial-level case on the day before it is filed, or the outcome of an appeal on the day before it is docketed, they can do so once they know what judge or judges have been assigned to decide it. In response to this public skepticism, Chief Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit wrote a noteworthy law review article defending the notion that “it is the law—and not the personal politics of individual judges—that controls judicial decision making.”<sup>1</sup> His article spawned a series of rebuttals and counter-rebuttals. Professor Richard Revesz conducted a careful empirical study of decisions by the judges of Edwards’ court in challenges to rules of the Environmental Protection Agency (EPA). He concluded that the political composition of three-judge panels often mattered a great deal.<sup>2</sup>

Judge Edwards wrote a surprisingly harsh critique of the Revesz “so-called ‘empirical stud[er],” claiming that its interpretations were “bogus.”<sup>3</sup> Revesz then rebutted this critique,<sup>4</sup> and Edwards published a further article rejecting the “neo-realist arguments of scholars who claim that the personal ideologies [rather than law and collegiality] . . . are crucial determinants” of outcomes.<sup>5</sup>

1. Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

2. Looking only at individual votes, Revesz found:

(1) for industry challenges [to EPA rules on procedural grounds], Republicans had a higher reversal rate [that is rate of reversing the EPA] than Democrats in all the periods [of time studied]; and (2) for environmental [group] challenges, Democrats had a higher reversal rate than Republicans in all the periods . . . . These relationships are consistent with the selective deference hypotheses (that judges’ votes are determined by their preferences concerning the substance of environmental policy) . . . .

Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1738-39 (1997). Turning to the composition of three-judge panels, Revesz found that judges were significantly more likely to vote to invalidate an EPA rule when at least two of the three members of the panel had been appointed by a President whose party could be expected to disagree with the rule (i.e., when at least two Republicans considered an industry challenge or when at least two Democrats considered an environmentalist challenge). In other words, “[T]he effects of panel composition are far greater than the effects of individual ideology.” *Id.* at 1764. The effects were presumably greater because, on a three-judge appellate panel, when members who had been appointed by a party that was more likely to disagree with an EPA decision constituted a majority of the panel, they had the power to change it or at least to force the EPA to reconsider its decision.

3. Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335, 1368 (1998).

4. Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

5. Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U.

Much of the Edward-Revesz debate concerned relatively small differences in the voting patterns of the various judges. For example, in two of six periods of time reported, Democratic judges voted 44% of the time to sustain environmentalists' challenges to EPA rules, while Republican judges did so only 42% of the time (a 5% disparity). In another period, the Democratic to Republican ratio was 47% to 33%. In the other periods, Republican judges were more prone to sustain such challenges than Democratic judges. In some periods, a Democratic judge was perhaps 50% more likely to vote for an environmentalist challenge than a Republican judge, a difference that should perhaps be disturbing if we expect judges to leave their political leanings behind when they take the bench. The differences were somewhat more dramatic in the case of industry challenges to the EPA. Republican judges voted nearly twice as often as Democratic judges to sustain those challenges.<sup>6</sup> In other words, a judge might be nearly 100% more likely to vote for an industry-requested remand if the judge were Republican rather than Democratic, statistics that may again suggest cause for concern. Those percentages are far larger than the approximate 17% disparity (about 5 months) in the lengths of sentences meted out by federal judges in 1986-1987 before federal sentencing guidelines took effect, a disparity thought so great as to warrant a federal statute imposing those guidelines.<sup>7</sup>

But how about a situation in which one judge is 1820% more likely to grant an application for important relief than another judge in the same courthouse?<sup>8</sup> Or where one U.S. Court of Appeals is 1148% more likely to rule in favor of a petitioner than another U.S. Court of Appeals considering similar cases?<sup>9</sup>

Welcome to the world of asylum law.

Collectively, asylum officers, immigration judges, members of the Board of Immigration Appeals, and judges of U.S. courts of appeals render about 79,000 asylum decisions annually.<sup>10</sup> Almost all of them involve claims that an

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PA. L. REV. 1639, 1640 (2003).

6. Revesz, *supra* note 2, at 1750 tbl.8.

7. James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 303 (1999).

8. See *infra* text after note 70 (discussing the difference in grant rates of two New York immigration judges for Albanian applicants).

9. See *infra* Figure 48 and accompanying text (discussing the difference in remand rates of the Fourth and Seventh Circuits when considering asylum claims from the same group of fifteen countries from which asylum is frequently granted).

10. In FY 2005, asylum officers rendered 28,305 merits decisions (grants, denials, referrals after interviews, and rejections after interviews based on failure to meet the statutory deadline, for applicants from all countries other than Mexico). E-mail from Ted Kim, Operations Branch Chief, Asylum Div., U.S. Citizenship & Immigration Servs., to Philip Schrag (Aug. 23, 2006) (attaching "Refugees, Asylum and Parole System: Grant Rates by Asylum Officer—FY99 through FY05 National Table (All Officers)," which contains the data) (on file with authors). In the same year, immigration judges made 30,903



applicant for asylum reasonably fears imprisonment, torture, or death if forced to return to her home country. Given our national desire for equal treatment in adjudication, one would expect to find in this system for the mass production of justice many indicators demonstrating a strong degree of uniformity of decision making over place and time. Yet in the very large volume of adjudications involving foreign nationals' applications for protection from persecution and torture in their home countries, we see a great deal of statistical variation in the outcomes pronounced by decision makers. The statistics that we have collected and analyzed in this Article suggest that in the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law. The variation is particularly striking when one controls for both the nationality and current area of residence of applicants and examines the asylum grant rates of the different asylum officers who work in the same regional building, or immigration judges who sit in adjacent courtrooms of the same immigration court. When an asylum seeker stands before an official or court who will decide whether she will be deported or may remain in the United States, the result may be determined as much or more by who that official is, or where the court is located, as it is by the facts and law of the case. The fact that the outcome of a case appears to be strongly influenced by the identity or attitude of the officer or judge to whom it is assigned is particularly discomfiting in asylum cases, because when a bona fide application is erroneously denied, the applicant is almost always ordered deported to a nation in which she will be in grave danger.<sup>11</sup>

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decisions on the merits in asylum cases. U.S. DEP'T OF JUSTICE, IMMIGRATION COURTS, FY 2005 ASYLUM STATISTICS (2006), available at <http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf>. During that year, the Board decided 16,762 asylum cases (this number excludes about 2000 cases that the Board is not able to characterize as favoring either party). Computer disk from Brett Endres, Executive Office of Immigration Review, to Andrew I. Schoenholtz (May 31, 2006) (on file with authors) (attaching Board of Immigration Appeals, "Crosstabulation for Decision Type by Attorney and Nationality per Year of Appeal"). Finally, during calendar year 2005, the U.S. courts of appeals decided 2163 asylum cases, as described in Part V of this Article.

11. This Article explores statistical disparities in asylum adjudication but does not attempt to convey the human suffering attendant on the denial of an application for asylum. One of us has recently co-authored, with an unsuccessful asylum applicant who had been tortured and nearly executed, a full account of the applicant's persecution and flight to the United States, and of the adjudication of his case. His application went through all of the stages of hearing and appeals that are described in this Article. After his request for asylum was turned down by an asylum officer and denied by the immigration judge who had the lowest grant rate in her immigration court, his appeal was rejected by a single member of the Board of Immigration Appeals and then by the U.S. Court of Appeals in the circuit that had the lowest rate of remanding cases to the Board. Forced to return to Africa, he was nearly murdered once again. DAVID NGARURI KENNEY & PHILIP G. SCHRAG, *ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA* (forthcoming 2008).

We cannot prove that the variations in outcomes based on the locations or personalities of the adjudicators are greater in asylum cases than in criminal, civil, or other administrative adjudications. Only a few scholars, such as Revesz, have attempted to analyze similarities or differences in adjudication in a large database of cases that involve particular subject matters and were governed by a single body of law.<sup>12</sup> In this Article, however, we report and analyze new statistical data that suggest to us that very significant differences from one decision maker to the next in the adjudication of asylum cases should be a matter of serious concern to federal policymakers.<sup>13</sup> The new statistics show disconcerting variability among individual adjudicators in the institutions for which adequate data are available for analysis.

In Part I of this Article, we describe the systems through which asylum cases are adjudicated and the four institutions that decide them: the asylum offices, the immigration courts, the Board of Immigration Appeals, and the United States courts of appeals. Readers familiar with the institutions that process asylum applications and with the procedures they follow may choose to skip Part I of this Article and begin with Part II.

In Part II of the Article, we look at the first stage of decision making: adjudications by asylum officers. The Department of Homeland Security provided us with grant rate data for each of the 928 asylum officers who served

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12. See, e.g., John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 10 FED. CIR. B.J. 435, 436 (2001) (finding that “[j]udges do not fit easily into pro-patent or anti-patent categories, or into affirmers and reversers”); Robert G. Dixon, Jr., *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 717 (showing that 153 of 252 Social Security disability hearing examiners reversed denials of benefits between 36% and 55% of the time, but 19 examiners reversed 66% to 80% of the time, and 26 reversed 21% to 30% of the time, a “striking and disturbing” disparity); James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351, 400 (1999) (“[W]eighted taxpayer prevalence scores demolish the assertions that Tax Court judges make decisions in congruity with their backgrounds.”); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 306, 353 (2004) (finding that although the political affiliation of the appointing President is not correlated with judicial votes on criminal appeals, takings, or federalism, in cases involving abortion and capital punishment, “judges vote their convictions”).

13. A recent law journal article reviews some of the data relating to disparities in immigration courts (looking only at rates within the New York City immigration court and ranking disparity levels for twenty-eight immigration courts) and briefly examines reversal rates in the courts of appeals (looking only at the Seventh Circuit and the combined reversal data for all federal circuits). Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006). That article does not analyze the Asylum Office and Board of Immigration Appeals data that we obtained, and does not engage as comprehensively with the data on the immigration courts and courts of appeals. It instead focuses on the evidence it examines to advocate compellingly for a political solution to the immigration court crisis. The article notes that legal scholars “concerned about IJ inconsistency . . . have been slow to incorporate statistical analysis into their work.” *Id.* at 21 n.125.

during fiscal years 1999-2005.<sup>14</sup> For decisions on cases of applicants from eleven key countries that generate many valid asylum claims, the Department also provided individual grant rates by nationality of the applicant. From these data, we measured changes in the rate at which asylum was granted by the Department from region to region (holding constant the group of countries of greatest interest and, in some cases, limiting our study to a particular country), and variations from officer to officer within each of the Department's eight regional asylum offices (again controlling for countries of the applicants). The results of this analysis are reported in Part II.

Part III examines statistics in asylum cases decided by 247 immigration judges from fiscal years 2000-2004. We investigated disparities in grant rates between different immigration courts, but more important, we examined disparities in the grant rates of different judges within the largest courts. We were also able to correlate the grant rates of individual judges with biographical information about those judges and with additional information about the cases. Certain correlations surprised us and raise serious questions about whether the results of cases are excessively influenced by personal characteristics of the judges, such as their prior government service. The results of our examinations are reported in Part III.

We would have liked to include an analysis of how individual members of the Board of Immigration Appeals resolve cases assigned to them, but the Department of Justice does not keep statistics on the dispositions of appeals by individual members of the Board,<sup>15</sup> and it does not make public the vast majority of its asylum decisions.<sup>16</sup> We were able to examine variations from year to year in the Board's treatment of asylum appeals. Our study included the period just before, during, and after FY 2002, when the Board was in great turmoil due to substantial personnel and procedural changes.<sup>17</sup> Although we

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14. "The fiscal year is the accounting period for the federal government which begins on October 1 and ends on September 30. The fiscal year is designated by the calendar year in which it ends; for example, fiscal year 2006 begins on October 1, 2005 and ends on September 30, 2006." United States Senate, Glossary, [http://www.senate.gov/reference/glossary\\_term/fiscal\\_year.htm](http://www.senate.gov/reference/glossary_term/fiscal_year.htm).

15. The Board claims that it does not track decisions by outcome, but there is some evidence to the contrary. See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 56 n.248 (2005). Even if the Board does track decisions by outcome, it apparently does not track them by member.

16. Confidentiality concerns could justify the Board's refusal to publish decisions that include identifying information about asylum applicants, as they or their relatives could suffer retaliation for reporting on their countries' human rights violations. However, the Board does not publish or otherwise make available even redacted copies of most of its asylum decisions.

17. See DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 19-25 (2003), available at [http://www.dorsey.com/files/upload/DorseyStudyABA\\_8mgPDF.pdf](http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf).

could not compare individual Board members' grant rates because the Board lacks the relevant data, we were able to measure the effect of these changes on its overall rate of decisions favorable to asylum applicants. Part IV of the Article describes and analyzes the data that the Board was able to provide to us.

Part V investigates variations in the treatment of asylum cases in the U.S. courts of appeals from one circuit to another. We examined the rate at which asylum denials by the Board of Immigration Appeals were remanded by courts in all of the circuits. We were able to compare these rates both for all cases and for cases from a group of fifteen countries that generate a particularly large number and high percentage of successful asylum cases. We were also able to compare the rates at which individual judges in two circuits voted to remand cases.

In Parts VI and VII, we summarize and comment on our findings and suggest several steps that might be taken to advance the degree to which the outcomes in asylum cases could become somewhat more uniform. We also recommend other reforms to improve the asylum adjudication process.

Human judgment can never be eliminated from any system of justice. But we believe that the outcome of a refugee's quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official.<sup>18</sup>

## I. THE ASYLUM PROCESS

As part of its commitment to human rights, the United States offers asylum to foreign nationals who flee to its shores and can prove that they are "refugees"—that is, that they have a well-founded fear of persecution in their own countries, and that their race, religion, nationality, political opinion, or membership in a particular social group is at least one central reason for the threatened persecution.<sup>19</sup> A foreign national who seeks asylum in the United States may do so either affirmatively or defensively. An affirmative applicant seeks asylum on her own initiative, and voluntarily identifies herself to the Department of Homeland Security (DHS) through her application. An affirmative applicant may be either an individual who maintains a valid non-immigrant visa (e.g., a tourist or student) or a person who either overstayed her visa or entered the United States without being formally processed by an immigration official. A defensive applicant applies for asylum after having been apprehended by DHS and placed in removal proceedings in immigration

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18. We agree with Stephen Legomsky that accuracy, consistency, and public acceptance are among the most important goals of any adjudicative system, and particularly one in which human life and liberty are at stake. See Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 622 (2000).

19. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1) (2000).

court, a part of the Department of Justice (DOJ).<sup>20</sup> A successful applicant is granted asylum and is not ordered removed.

The Department of Homeland Security (DHS) is the executive agency primarily responsible for overseeing immigration processes, including affirmative asylum applications. The Department's Office of Citizenship and Immigration Services (USCIS) houses the asylum corps, comprised of asylum officers who evaluate asylum applications and interview the applicants. The Department's Bureau of Immigration and Customs Enforcement includes the trial attorneys who oppose asylum claims before the immigration courts.

Asylum decisions, whether by asylum officers or immigration judges, involve both a judgment about whether the applicant's story, if true, would render the applicant eligible for asylum under American law and an assessment as to whether the applicant is telling the truth about his or her personal experiences of actual or threatened persecution. Among similar cases, we would expect some, but relatively little, variation from one experienced adjudicator to another in relationship to the legal assessment of a truthful applicant's legal eligibility. Assessments of credibility are more difficult and subjective, so we might expect somewhat greater variability from one adjudicator to another with respect to this component of the decision. Nevertheless, a system that endeavors to prevent arbitrary adjudication should attempt to keep even this aspect of variability within a relatively narrow range.

It is a difficult task indeed that the adjudicators face, as it is not only important to grant genuine claims but also to deny false claims. Successful false asylum claims undermine the integrity of the asylum system and reduce public support for the admission of genuine refugees.

### *A. The Regional Asylum Offices*

Several weeks after filing a written application for asylum, an affirmative asylum seeker is interviewed by a trained asylum officer in one of the eight regional USCIS asylum offices. Within each regional office, cases are assigned randomly to particular asylum officers.<sup>21</sup> The interview is nonadversarial, with the asylum officer in an inquisitorial role. There is no separate representative for the government, and asylum seekers may be represented by counsel at their own expense. The asylum officer can grant asylum, refer the asylum claim to immigration court, or, if the asylum seeker has valid immigration status in the

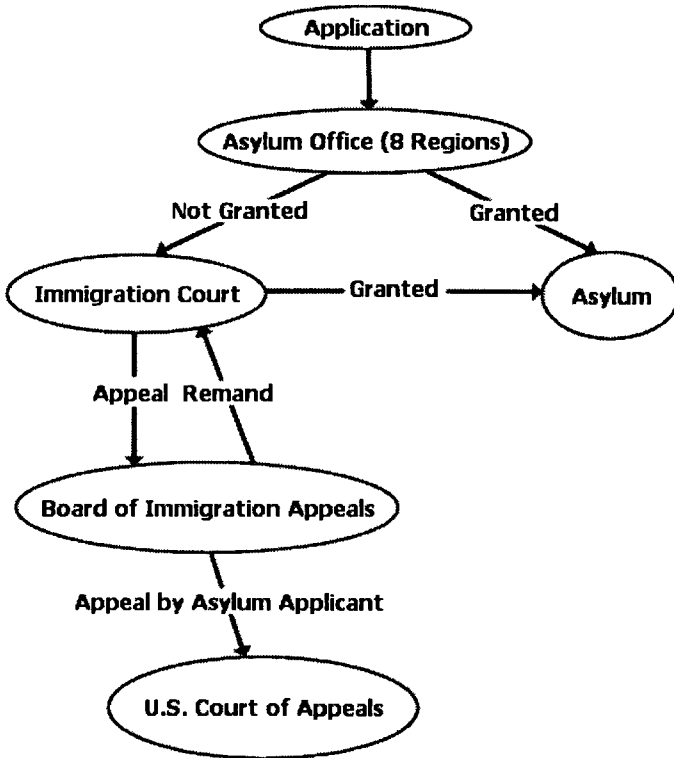
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20. DHS may have apprehended the individual in the interior of the country or at an airport, seaport, or land port of entry at which he arrived without a valid passport or visa. Individuals without proper documentation who voluntarily identify themselves to immigration officials at a port of entry as applicants for asylum are apprehended and detained just as if they were discovered by officials to have lacked such documentation.

21. ASYLUM DIV., U.S. DEP'T OF HOMELAND SEC., AFFIRMATIVE ASYLUM PROCEDURES MANUAL 13 (2003).

United States, deny the asylum claim.<sup>22</sup> About 35% of adjudicated cases in most recent years are grants of asylum. Most asylum officer decisions, however, result in referrals to immigration court.

**Figure 1. The Affirmative Asylum Process**



The Asylum Office keeps separate statistics on three different types of referrals, though all three result in removal hearings in immigration court. First, referrals without interviews occur when an asylum applicant does not appear for a scheduled interview. Because there is no interview or adjudication on the merits in these cases, we have excluded them entirely from our study. Second, regular referrals occur when the asylum officer either (1) does not believe that the applicant has carried her burden of proving facts showing that she meets the statutory definition of a refugee, or (2) accepts the proffered facts as true but does not believe that those facts qualify the applicant for asylum as a matter of

22. 8 C.F.R. §§ 1208.1(b), 1208.9, 1208.14(b)-(c) (2006). Denials comprise only a small fraction of asylum officer decisions, as only 7% of asylum seekers apply while they still have a lawful immigration status. See U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 55-64 tbls.18 & 19 (2006).

law. The third type of referral, called a “rejection” for purposes of statistical record-keeping, occurs when the asylum officer does not believe that the applicant applied for asylum within one year after last entering the United States, a deadline imposed by Congress in 1996, effective April 1, 1998.<sup>23</sup> An applicant who filed more than a year after entering the United States may be granted asylum if she can prove the existence of “changed circumstances” or “extraordinary circumstances” justifying late filing.<sup>24</sup> If she is not able to prove entry less than a year before application, or if she is not able to show the existence of a qualifying excuse, she is “rejected” and referred to an immigration court hearing.

Decisions by asylum officers are reviewed by a supervisory asylum officer within the regional office before being released to the asylum applicant approximately two weeks after the interview takes place. In rare cases (e.g., if the case presents a novel issue of law as to which neither the Department of Homeland Security nor the Attorney General has made a policy decision), the case may be referred to DHS national headquarters before a decision is rendered.

### B. *The Immigration Courts*

When an asylum officer refers a case to immigration court, the Asylum Office serves the asylum applicant with a “Notice to Appear” in that court on a specific date.<sup>25</sup> The notice to appear is the equivalent of a summons in a civil case, and with service of this notice, the asylum applicant becomes a “respondent.”

In most cases, the respondent has no basis for denying the government’s charge of being present in the United States without authorization, so the bulk of the court proceeding, which can last for several hours, is devoted to a *de novo* hearing on her evidence of eligibility for asylum. If for some reason the respondent does not qualify for asylum (e.g., she missed the application deadline), she may be eligible for withholding of removal<sup>26</sup> or protection under

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23. 8 U.S.C. § 1158(a)(2)(B).

24. 8 U.S.C. § 1158(a)(2)(D); 8 CFR § 208.4(a)(4)-(5) (2007) (interpreting the statute); see PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* (2000) (describing the history of the enactment of the deadline); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 *Geo. Immigr. L.J.* 1 (2001) (detailing the exceptions to the deadline and their limitations).

25. 8 C.F.R. §§ 1003.18(b), 1208.2(c)(3)(ii) (2007).

26. 8 U.S.C. § 1231(b)(3) (2000). An important distinction between asylum and withholding is that to win asylum, an applicant must demonstrate only well-founded fear, perhaps only a ten percent chance, of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). By contrast, to obtain withholding of removal, an applicant must prove that persecution is more likely than not (that is, a fifty-plus percent chance). *INS v. Stevic*, 467 U.S. 407, 423-24 (1984).

the Convention Against Torture.<sup>27</sup> The benefits awarded with those types of relief are far more limited. For example, an asylee may obtain asylum for her dependent spouse and minor children in the United States, or, if they are abroad, she may later bring those dependents to the United States as derivative beneficiaries of her asylum claim. After a year, asylees may apply to become permanent residents, and, after five years, to become American citizens. However, grants of withholding of removal or protection under the Convention Against Torture do not lead to permanent residence or citizenship, and do not provide derivative protection for dependents.<sup>28</sup>

The immigration court also hears defensive asylum cases. A defensive case is one that is presented by an applicant without valid immigration status who was apprehended by DHS before the individual filed an asylum application. Such an individual does not have an opportunity to present their claim to an asylum officer, and may file their asylum application only in immigration court. Defensive applicants are usually detained (jailed) by DHS after apprehension. A small number are released on bond (or on their own recognizance) before their immigration court hearings, while most remain detained through their hearings and any subsequent appeal.

In both affirmative cases that were referred by an asylum officer and in defensive cases, immigration court hearings are adversarial proceedings. A DHS attorney is assigned to cross-examine the asylum applicant and usually argues before the immigration judge that asylum is not warranted. Asylum seekers may be represented at their own expense, but indigent applicants are not provided with legal counsel even though nearly all unsuccessful applicants are ordered deported.

### *C. The Board of Immigration Appeals*

An applicant who is denied asylum by an immigration judge may appeal to the Board of Immigration Appeals, another institutional component of the Department of Justice. Today the Board consists of eleven to fifteen members appointed by the Attorney General of the United States. The Board was created by a directive of the Attorney General, rather than by statute, and its members serve at the pleasure of the Attorney General, exercising his delegated authority.<sup>29</sup>

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27. 8 C.F.R. §§ 1208.16-.18 (2007).

28. 8 C.F.R. §§ 1208.21, 1209.2 (2007).

29. CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 3.05[2] (2007).



#### D. *The United States Courts of Appeals*

An asylum applicant (and anyone else whose order of removal is sustained) may seek review of an adverse Board decision in a U.S. Court of Appeals.<sup>30</sup> The circuit courts may remand a case in which the Board rendered a decision contrary to the law or abused its discretion, but the courts grant a great deal of deference to the Board.<sup>31</sup> Except in rare instances, the courts of appeals can only remand a decision to the Board; they cannot grant asylum.<sup>32</sup>

#### E. *The Supreme Court*

In principle, a foreign national who has been ordered removed and whose removal has been sustained by a Court of Appeals could seek certiorari in the U.S. Supreme Court. However, as a practical matter, the Court of Appeals is the last stop; the Supreme Court has accepted review in only a handful of asylum cases since the Refugee Act authorized asylum in 1980.

### II. THE REGIONAL ASYLUM OFFICES

The Asylum Office, part of the Department of Homeland Security, makes decisions in the first instance when asylum seekers come forward on their own to assert claims. Asylum seekers file such claims knowing that they will be placed into removal proceedings if they are not successful and have no lawful immigration status in the United States. These “affirmative” claims, assessed at eight regional asylum offices, constitute the vast majority of first-instance asylum cases.<sup>33</sup>

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30. The Board acts for the Attorney General and the Attorney General’s decisions bind the Department of Homeland Security, so the Department does not appeal adverse decisions of the Board. Palmer et al., *supra* note 15, at 38 n.203.

31. The standard of deference that courts should grant to the Board varied among circuits for several years before Congress codified the standard in 1996. See Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133 (2005). The current uniform standard requires that the circuits uphold findings of fact unless “any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B) (2000). Credibility determinations must be sustained unless they are not supported by specific, cogent, and relevant reasoning. See, e.g., Gjerazi v. Gonzales, 435 F.3d 800 (7th Cir. 2006); Camara v. Ashcroft, 378 F.3d 361 (4th Cir. 2004). In actual practice, however, the federal circuits appear to vary dramatically in how they apply those standards. See *infra* Part V.

32. INS v. Ventura, 537 U.S. 12 (2002).

33. See OFFICE OF PLANNING, ANALYSIS, AND TECH., U.S. DEP’T OF JUSTICE, FY 2005 STAT. Y.B. II (showing 35,049 affirmative cases and 15,551 defensive ones), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>. On the different stages of the asylum process, see generally U.S. Citizenship and Immigration Servs., Obtaining Asylum in the United States: Two Paths to Asylum, <http://uscis.gov/graphics/services/asylum/paths.htm>. The eight regional Asylum Offices are located in Arlington (VA), Chicago, Houston, Los

With respect to training and quality control, every new asylum officer completes an intensive five-week basic training course with testing.<sup>34</sup> Each week, every regional office conducts four hours of training on new legal issues, country conditions, procedures, and other relevant matters. A supervisory asylum officer reviews every decision proposed by an asylum officer. Supervisory asylum officers must complete an intensive two-week training course on substantive law with testing. At least one quality assurance or training officer in each regional office regularly reviews supervisory sign-offs on cases in order to report to the Regional Office Director on possible inconsistencies in the application of the law and to identify training needs.

To support these regional officers, the Asylum Office headquarters maintains staff dedicated to quality assurance, training, and country-conditions research to provide support to the field. Every month, quality assurance/training officers in each regional office hold a conference call with headquarters office quality-assurance staff and country condition researchers to address common issues or concerns, new cases, emerging patterns of claims, and training ideas. The quality assurance team reviews cases involving novel or complex legal issues. This team also closely monitors the implementation of new laws. For example, in implementing the one-year filing deadline, this staff reviewed all referrals based on the deadline to ensure consistent application of the new law. In addition to asylum quality-assurance staff, each regional office has fraud prevention coordinators and immigration officers with the Fraud Detection and National Security Division of USCIS, whose responsibilities include identification of fraud indicators, provision of training, and assistance to asylum officers and supervisory asylum officers.<sup>35</sup>

Nationals from well over one hundred countries applied for asylum in recent years.<sup>36</sup> Asylum officers have different nationality caseloads in the eight regions since applicants from various countries are concentrated to different degrees in certain regions. In order to account for nationality differences in

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Angeles, Miami, Newark (NJ), New York City, and San Francisco. Previous research suggested a significantly lower rate of granting asylum both nationally, and particularly at two offices, following the terrorist attacks on September 11, 2001. Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 340-44 (2005) (showing the significant decline in grant rates at the Houston and Los Angeles offices). To understand what factors might account for such variation, we asked the Asylum Office for raw data on nationality, representation, the eight Regional Offices, and individual decision makers over time. The Asylum Office provided us with very useful data on each of these factors associated with grant rates for fiscal years 1999-2005. The Methodological Appendix to this Article includes a complete explanation of these measurements.

34. E-mail from Joanna Ruppel, Deputy Dir., Asylum Div., U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to Andrew I. Schoenholtz (Dec. 18, 2006) (on file with authors).

35. *Id.*

36. U.S. DEP'T OF HOMELAND SEC., 2006 YEARBOOK OF IMMIGRATION STATISTICS tbl. 17 (2007), <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/Table17D.xls>.

caseloads, we based comparisons of grant rates only on cases of nationals from countries that we call Asylee Producing Countries (APCs). The countries on this list had at least five hundred asylum claims before the asylum offices or immigration courts in FY 2004, and a national grant rate of at least 30% before either the asylum office or the immigration court. The minimum claim criterion ensures that the database includes a significant number of applicants and grantees. The minimum grant rate requirement ensures that asylum officers or immigration judges have reached a reasonable degree of consensus in concluding that many applicants from these countries are bona fide refugees.

Fifteen countries met these criteria: Albania, Armenia, Cameroon, China, Colombia, Ethiopia, Guinea, Haiti, India, Liberia, Mauritania, Pakistan, Russia, Togo, and Venezuela. Countries with low grant rates, such as El Salvador and Guatemala, are not on our APC list. We also excluded Mexicans from our database since the vast majority entered the affirmative asylum system for purposes other than to obtain asylum.<sup>37</sup> We first examined the data from eleven countries<sup>38</sup> where there were enough data on individual asylum officers to compare certain nationalities fairly.

The Asylum Office provided us with data on decision making by 928 asylum officers from all eight regional offices over a period of seven years, from 1999-2005.<sup>39</sup> For security and privacy reasons, the Asylum Office provided these data without identifying either the individual officers or the regional office by name. Rather, each officer was assigned a number, and each regional office a letter (Regions A through H). We studied the grant rates only of the 884 officers who decided at least fifty APC cases.

We also established a standard to measure disparities among individual adjudicators in the same office. For this Article, we created a very tolerant standard of consistency, regarding an adjudicator as deviating significantly only if her grant rate for the population in question was higher or lower by more than 50% than the overall grant rate for the same population in the decision maker's own regional asylum office.<sup>40</sup> Some might argue that this measure

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37. According to the Asylum Office, Mexicans voluntarily entered the affirmative asylum system in large numbers during this period principally in order to be placed into immigration court proceedings where they could seek relief other than asylum. Since they are generally not seeking asylum, they are not included in our analysis. See Schoenholtz, *supra* note 33, at 338 n.62 (explaining this behavior).

38. There was not sufficient data on asylum officer decisions to compare four APC nationalities fairly, so the individual decision-making analysis that follows does not include data on Guinea, Mauritania, Togo, and Venezuela. See *infra* Methodological Appendix Part II.

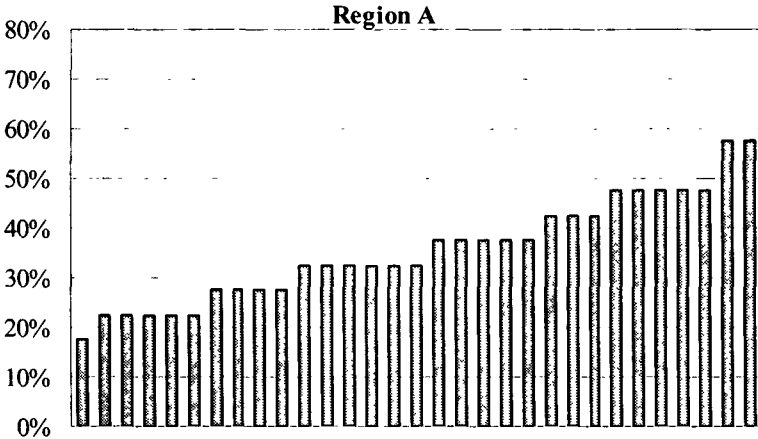
39. The Methodological Appendix includes the terms and definitions established by the Asylum Office for this data set, along with other relevant materials. This data is available at <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

40. Our rationale for adopting this measure of consistency is explained in more detail in the Methodological Appendix. See *infra* Methodological Appendix.

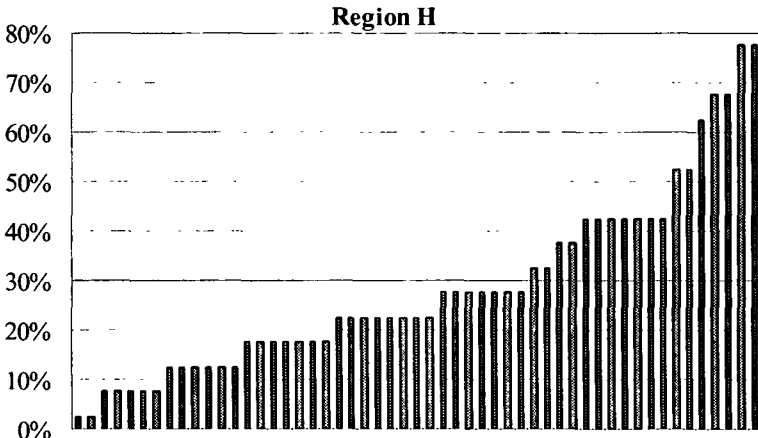
tolerates too much deviation within an office, but even using this benchmark, there is a great deal of disparity in asylum adjudication.

*A. Grant Rate Disparities for Asylee Producing Countries Among Individual Asylum Officers*

**Figure 2. Individual Asylum Officer Grant Rates for APC Cases—Regions A & H**



*Note:* Data are shown for all officers deciding at least 50 APC cases; the mean grant rate for APC cases in Region A was 35%.



*Note:* As above, data are shown for all officers deciding at least 50 APC cases; the mean grant rate for APC cases in Region H was 26%.

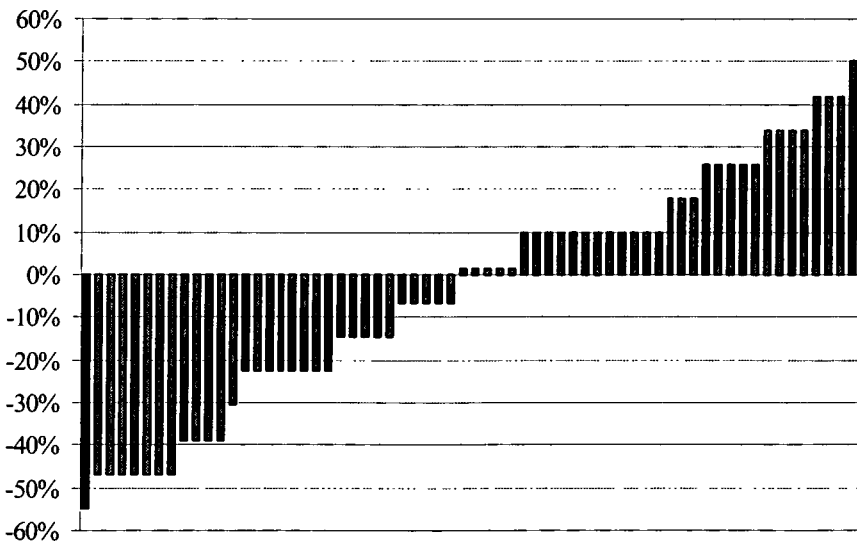
Figure 2, like many of the bar graphs in this Article, shows the spread of grant rates among adjudicators in a particular office. Each bar represents a different adjudicator’s grant rate. Bar graphs like these are a way of viewing the

degree of consistency within an office: the flatter the slope of a line connecting the tops of the bars, the more consistent the decision making within the office. Figure 2 shows the grant rates of individual officers in APC cases in two asylum office regions.

In principle, since clerks in the asylum offices assign cases to asylum officers randomly,<sup>41</sup> the graphs of grant rates for asylum officers deciding similar cases within a particular regional office should be quite flat. Indeed the graph for Region A is relatively flat. Most of the officers grant asylum to nationals of APC countries at a rate of between 25% and 50%. But Region H shows a much steeper slope and therefore much less consistency among its asylum officers.

We thought it would be useful to compare these individual officers' APC grant rates either to the mean regional office or national APC grant rate. Since there are significant differences in the mix of countries of origin of those making APC claims in the various regional offices, we concluded that comparing individual grant rates to the mean national APC grant rate would not take that variation in composition into account. We therefore used regional mean grant rates for comparison purposes.

**Figure 3. Individual Officers' Deviations from the Regional Office Mean Grant Rate in APC Cases—Region D**



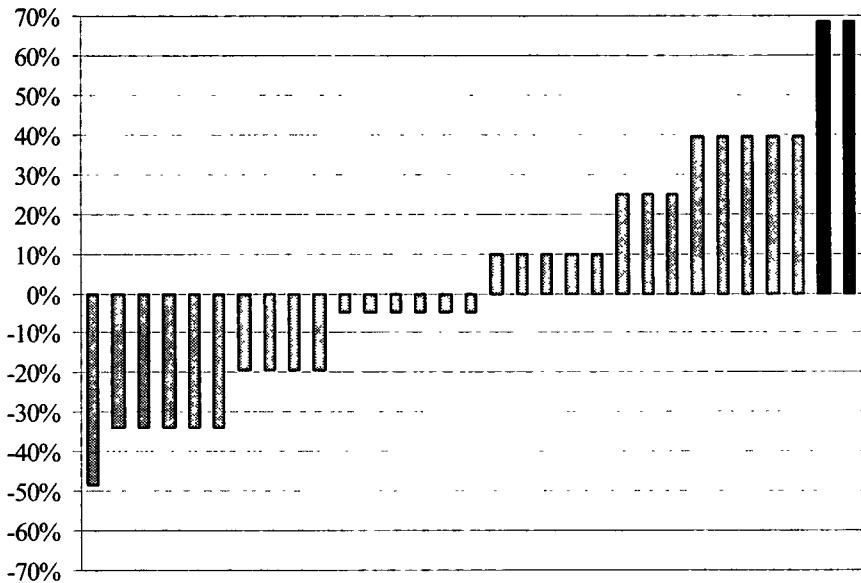
*Note:* Data are shown for all Region D officers who decided at least 50 APC cases (64 officers). The mean grant rate for APC cases decided by these officers was 62%. One officer, shown in black, deviated by more than 50%.

41. See *supra* note 21 and accompanying text.

Figure 3 and the other deviation graphs in this Article display the degree to which each officer deviated from the mean APC grant rate for the region in question. Figure 3 shows exceptional consistency in Region D as measured by this standard. Only one of sixty-four officers deviated from the Region D mean by more than 50%.

Similarly, in Region A shown in Figure 4, only two of thirty-one officers deviated by more than 50% from the regional office mean APC grant rate.

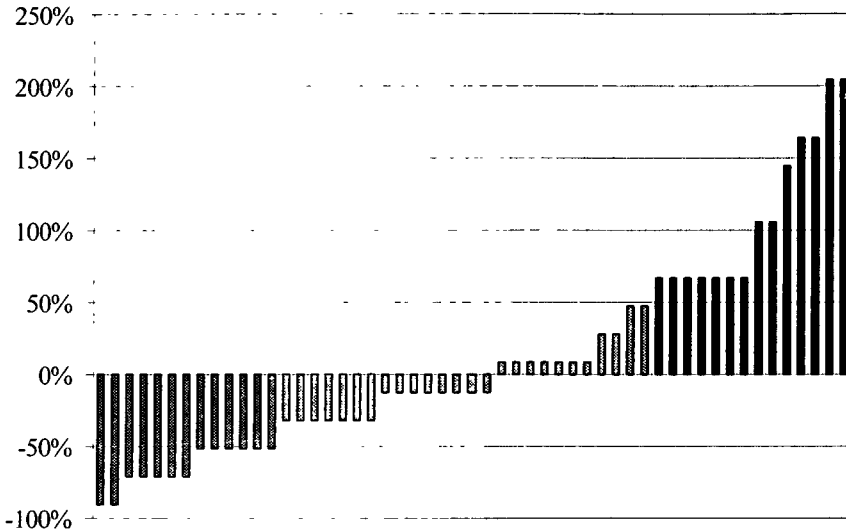
**Figure 4. Individual Officers' Deviations from the Regional Office Mean Grant Rate for APC Cases—Region A**



*Note:* Data are shown for all Region A officers who decided at least 50 APC cases (31 officers). The mean grant rate for APC cases decided by these officers was 35%. See *supra* Fig.2. Two officers, shown in black, deviated by more than 50%.

But not all regional offices show that extraordinary degree of consistency. In Region H, more than half of the officers deviated by more than 50% (Figure 5). In fact, five officers deviated as much as 130-190%.

**Figure 5. Individual Officers' Deviations from the Regional Office Mean Grant Rate in APC Cases—Region H**



*Note:* Data are shown for all Region H officers who decided at least 50 APC cases (53 officers); the mean grant rate for APC cases decided by these officers was 26%. See *supra* fig.2. Twenty-seven officers, shown in black, deviated by more than 50%.

**Table 1. Grant and Deviation Rates for All Regional Offices**

<i>Region</i>	<i>APC Grant Rate</i>	<i>Percentage of Officers Deviating from Regional APC Grant Rate by Over 50%</i>
D	62%	2%
A	35%	6%
C	56%	9%
B	39%	11%
E	26%	18%
F	52%	22%
G	38%	35%
H	26%	51%

*Note:* This table is based on 126,504 cases decided by the 527 asylum officers who had decided at least fifty APC cases.

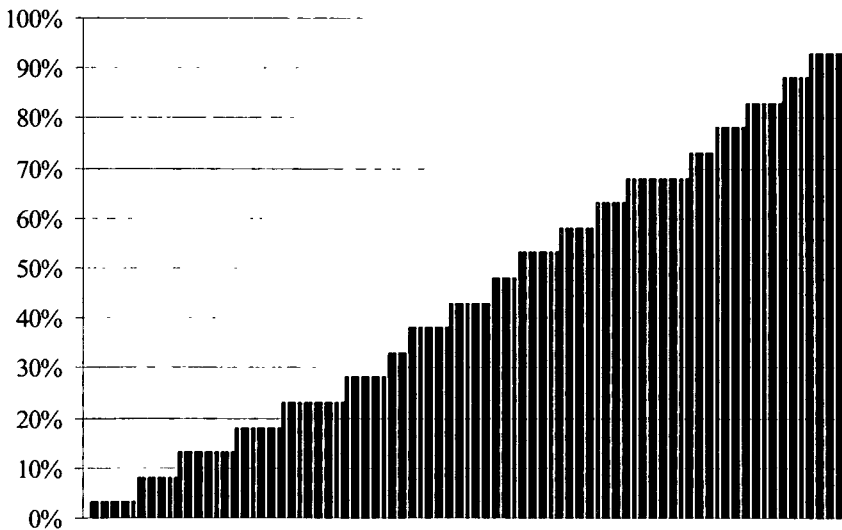
When we compare the grant and deviation rates for all of the asylum offices, we see significant variation. As Table 1 shows, the regional deviation rates vary tremendously—from 2% to 51%. Interestingly, these disparities do not depend exclusively on the grant rate. For example, Regions A and G have similar APC grant rates—35% and 38%, respectively. Yet the percentage of officers who deviate from their respective asylum office is six times greater in Region G (35% deviation rate) than in Region A (6% deviation rate).

### B. Grant Rate Disparities for Single Countries Among Individual Asylum Officers

By definition, all APC countries have a high rate of successful asylum applicants. Nevertheless, the particular mix of countries of origin in the pool of cases adjudicated in a particular region may affect that region's grant rate, which could explain at least some of the disparity between offices with respect to APC grant rates that we see in Table 1.<sup>42</sup> We therefore decided to look at whether regional office grant rates continued to vary when we narrowed our focus to applicants from a single country.

Our first analysis examines cases from China. Figure 6 shows the grant rates of 290 asylum officers nationwide who decided at least 100 Chinese cases from FY 1999-2005. This graph shows that asylum officers nationally have not reached any consensus regarding Chinese cases. The disparities are striking, from a low grant rate of 0% to a high of more than 90% and almost every possibility in between.

**Figure 6. Individual Officer Grant Rates in Chinese Cases—All Regions**

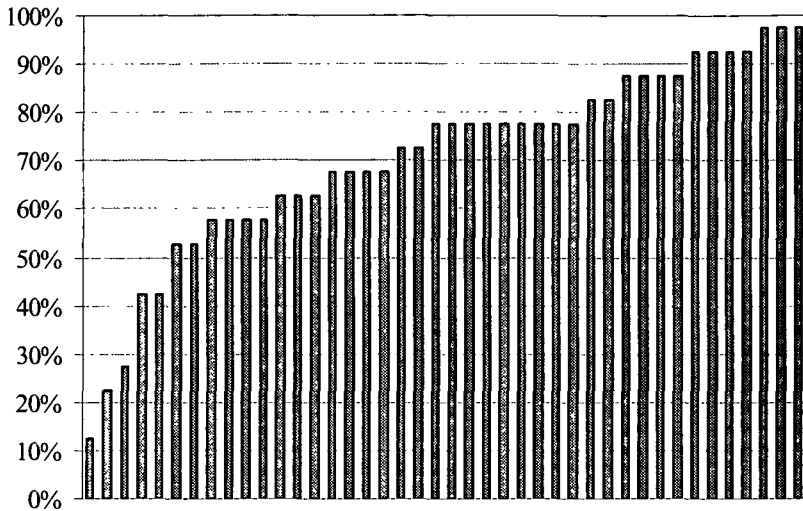


We also examined asylum officers' grant rates in Chinese cases by region. To ensure sufficient data within each region, however, we had to reduce to 25 the minimum number of cases decided by an officer before that officer would be included in our study. Some regions show high consistency among asylum officers deciding Chinese cases. In Region C, for example, grant rates were pretty consistent (Figure 7).

42. Differences in the mix would not, however, explain the differences in rates of consistency.

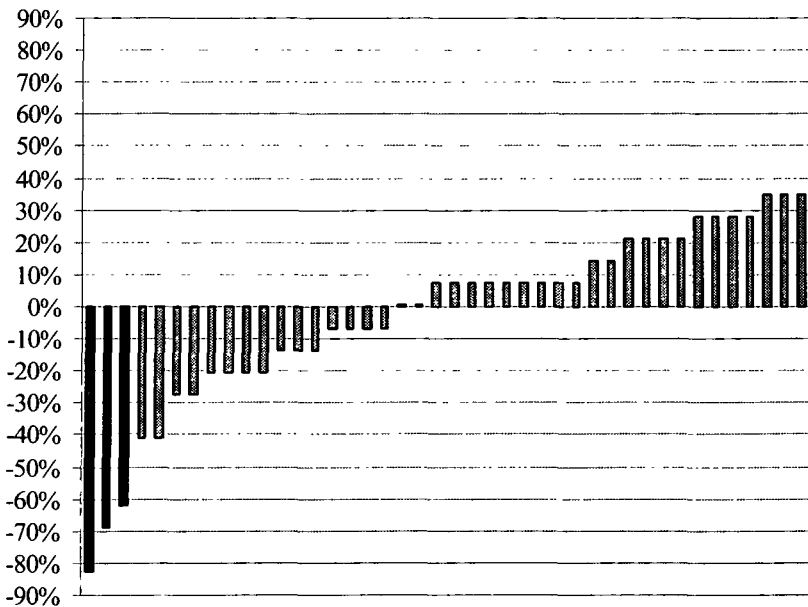


Figure 7. Individual Officer Grant Rates in Chinese Cases—Region C



Note: Data are shown for all Region C officers with at least 25 Chinese cases (42 officers); the mean grant rate for Chinese cases decided by these officers was 72%.

Figure 8. Individual Officers' Deviations from Regional Mean in Chinese Cases—Region C

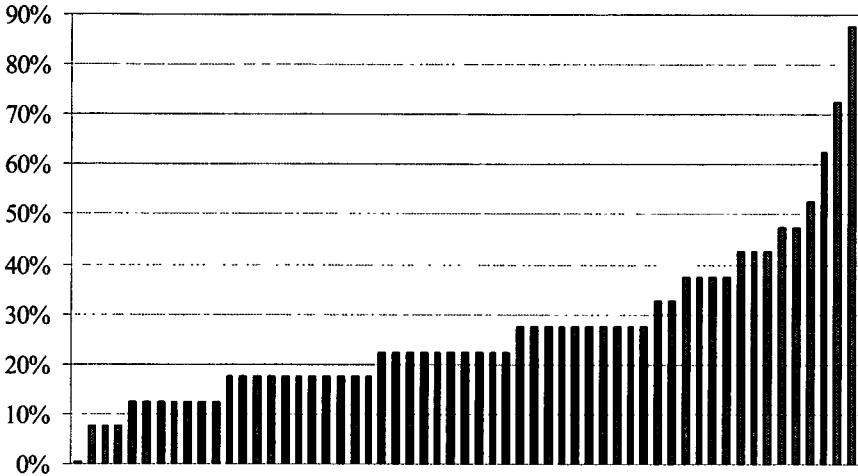


Note: Data are the same as in Figure 7. Two asylum officers had grant rates at exactly the mean; their data points have been jittered so as to appear visible on the graph. Three officers, shown in black, deviated by more than 50%.

As Figure 8 shows, only three of forty-two officers deviated from the Region C China mean by more than 50%.

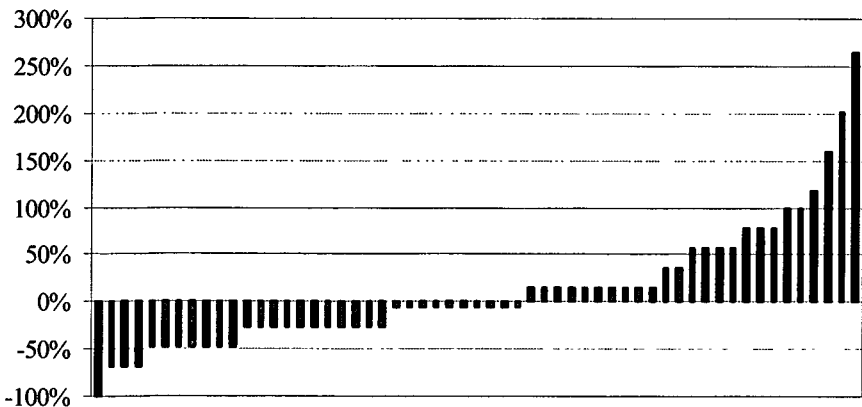
However, in Region E, there is considerably less consistency (Figure 9). As Figure 10 shows, seventeen of fifty-seven asylum officers, or about 30%, deviated from the regional China mean by more than 50%. This graph also shows extreme rates of deviation from the mean, with several officers deviating 100% or more and one officer over 250% deviant.

**Figure 9. Individual Officer Grant Rates in Chinese Cases—Region E**



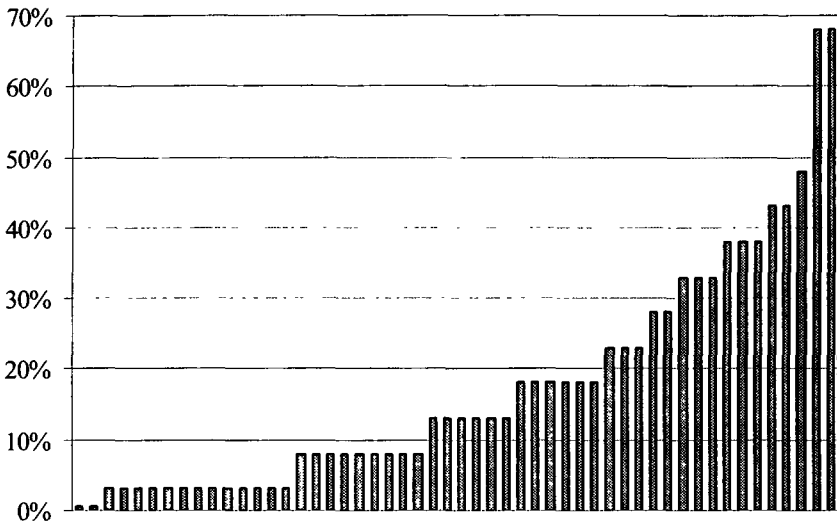
*Note:* Data are shown for all Region E officers who decided at least 25 Chinese cases (57 officers); the mean grant rate for Chinese cases decided by these officers was 24%. One officer granted no cases; that data point is jittered so as to appear visible on the graph.

**Figure 10. Individual Officers' Deviations from Regional Office Mean in Chinese Cases—Region E**



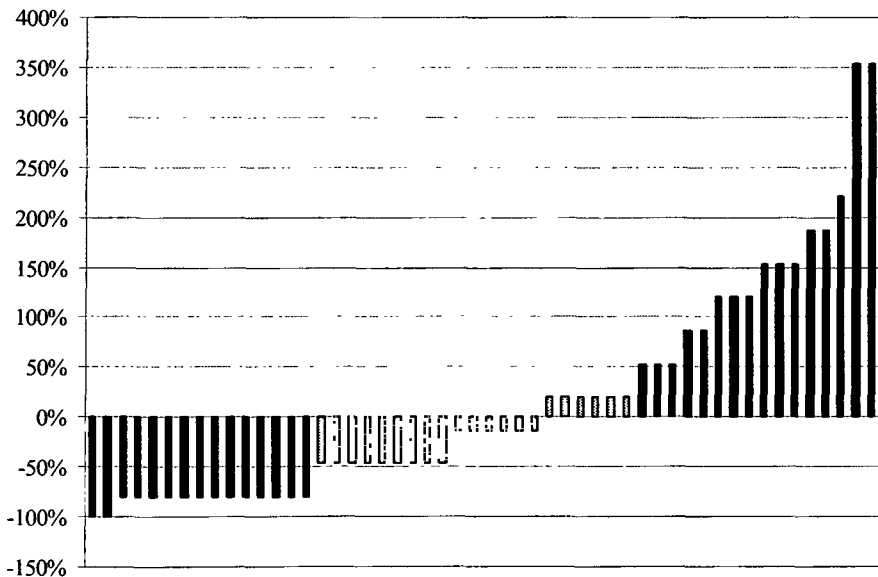
*Note:* Data are same as in Figure 9. Seventeen officers, shown in black, deviated by more than 50%.

**Figure 11. Individual Officer Grant Rates in Chinese Cases—Region H**



*Note:* Data are shown for all Region H officers who decided at least 25 Chinese cases (52 officers); the mean grant rate for Chinese cases decided by these officers was 15%. Two officers granted 0% of their cases; their data points have been jittered so as to appear visible on the graph.

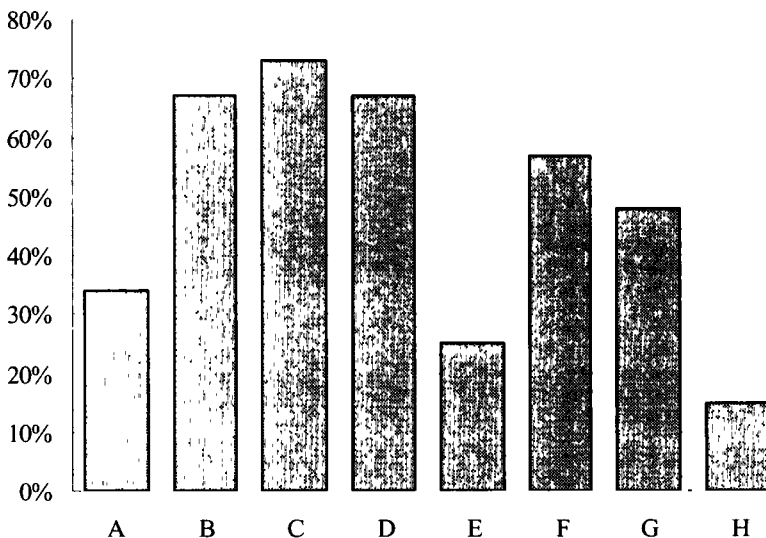
**Figure 12. Individual Officers' Deviations from Regional Office Mean in Chinese Cases—Region H**



*Note:* Data are the same as in Figure 11. Thirty-one officers, shown in black, deviated by more than 50%.

Some regions are even less consistent than this, despite the fact that the officers are deciding essentially the same pool of cases. In Region H, the grant rates vary between 0% and 68% (Figure 11). In this region, thirty-one of fifty-two officers, or 60%, who decided more than twenty-five China cases deviated from the regional China mean by more than 50% (see Figure 12). Two officers granted asylum in none of their cases. One of them (Officer 343) decided 273 Chinese cases, but did not grant a single asylum claim.

**Figure 13. Mean Grant Rates in Chinese Cases By Region**

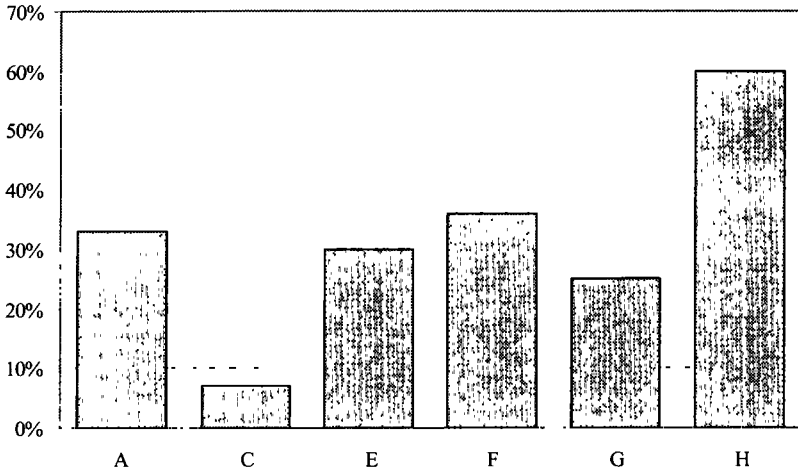


*Note:* Data show the mean grant rate for all officers in Chinese cases (total of 38,748 cases in all regions).

Figure 13 provides the same information broken down into mean grant rates by regional office. The range is very significant: while Region H grants at a 15% rate, Region C grants asylum to people from the same country at a 72% rate. What could account for this? It is possible that migrants from certain regions within China (or traffickers who assist them) choose to go to particular regions of the United States before applying for asylum, and that fraud is more prevalent among migrants from some of those regions than among migrants from other regions. Perhaps, therefore, migration patterns cause Region H to receive a much higher proportion than Region C of Chinese applicants who have false claims for asylum. While in principle these migration patterns could explain some degree of disparity among the U.S. regional asylum offices, we doubt that it could account for a five-fold difference in grant rates from one office to another. Furthermore, there are significant differences in mean grant rates from region to region even when we examine the rates for applicants from countries much smaller than China. For example, the regional mean grant rates

for Armenian claims in Regions C, F, and G were, respectively, 57%, 37%, and 23%.<sup>43</sup> In addition, it could not possibly explain the differences in grant rates from officer to officer within regional asylum offices.

**Figure 14. Percentage of Officers Who Are Outliers in Chinese Cases by Region**



*Note:* Officers are considered outliers if their grant rates deviated by more than 50% from the regional office mean grant rate. Data are shown for officers deciding at least 25 Chinese cases. There were no such officers in Region B and only two such officers in Region D, so they are omitted from this chart.

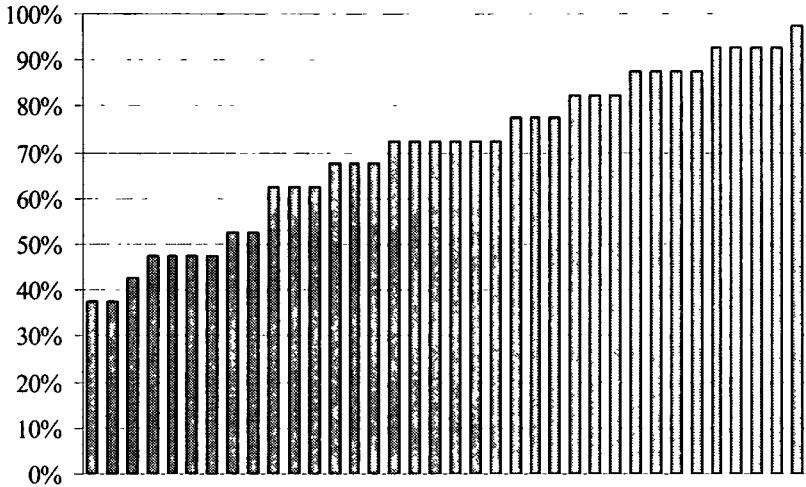
Figure 14 compares the degree of deviation from the regional mean China grant rate in the six regional offices that had many asylum officers who decided twenty-five or more China cases. The deviation rate is extraordinary, varying from about 7% in Region C to about 60% in Region H.

The last graphs in this Part examine the degree of consistency within a regional office with respect to single countries other than China. Region D decides many Ethiopian cases, and Figures 15 and 16 show that it does so with a good deal of consistency.

Figure 15 shows that many asylum officers in this region seem to grant at similar rates in these cases.

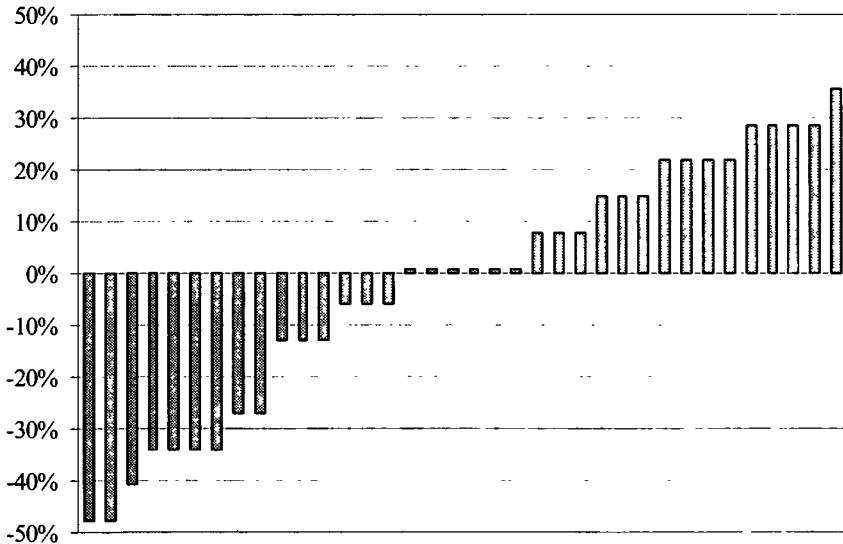
43. The data for Armenia are derived from the country-by-country statistics for individual asylum officers supplied to the authors by the Department of Homeland Security. E-mail from Ted Kim, Operations Branch Chief, Asylum Div., U.S. Citizenship & Immigration Servs., U.S. Dep't. of Homeland Sec., to Andrew Schoenholtz (Oct. 24, 2006), *amended by* E-mail from Trina Zwicker, Program Manager, Operations Branch, Asylum Div. U.S. Citizenship & Immigration Servs., U.S. Dept. of Homeland Sec., to Philip Schrag (Jan. 23, 2007) (stating that the headings for Armenia and Cameroon in the October 23, 2006, dataset should be reversed).

**Figure 15. Individual Officer Grant Rates in Ethiopian Cases—Region D**



*Note:* Data are shown for all Region D officers who decided at least 50 Ethiopian cases; the mean grant rate for Ethiopian cases decided by these officers was 72%.

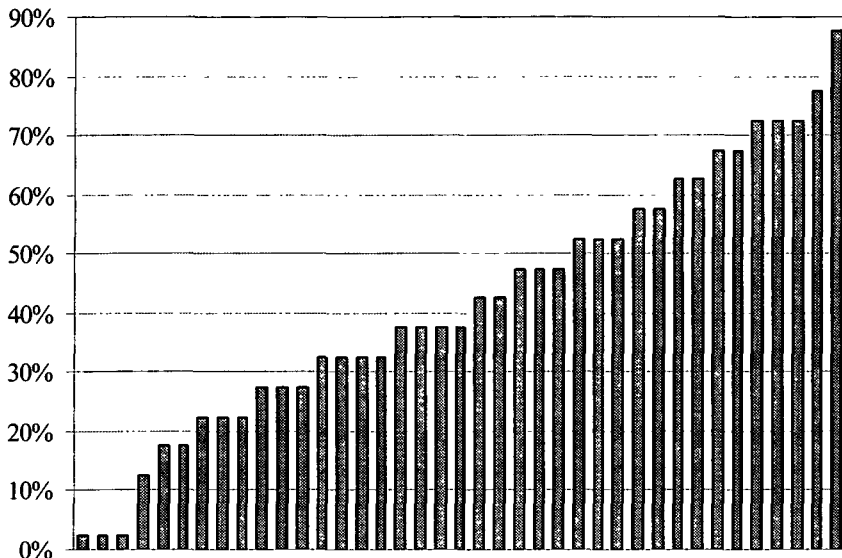
**Figure 16. Individual Officers' Deviations from Regional Office Mean in Ethiopian Cases—Region D**



*Note:* Shows percentage deviation from the mean grant rate in Region D for Ethiopian cases, which was 72%.

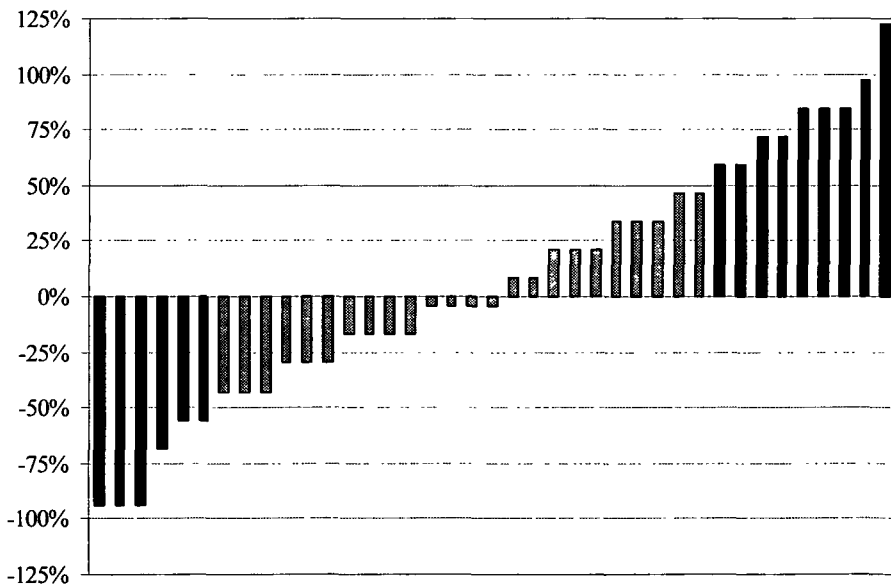
In fact, *no* officer deviates from the mean by more than 50% (Figure 16).

Figure 17. Individual Officer Grant Rates in Indian Cases—Region C



Note: Data are shown for all Region C officers who decided at least 50 Indian cases; the mean grant rate for Indian cases decided by these officers was 39%.

Figure 18. Individual Officers' Deviations from Regional Office Mean in Indian Cases—Region C



Note: Deviations are from the mean grant rate of 39%. The darker shaded bars show deviations of greater than 50%.

By contrast, in Region C, the grant rates for Indian cases range considerably, from 3% to 88% (Figure 17). In Region C, fifteen of thirty-nine officers deviate from the mean Indian grant rate by more than 50% (Figure 18). We find this of particular interest because only one in eleven asylum officers in Region C deviated more than 50% from the mean regional APC grant rate. Given Region C's high degree of consistency in its adjudications of APC cases generally, perhaps the significant degree of inconsistency in Indian cases reflects particular disagreements among officers about the extent of persecution within India, or about the extent of fraud committed by Indian applicants.

But what explains the tremendous range from very little to quite significant degrees of inconsistency at the eight Asylum Offices? Training, supervisory review, and the quality assurance mechanisms discussed above could well account for the high degree of consistency that exists in several offices.<sup>44</sup> But the existing mechanisms have not created a just system in all regional offices for those whom America wants to protect. New approaches need to be developed to achieve such a result.

### III. THE IMMIGRATION COURTS

As explained in Part I, immigration courts are the "trial-level" administrative bodies responsible for conducting removal hearings—hearings to determine whether non-citizens may remain in the United States.<sup>45</sup> For represented asylum seekers, these hearings are generally conducted like other court hearings, with direct and cross-examination of the asylum seeker, testimony from other supporting witnesses where available, and opening or closing statements by both sides. Approximately one-third of asylum seekers in immigration court are unrepresented;<sup>46</sup> in these cases, the immigration judge must play a more active role in questioning the applicant and building the factual record.<sup>47</sup> Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply in immigration court.

Until 1983, immigration courts were part of the Immigration and Naturalization Service (INS), which was also responsible for enforcement of immigration laws and housed the INS trial attorneys who opposed asylum claims in court.<sup>48</sup> In January of that year, the Executive Office for Immigration

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44. See discussion *supra* Part I.B.

45. 8 C.F.R. § 1240.1(a)(1)(i) (2007). For further information on removal hearings, see *supra* Part I.

46. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 742 (2002).

47. 8 U.S.C. § 1229a(b)(1) (2000) ("The immigration judge shall . . . interrogate, examine, and cross-examine the alien and any witnesses.")

48. Indeed, before 1956, "special inquiry officers," who were the predecessors to immigration judges, held hearings as only part of a range of responsibilities that included



Review (EOIR) was created, placing the immigration courts in a separate agency within the Department of Justice.<sup>49</sup> In 2003, when the Department of Homeland Security was created, the trial attorneys became part of that Agency but the courts remained in the Department of Justice.

There are fifty-three immigration courts located in twenty-four states, and more than two hundred immigration judges sit on these courts.<sup>50</sup> Asylum cases are assigned to immigration courts according to the asylum seeker's geographic residence.<sup>51</sup> The administrators in each immigration court assign cases to immigration judges to distribute the workload evenly among them, and without regard to the merits of the cases or the strength of defenses to removal that may be asserted by the respondents.<sup>52</sup>

For the approximately 65% of asylum seekers whose cases are referred by asylum officers to immigration court, the removal hearing allows them to present their claim *de novo*.<sup>53</sup> The immigration court presents the last good opportunity for these asylum seekers to prevail. The immigration court also hears claims from individuals who raise an asylum claim after being placed in removal proceedings. For such individuals, the immigration court hearing is the only opportunity they will have to present evidence in support of their case. It is therefore of the utmost importance that immigration court proceedings be

enforcing immigration laws. These officials were retitled "immigration judges" in 1973. T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 107-09 (2d ed. 1991).

49. See Board of Immigration Appeals, 48 Fed. Reg. 8038 (Feb. 25, 1983) (to be codified at 8 C.F.R. pts. 1, 3, 100).

50. Office of the Chief Immigration Judge, Executive Office of Immigration Review, U.S. Dep't of Justice, <http://www.usdoj.gov/eoir/ocijinfo.htm>.

51. Asylum cases are assigned to the court with jurisdiction over the asylum seeker's residence when the Notice to Appear is issued. 8 C.F.R. §§ 1003.14(a), 1003.20(a) (2007). See *supra* Part I for discussion of the Notice to Appear. An asylum seeker may move to change venue "for good cause." 8 C.F.R. § 1003.20(b) (2007).

52. The only exception is that in some courts, a particular judge may be designated to hear cases initiated against unaccompanied minors, which are referred from the Office of Special Investigations, and attorney discipline cases. The percentage of such cases is very small, in the low single digits. E-mail from the Executive Office for Immigration Review to Andrew Schoenholtz (Feb. 1, 2007) (on file with authors); see also U.S. GOV'T ACCOUNTABILITY OFFICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 17 (2006) ("Within each immigration court, newly filed cases are generally assigned to immigration judges through an automated process; however, some flexibility exists. . . . [T]he court administrator may manually schedule some cases to correct inequities that occurred in the number and type of cases that were assigned to a judge by the automated system. Also, cases that are re-entering the immigration court system are generally manually assigned to the immigration judge who had initially adjudicated the case. Further, if a judge already has a heavy caseload, . . . the [delegate of the] Chief Immigration Judge . . . may decide to exclude a judge from assignment of newly filed cases through the automated system." (footnote omitted)).

53. The DHS trial attorney may present the asylum application filed with the Asylum Office to impeach the asylum seeker on inconsistencies between that application and any documents filed in Immigration Court. 8 C.F.R. §§ 1208.6, 1240.2, 1240.7 (2007).

predictable and fair, as a loss in immigration court will likely result in removal—a possible death sentence for some asylum seekers whose cases are wrongly denied.

We were fortunate to have access to vast amounts of data relating to asylum decision making in immigration court from January 2000 through August 2004. Our analysis of disparities in decision making in the asylum process follows three reports: Frederick Tulsy's article in the *San Jose Mercury News* detailing the results of his Freedom of Information Act (FOIA) request to the Immigration and Naturalization Service;<sup>54</sup> the *asylumlaw.org* website, which provides data received in response to their FOIA request to the Department of Homeland Security;<sup>55</sup> and the Transactional Records Access Clearinghouse (TRAC) website,<sup>56</sup> which analyzes the data from the first two requests and provides extensive biographical information for many of the immigration judges. We are indebted to Tulsy, *asylumlaw.org*, and TRAC for obtaining and sharing these data.<sup>57</sup>

Our analysis takes this prior work as a jumping-off point, analyzing the available data in two new ways. First, we examined the grant rates across and within courts, looking at 78,459 decisions in the aggregate for APCs as well as cases involving asylum seekers from individual countries.<sup>58</sup> Second, we used immigration judges' biographical information and a database of 66,443 cases to run a descriptive cross-tabulation analysis that showed us how characteristics such as age, gender, and prior employment experience correlated with their decisions in asylum cases.<sup>59</sup> This analysis also looked at individual

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54. Fredric N. Tulsy, *Asylum Seekers Face Capricious Legal System*, SAN JOSE MERCURY NEWS, Oct. 18, 2000, at 1A.

55. *Asylumlaw.org*, U.S. Immigration Judge Decisions in Asylum Cases, Jan. 2000 to Aug. 2004, [http://www.asylumlaw.org/legal\\_tools/index.cfm?fuseaction=showJudges2004](http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=showJudges2004).

56. TRAC, Immigration Judge Reports—Asylum, <http://trac.syr.edu/immigration/reports/judgereports>.

57. Moreover, the United States Committee on International Religious Freedom conducted a statistical analysis of immigration judge rulings on claims of asylum seekers in expedited removal from FY 2000 to FY 2003. Patrick Baier, *Selected Statistical Analyses of Immigration Judge Rulings on Asylum Applications, FY 2000-2003*, in II REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 674 (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/index.html](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html).

58. For the criteria by which these "Asylee Producing Countries" were selected, see *supra* text accompanying note 37. As further explained in the Methodological Appendix, this data includes defensive asylum claims, but eliminates detained asylum cases as thoroughly as possible. Approximately 30% of the asylum claims in the database were defensive, and approximately 7% were detained. See E-mail from Executive Office of Immigration Review to Andrew Schoenholtz (Jan. 25, 2007) (on file with authors); *infra* Methodological Appendix Part III.

59. We eliminated defensive asylum seekers from this database, thus minimizing the number of detained cases. According to information provided by the Executive Office for Immigration Review, only 996 detained cases remain in the data after eliminating defensive cases. See E-mail from Executive Office of Immigration Review to Andrew Schoenholtz (Feb. 6, 2007) (on file with authors); see also Methodological Appendix Part III.

characteristics of asylum seekers, such as number of dependents and legal representation, revealing interesting insights into how these factors play into immigration judges' decisions. We also ran three regression analyses to confirm the results of the bivariate cross-tabulations.<sup>60</sup> The methodological challenges we faced and choices we made are described in Part III of the Methodological Appendix.

#### A. Disparities Between Courts

Figure 19 shows, for each APC, the grant rate in the high-volume immigration courts with the highest and lowest grant rate for nationals of that country, as well as the average grant rate for all high-volume immigration courts. The graph reveals that even for asylum seekers from countries that produce a relatively high percentage of successful asylees, there are serious disparities among immigration courts in the rates at which they grant asylum to nationals of five of these countries. As explained further in the Methodological Appendix, we are primarily concerned with court-wide grant rates that deviate by more than 50% from the national average grant rate for any of these countries.<sup>61</sup>

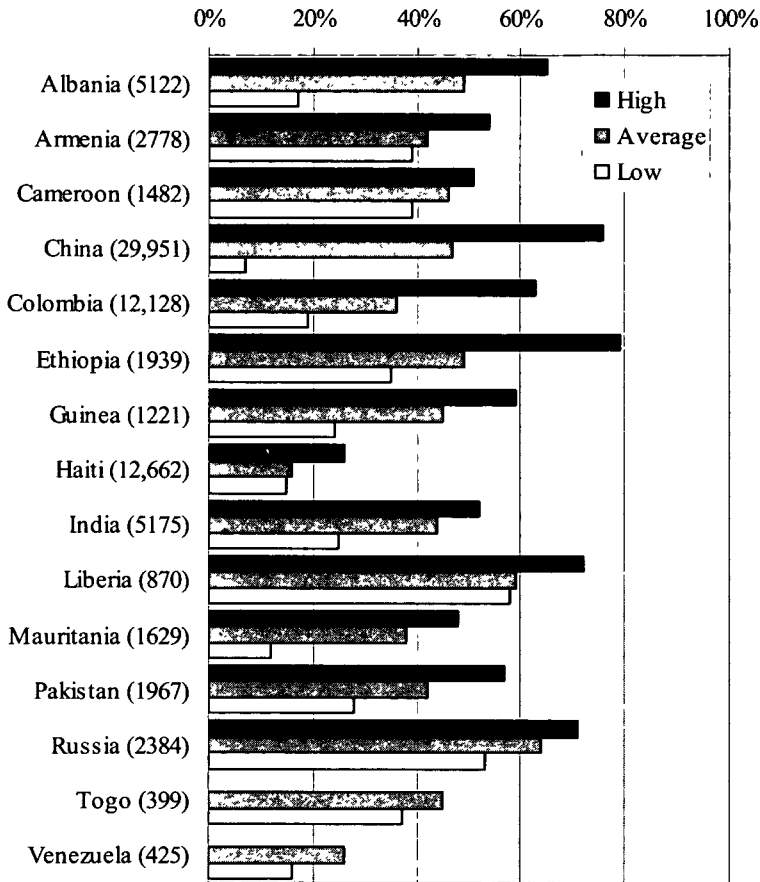
We found serious disparities in decision making with respect to applicants from *six* of the fifteen APCs. Asylum seekers from three of these countries faced a grant rate in at least one court that was more than 50% below the national average, and applicants from four of these countries enjoyed a grant rate in at least one court that was more than 50% above the national average. For one of these countries, China, the high grant rate *and* the low grant rate deviated by more than 50% from the national average.

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60. The regression analyses included several independent variables for which we did not report cross-tabulations. These additional variables are discussed further in Part III of the Methodological Appendix.

61. As further explained in Part III of the Methodological Appendix, the "national average" is limited to cases from APCs decided in "high-volume immigration courts," terms defined in the Methodological Appendix. *See infra* Methodological Appendix Part III.

**Figure 19. High, Low, and Average Grant Rates for Nationals of APCs in High-Volume Immigration Courts**



*Note:* The “High” and “Low” bars represent the highest and lowest grant rates from high-volume immigration courts deciding at least 100 cases involving nationals from a particular country). The “Average” bar denotes the average grant rate across all immigration courts for such cases. Togo and Venezuela have only “Low” and “Average” bars because only one immigration court heard more than 100 cases from those countries. The numbers in parentheses denote the number of asylum cases from that country decided by high-volume immigration courts during the time frame studied. *See also infra* note 62.

This means that a Chinese asylum seeker unlucky enough to have her case heard before the Atlanta Immigration Court had a 7% chance of success on her asylum claim, as compared to 47% nationwide.<sup>62</sup> Moreover, if this same

62. The following chart provides the cities in which high and low grant rates were awarded by country of asylum seeker. We examined only courts that decided 100 or more cases from the country in question. Only one immigration court (Baltimore) decided 100 or more cases from Togo, and only one immigration court (Miami) decided 100 or more cases

asylum seeker had presented her claim 400 miles to the south, before the Orlando Immigration Court, she would have had a 76% chance of winning asylum, over ten times the Atlanta grant rate. Colombian asylum seekers also faced major disparities: those who appeared before the Orlando Immigration Court had a 63% grant rate, while those heard by the Atlanta Immigration Court faced a grant rate of 19%. The average national grant rate for Colombian asylum seekers is 36%. Why is an individual fleeing persecution in China 986% more likely to win her asylum claim in one venue than in another? Why is the average national grant rate for Chinese asylum claims 571% higher than the Atlanta court's grant rate? And why are Colombian asylum seekers 232% more likely to win their claims in Orlando than they are in Atlanta?

One answer is that some immigration courts grant asylum cases from the aggregate of *all* APCs at a rate much lower (e.g., Atlanta, Detroit, Miami, and San Diego) or much higher (e.g., New York, Orlando, and San Francisco) than the national average. For example, grant rates at least 50% below the national average rate were awarded in Atlanta for Chinese cases and in Detroit for Albanian and Mauritanian cases. As Figure 20 shows, the average grant rate in high-volume immigration courts for APCs was 40%, but the average grant rates in Atlanta and Detroit for all APCs, at 12% and 19% respectively, were over 50% lower than the national average. The Miami court's average grant rate for APCs was 42% below the national average, at 23%.

There were also upward disparities in the high-granting courts, although these were not as extreme. The San Francisco Immigration Court, which granted asylum to Ethiopians at a rate more than 50% greater than the national average rate, had an average grant rate for all APCs that was 35% greater than the national average. In addition, the New York Immigration Court, which had

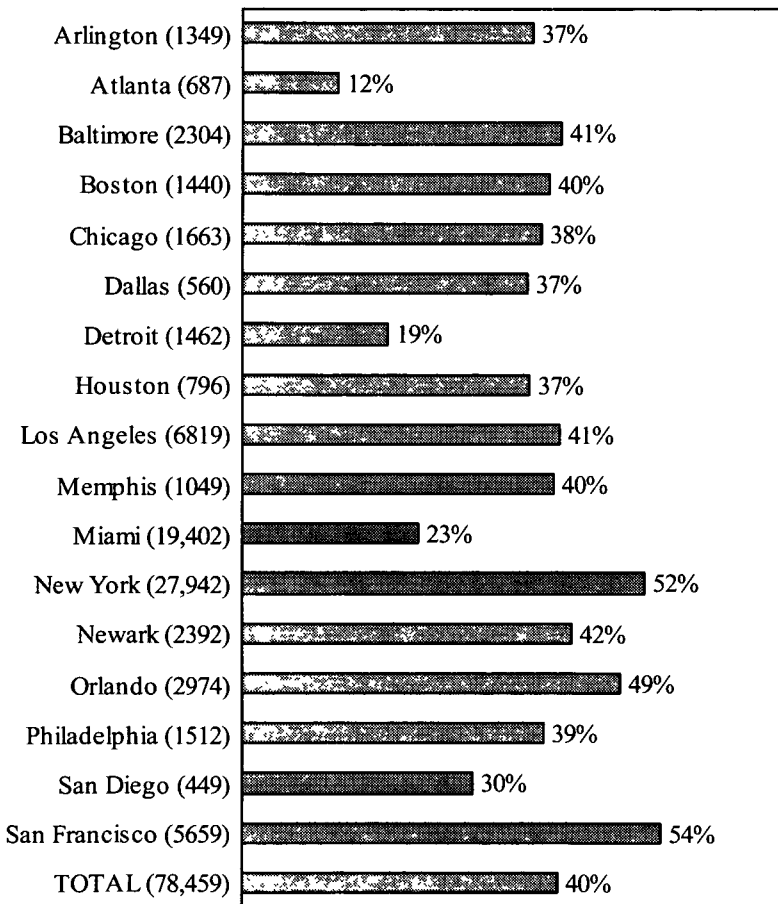
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from Venezuela; as a result, the chart below includes a low grant rate but not a high grant rate for both countries.

<i>Country</i>	<i>High Grant Rate (%)</i>	<i>Low Grant Rate (%)</i>
Albania	New York (65%)	Detroit (17%)
Armenia	San Francisco (54%)	Los Angeles (39%)
Cameroon	Houston (51%)	Baltimore (39%)
China	Orlando (76%)	Atlanta (7%)
Colombia	Orlando (63%)	Atlanta (19%)
Ethiopia	San Francisco (79%)	Arlington (35%)
Guinea	New York (60%)	Baltimore (24%)
Haiti	New York (27%)	Miami (15%)
India	Los Angeles (52%)	Newark (25%)
Liberia	Newark & New York (72%)	Philadelphia (58%)
Mauritania	New York (49%)	Detroit (12%)
Pakistan	Philadelphia (57%)	Houston (28%)
Russia	San Francisco (71%)	Newark (53%)
Togo	N/A	Baltimore (37%)
Venezuela	N/A	Miami (16%)

the high grant rate for Haiti, had an average grant rate for APCs that was 30% greater than the national average, and the Orlando Immigration Court, which had the high grant rate for both China and Colombia, had an average APC grant rate that was 23% higher than the nationwide mean. One explanation for the differences between the courts could be simply cultural, for lack of a better term—some courts are more likely to grant asylum claims while other courts, despite being components of a single national Executive Office for Immigration Review, are especially tough on all asylum seekers.

**Figure 20. Average Grant Rates for All APCs in High-Volume Immigration Courts**



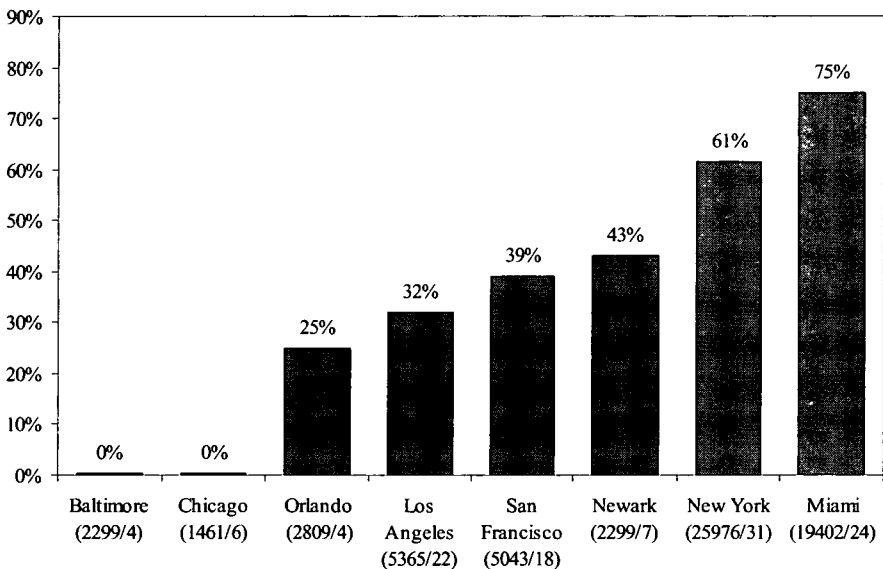
*Note:* The numbers in parentheses after the court name indicate the number of cases from all APCs decided by the court in question.

It seems possible that, to some extent, the differences across courts (and from one region of the asylum office to another) may be due to differences in the populations of asylum seekers in different geographic locations, though we

know of no reason why Orlando should attract a much higher proportion of bona fide asylum applicants from APCs than Atlanta. Within a court, however, no such geographic variable should exist, as nearly all cases are assigned randomly to the judges.<sup>63</sup> As explained below, our research found tremendous differences in the asylum grant rates of immigration judges on the same court, even holding nationality constant. To further investigate discrepancies between decision makers *within* the high volume immigration courts, we examined the grant rates of individual immigration judges, holding nationality constant.

### B. Disparities Within Immigration Courts

**Figure 21. Percent of Judges Deviating over 50% from National APC Mean**



*Note:* The x-axis shows: city (number of cases decided/number of judges). As noted *infra* note 64, the number of cases decided includes only cases heard by judges hearing 100 or more APC cases on each court and the number of judges includes only judges who decided 100 or more APC cases on each court.

We began our investigation of grant rate disparities within immigration courts by looking at the eight largest courts by volume: Baltimore, Chicago, Los Angeles, Miami, Newark, New York, Orlando, and San Francisco. Taking only judges who had decided 100 or more cases, we analyzed discrepancies in grant rates for asylum seekers from APCs.<sup>64</sup> With the national APC mean of

63. See *supra* text accompanying note 52.

64. The number of cases decided by judges hearing 100 or more APC cases on each court as well as the number of judges hearing 100 or more APC cases are indicated in parentheses after the name of the court on each graph in this Subpart.

40% as a starting point, we determined for each court how many judges' APC grant rates were more than 50% deviant from that mean. Figure 21 provides the results of this investigation.

### C. Disparities from the Court Mean

The statistics tell us that the five largest courts have consistent outliers,<sup>65</sup> that is, from one-third to three-quarters of the judges on these courts grant asylum in Asylee Producing Countries cases at rates more than 50% greater or more than 50% less than the national average. Why would it be that there are such discrepancies in grant rates between judges on the same court? One obvious response to this finding is that there may be different geographic populations of asylum seekers in different regions; for example, it may be that in Chicago, the Chinese asylum seekers all come from a certain region or ethnic group and have similarly viable asylum claims, while in Miami, the Chinese asylum seeker population is more diverse, resulting in greater disparities in claim viability. As a result, individual judges in Miami might produce grant rates more discrepant from the Miami court mean for Chinese cases than those in Chicago are from the Chicago mean for Chinese cases.

We tested this concern by limiting geographic variability, looking only at individual judges' discrepancies from *their own court's* average grant rate for asylum seekers from APCs.<sup>66</sup> We focused on the four largest courts<sup>67</sup>: San Francisco, Miami, New York, and Los Angeles, with eighteen, twenty-one, twenty-six, and twenty-seven judges, respectively.<sup>68</sup> We discovered that in the

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65. It is important at this juncture to clarify that these judges' decisions are not necessarily inaccurate simply because their grant rates are discrepant with the national average or their court's average. It could be, for example, that a judge with an unusually high grant rate is deciding cases as fairly as possible, and that the average grant rate is inaccurate because of a plethora of low-granting judges who are not deciding cases as fairly as the high-granting "outlier" judge. We note only that these discrepant grant rates indicate the need for further investigation to determine whether any inappropriate personal biases are coming into play. To be clear, we are *not* advocating that these judges be disciplined or otherwise sanctioned based solely on discrepant grant rates, but instead that the data may be a jumping-off point for a more thorough examination of performance and professionalism in the courtroom.

66. We looked only at judges hearing one hundred or more APC cases to determine disparities. The number of APC cases decided by each judge is noted in parentheses along the x-axis of each chart. We looked at all APC cases decided by each court (in other words, we did not limit this calculation to cases decided by judges hearing one hundred or more APC cases) to determine the court APC mean. The number of APC cases decided by all judges on each court is noted in parentheses next to the "Court Mean" label.

67. In the four other courts examined in Figure 21, the percentages of judges deviating from *their own court's* APC mean by 50% or more were Baltimore: 0% (0 of 4 judges; 41% mean); Chicago: 17% (1 of 6 judges; 38% mean); Newark: 29% (2 of 7 judges; 42% mean); and Orlando: 0% (0 of 4 judges; 49% mean).

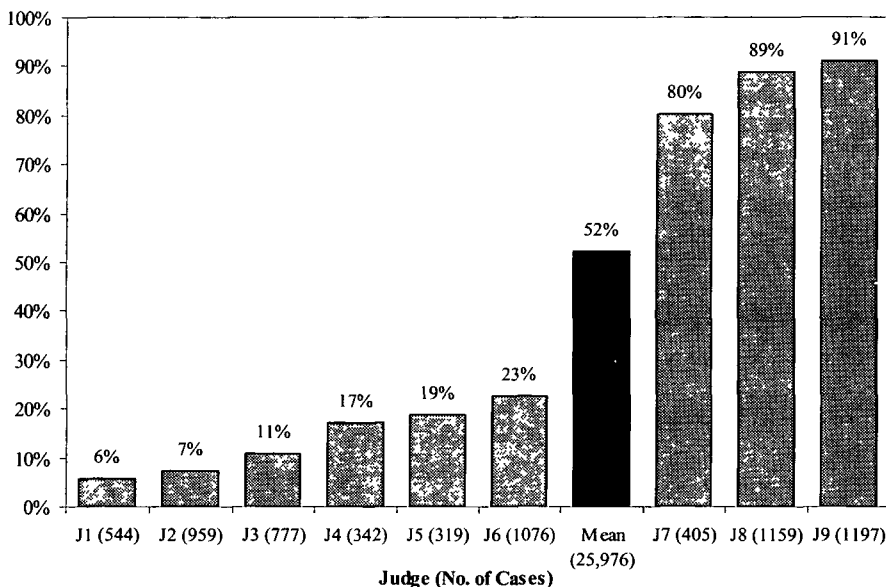
68. The numbers of judges per court are current as of July 2004. As further explained in Part III of the Methodological Appendix, the Miami court numbers exclude judges at



three largest courts, more than a quarter of the judges were markedly out of step with the other judges in their own courthouse.<sup>69</sup>

As Figure 22 shows, in New York, one judge granted only 6% of the APC asylum cases before him, and another pulled in just behind him, having granted 7% of asylum cases he heard. A New York judge who was transferred to the Miami court in September 2003 granted asylum in 11% of the APC cases he heard in New York (as compared to 6% in Miami). Three more judges granted fewer than a quarter of the cases that came before them, at rates of 17%, 19%, and 23%. The New York Immigration Court also had three judges who awarded asylum to most of the asylum seekers before them, at rates of 80%, 89%, and 91%. This means that 29% of New York judges decided APC cases at rates more than 50% discrepant from the court's mean of 52%.

**Figure 22. Grant Rates for Judges Who Are Outliers in APC Cases—New York (9 of 31 judges)**



*Note:* This graph and the two graphs that follow show grant rates for judges deciding at least 100 APC cases who deviated by more than 50% from their court's mean in APC cases.

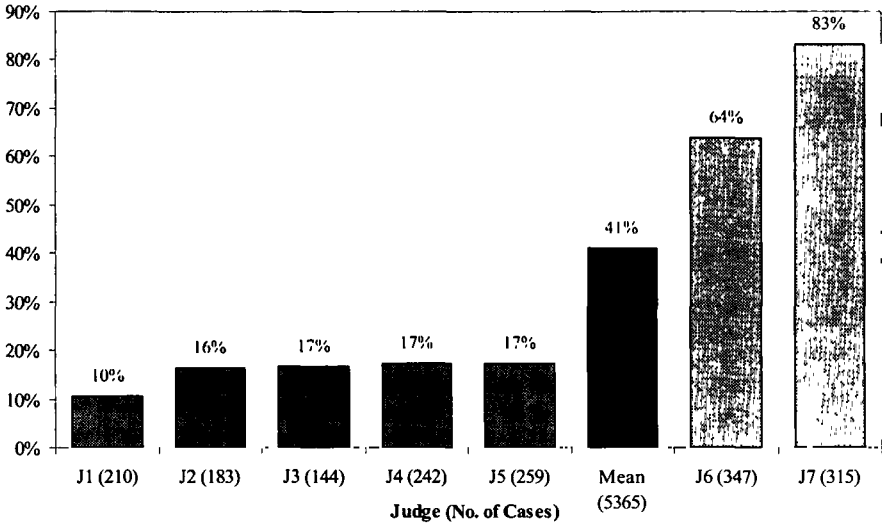
As illustrated in Figure 23, in Los Angeles, one judge granted asylum to only 10% of the applicants from APCs who came before him; another judge approved only 16% of the APC asylum cases she heard; and three judges

Krome Detention Center, and the New York court numbers exclude judges at the Varick Street court, as these judges hear predominantly detainee cases.

69. Only three of eighteen, or 17%, of San Francisco judges deviated by more than 50% from that court's mean APC grant rate of 54%.

granted only 17% of the APC asylum claims in their courts. Against these five, the highest-granting judge approved 83% of the asylum cases from APCs in his court, and another judge granted 64% of the cases from APCs before him. In the end, 32% of the Los Angeles judges deviated more than 50% from the court's APC mean of 41%.

**Figure 23. Grant Rates for Judges Who Are Outliers in APC Cases— Los Angeles (7 of 22 judges)**



**Figure 24. Grant Rates for Judges Who Are Outliers in APC Cases— Miami (8 of 24 judges)**

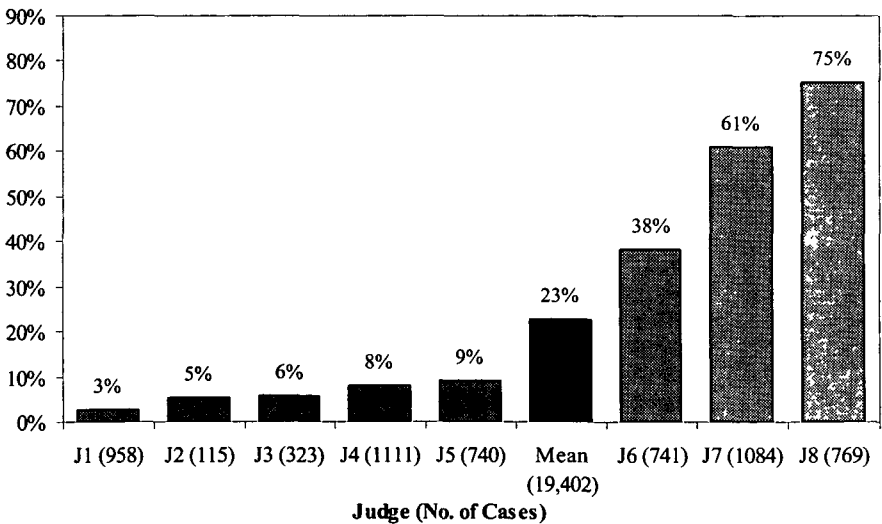


Figure 24 shows that the numbers are similar in Miami: one judge granted only 3% of the asylum claims before him (27 of his 958 cases). Two other

judges eked in just ahead of him, with average asylum grant rates for APCs of 5% and 6%. The next judge in line granted 8% of the asylum cases he saw and another granted 9%. In contrast, three judges granted asylum at rates more than 50% above the Miami average, 75%, 61%, and 38%. In sum, 33% of the Miami judges decided APC asylum cases at rates more than 50% deviant from the court's mean of 23%.

In total, in the Los Angeles, Miami, and New York immigration courts, we found eight judges whose average grant rates for all asylum seekers from APCs during the period studied were more than 50% above their court's mean and sixteen judges whose rates were more than 50% below their court's mean. From a pool of approximately seventy-four judges, 32% decided asylum cases from APCs at rates significantly discrepant from their court's average grant rate. Why are there such great disparities among judges in these courts?

#### D. *Disparities from the Court Mean, Holding Nationality Constant*

Even when examining disparities from each court's mean, thus correcting for any geographical differences in populations of asylum seekers, there are serious discrepancies in the grant rates of individual immigration judges on the same court. To delve more deeply into the causes of these disparities, we again limited the variables and examined individual grant rates for asylum seekers of only one nationality for immigration judges in each of the four largest courts.<sup>70</sup>

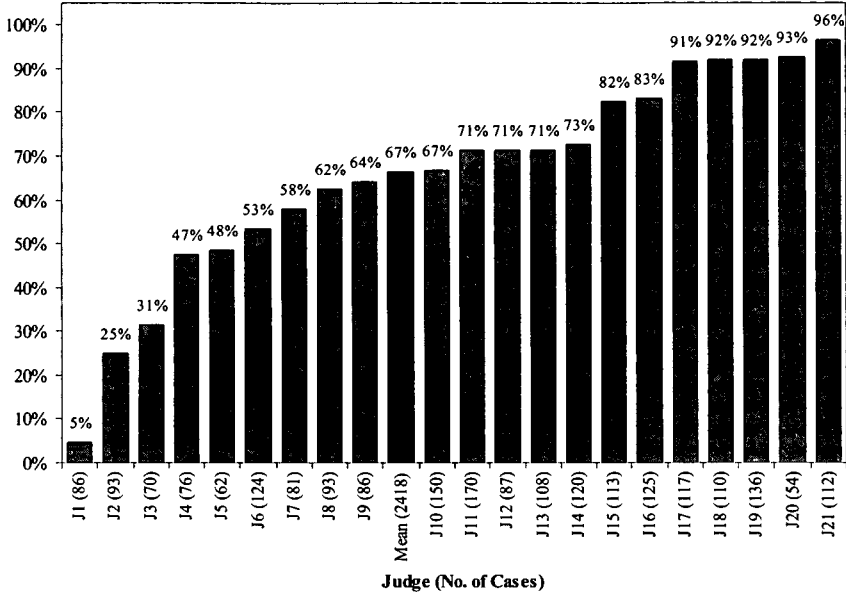
Figures 25 through 28 show, for each of the four largest courts, the grant rate for each judge when deciding cases involving nationals of one of the two countries from which the largest number of asylum cases were filed in that court. In each chart, the black bar marked "Mean" shows the mean grant rate for that country's applicants in that court. In New York, for example, three judges decided Albanian cases at a rate more than 50% below the court

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70. We excluded judges who had decided fewer than fifty asylum cases from the country in question as well as immigration judges detailed to the court in question from depiction in the chart. See *infra* note 186 for further explanation of the concept of "detailing" immigration judges. The data by court includes judges who retired or were hired during the January 2000 to August 2004 time frame. We included the following numbers in parentheses: after each judge's number, the number of cases that judge heard from the country in question; and after the word "Mean," the total number of cases from the country in question heard by judges on that court, including judges who heard fewer than fifty asylum cases from that country (but still excluding judges detailed to the court in question). For each court, we have provided a chart showing grant rates for one of the top two nationalities by volume heard in that court. For both Los Angeles and New York, China was the top nationality by volume. To avoid repetition of nationality, we provided grant rates in New York for Albania, which was the second nationality by volume in New York. Moreover, Haiti was the top nationality by volume in Miami; because the grant rate for Haitians in Immigration Court was substantially lower than that for all other APCs, we provided grant rates for Colombia, which was the second nationality by volume in Miami. India was the top nationality by volume in San Francisco.

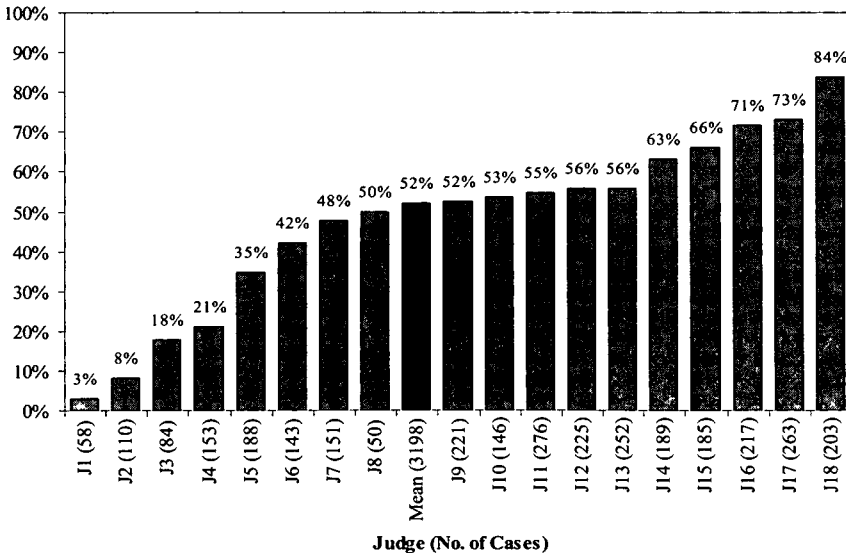
average—meaning that 14% of the judges ruled at a rate considerably at odds with the court’s mean of 67%.

**Figure 25. Judges’ Grant Rates in Albanian Cases—New York**



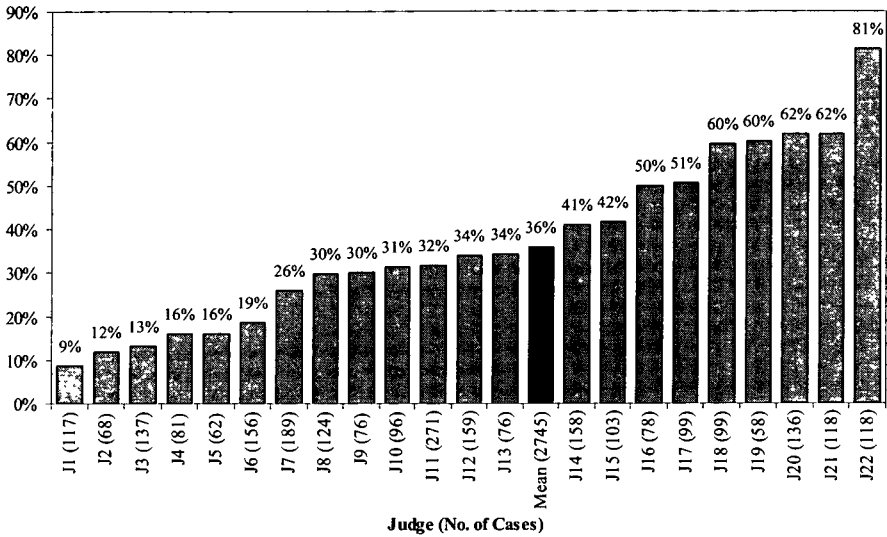
Note: See note 70.

**Figure 26. Judges’ Grant Rates in Indian Cases—San Francisco**

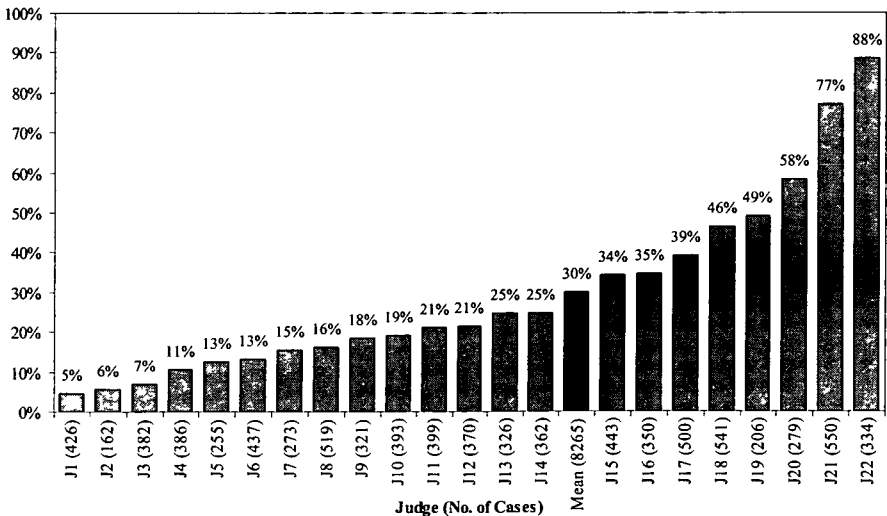


And in San Francisco, four judges decided Indian cases at rates more than 50% below and one judge at a rate more than 50% above that court’s mean; 28% of the judges deviated by more than 50% from the court’s average of 52%. The situation was even worse in Los Angeles for Chinese cases, where five judges granted at a rate more than 50% lower than and five judges granted at a rate more than 50% higher than the court mean, so that 45% of the judges were out of step with the court’s average of 36% in these cases.

**Figure 27. Judges’ Grant Rates in Chinese Cases—Los Angeles**



**Figure 28. Judges’ Grant Rates in Colombian Cases—Miami**



Similarly, in Miami six judges decided Colombian cases at rates 50% below the mean and five judges decided these cases at rates 50% above the mean; 50% of these judges decided asylum cases at a rate that varied by more than 50% from the court's average of 30%.

The differences in grant rates among the judges in the larger courts are large. In Los Angeles, one judge granted asylum to 9% of the 117 Chinese applicants who appeared before him, whereas another granted asylum to 81% of 118 Chinese applicants—nine times the rate of his colleague. In Miami, Colombians before one judge were granted asylum at a rate of 5%, while those who appeared before another judge, with an 88% grant rate, were almost eighteen times more likely to win asylum. The same story is repeated in New York, with one judge granting asylum to 5% of the Albanians whose cases he heard, and another granting asylum to 96% of the Albanians in her court. The second judge worked in the same suite of offices as the first judge but was nineteen times more likely to grant asylum. And the case in San Francisco is even more dramatic; one judge granted 84% of Indian asylum cases, a rate twenty-eight times that of another judge in the same courthouse who granted 3% of these cases.

#### *E. Variables Impacting Judges' Decisions*

We also performed a descriptive analysis, using cross-tabulation, of the decisions of the judges during the time frame discussed above. We examined the following variables to determine their impact on the judges' grant rates: whether the asylum seeker was represented, the number of dependents the asylum seeker had, the gender of the judge, and the prior work experience of the judge.<sup>71</sup> The last category was broken out into experience working in the following fields: for the Immigration and Naturalization Service or the Department of Homeland Security, for the government (except the INS or DHS), in the military, for a non-governmental organization, in private practice, and in academia. Although each variable was statistically significant to a 99%

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71. We ran cross-tabulation analyses for several other independent variables, which we do not report here. We did include these variables in the regression analyses to increase the accuracy of our models. The cross-tabulation and regression results for these variables can be found at <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>. First, we did not report here the age of the judge, the size of the judge's caseload, the size of the court's caseload, or the weekly earnings in the state in which the judge's court sits because both the cross-tabulation analysis and the regression analyses found that these variables did not have much impact on grant rates. Second, we did not report years that a judge served on the bench because the cross-tabulation analysis did not reveal a clear pattern relating to grant rates. Third, we did not report the national freedom index of the asylum seeker's country of origin because this variable, as expected, related inversely to grant rate (less freedom, higher grant rate), and was largely included to increase the accuracy of the regression models. Finally, we did not report results for political party of the President whose Attorney General appointed the judge because important results were not statistically significant to a 95% probability.

probability (i.e., the relationship did not occur by chance), the magnitudes of some relationships were quite weak. We confirmed the statistical significance of the cross-tabulation analysis with chi-square and performed two logistic regression analyses and one hierarchical linear regression to ensure that the results of the cross-tabulation analysis would remain consistent with all other variables held constant.<sup>72</sup>

The results of the cross-tabulation analysis confirm earlier studies showing that whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.<sup>73</sup> Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analyses confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.<sup>74</sup>

Given the complexity of the asylum process and increasingly stringent corroboration requirements in immigration court, it is not surprising that legal assistance plays an enormous role in determining whether an asylum seeker wins her case. While there could be a selection effect in play—that is, legal representatives might take on only viable asylum cases, thus weeding out weak claims—the power of the representation variable makes it unlikely that this is the only causal factor. Moreover, the data do not take into account the quality of representation. Asylum seekers represented by Georgetown University's clinical program from January 2000 through August 2004 were granted asylum at a rate of 89% in immigration court.<sup>75</sup>

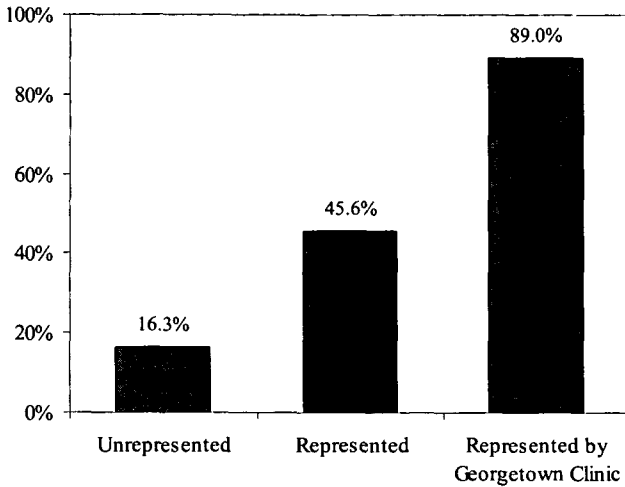
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72. The full results of the cross-tabulation analysis as well as the regression analyses confirming these results can be found at <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>. An explanation of the methods we used can be found in Part III of the Methodological Appendix.

73. See Donald Kerwin, *Revisiting the Need for Appointed Counsel*, in *INSIGHT*, at 1 (Migration Policy Inst., No. 4, 2005), available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf); Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in *II REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL*, *supra* note 57, at 232, 239; Schoenholtz & Jacobs, *supra* note 46, at 739-40.

74. The bivariate cross-tabulation analysis does not control for other variables, while the multivariate regression analyses do control for other variables. These analyses exclude all Mexican cases and defensive cases; see Part III of the Methodological Appendix for our method and reasoning.

75. Because two of the authors of the Article have selected cases for the Georgetown asylum clinic, they can verify that these cases are not selected solely based on the likelihood of success—that is, the clinic does not select only those cases most likely to win. There is, of course, some selection bias, as the clinic's standard for acceptance of asylum clients is that they present a genuine, non-frivolous claim, but this is a low bar. Indeed, the clinic often chooses particularly complex and difficult cases so that students will have challenging educational experiences. The main selection principle is that the case has to be one that will have a hearing in April or November, when the students, who arrive in August and January, will be fully trained.

**Figure 29. Relationship Between Representation and Grant Rates**

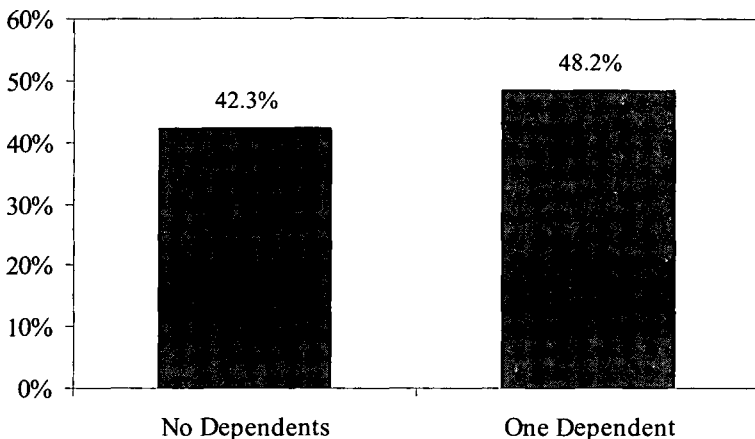
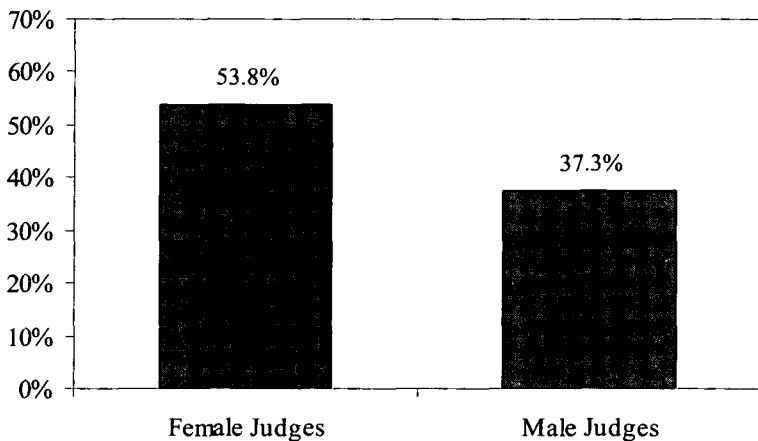
Similarly, asylum applicants represented pro bono by large law firms cooperating with Human Rights First (formerly the Lawyers Committee for Human Rights) had a success rate of about 96% in the 479 cases they handled to conclusion in that same period.<sup>76</sup> Asylum seekers whose legal representatives track down corroborating evidence and obtain experts to testify about country conditions as well as about the asylum seeker's mental and physical health are more likely to win their cases. Moreover, such claims are easier for adjudicators to decide than those that rely only on the asylum seeker's testimony.

The number of dependents that an asylum seeker brought with her to the United States played a surprisingly large role in increasing the chance of an asylum grant. According to the cross-tabulation analysis, while asylum seekers with no dependents have a 42.3% grant rate, having one dependent increases the grant rate to 48.2%. This could be because asylum seekers who bring children in addition to a spouse appear more credible, or because immigration judges are more sympathetic to asylum seekers who have a family to protect. In any case, the regression analyses confirm that this factor affected judges' determination whether to grant an asylum claim.

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76. Human Rights First (HRF) refers cases to large law firms in New York and Washington, DC. The HRF data refers to cases accepted from January 2000 through December 2004 and adjudicated during that period. The 96% success rate (94% grants of asylum, 2% grants of withholding of removal) refers not only to adjudications in immigration court but also to cases that HRF cooperating lawyers handled in the asylum office, the Board of Immigration Appeals, and in federal court, because HRF is unable to separate its final adjudication data by forum. However, only final outcomes are reported, so no case was counted twice. E-mail from Anwen Hughes, Human Rights First, to Philip Schrag (April 27, 2007) (on file with authors).



**Figure 30. Relationship Between Asylee's Dependents and Grant Rates****Figure 31. Relationship Between Judge's Gender and Grant Rates**

We also looked at characteristics of the judges that impacted the asylum decision. Perhaps the most interesting result of our cross-tabulation study was that the gender of the judge had a significant impact on the likelihood that asylum would be granted. Female immigration judges granted asylum at a rate of 53.8%, while male judges granted asylum at a rate of 37.3%.<sup>77</sup> An asylum applicant assigned by chance to a female judge therefore had a 44% better chance of prevailing than an applicant assigned to a male judge.<sup>78</sup> In contrast, no appreciable difference existed in the grant rates of male and female asylum

77. Our regression analyses confirm that with all other variables held equal, female gender of the judge is correlated with higher grant rates. See <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

78. The study included 78 female judges and 169 male judges.

officers. Our study of the grant rates of 264 male and 257 female officers who decided fifty or more APC cases from FY 1999 through FY 2005 shows only a 7% difference, with male officers granting asylum at a rate of 44% and female officers granting at a rate of 41%.

Several political scientists have studied the effect of gender on judicial decision making in federal and state courts. Our cross-tabulation analysis, which analyzes over 60,000 decisions by 78 female immigration judges and 169 male immigration judges, includes significantly greater numbers of both female judges and decisions than any of the prior studies.<sup>79</sup> The literature in this area offers several possible reasons for gender differentials in judicial decision making.<sup>80</sup> One survey of federal judges found that while 81% of

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79. Most of these studies have found that a gender differential exists, but there has been great variation in findings about the types of cases that are impacted by the gender of the decision maker. See, e.g., David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 159, 165 (1993) (finding that twenty-four female state supreme court justices in the 1970s and 1980s voted differently from male justices in cases involving women's issues, but not in those involving criminal rights and economic liberties, with some variation due to political party); Sue Davis, Susan Haire & Donald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129, 131-32 tbls.2-4 (1993) (finding that female judges on the federal courts of appeals from 1981 to 1990 voted differently from male judges in employment discrimination and search and seizure cases, women being 36.9% more likely to vote in favor of the plaintiff in the former and 62.4% more likely to cast a liberal vote in the latter, but finding no significant gender differential in obscenity cases; examining votes of 15 female and 237 male judges in search and seizure cases and 16 female and 188 male judges in discrimination cases); Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court*, 63 ALB. L. REV. 1205, 1224-25, 1227 tbl.1 (2000) (finding differences in the voting patterns of twelve male and female justices on the Michigan Supreme Court from 1985 through 1998 in thirty-six divorce cases, in which women were 32.9% more likely to cast a liberal vote, and in forty discrimination cases, in which men were 36.5% more likely to vote liberally, but finding no statistically significant gender disparity in twenty-one feminist issues cases); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279, 279 (1997) (finding differences in the voting patterns of male and female judges appointed by President Clinton to the federal district courts through July 1996 in sixty-two cases involving race issues decided by twenty judges, in which women were 74.8% more likely to vote in favor of the minority position, but finding no gender disparity in twenty-four cases involving women's issues decided by sixteen judges). But see Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influences of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 265, 275 (1995) (finding that gender and other variables did not affect outcomes in 2258 federal civil rights and prisoner cases filed in three federal districts and decided by forty-seven district judges in FY 1981; the number of female judges in this study was so small that the authors caution that these results cannot be a basis for inferential statistics beyond the sample); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 167-68, 172 (1984) (finding no statistically significant differences between the 121 female and male judges sitting on four federal courts of appeals from July 1979 to June 1981 in 765 cases involving criminal procedure, race discrimination, and sex discrimination).

80. See, e.g., Martin & Pyle, *supra* note 79, at 1214-20 (discussing three groups of studies of gender differences, namely tokenist, feminist jurisprudence, and "different voice"

female judges had experienced sex discrimination, only 18.5% of men on the bench had experienced race or class discrimination.<sup>81</sup> This experience may have an impact in the courtroom: it might make female judges more sympathetic to stories of persecution, as well as more conscious in eliminating their own biases from the decision making process. Carrie Menkel-Meadow notes that some women lawyers would prefer that trials take the form of “conversations with fact-finders—rather than persuasive intimidation.”<sup>82</sup> It is possible that female immigration judges are inclined to a non-adversarial proceeding in their courtroom, an approach more likely to solicit a coherent and complete story from a traumatized asylum seeker.<sup>83</sup> Finally, Judith Resnik argues that feminist approaches to judging focus on caretaking and an understanding of connections to those before them.<sup>84</sup> This may lead feminist immigration judges to empathize more with the plight of asylum seekers, and to decide asylum cases from a perspective of connection with, rather than distance from, the applicant. In the end, we cannot be sure of the cause of this difference, or whether women or men are more likely to decide asylum cases “correctly,” but this statistical outcome points to issues ripe for future study.

We wondered whether some of the “gender effect” on asylum decision making was related to the different prior work experience of male and female judges. We found that the two groups—male judges and female judges—had distinctly different work experience prior to appointment to the bench.<sup>85</sup> Of 78 female judges studied, 29% had previously worked for non-governmental organizations, defending the rights of immigrants or indigent populations. But

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judicial studies); Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW* 221, 222 (Richard L. Abel & Philip S.C. Lewis eds., 1995) (arguing that female lawyers will bring a different perspective to the profession); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543 (1986) (finding a different, feminine jurisprudence in Justice O'Connor's constitutional opinions); see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1906-28 (1988) (discussing implications of feminist theories for the judiciary). These studies all reference CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982), which, though not a legal study, remains perhaps the most influential book in prompting academics to examine the question whether men and women reason differently.

81. Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 207 (1990).

82. Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The “Feminization” of the Legal Profession*, 24 OSGOODE HALL L.J. 897, 915 (1986).

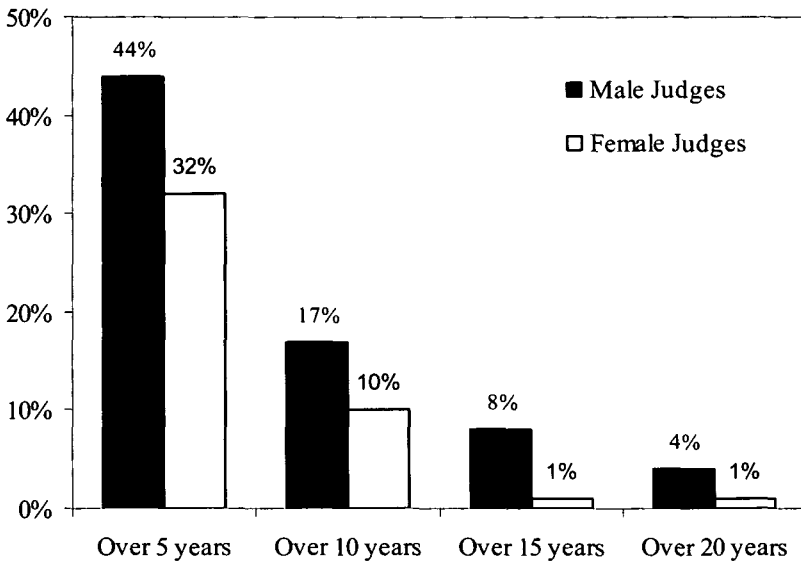
83. See PHYSICIANS FOR HUMAN RIGHTS, *EXAMINING ASYLUM SEEKERS: A HEALTH PROFESSIONAL'S GUIDE TO MEDICAL AND PSYCHOLOGICAL EVALUATIONS OF TORTURE* 23-25 (2001), available at <http://physiciansforhumanrights.org/library/documents/reports/examining-asylum-seekers-a.pdf> (describing these results in physical and psychological examinations).

84. Resnik, *supra* note 80, at 1921, 1927.

85. Of course, the regression analyses demonstrate that gender has a significant impact on grant rate even with work experience held constant. See <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

of 169 male judges studied, only 9% had worked for NGOs. In contrast, 56% of male judges had previously worked for the INS or DHS, and 83% of male judges had worked for the government in some capacity (excluding work for INS or DHS) before their appointment to the bench. Only 51% of female judges had prior work experience with INS or DHS, although 72% of women had previous government experience. As Figure 32 illustrates, this differential in previous INS or DHS experience becomes even more striking with time; while 32% of female judges and 44% of male judges had over five years of INS/DHS experience, 10% of females and 17% of males had worked for INS/DHS for more than ten years, 1% of females and 8% of males had over fifteen years INS/DHS experience, and 1% of females but 4% of the males had over twenty years INS/DHS experience. While women had more prior experience in occupations likely to make them sympathetic to asylum seekers, men had substantially more and longer experience in positions adversarial to asylum seekers.

**Figure 32. Judges' INS/DHS Experience by Gender<sup>86</sup>**

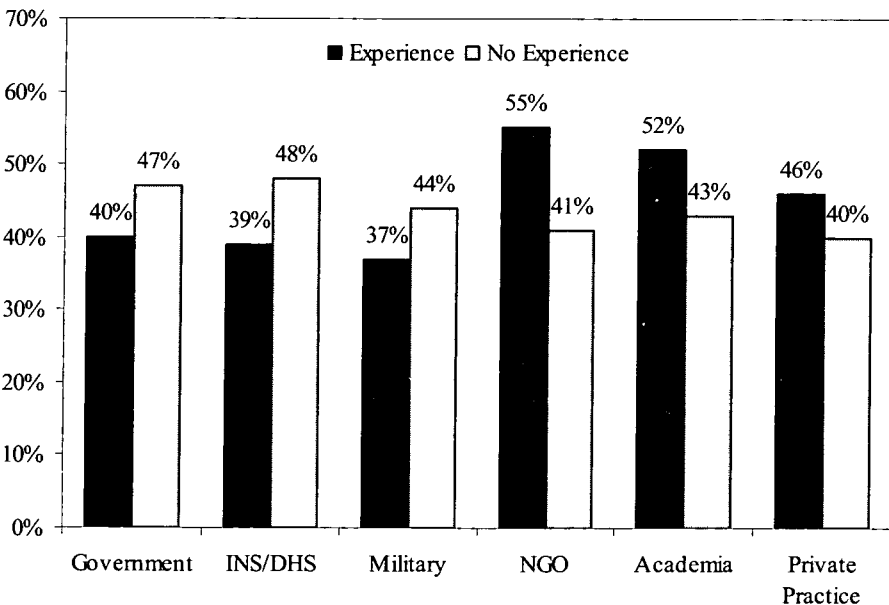


We also found that prior work experience of all types had a significant impact on a judge's grant rate. Judges with prior government experience (excluding work for INS or DHS) granted asylum at a rate of 39.6%, contrasted with a grant rate of 47.1% for those with no prior government experience, a difference of 19%. Judges with prior INS or DHS experience granted 38.9% of

86. Unlike the other figures in this section, this figure demonstrates the relationship between two independent variables (gender and INS/DHS experience) but does not include the effect of either on the dependent variable (grant rate).

the asylum claims before them, in contrast to judges without DHS/INS experience, who granted at a rate of 48.2%, a difference of 24%. Judges with military experience granted asylum at a rate of 37.4%, compared with a rate of 44.2% for those without military experience, a difference of 18%. On the other end of the spectrum, judges who had worked for non-profit organizations granted asylum at a rate of 55.4%, compared with a rate of 41.1% for those without such experience, a difference of 35%. And judges with prior experience in academia granted asylum at a rate of 52.3%, in contrast to a rate of 43.2% for those without experience as an academic, a disparity of 21%. Finally, judges who had worked in private practice granted asylum at a rate of 46.3%, compared to 39.5% for judges without experience in a private firm, a difference of 17%.

**Figure 33. Grant Rates by Different Types of Prior Work Experience**

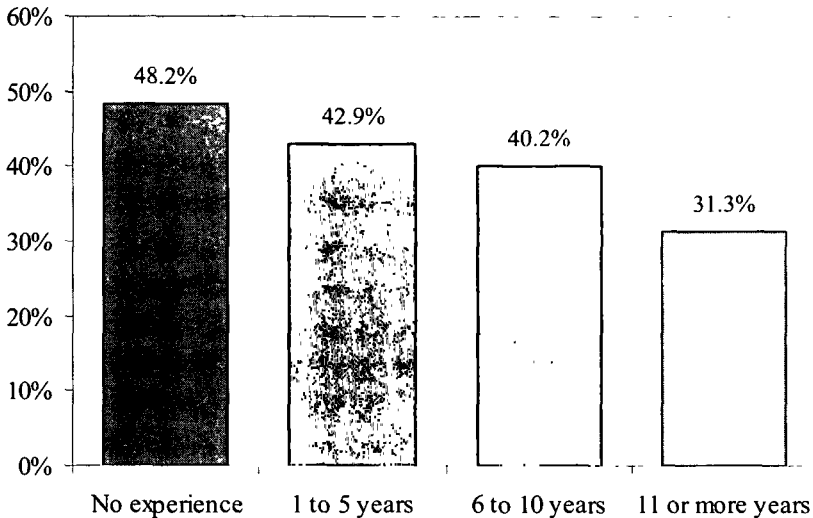


Despite our initial hypothesis that male judges had lower grant rates because they had more prior work experience of the type that leads judges to be skeptical of applicants' claims, we found that gender had an impact on grant rates independent of prior work experience. When we considered only the grant rates of judges with no prior work experience in government, or no such experience in INS or DHS, or no such experience in non-profit organizations, the increased chance of winning with a female judge was in each instance at least 30% greater than the chance of winning with a male judge.<sup>87</sup>

87. See *infra* Figure 35 and preceding text.

Setting the gender findings aside for a moment, we explored further the finding that work experience in an enforcement capacity with the former Immigration and Naturalization Service or the current Department of Homeland Security made judges less likely to grant asylum. This effect became more pronounced with years of service. The cross-tabulation analysis tells us that judges who had not worked for the INS or DHS had a grant rate of 48.2%, while judges who had worked there for one to five years granted asylum at a rate of 42.9% (Figure 34). Moreover, judges with six to ten years of INS or DHS experience granted asylum at a rate of 40.2% and those with eleven or more years in the INS or DHS granted asylum to only 31.3% of the asylum seekers before them. Perhaps people who spend many years enforcing the immigration law carry some of the culture or ideology of their agencies with them when they are appointed to the bench.

**Figure 34. Grant Rates by Judges' INS/DHS Experience<sup>88</sup>**



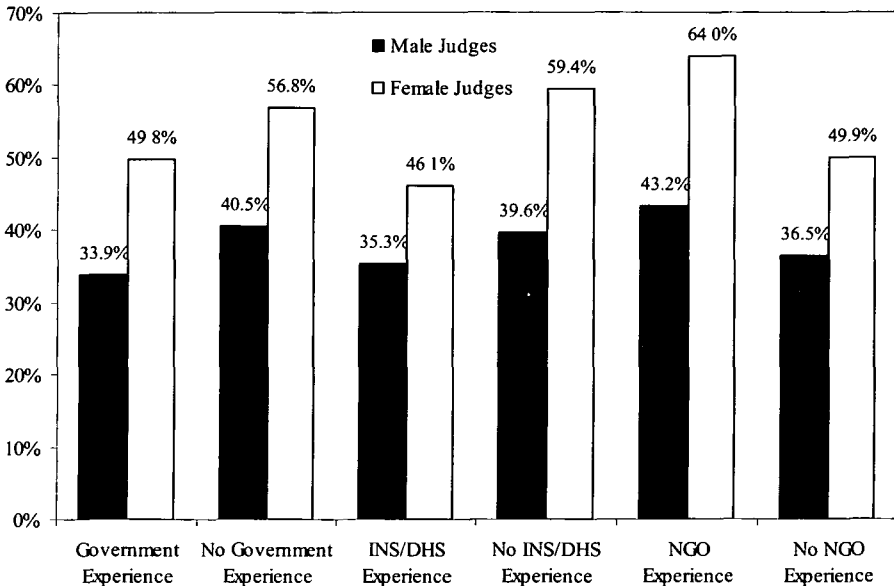
We next explored a combination of independent variables—namely gender and work experience—and learned that gender has an effect on grant rate even among judges with similar prior work experience or even without a certain type of work experience.<sup>89</sup> As Figure 35 shows, female judges still grant asylum at consistently higher rates than male judges regardless of the type of prior work experience. For example, when we look only at judges with no work experience

88. We did not confirm this relationship in the regression analyses, as we ran INS/DHS experience by number of years of experience, but not broken down by the ranges laid out in this graph. The regression analyses did confirm that years of INS/DHS experience correlated negatively with grant rates.

89. Of course, it was not possible to use regression analyses to confirm the results of these cross-tabulations that combined independent variables.

for the INS or DHS, we find that women grant at a rate of 59.4%, which is 50% higher than the male judges' rate of 39.6%. In the group of judges with no prior government work experience (excluding INS or DHS), female judges granted 56.8% of the asylum cases they heard, a rate 40% higher than male judges, who granted 40.5% of the asylum cases before them. And when we look at judges without experience working for NGOs, the grant rate for female judges is 49.9%, a rate 37% higher than the 36.5% grant rate awarded by male judges.<sup>90</sup>

**Figure 35. Grant Rates by Gender and Work Experience**



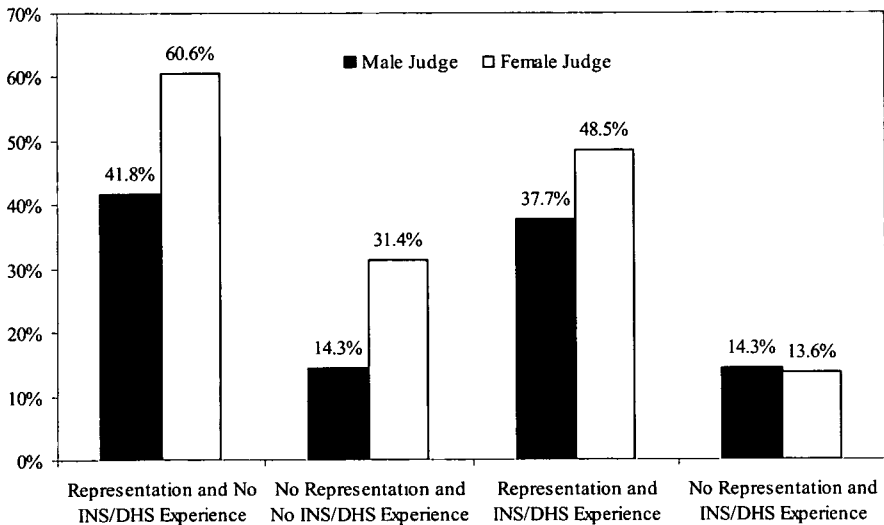
When we examine gender and *contrasting* prior work experience, the disparities in grant rates increase. Female judges with no prior government work experience granted asylum at a rate of 56.8%, a rate 68% higher than that of male judges with prior government work experience, who granted at a rate of 33.9%. Similarly, female judges without prior work experience with the INS or DHS granted 59.4% of the asylum cases they saw, a rate 68% higher than male judges with prior INS/DHS work experience, who granted only 35.3% of the cases before them. Finally, female judges with prior work experience at a non-profit organization granted 64% of the asylum claims before them, a rate 75%

90. Similarly, when we examine grant rates of judges with INS or DHS experience, female judges grant 46.1% of the asylum cases before them, a rate 31% higher than male judges, who grant only 35.3% of asylum cases they hear. Looking at judges with government experience, female judges grant at a rate of 49.8%, 47% higher than the male grant rate of 33.9%. And women with NGO experience had a grant rate of 64%, 48% higher than men, who had a grant rate of 43.2%.

higher than male judges with no prior non-profit work experience, who granted only 36.5% of the cases they heard.

When we added the representation factor into the mix, the disparities were even more striking. Our cross-tabulation analysis determined that female judges grant asylum to represented asylum seekers at a rate of 55.6%, a rate 289% higher than the rate at which male judges granted asylum to unrepresented asylum seekers, or 14.3%. Moreover, as Figure 36 illustrates, female judges with no DHS/INS experience grant asylum to represented asylum seekers at a rate of 60.6%, which is 324% higher than the 14.3% grant rate of male judges with DHS/INS experience hearing the cases of unrepresented asylum seekers.

**Figure 36. Grant Rates by Gender, Representation, and DHS/INS Work Experience**



#### IV. THE BOARD OF IMMIGRATION APPEALS

##### A. Background

Any party may appeal an adverse immigration court decision to the Board of Immigration Appeals (BIA). As one of us has argued elsewhere, the BIA has been the single most important decision maker in the asylum adjudication system.<sup>91</sup> It reviews cases nationwide and sets precedents that immigration judges and asylum officers must follow. Given that the Supreme Court issues very few asylum law decisions, the BIA essentially interprets immigration law for the country. While a U.S. Court of Appeals may disagree with a Board

91. Schoenholtz, *supra* note 33, at 352-53.



interpretation, the BIA must follow that court's jurisprudence only for appeals from immigration courts in the court's own jurisdiction. Moreover, the federal courts must show extreme deference to the BIA.<sup>92</sup>

The Attorney General established the BIA by regulation and has the power to overrule its decisions, change its adjudicatory procedures, and appoint and remove Board members who disagree with his political ideology.<sup>93</sup> During the 1990s, Attorney General Janet Reno increased the size of the BIA to address a growing caseload. She added members who had served as INS trial attorneys or Office of Immigration Litigation attorneys at the Department of Justice, a senior congressional staffer who had served the Republican Chairman of the House Immigration Subcommittee, and several lawyers from private practice, advocacy, and academia.<sup>94</sup> The latter appointments balanced somewhat the predominant government experience of existing members and of her appointees who had prior law enforcement experience. The caseload, however, continued to increase, resulting in a large backlog. To address this, the Attorney General authorized major changes in the adjudicatory process.

Throughout the first half century of operations, the Board issued its decisions in two ways. Most decisions resulted from three-member reviews of a case. In a limited number of cases, the Board issued en banc decisions. In October 1999, the Attorney General authorized a new procedure to enable the Board to address the large backlog of cases. She gave individual BIA members the authority in certain circumstances to issue summary affirmances—decisions without any written analysis.<sup>95</sup> Instead of having all appeals decided by three-member or en banc panels, the BIA began to issue individual member summary

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92. See *supra* text accompanying note 31. An unusually extreme degree of deference is required by 8 U.S.C. § 1252(b)(4)(B) (2000), specifying that “the administrative findings of fact [of the BIA or of an immigration judge whose findings are not rejected by the BIA] are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”

93. The Board was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. See Reorganization Plan No. V, 3 C.F.R. 1940 Supp. 336 (1941). The Board is not a statutory body; it was created wholly by the Attorney General from the transferred functions. Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454 (July 1, 1940); see *In re L—*, 1 I & N Dec. 1, 2 n.1 (B.I.A. 1940).

94. See Executive Office for Immigration Review, U.S. Dep't of Justice, Fact Sheet (Dec. 2006), <http://www.usdoj.gov/eoir/fs/biabios.htm> (describing the biographical information of Board members Juan P. Osuna, Gerald S. Hurwitz, Patricia A. Cole, Lauri S. Filppu, Edward R. Grant, Frederick D. Hess, David B. Holmes, Neil P. Miller, and Roger Pauley); Executive Office for Immigration Review, U.S. Dep't of Justice, Fact Sheet (June 2005), <http://www.usdoj.gov/eoir/fs/ogebio.htm> (describing the biographical information of former-Board members Gustavo D. Villageliu and Cecelia M. Espenoza); see also Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1159 (2004) (describing Paul W. Schmidt, Noel A. Brennan, and John W. Guendelsberger).

95. See Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135-42 (Oct. 18, 1999).

affirmances in certain limited categories of cases.<sup>96</sup> The Board issued its first summary affirmances in September 2000.<sup>97</sup> The BIA Chairman did not authorize affirmances without opinion at this time in any asylum, withholding, or CAT cases.

In December 2001, an independent audit determined that this streamlining was an unqualified success. First, the Board completed 53% more cases using summary affirmances in a circumscribed manner during its implementation period from September 2000 to August 2001, as compared to the previous twelve-month period. Second, for the first time in a number of years, the Board completed more cases than it received.<sup>98</sup>

Despite this demonstration that a more efficient Board could address its caseload over time, as well as agreement “with the fundamental assessment that the Board’s [initial] use of the streamlining process has been successful,”<sup>99</sup> Attorney General John Ashcroft authorized new policies in the name of streamlining that fundamentally changed the nature of the BIA’s review function. In addition, he radically changed the composition of the Board.

The February 2002 proposed rule, which became final in August 2002, made single member decision making the “dominant method of adjudication for the large majority of cases,” and single member summary affirmances commonplace.<sup>100</sup> In March 2002, Acting Chairman Lori Scialabba authorized

96. Under the 1999 streamlining regulation, the BIA Chairman could designate certain categories of cases eligible for single member summary affirmation if:

the result reached in the decision under review was correct; . . . any errors in the decision under review were harmless or nonmaterial; and . . . (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-member review is not warranted.

8 C.F.R. § 3.1(a)(7)(i)-(ii) (2000). Even this relatively modest regulatory change allowing some cases to be decided without opinions drew criticism from the Bar. Most of the twenty-three commenters on the proposed rule objected that allowing a single Board member to decide appeals on the merits “would compromise consistency and thereby devalue the guidance that the Board provides,” but the Department of Justice rejected those comments because three-member review “is extremely time and labor intensive and is of significantly less value in routine cases.” Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,139; see also Philip G. Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, 12 GEO. IMMIGR. L.J. 531 (1998).

97. See Memorandum from Paul Schmidt, Chairman, Bd. of Immigration Appeals, to Board Members, Streamlining Implementation - Phase III (Aug. 28, 2000), available at <http://www.usdoj.gov/eoir/vll/genifo/streamimplem.pdf>.

98. To be precise, the Board completed 4000 more cases than it received. See ARTHUR ANDERSEN & CO., BOARD OF IMMIGRATION APPEALS (BIA): STREAMLINING PILOT PROJECT ASSESSMENT REPORT 5, 6 (2001), reprinted in DORSEY & WHITNEY LLP, *supra* note 17, app. 21; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, STATISTICAL YEAR BOOK: 2002, at S2 (2003), available at <http://www.usdoj.gov/eoir/statpub/fy02syb.pdf>.

99. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002).

100. *Id.* Under the new regulation, all cases are adjudicated by a single Board member unless they fall into one of six specified categories, which are handled by a panel of three

the expansion of affirmances without opinion to several new types of cases, including asylum, withholding of deportation, and Convention Against Torture claims.<sup>101</sup> The final rule also authorized single members to issue short orders affirming immigration judge decisions or dismissing appeals on procedural grounds.<sup>102</sup> The regulatory language appeared to establish a streamlining hierarchy, stating that, “[i]f the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel.”<sup>103</sup> As the second major streamlining tool, these single-member short orders are closer in kind to affirmances without opinion than to the more fully reasoned panel decisions that the Board regularly issued until 2002.<sup>104</sup>

The new rule also reduced the membership of the Board from twenty-three to eleven authorized positions. By downsizing, Attorney General Ashcroft removed from the Board five members who had been appointed during the Clinton Administration, and a sixth resigned when she saw that she would not be retained. The members he removed were not those with the least seniority. The Attorney General observed in the final streamlining rule that “the ability of individuals to reach consensus on legal issues” was a justification for the reduction in size,<sup>105</sup> but those removed from the Board were the members who

Board members. Those six categories are where there is a need to (1) settle inconsistencies between the rulings of different immigration judges; (2) establish precedent construing the meaning of ambiguous laws, regulations, and procedures; (3) review a decision by an immigration judge or DHS that is not in conformity with the law or applicable precedents; (4) resolve a case or controversy of major national import; (5) review a clearly erroneous factual determination by an immigration judge; or (6) reverse the decision of an immigration judge or DHS, other than reversal under 8 C.F.R. § 1003.1(e)(5). 8 C.F.R. § 1003.1(e)(6) (2007). The new rule also largely stripped the Board of its *de novo* review authority. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,888-91.

101. Memorandum from Lori Scialabba, Acting Chairman, Bd. of Immigration Appeals, to Board Members, Use of Summary Affirmance Orders in Asylum and Cancellation Cases (Mar. 15, 2002), *available at* <http://www.usdoj.gov/eoir/vll/genifo/sl031502.pdf>. In May, Scialabba authorized summary affirmances in all cases. Memorandum from Lori Scialabba, Acting Chairman, Bd. of Immigration Appeals, to Board Members, Expanded Use of Summary Affirmance for Immigration Judge and Immigration and Naturalization Service Decisions (May 3, 2002), *available at* <http://www.usdoj.gov/eoir/vll/genifo/st050302.pdf>.

102. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,880.

103. 8 C.F.R. § 1003.1(e)(5).

104. For examples of more fully reasoned panel decisions, see DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW* app. VI (2d ed. 1991).

105. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,893. The Attorney General observed in full:

The Department has determined that 11 Board members is the appropriate size for the Board

most disagreed with him ideologically. He did retain some members who had been appointed by his Democratic predecessor, but the members he removed were those who had come from the practice of immigration law, advocacy, and law teaching, while those who were retained had experience primarily in federal government service.<sup>106</sup>

Finally, during the downsizing transition, the Attorney General required BIA members to clear their current backlog of 55,000 cases within 180 days.<sup>107</sup> Human Rights First pointed out that to do so, each Board member “would have to decide 32 cases every work day, or one every 15 minutes.”<sup>108</sup>

The 2002 streamlining changes were controversial. An independent study concluded that the Board’s remand rate declined significantly,<sup>109</sup> and the Board’s Chairwoman responded that the data on which the study was based was outdated and “unsubstantiated.”<sup>110</sup>

Various studies focused as well on the significant, increased caseload at the federal courts of appeals reportedly resulting from the 2002 streamlining changes. The leading scholars of this development, Professor Steven Yale-Loehr, Second Circuit Director of Legal Affairs Elizabeth Cronin, and Second Circuit staff member John Palmer concluded as follows:

[O]ur data support the hypothesis that [the] appeal rate has increased as a result of a surge in BIA decisions that leave non-detained aliens with final expulsion orders and a fundamental shift in behavior among lawyers and their clients, causing them to focus their litigation in the courts of appeals for the first time. We think this fundamental shift was triggered by the high volume of final expulsion orders that began to be issued starting in March 2002 and a general dissatisfaction with the BIA’s review.<sup>111</sup>

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based on judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload. The Board is expected to function with two three-member panels and five Board members acting individually in deciding cases. The Department believes that this is a realistic evaluation of the resource needs, capacities and resources of the Board in adjudicating immigration issues. The Attorney General may reevaluate the staffing requirements of the Board in light of changing caseloads and legal requirements following implementation of the final rule.

*Id.*

106. See Levinson, *supra* note 94, at 1155-56.

107. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,903.

108. Press Release, Human Rights First, New Regulations Threaten to Turn Board of Immigration Appeals into Rubber Stamp: Justice Department Rules Place Speed Above Justice for Refugees Seeking Asylum in the United States (Aug. 28, 2002), available at [http://www.humanrightsfirst.org/media/2002\\_alerts/0828.htm](http://www.humanrightsfirst.org/media/2002_alerts/0828.htm).

109. DORSEY & WHITNEY LLP, *supra* note 17, at 39-40.

110. Letter from Lori Scialabba, Chairman, Bd. of Immigration Appeals, to the ABA Comm’n on Immigration Policy, Practice, and Pro Bono (Dec. 22, 2003), available at <http://www.usdoj.gov/eoir/press/03/ABA.pdf>.

111. Palmer et al., *supra* note 15, at 94.

### B. *Data Request and the Limitations of Board Recordkeeping*

To measure the effects of streamlining on appeals involving asylum, we requested data from the Board regarding asylum determinations for fiscal years 1998 to 2005. We specifically asked for statistics that would enable us to examine individual member decision making on the merits of asylum claims. We also requested data regarding the mode of decision making (i.e., panel, single member short opinions, or affirmances without opinion). Finally, we asked for information on the nationality of non-citizens whose cases were appealed and whether they were represented in the appellate process.<sup>112</sup>

The Board provided us with data on nationality and representation, as well as on mode of decision making. Two important problems surfaced with regard to the data that the Board collects and how it does so. First, the Board knows the period of service of every Board member, and it knows the outcome of each Board decision, but it does not keep statistical records from which it can ascertain which members made or participated in which decisions, or from which it could calculate the rate at which individual members rendered decisions (grants or remands) that benefited asylum applicants. Therefore, we were not able to determine the existence or extent of disparities in the decisions from one member to the next, as we were able to do for asylum officers and immigration judges. Nor could we explore the possible effect of the genders or prior experiences of the adjudicators. Second, for fiscal years 2001 and 2002, the precise period during which the Attorney General radically altered its procedures, the Board did not have reliable data on the mode of decision making—whether particular decisions were rendered by a single member or by a three-member panel. The coding of the decision modes changed during that period. Unfortunately, the very helpful EOIR staff currently responsible for statistical reports did not have the information needed to decipher the meaning of the codes used in 2001 and 2002.

Accordingly, the analysis that we present below is limited by these factors. Unlike our analyses of Asylum Office and immigration court decision making, our study of the Board cannot address the degree to which disparities exist among individual decision makers. That in itself is an important finding. In order to ensure consistency in the application of the law and for its own quality control purposes, the Board should reform its data system so that it can collect and analyze individual member decision making.<sup>113</sup>

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112. See Letter from Andrew Schoenholtz to Lori Scialabba, Chairman, Bd. of Immigration Appeals (Jan. 30, 2006) (on file with authors).

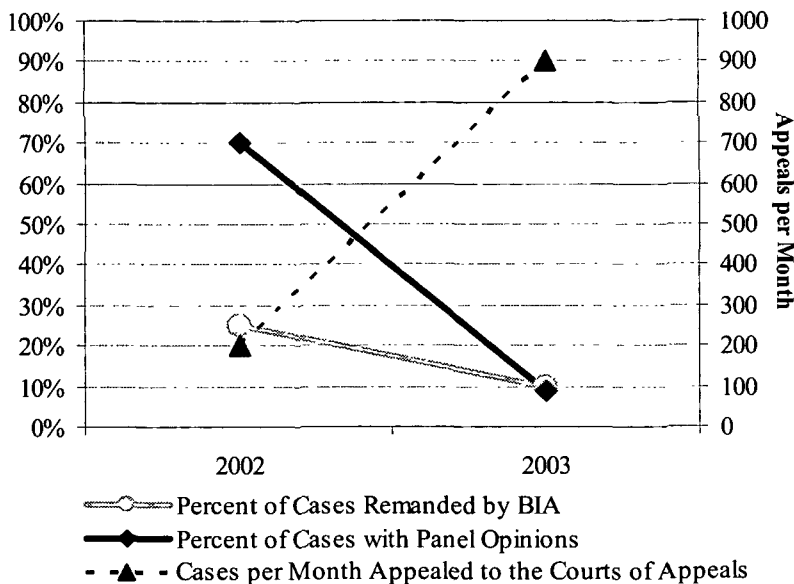
113. With appropriate resources, EOIR has proven that it is capable of improving its data systems with regards to the immigration court. Improved reporting based on these data systems, such as EOIR's Statistical Year Books, has made it possible for government and independent researchers to examine trends and help policymakers understand just how well, for example, the immigration courts are working. EOIR should do the same for the BIA.

### C. Findings

In examining the BIA data,<sup>114</sup> we looked to see what we could learn about the impact of the major 2002 streamlining changes ordered by Attorney General Ashcroft. The first impact has been widely reported by the Palmer, Yale-Loehr, and Cronin study described above: significantly increased caseloads at the federal courts of appeals.<sup>115</sup>

In February 2002, the month before Attorney General Ashcroft changed the procedures,<sup>116</sup> 200 cases were appealed to the courts each month. One year later, 900 cases a month were appealed, and by April 2004, more than 1000 cases per month were being appealed.<sup>117</sup> The second impact that Figure 37 shows concerns the important issue of outcome—the grant and remand rates declined significantly as the number of panel decisions dramatically dropped.

**Figure 37. All Immigration Cases Appealed from BIA to Courts of Appeals**



114. Part IV of the Methodological Appendix, *infra*, more fully describes the data set and the decisions on the merits at the Board.

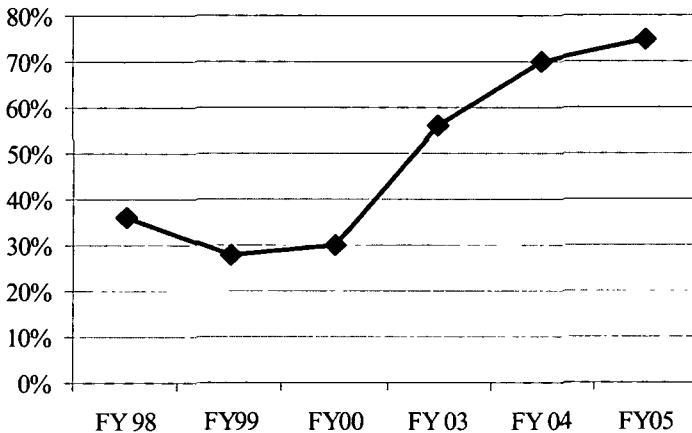
115. Palmer et al., *supra* note 15, at 3.

116. The pertinent procedures were actually changed several months before the regulation requiring those changes became effective in August 2002. *See* sources cited *supra* note 100.

117. Palmer et al., *supra* note 15, at 3; DORSEY & WHITNEY LLP, *supra* note 17, at 40. These monthly caseload numbers include both asylum and other immigration law appeals.

The decline in remand rates of all Board decisions was mirrored in its asylum decisions.<sup>118</sup> To understand the factors that might account for the drop, we examined the different types of Board decisions. We began by looking only at panel decisions (for the six years with reliable data). As Figure 38 demonstrates, following the 2002 streamlining, these three-member decisions increasingly favored asylum applicants. During fiscal years 1998-2000, that is, when asylum decisions were made only by three-member panels or en banc,<sup>119</sup> panel decisions regarding all applicants from APCs favored the government about two-thirds of the time. During fiscal years 2003-2005, that is, after the implementation of the Ashcroft changes, almost the exact opposite occurred in panel decisions: 64% of the *panel* adjudications favored asylum applicants.

**Figure 38. Grant and Remand Rates in Panel Asylum Decisions (FYs 1998-2000, 2003-2005)**

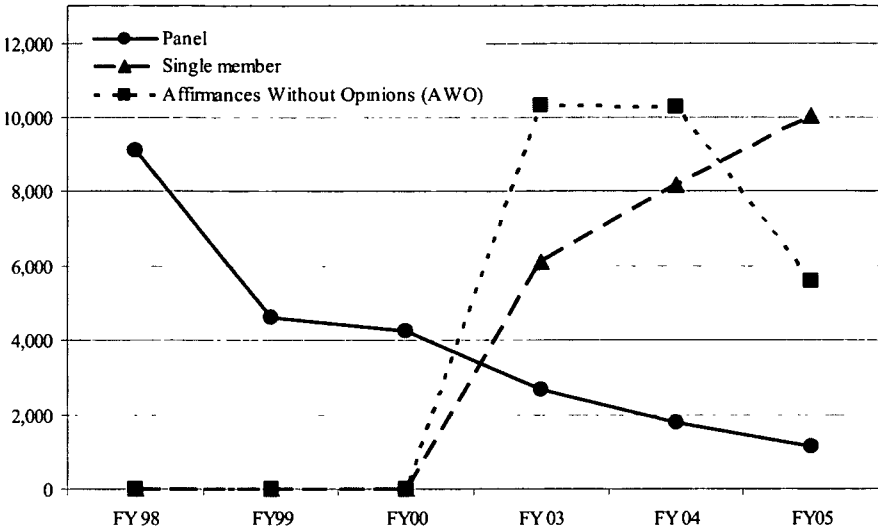


But as Figure 39 shows, the number of panel decisions decreased significantly, from about 9000 in FY 1998 to 1100 in FY 2005. The number of affirmances without opinions rose to over 10,000 in FY 2003, as did the number of single member short opinions in FY 2005. Initially following the Ashcroft changes, the affirmances without opinion dominated Board decision making. That changed in FY 2005, when single member short opinions began to dominate.

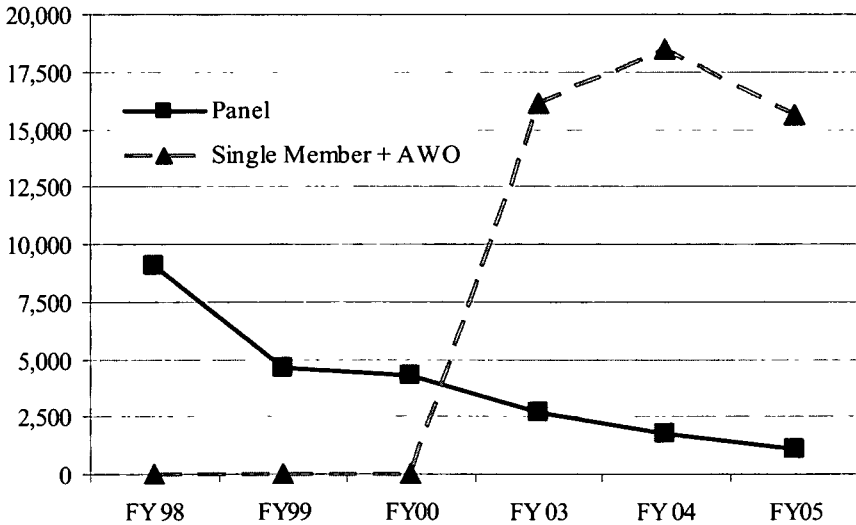
118. See *infra* Figure 41.

119. Affirmances without opinion were first issued in September 2000, right at the end of the fiscal year, but none were issued in asylum cases until the Ashcroft changes were implemented.

**Figure 39. Number of Decisions by Year and Type (FYs 1998-2000, 2003-2005)**



**Figure 40. Number of Decisions Issued by Panels and Single Members**

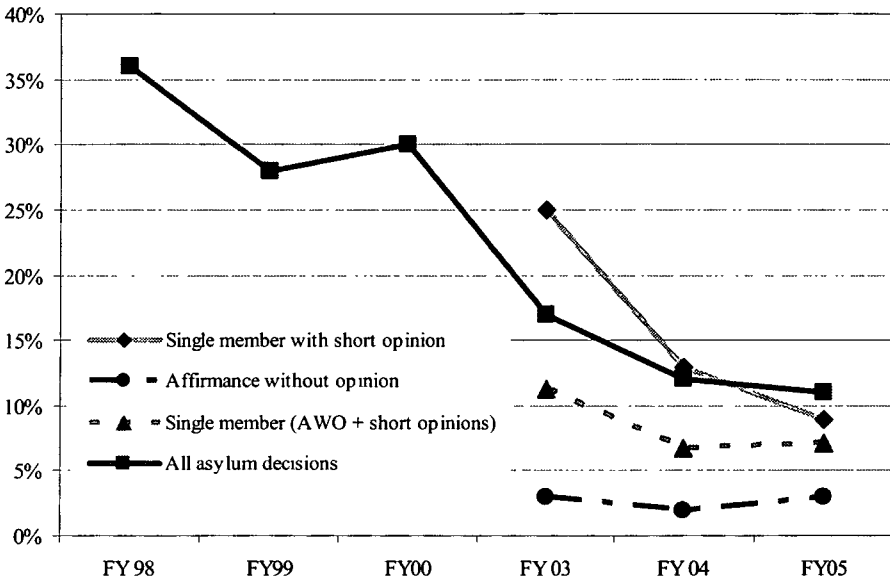


As Figure 40 illustrates, by FY 2005, single member decisions (affirmances without opinions and short opinions combined) totaled some 16,000 compared to the 1100 panel decisions. With this major change in the mode of decision making, what happened to the outcomes in these cases?



Figure 41 shows a steep drop in remand rates favorable to asylum applicants. From fiscal years 1998-2000, asylum applicants received favorable decisions in over 30% of the cases. For fiscal years 2003-2005, the rate dropped by more than half. Affirmances without opinion favored asylum applicants in about 3% of cases. The single member short opinions favored asylum seekers 25% of the time in FY 2003, but as they increased in dominance, asylum applicants found favor through short opinions less than 10% of the time.

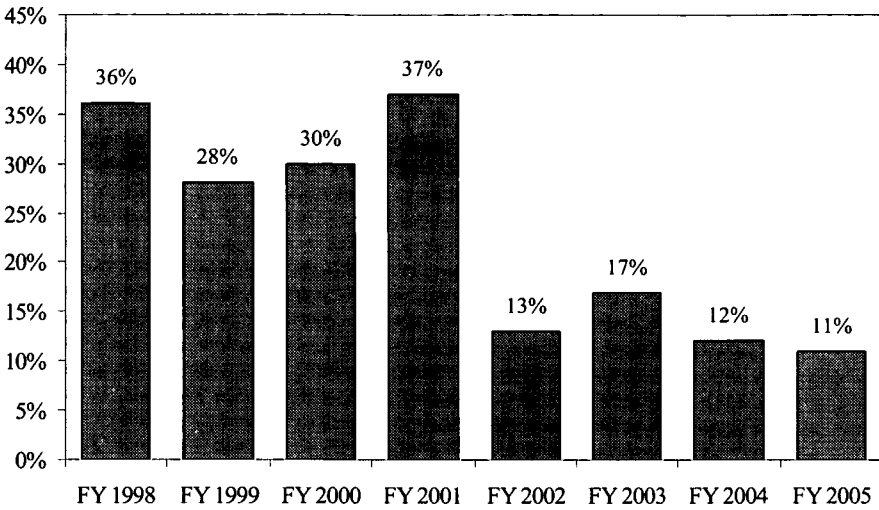
**Figure 41. Remand Rates in Asylum Cases**



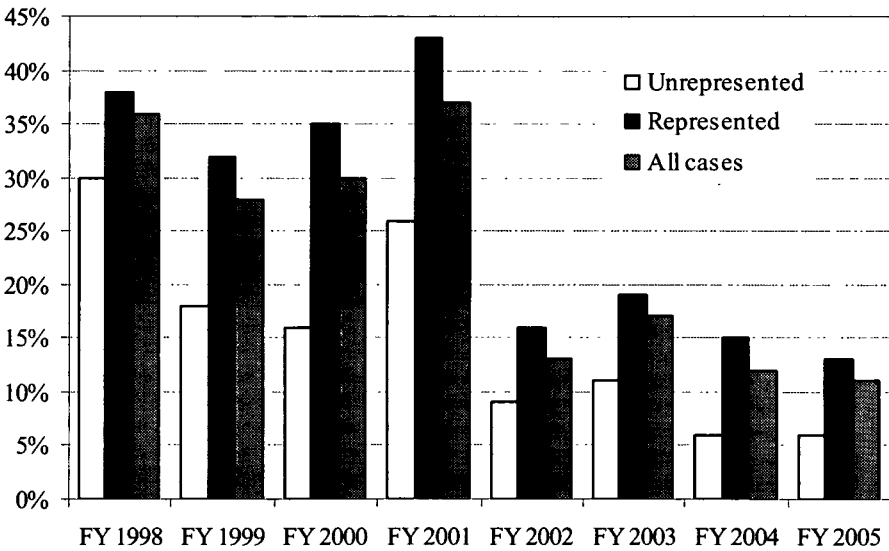
*Note:* In order to present an understandable graph, we did not include a separate line for panel decisions. Because those decisions are included in the line for “All asylum decisions,” the line ends in FY 2005 at a point higher than the end point for the other lines. This reflects the higher grant and remand rate in panel decisions as set forth in Figure 38.

Viewed as a simple bar graph, we see in Figure 42 that the success rate for all asylum applicants fell from 37% in FY 2001 to 11% in FY 2005, a drop of 70%.

**Figure 42. Asylum Grant and Remand Rates**



**Figure 43. Asylum Grant and Remand Rates, Including Representation**

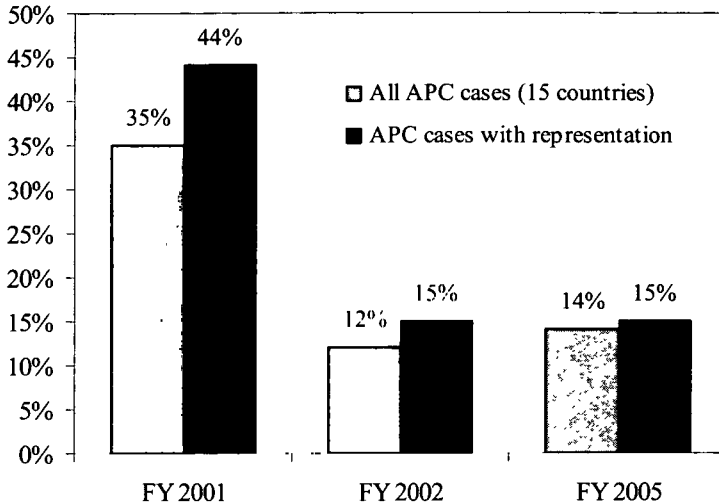


*Note:* Based on 84,191 appeals.

We also wanted to understand the degree to which representation affected outcomes as the Board changed its mode of decision making. Figure 43 shows that the change in outcomes following the Ashcroft changes—the sudden and lasting decline in the rate of success by asylum applicants—occurred whether or not the applicant was represented by counsel. As Figure 43 shows, the success rate of represented asylum applicants fell from 43% in FY 2001 to 13%

in FY 2005, a decrease of 70%. Unrepresented applicants were hit even harder: during the same time frame, the success rate of unrepresented applicants fell from 26% to 6%, a decrease of 77%.

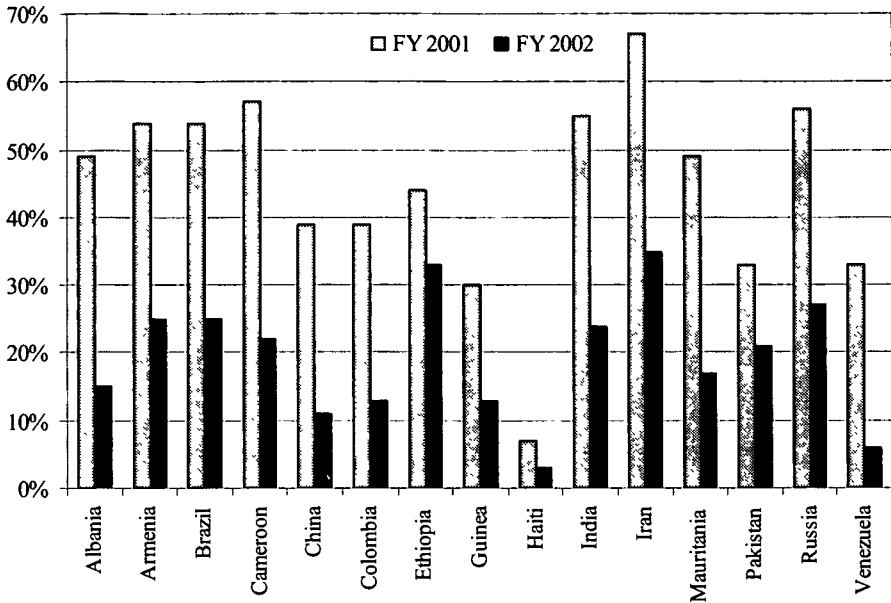
**Figure 44. Asylum Grant and Remand Rates for Applicants from APCs**



Even when only cases from APCs are considered, an extraordinary decline occurred.<sup>120</sup> As Figure 44 demonstrates, the success of all APC asylum applicants declined from 35% in FY 2001 to 14% in FY 2005. The decline for represented APC asylum applicants was even greater: from 44% in FY 2001 to 15% in FY 2005, a 66% drop. The greatest decline occurred with regards to *pro se* asylum applicants from non-APC countries, from a 31% success rate in FY 2001 to a 5% success rate in FY 2005, or a decline of 84%.

Finally, as Figure 45 shows, the success rates of asylum seekers from each of the fifteen APC countries declined significantly and immediately once the Ashcroft changes occurred. The drops from FY 2001 to 2002 ranged from 25% (Ethiopia) to 82% (Venezuela). Asylum seekers from eleven of the fifteen APC countries faced a decline in grant rates of more than 50%.

120. See *supra* text accompanying note 37 (listing “Asylee Producing Countries” and the criteria by which we selected them).

**Figure 45. Asylum Grant and Remand Rates by APC (FYs 2001-2002)**

## V. THE UNITED STATES COURTS OF APPEALS

As a practical matter, the last chance for an unsuccessful asylum applicant is to appeal an adverse Board decision to a U.S. Court of Appeals.<sup>121</sup> Appeals can be taken only to the circuit in which the immigration judge decided the underlying asylum case.<sup>122</sup> Since the location of the immigration court that decides a case is determined by the state of residence of the foreign national when removal proceedings are initiated a year or two before the appeal, the venue for the appeal depends on where the asylum applicant lived at that time.

A Court of Appeals may sustain a Board decision, or it may remand the case for further consideration by the Board.<sup>123</sup> We do not think that the likelihood of success (that is, of obtaining a remand) should depend on the state in which the applicant happened to have settled, and one might think that federal courts would be sensitive to any significant disparity in remand rates

121. See *supra* text following note 30.

122. 8 U.S.C. § 1252(b)(2) (2000).

123. The Supreme Court has instructed courts of appeals that they should ordinarily remand an erroneous Board decision and not grant asylum themselves, because even if an individual is legally eligible for asylum, the Attorney General has discretionary authority to grant or refuse to grant asylum. *INS v. Ventura*, 537 U.S. 12, 16 (2002). Since withholding of removal is not a discretionary form of relief, courts of appeals may in principle grant that form of relief. But since the standard of proof for obtaining withholding of removal is much higher than the standard of proof for asylum, the courts almost always either sustain the Board or remand the case.

from one circuit to another. We therefore investigated whether any such disparity existed.<sup>124</sup>

**Table 2. Asylum and Related Appellate Decisions by Circuit (Calendar Years 2004 and 2005)**

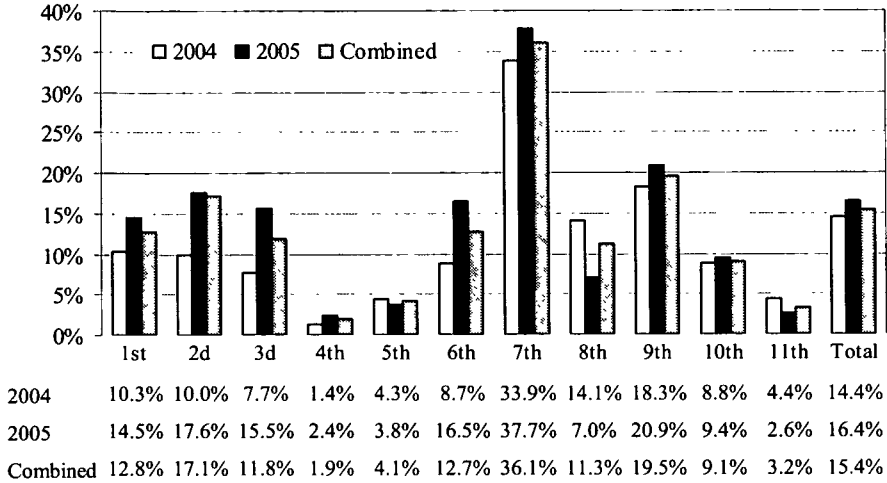
Circuit	2004		2005		2004-05	
	Number of merits decisions	Number of cases remanded	Percentage of cases remanded	Number of merits decisions	Number of cases remanded	Percentage of cases remanded
1st	39	4	10.30%	55	8	14.50%
2d	30	3	10.00%	421	74	17.60%
3d	156	12	7.70%	174	27	15.50%
4th	143	2	1.40%	126	3	2.40%
5th	94	4	4.30%	78	3	3.80%
6th	104	9	8.70%	109	18	16.50%
7th	56	19	33.90%	77	29	37.70%
8th	85	12	14.10%	57	4	7.00%
9th	1220	225	18.30%	877	183	20.90%
10th	34	3	8.80%	32	3	9.40%
11th	91	4	4.40%	156	4	2.60%
ALL	2052	296	14.40%	2163	354	16.40%

*Note:* Our tables do not include data from the Court of Appeals for the District of Columbia Circuit. There are no immigration courts in the District of Columbia, and therefore the D.C. Circuit hears no appeals from denials of relief from removal.

124. See the Methodological Appendix for our case identification criteria and search methods.

Table 2 and Figure 46 show the results of our data compilation. They demonstrate a surprising degree of variation among circuits.

**Figure 46. Remand Rates in Asylum and Related Cases, 2004-05, by Circuit**



The table and graph show that an asylum applicant who lives in the Fourth Circuit, known generally among lawyers as the most conservative circuit,<sup>125</sup> has only a 1.9% chance of winning a remand, whereas in the Seventh Circuit, about 36.1% of asylum cases are remanded to the Board. We know of no rational reason why a person living in Illinois, Indiana, or Wisconsin should have an 1800% greater chance of winning her asylum appeal than a person living in Virginia, Maryland, West Virginia, and the Carolinas. We hypothesized that that the federal judges’ remand rate might be much higher in the Seventh Circuit than in the Fourth Circuit if the *immigration judges* in the Seventh Circuit had been inappropriately reluctant to grant asylum, compared to the immigration judges in the Fourth Circuit. However, the only immigration court in the Seventh Circuit (Chicago) does not seem to be less inclined to grant asylum than its counterparts in the Fourth Circuit. It grants asylum to applicants from all countries at a rate of 34% and to applicants from APCs at a rate of 38%. This is about the same rate as the two immigration courts in the Fourth Circuit (Arlington, where the corresponding rates are 31% and 37%, and Baltimore, where the rates are 38% and 41%). We believe that to a large extent,

125. The Fourth Circuit often writes opinions that “lead the way [to the right], issuing groundbreaking rulings in the hope that the Supreme Court will ratify them as the law of the land.” Brooke A. Masters, *4th Circuit Pushing to Right; Federal Court Tests Supreme Intentions*, WASH. POST, Dec. 19, 1999, at C1; see also Tony Mauro, *4th Circuit Seen to Be the “Right” Place, as a Rule*, USA TODAY, Mar. 9, 1999, at 11A; Laura Sullivan, *4th Circuit’s Reputation Is Polite, Conservative; Bush Administration Steers Sensitive Cases to Friendly Panel of Judges*, BALT. SUN, Nov. 18, 2003, at 1A.

the statistics shown in the table reflect not the relative merits of the cases or the differential grant rates of the immigration judges, but rather the differing attitudes that the judges in these circuits have, in the aggregate, with respect to asylum seekers' claims, or at least the differing degrees of their skepticism about the adequacy of Board and immigration judge decision making.<sup>126</sup> The fact that the three circuits with the lowest grant rates are the three Southern circuits reinforces our surmise that the variation is somehow linked to regional culture, which apparently affects federal appellate judges as well as other citizens, more than any differing characteristics of these asylum cases.

We note, incidentally, that variations among circuits in their remand rates in asylum cases are much greater than variations in their rates of remanding or reversing civil cases. Figure 47, making this comparison, shows that in FY 2005, ten of the eleven circuits in our study had a rate of overturning district courts in civil cases that was between 10% and 20%. In asylum cases the spread from circuit to circuit was much greater.<sup>127</sup>

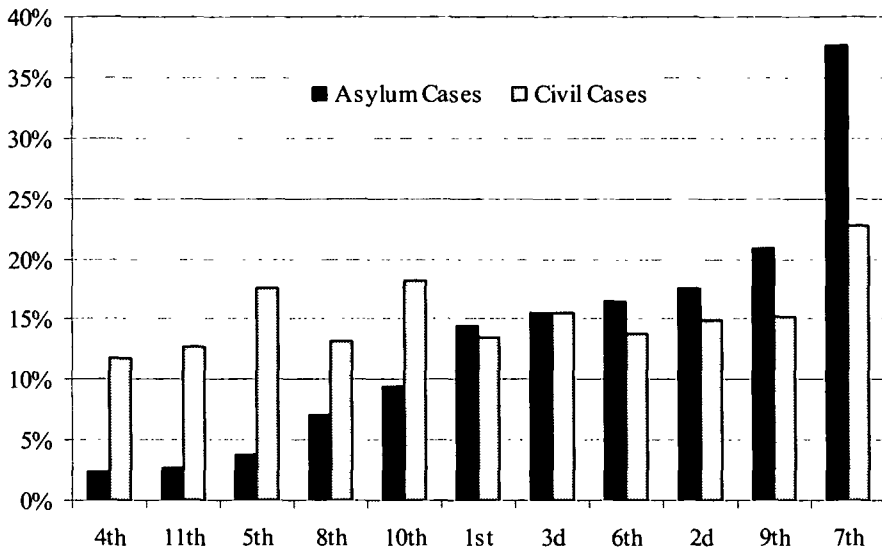
126. The Seventh Circuit's skepticism is plain from the first paragraph of *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005). Judge Posner wrote:

Our criticisms of the Board and of the immigration judges have frequently been severe. E.g., *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) ("the [immigration judge's] opinion is riddled with inappropriate and extraneous comments"); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Sosnovskaia v. Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); *Soumahoro v. Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); *Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005) (the immigration judge's unexplained conclusion is "hard to take seriously"); *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) ("there is a gaping hole in the reasoning of the board and the immigration judge"); *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003) ("the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases"). Other circuits have been as critical. *Wang v. Attorney General*, 423 F.3d 260, 269 (3d Cir. 2005) ("the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding"); *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"); *Fiadjoe v. Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment, personal speculation, bias, and conjecture"); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("it is the [immigration judge's] conclusion, not [the petitioner's] testimony, that 'strains credulity'").

*Id.* at 829.

127. The civil case rate was determined by dividing the number of remands and reversals in all non-prisoner civil cases (those civil cases that included the United States as a party and those that were entirely private cases) by the number of all such cases terminated on the merits. See ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANN. REP. DIR. app. tbl.B-5, available at <http://www.uscourts.gov/judbus2005/appendices/b5.pdf>. Although the spreads are very different, the means for the two sets of rates were comparable: 16.4% for asylum cases and 15.2% for civil cases.

**Figure 47. Asylum Remand Rates (Calendar 2005) and Civil Reversal Rates (FY 2005) Compared**

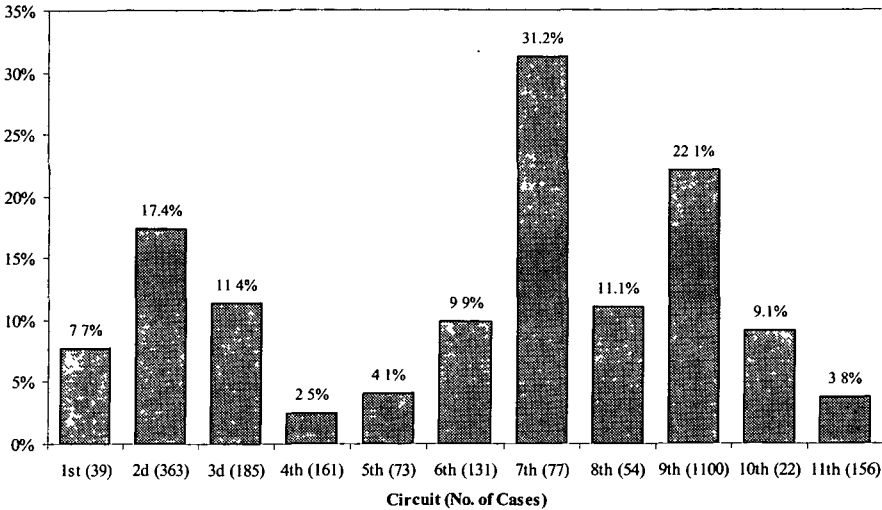


*Note:* The data are displayed in order of increasing grant rate in asylum cases. Civil cases exclude prisoner cases; reversals and remands are both counted as reversals, because both are decisions favorable to the appellant.

It may be objected that the comparison across circuits shown in Figure 47 is not very meaningful because the Fourth, Fifth, and Eleventh Circuits, which have the lowest remand rates, may receive many more appeals from Mexicans or Central Americans with relatively weak asylum claims, whereas the Seventh Circuit may receive most of its appeals from asylum seekers from countries such as Cameroon that have had worse human rights records in recent years. To control the sample to the extent possible, we also calculated the remand rate for decisions rendered during calendar years 2004 and 2005 in appeals from the Board by nationals of the fifteen nations that we denominated as APCs. Neither Mexico nor any Central American countries are among the fifteen APC countries.

Figure 48 shows the remand rates for cases filed by APC nationals and decided during calendar years 2004 and 2005:



**Figure 48. Percentage of APC Cases Remanded, 2004-2005, by Circuit**

Nationals of the fifteen APC countries account for almost half of all asylum appeals to the U.S. courts of appeals. We expected that because all of these cases come from countries with poor human rights records (as measured by a high grant rate at lower levels of the system), we would find a significantly lower level of disparity among circuits than that revealed by Table 2. However, the level of disparity in remand rate from one circuit to another is reduced only very slightly. There are still significant differences among circuits, with the three Southern circuits granting remands in a negligible fraction of cases, five circuits (the First, Third, Sixth, Eighth, and Tenth) granting remands in a range between about 8% and about 12% of their cases, and another three circuits (the Second, Seventh, and Ninth Circuits) remanding in a range between 17% and 31% of their cases. The Seventh Circuit continues to top the list, so that an asylum applicant from an APC who appeals to that circuit has a 721% greater chance of obtaining a remand than one who must appeal from the removal order of an immigration judge in Miami to the Eleventh Circuit, and an 1148% greater chance than one whose order of deportation was rendered by an immigration judge in Arlington or Baltimore in the Fourth Circuit.

Although the number of cases is much smaller, we can also compare the results obtained by applicants from China, the single APC with the largest number of asylum cases. In order to increase the number of cases considered, we have included in Table 3 all asylum cases decided in three years (2003, 2004, and 2005), rather than only two years, as in the previous analysis.<sup>128</sup>

128. We did not have the resources to conduct this type of examination for cases from all countries for a three year period. See Part V of the Methodological Appendix for further discussion of our search method. Although the number of cases in the table is relatively small, we did not need to compute whether sampling error might account for the disparities

**Table 3. Remand Rates for Asylum and Related Cases by Nationals of China (2003-2005)**

<i>Circuit</i>	<i>Number of Merits decisions</i>	<i>Number of cases remanded</i>	<i>Percentage of cases remanded</i>
1	13	1	7.7%
2	307	47	15.3%
3	114	16	14.0%
4	28	0	0%
5	22	5	22.7%
6	10	2	20%
7	27	8	29.6%
8	9	2	22.2%
9	211	78	37.0%
10	4	1	25.0%
11	26	1	3.8%
<i>Total</i>	771	161	20.9%

This table suggests that even for a set of cases that are likely to be the most similar, because they all involve claims of persecution by the same country, there is wide variation in the remand rate from circuit to circuit.<sup>129</sup> In three circuits, the remand rate was in single digits or lower (the Fourth Circuit remanded none of its twenty-eight Chinese cases), while in six circuits, the remand rate was 20% or more.

We could not compare the individual rates of votes to remand in some circuits (such as the Fourth, Fifth, and Eleventh Circuits) because there were not enough votes to remand to make such a study statistically meaningful; few of these judges cast any votes to remand. At the other extreme, the Ninth Circuit decided so many cases that we lacked the resources to count individual votes.<sup>130</sup> However, we did examine the individual votes to remand in two circuits, in each of which the judges collectively cast more than 600 votes on asylum cases during 2004 and 2005.<sup>131</sup> In the Third Circuit, sixteen judges

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between circuits, because we did not sample; we looked at every case from China for the three-year period reported by the table.

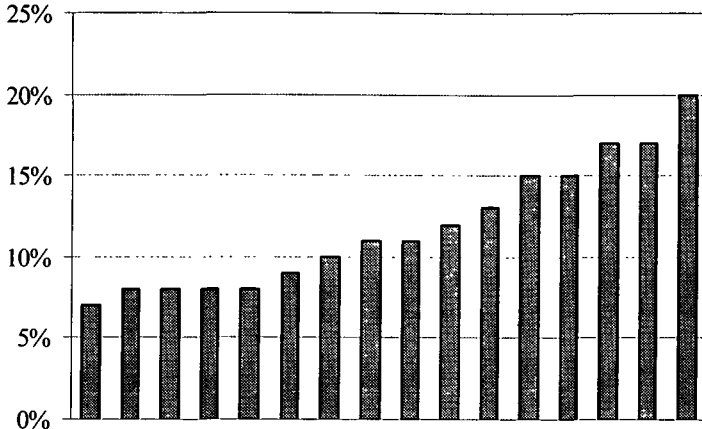
129. The difference between the 0% rate in the Fourth Circuit and the 30% rate in the Seventh Circuit cannot be explained by the possibility that immigration judges in the Fourth Circuit were overly generous to Chinese applicants, compared to their counterparts in the Seventh Circuit. The grant rates in Chinese cases in the Fourth Circuit's immigration courts (Arlington and Baltimore) during this period were 30% and 38% respectively, while the grant rate for such cases in Chicago was 31%.

130. Although we were unable to study the more than 6000 asylum votes cast by Ninth Circuit judges during 2004 to 2005, a period after Attorney General Ashcroft's changes in BIA procedure sharply escalated appeals to that circuit, a study by Prof. David Law did code, by judge, the nearly 6000 Ninth Circuit asylum votes that were cast between 1992 and 2001. We apply our methodology to his data in the Ninth Circuit Appendix.

131. See *infra* Methodological Appendix Part V (explaining further our methodology in choosing to examine the Third and Sixth Circuits).

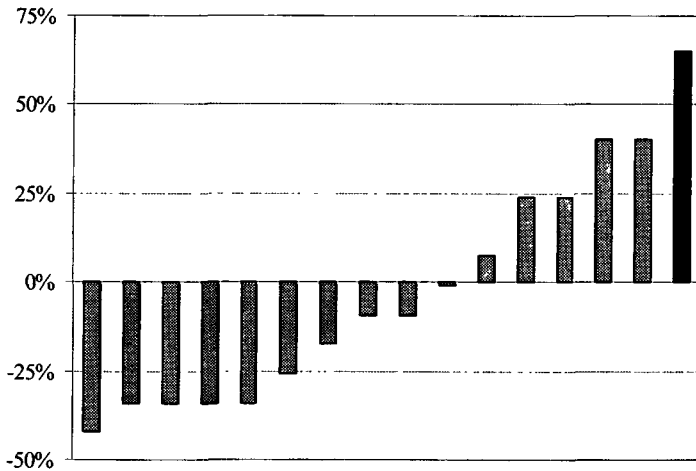
voted in twenty-five or more asylum cases. Figure 49 and Figure 50 show their grant rates and their rates of deviation from the 12.1% circuit mean.<sup>132</sup>

**Figure 49. Remand Rates of Third Circuit Judges, 2004-2005**



*Note:* Includes judges with at least 25 cases; judges' names are omitted.

**Figure 50. Third Circuit Judges' Deviation from Circuit Mean**



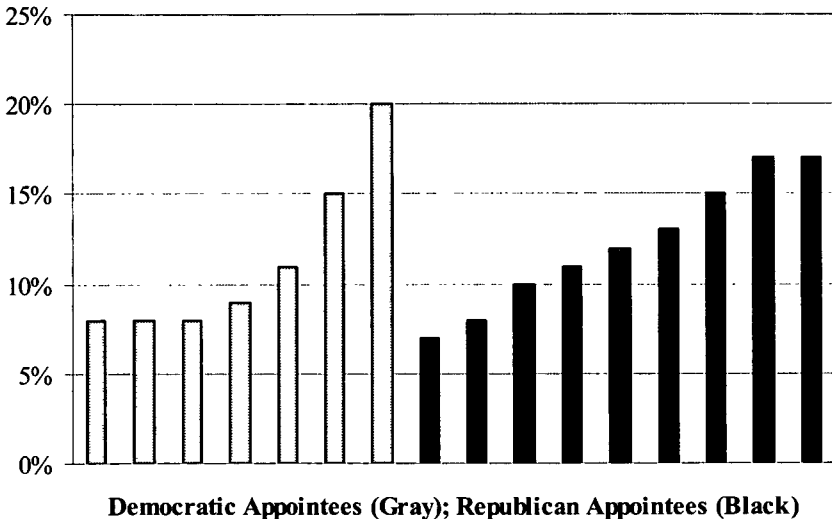
*Note:* Only one judge (shaded black) deviated more than 50% from the mean.

132. There is usually a small difference between the mean rate at which a court, through its panels, votes to remand, and the mean rate at which individual judges vote to remand. Figures 50 and 53 show deviations from the mean in vote-to-remand rate of judges who have heard at least twenty-five cases (Third Circuit) or twenty-three cases (Sixth Circuit). In the Third Circuit, this rate was 12.1%, and in the Sixth Circuit it was 11.4%. The mean vote-to-remand rate was computed by dividing the total number of votes in favor of remanding asylum cases that were cast by the judges who voted at least twenty-five or twenty-three times by the total number of votes in such cases cast by these judges.

These figures show considerable consistency. Only one judge deviated from the circuit mean by more than 50%.

We also investigated whether there was any relationship between the voting pattern of the Third Circuit judges and the political parties of the Presidents who appointed them. We found no relationship: as a group, appointees of Presidents of each party voted to remand at the same 12% rate. In this diagram, each point represents the vote-to-remand rate of a judge who voted on at least twenty-five asylum or asylum-related cases in 2004 and 2005. Black lines represent Republican appointees and gray lines represent Democratic appointees.<sup>133</sup>

**Figure 51. Third Circuit Remand Vote Rates by Party of Appointing President**



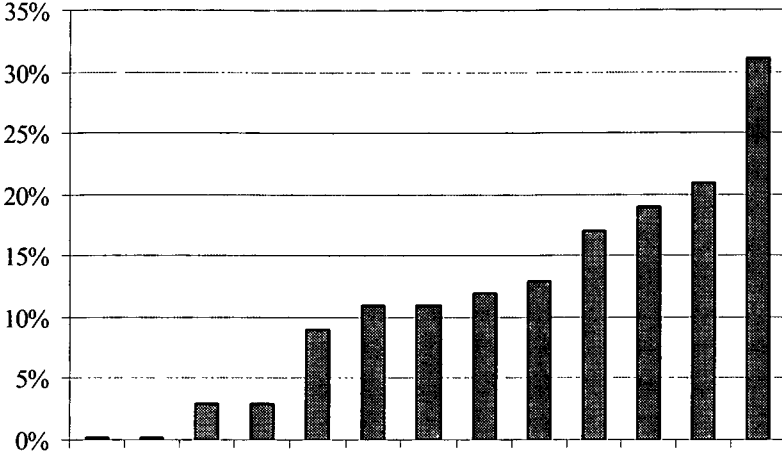
The remand rate in the Sixth Circuit was nearly identical to that of the Third Circuit (12.7% vs. 11.8%),<sup>134</sup> but a close investigation of voting shows a much more scattered pattern. Figure 52 and Figure 53 show the grant rates, and the rates of deviation from the circuit mean, respectively, of the thirteen judges who voted in twenty-three or more asylum and related cases.<sup>135</sup>

133. The 12% vote-to-remand rate for each party’s appointees is the mean rate for all twenty-two judges of the party in question, not only the sixteen judges who met the threshold number of votes for display in the diagram.

134. The political composition of the circuits was also similar during the time period of this study. The Third Circuit had nine Republican and seven Democratic appointees who voted in at least twenty-three asylum and asylum-related cases (in fact the minimum number of votes cast by any of these sixteen judges was twenty-eight), while the Sixth Circuit had eight Republican and five Democratic appointees who cast at least twenty-three votes.

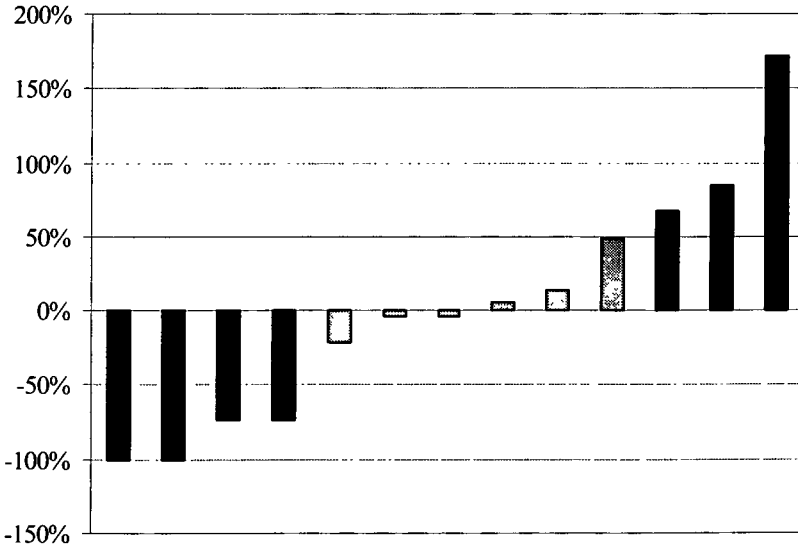
135. We lowered our usual minimum threshold slightly to capture more data. Eleven

**Figure 52. Remand Rates of Sixth Circuit Judges, 2004-2005**



*Note:* Two judges, whose bars are jittered so as to be visible in the graph, voted to remand in 0% of their cases.

**Figure 53. Sixth Circuit Judges' Deviation from Circuit Mean**



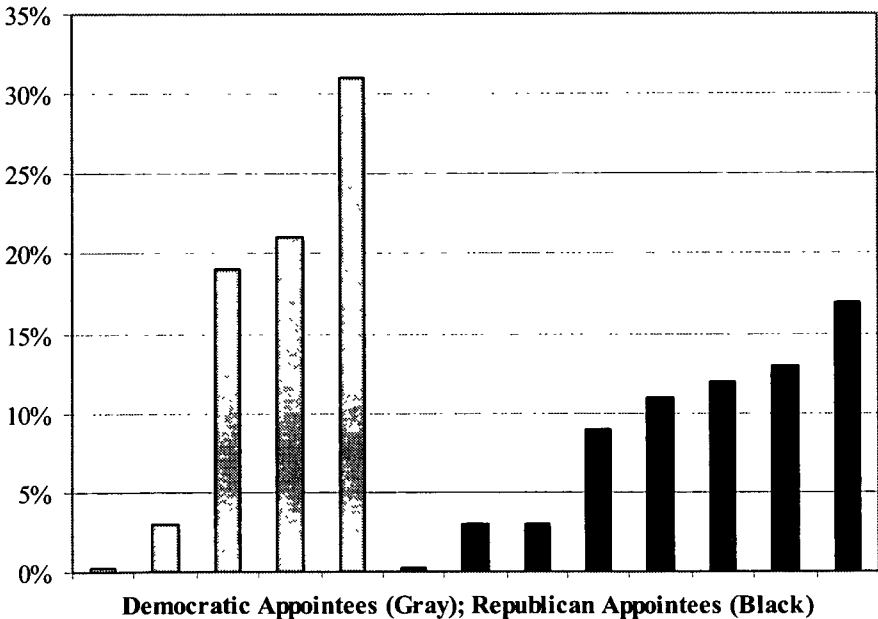
*Note:* Seven of thirteen judges, shaded in black, deviated by more than 50% from the mean.

of these thirteen judges voted in at least twenty-five asylum cases. The two others voted in twenty-three and twenty-four cases, respectively.

Votes on the Sixth Circuit showed much greater disparity than in the Third Circuit. Seven of the thirteen judges who voted in at least twenty-three cases deviated from the circuit mean by more than 50%.

Furthermore, in the Sixth Circuit, unlike the Third Circuit, there appears to be a significant difference in the voting patterns of judges appointed by Presidents of different parties. The judges appointed by Republican Presidents had a weighted mean grant rate of 9.3%, while those appointed by Democratic Presidents had a weighted mean rate of 14.6%. In other words, the Democratic Presidents' appointees voted to remand at a rate 57% higher than that of the appointees of Republican Presidents. Figure 54 compares individual vote-to-remand rates on the Sixth Circuit.

**Figure 54. Sixth Circuit Remand Vote Rates by Party of Appointing President**



Note: Two judges, whose bars are jittered so as to be visible in the graph, voted to remand in 0% of their cases.

The samples are smaller than those in most of our other investigations, but the results suggest that at least in some courts, political ideology may play a role in decision making in these asylum cases. We hope that in the future we will be able to conduct a more exhaustive study, with a larger database, of the influence of political party affiliation on the appellate courts' adjudication of asylum cases.<sup>136</sup>

136. In the Ninth Circuit, there appears to be a strong relationship between the rate at which a judge votes in favor of asylum applicants and the political party of the appointing President. See *infra* Ninth Circuit Appendix (describing an empirical study by Professor

## VI. KEY FINDINGS

In 1940, Attorney General Robert H. Jackson wrote to Congress that “[i]t is obviously repugnant to one’s sense of justice that the judgment meted out . . . should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition.”<sup>137</sup> We assume that Attorney General Jackson recognized that the personal histories and personalities of judges would inevitably have *some* effect on their judgments in cases and that what he meant was that the effect of these individual characteristics should not be very large. With that understanding, we agree with his view. We are therefore quite troubled by the degree to which the grant rates of asylum adjudicators in certain regional asylum offices, large immigration courts, and courts of appeals diverge to a very great extent from those of other adjudicators in the same offices and from courts deciding cases from nationals of the same country or group of countries in the same time frame.

*A. Disparities Within Particular Asylum Offices, Immigration Courts, and Federal Appeals Courts*

We adopted what we considered a very forgiving standard for assessing the degree to which adjudicators vary from the norm. We accepted the possibility that even within the subset of refugees who come from the small group of APCs that produce the highest rates of successful asylum-seekers, variations in the refugee populations who migrate to particular regions might justifiably account for at least some region-to-region variation. Therefore, except in a few instances in which we explicitly compared one region with another, we measured adjudicators’ deviations from the mean by comparing individual grant or remand rates not with national norms but with the norms for those adjudicators’ own local offices. We also decided, for purposes of this Article, to count an adjudicator as an “outlier” from the norm only if the adjudicator’s grant or remand rate was more than 50% higher or lower than the local mean.

Even by this standard, officers who adjudicate asylum applications in some of the eight regional offices of the Department of Homeland Security’s Asylum Office appear to have grant rates that reflect personal outlooks rather than an office consensus. Over the course of a seven-year period, more than 20% of the asylum officers in three of these regional offices had grant rates for applicants from APCs that deviated from the regional norm by more than 50%. In only three offices did fewer than 10% of the asylum officers have grant rates that deviated from the regional norm by more than 50%. In one office, there was so

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Law).

137. 1940 ATT’Y GEN. ANN. REP. 5-6, *quoted in* Anderson et al., *supra* note 7, at 275. The Attorney General was referring to criminal sentencing.

little consensus that most of the officers deviated from the office norm by more than 50%.

Even confining our analysis to applications by nationals of a single country, asylum officers in some regions appear to issue grants at very different rates from each other. Six of the eight regional asylum offices adjudicate large numbers of applications from China. One of those offices ("Region C") shows great consistency among officers in their rates of granting asylum to these applicants. In that region, only 7% of the officers deviate from the regional office's mean grant rate for Chinese cases by more than 50%. In four other regions, the percentage of officers who deviate by more than 50% ranges between 25% and 35%. And in one office, thirty-one of the fifty-two officers deviated by more than 50% from the mean. In that office, two officers did not grant asylum to any Chinese applicants (one of those officers turned down 273 applications), while two other officers granted asylum in 68% of their cases (one of them had 150 such cases).<sup>138</sup> Some individual officers deviated by much more than 50%. For example, in "Region F," in which the mean grant rate for Chinese applicants is 57%, four of the officers granted asylum in fewer than 5% of their 364 Chinese cases, while twelve other officers granted asylum in more than 90% of their 1145 Chinese cases.

Judges of the immigration courts with large numbers of cases also appear to adjudicate asylum cases inconsistently. In the three largest immigration courts, more than 25% of the judges have asylum grant rates in cases from APCs that deviate from their own court's mean rate for such cases by more than 50%. The degree of deviation is dramatic even when the analysis is confined to nationals of one country. For example, half the judges (eleven of twenty-two) in the Miami Immigration Court who adjudicated at least fifty cases over a period of nearly five years have grant rates for Colombian asylum seekers that deviate from that court's Colombian mean grant rate by more than 50%. A Colombian asylum seeker might be assigned to a judge who granted asylum in 5% of his 426 cases during the period of our study or to another who granted asylum in 88% of his 334 cases.

We would have liked to have been able to analyze the internal consistency of decision making within the Board of Immigration Appeals, and we were very surprised to learn that although the Board keeps voluminous statistics on its work, it does not keep statistical records from which it could discern the pattern of individual members' votes. This gap in the statistical record is especially troubling in view of the decisions of Attorney General Ashcroft and Board Chair Lori Scialabba to direct individual members of the Board, rather than panels, to make most of the Board's decisions in asylum cases. A single individual now makes the life-altering decision to affirm, remand, or grant asylum in these cases, but the Board keeps no statistical records of what the

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138. In each of these regions, the officers whose grant rates are reported here adjudicated at least twenty-five cases from FY 1999 through FY 2005.



members are doing in these cases, making its own quality control very challenging, and rendering public accountability virtually impossible. One member could be remanding only 1% of appellate cases to correct immigration judges' errors, while a member in the next office is remanding 10% of similar cases. Yet the Board would never know that the assignment of a case to a particular member had such a great impact on the applicant's odds of obtaining a remand or an eventual grant of asylum.

We also analyzed asylum decisions of the U.S. Courts of Appeals, though our investigation of asylum cases in the federal courts is necessarily incomplete. Because the court system does not keep separate statistics on its asylum cases, we had to examine individually thousands of unpublished decisions to determine which ones were in fact appeals from the BIA of denials of asylum, withholding of removal, or protection under the Convention Against Torture. In the period we examined, calendar years 2004 and 2005, most circuits had too few cases to enable us to compare the rates at which individual judges voted to remand cases. (The Ninth Circuit, by contrast, had too many cases for us to undertake this analysis!) We did perform this study on the decisions of the Third and Sixth Circuits, however, and we found that the results were quite different in those two circuits. The Third Circuit showed a remarkable degree of consistency from judge to judge, while in the Sixth Circuit, seven of the thirteen judges who cast twenty-three or more votes in asylum cases deviated from the circuit's mean rate of votes to remand by more than 50%. In addition, we could find no significant pattern in the Third Circuit relating remand votes to the political party of the President who appointed the judge, while in the Sixth Circuit, judges appointed by Democratic Presidents voted to remand cases at about twice the rate of judges appointed by Republican Presidents.

### B. *Disparities from Region to Region*

Although we focused principally on deviations within local adjudicative bodies (asylum offices, regions, cities, or circuits), our data also showed some dramatic differences across geographic territory. Among regional asylum offices, overall grant rates for applications from nationals of eleven APCs varied between 26% in one region and 62% in another region.<sup>139</sup> This disparity could be simply the result of differences in nationalities (and therefore appreciable differences in degrees of threatened persecution) in the mix of cases in the different regional offices. We have reason to be skeptical of this explanation, however. First, there is a very large disparity in grant rates among regional offices even when we examine decisions involving a single small country, such as Armenia.<sup>140</sup> The officers in one regional asylum office

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139. See *supra* Table 1.

140. It is possible that different groups of Chinese refugees, from different regions of

(Region C) granted asylum to Armenian applicants at a rate 148% higher than those in another office (Region G).<sup>141</sup> Also, even if the asylum office with the lowest rate had a case load entirely composed of cases from the APC country with the lowest grant rate and the asylum office with the highest rate had a case load composed entirely of cases from the country with the highest grant rate, the difference between the offices would be only 84%, not the observed 138%.<sup>142</sup>

Among immigration courts, there is some consistency from city to city. In cases from the APCs, nearly all of the immigration courts grant asylum at a rate of between 37% and 54%. No courts grant asylum in these cases at a rate higher than 54%. However, four immigration courts—in Atlanta, Miami, Detroit, and San Diego—grant asylum at rates significantly lower than 37%.

We also compared the remand rates of the circuits in cases involving nationals of fifteen APCs (once again excluding all countries whose nationals are not in large measure successful at the lower levels of the asylum process). Five of the eleven circuits that hear asylum appeals have remand rates of between 8% and 11%, and two other circuits had remand rates between 12% and 22%. But the Seventh Circuit's remand rate was significantly higher (31%), and the Fourth, Fifth, and Eleventh Circuits all had remand rates under 5%. It may not be surprising that all three of those circuits are in the American South, which is often considered more conservative than other parts of the country. Nevertheless, all of these circuits are applying the same national asylum law,<sup>143</sup> and it seems odd to us that the rights of refugees seeking asylum

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China and with differing degrees of meritorious claims, might arrive at different U.S. coasts and therefore have their claims adjudicated by different regions of the asylum office. However, there are no empirical studies to support this speculation. Furthermore, it seems less likely that asylum seekers from smaller countries such as Armenia are composed of groups with particular characteristics that flee to different U.S. cities.

141. See *supra* note 43 and accompanying text.

142. This conclusion is based on an examination of the disparity between the highest and lowest grant rates nationally among the five APCs (Armenia, China, Colombia, Ethiopia and Haiti) that accounted for 78% of all cases from the eleven APC countries. Of these five APCs, the grant rate for the country (Ethiopia) with the highest grant rate (59% in FY 2003 and 2004 combined) is only 84% higher than the grant rate for the country (China) with the lowest grant rate (32% in FY 2003 and 2004). The percentages in this note are derived from U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS 55 tbl.18 and U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 60 tbl.18. Unfortunately, DHS is no longer including in its annual statistical yearbooks detailed statistical information on the number of cases that it grants, denies, refers and rejects. Compare *id.*, with U.S. DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 44 tbl.17. Both books are available at <http://www.dhs.gov/ximgrn/statistics/publications/yearbook.shtm>. The discontinuance of detailed statistical reporting makes it much more difficult for researchers to analyze trends in asylum adjudication by DHS unless they make informal arrangements, as we did, to receive data sets directly. Fortunately, the Department has been willing to share those data sets with scholars without requiring them to go through the often lengthy processes triggered by formal requests under the Freedom of Information Act.

143. There are, of course, minor differences in statutory interpretation from circuit to

in the United States should turn significantly on the region of the United States in which they happen to file their applications.

### *C. Possible Causes of Disparities Among Immigration Judges*

Thanks to sophisticated statistical software and to the fact that the Executive Office for Immigration Review publishes biographical information on immigration judges, we were able to present a descriptive analysis correlating judges' grant rates with personal and biographical information, as well as with certain other information about the immigration court cases. We confirmed the findings of prior studies showing that represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients. This difference could reflect the reluctance of lawyers to accept weak cases, but to a significant extent it probably also reflects the difficulty of winning an asylum case without the assistance of a professional advocate. Such advocates are able to collect affidavits from lay and expert witnesses and other corroborating documents; are familiar with the Immigration and Nationality Act, the voluminous regulations promulgated under that law, and the volumes of case law interpreting it; understand the court's exacting standards for the corroboration of testimony and authentication of documents; know the court's timetables and formal requirements for filing papers; are aware of the procedures for pleading and motions; and know how to conduct direct and cross examination of witnesses and make closing statements that tie together the facts and law.

Our other discoveries resulting from our study of immigration court decisions were even more fascinating. We found that applicants had a significantly greater chance of winning if their applications included a request for protection of a spouse or minor child in the United States. Perhaps family applications are more persuasive, because judges don't believe that married applicants would flee from danger and leave a spouse or child behind, or because the judges feel additional sympathy for spouses and children, or because they suspect that unmarried applicants are more likely to commit fraud or be terrorists. The reasons for the increased odds of prevailing if one has dependents in the United States merit further study.

Perhaps the most interesting result of our study is that the chance of winning an asylum case varies significantly according to the gender of the

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circuit. But very few asylum appeals turn on statutory interpretation. Most focus on whether the immigration court and the Board drew proper inferences and conclusions from the testimony and documentary evidence in the case. The leading treatises, such as DEBORAH ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: ADMINISTRATIVE DECISIONS AND ANALYSIS* (3d ed. 1994), cite circuits interchangeably to support their descriptions of the law because statutory interpretation is in fact so uniform nationally (although by dint of its larger asylum docket, the Ninth Circuit has had to reach and decide more legal issues than most others).

immigration judge. Female judges grant asylum at a rate that is 44% higher than that of their male colleagues. The work experience of the judge before joining the bench also matters: The grant rate of judges who once worked for the Department of Homeland Security (or its predecessor, the Immigration and Naturalization Service) drops largely in proportion to the length of such prior service. By contrast, an asylum applicant is considerably advantaged, on a statistical basis, if his or her judge once practiced immigration law in a private firm, served on the staff of a nonprofit organization, or had experience as a full-time law teacher.

#### *D. The Erosion of Appellate Review by the Board of Immigration Appeals*

If adjudication by the asylum office and the immigration courts has become something of a random process, one might expect reform to have been initiated by appellate review. Unfortunately, in recent years the Board focused primarily on reducing its own backlog (which it accomplished by affirming the vast majority of removal orders rapidly) rather than providing effective appellate oversight.

Even though we were unable to evaluate the consistency of decision making from one Board member to another, the statistical information that the Board provided enabled us to confirm and expand upon a previously reported change in the Board's work over time. As the law firm of Dorsey & Whitney discovered in 2003, the "reforms" mandated by Attorney General Ashcroft—firing five Clinton appointees and encouraging others to leave, requiring most decisions to be decided by summary affirmances or very short opinions, and replacing three-member panel decision making with single-member affirmances for most asylum cases—resulted in a sudden and drastic reduction in the rate at which the Board rendered decisions favorable to asylum applicants.<sup>144</sup> The statistical information available to Dorsey & Whitney included all Board cases, not only asylum cases, but our study shows that its conclusions are equally valid when the cases under study are limited to those involving asylum. Although the BIA was rendering decisions favorable to asylum applicants in 37% of asylum appeals in FY 2001, before the firing of the Clinton appointees and before most asylum cases were assigned to a single judge who could affirm summarily, that rate dropped precipitously to 13% the following year, and by FY 2005 it was only 11%. Some might argue that from FY 1998 through FY 2001, the Board was being too generous to asylum applicants and that a rate such as 11% is more appropriate, or that fewer meritorious appeals were filed after FY 2001. We have no way of knowing which rate is a more accurate reflection of justice. But we are troubled by the facts that the rate drop was sudden and persistent, that it was associated temporally with a purge of certain members appointed by a prior administration

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144. See DORSEY & WHITNEY LLP, *supra* note 17, at 39–40.

and with increased fear of foreign nationals after the 9/11 attacks, and that it also coincided with the institution of new procedures that provided less scrutiny of immigration judges' decisions. These factors cause us to suspect that in many asylum cases, the BIA has ceased to function as an effective appellate body.

## VII. POLICY IMPLICATIONS

Different observers may draw different conclusions from the data that we have presented here. Some may conclude that the asylum adjudication system is operating as it should, and that no reforms are needed. In particular, at least two groups of people may be very comfortable with the status quo. Some may believe that (except when the Attorney General exercises a prerogative right to change the result of a case or to fire Board members or judges with whom he disagrees), asylum adjudicators should be "independent" in the sense of receiving little or no direction to act in a uniform way, even if disparities result. In addition, some refugee advocates may support greater consistency as a desirable goal but believe that no attempt to reduce disparities should be made because politicians who oppose more immigration and those who agree with them within the executive branch may convert a project seeking more consistency into one that imposes uniformly lower grant rates on the adjudicators.

We are very troubled, however, by the central finding of our study. Whether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a spin of the wheel of chance; that is, by a clerk's random assignment of an applicant's case to one asylum officer rather than another, or one immigration judge rather than another. We think that an adjudicator's deviation by more than 50% from the mean rate for similar cases in that adjudicator's own office raises serious questions about whether the adjudicator is imposing his or her own philosophical attitude (or personal level of skepticism about applicants' testimony) to the cases under consideration.

Similarly, at the appellate levels, we are troubled by the fact that factors unrelated to the merits of cases so significantly affect an appellant's chance of obtaining a remand. These extraneous factors include, at the Board of Immigration Appeals, a Republican Attorney General's 2002 decision to purge the Board of many members selected by his Democratic predecessor, and to require cursory opinions, at best, rather than careful analyses of appellants' contentions. At the U.S. Court of Appeals level, the most obvious extraneous factor affecting the outcomes of cases is the region of the country in which the asylum applicant happened to settle before filing his or her application.<sup>145</sup>

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145. The vast majority of asylum applicants are not permitted to work while their applications are pending. The authors know from personal experience that clients of the

Despite our misgivings about the random factors affecting the current system, we do not think that the process would be improved by more stringent controls on asylum officers, immigration judges, or other participants in the system. The most obvious control would be a rigid quota system; for example, a directive requiring every asylum officer to approve between 35% and 40% of the applications that the officer adjudicates, or requiring every immigration judge to grant asylum to between 40% and 45% of all applicants.

For several reasons, the cure of a quota system could be worse than the disease of random adjudication. First, there is no way to know what the right percentage would be for any quota. The mean rate for a particular nationality in a particular adjudicating office could be too low or too high. Just because it is the mean does not make it self-evidently the correct rate. Second, nothing in this study dictates what the correct range or tolerance should be for a quota system. We somewhat arbitrarily selected a 50% test as our measure of deviation, but this range actually seems to us extremely tolerant of variation by individual adjudicators. On the other hand, a range of plus-or-minus 10% or even 20% from the mean seems to us to allow too little tolerance for individual variation based on the normal scatter of valid or doubtful asylum cases. Third, we fear that any quota system imposed by political authorities would become ossified, reflecting historical national or regional grant rates but not changing quickly enough to reflect alterations in human rights conditions that may occur within persecuting countries. Also, while approximately fifteen countries produce enough cases to generate reliable mean grant rates, most countries—even many with bad human rights records—have fewer nationals who flee to the United States, so the statistical record of grant rates from those countries would not be a good basis for a quota system.

We also do not recommend a more detailed codification of the substantive rules governing asylum. It is true that some of those rules are not spelled out in the Code of Federal Regulations or in precedent cases. For example, there has never been a succinct, definitive definition of “persecution,” because the nature of persecution and our understanding of it keep changing. Also, while a more detailed codification could theoretically reduce disparity in decision making, neither this study nor any other study that we know of offers evidence that disagreements about substantive law account for the disparities in grant rates. Those disparities could as easily result from officers’ or judges’ different degrees of skepticism about the veracity of applicants, or the adjudicators’ different political philosophies or personal backgrounds. Indeed, our study suggests that the gender and prior work experience of the adjudicators correlate strongly with grant rates.

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asylum clinic at Georgetown University have settled in the Baltimore/Washington area primarily because that is where they have friends or family members who can support them for several months until their cases have been decided. The applicants know nothing about regional differences in immigration court grant rates, much less the statistical likelihood of winning appeals in various circuits.

We do believe, however, that worthwhile steps can be taken to improve decision making. First, we suggest that EOIR implement more rigorous hiring standards.<sup>146</sup> To be selected as an immigration judge, a candidate should have to demonstrate that he or she is sensitive to cultural differences and likely to treat all parties respectfully; capable of managing a large docket without becoming impatient; predisposed to be very careful in judging the credibility of people who claim to be victims of trauma or torture; and able to produce well-reasoned decisions that take into account all of the evidence and arguments presented by the parties. In addition, it would be desirable for the judges to have some degree of knowledge of or experience with immigration law. Immigration judges are not ALJs, and while we do not suggest regulating them under the APA, we believe that their selection process should be at least as rigorous as that provided for judges who, arguably, make less consequential decisions.<sup>147</sup>

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146. For a description of the EOIR's current hiring process, see Jason McLure, *Borderline Calls*, LEGAL TIMES, June 19, 2006, at 1:

... [T]he process by which the judges are hired is a murky one, often little understood by either immigration lawyers or the judges themselves. . . . Applicants are vetted by [EOIR's] chief immigration judge, who conducts interviews and makes formal hiring recommendations.

But according to an immigration-judge hiring policy released by the Justice Department, the attorney general also has the option to pre-empt the formal vetting process and directly hire a judge of his choosing.

Indeed, from October 2004 until early 2007, the Justice Department filled "the overwhelming majority" of immigration judge positions through direct selection by the Attorney General, bypassing the public competition process. Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 28, 2007, at 12. EOIR acknowledges that the Attorney General can bypass the entire public competition process, but it has provided this description of standards and procedures for hiring immigration judges:

Unless the Attorney General elects to make a direct appointment, . . . [a vacancy announcement is sent] to various sources (DOJ postings, Internet sites, bar associations, law journals, etc.). Applicants must have an LL.B. or a J.D. degree and be duly licensed and authorized to practice law as an attorney under the laws of a state, territory, or the District of Columbia. Applicants must be U.S. citizens and have a minimum of 7 years of relevant post-bar admission legal experience at the time the application is submitted, with 1 year experience equivalent to the GS-15 level in the Federal Service. . . .

[The Office of the Chief Immigration Judge looks for] experience in at least three of the following areas: knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures. After reviewing the written applications, OCIJ selects applicants for an interview when appropriate.

Executive Office for Immigration Review, AILA-EOIR Liaison Agenda Questions: For Oct. 17, 2005, <http://www.usdoj.gov/eoir/statspub/eoiraila101705.pdf>. Note that immigration law experience is not required, and even knowledge of immigration law is only one of several alternative qualifications for this job.

147. In Canada, a person desiring to become an adjudicator for the Immigration and Refugee Board must fill out a lengthy application that is used as an initial screening mechanism and pass a written entrance test. The applicant must also qualify under a competency profile which evaluates such qualities as the applicant's self-control and cultural competence. See the standards described in Immigration and Refugee Board of Canada, The

Second, we suspect that more training is in order, with particular attention to exercises and lessons that will properly promote greater consistency. The asylum officers currently receive much more initial and ongoing training than the immigration judges. The tenure of every asylum officer begins with a five-week basic training course (including testing). In addition, on a continuing basis, four hours a week are set aside for training officers on new legal issues and country conditions. The trainers themselves participate in monthly conference calls with the national headquarters to address new issues, emerging patterns of claims, and ideas for training techniques.<sup>148</sup> During some periods, in at least some of the regional asylum offices, the weekly training has on occasion included work on interviewing techniques and intercultural communication. Regular periodic training of this type should be standardized not only in every asylum office but also for immigration judges, who have only sporadically received ongoing training. In 2006, for example, Immigration Judge Denise Slavin, President of the National Association of Immigration Judges, complained, "We have had no training conferences in person for the last three years. . . . We used to have [a] training conference every year but because of funding cuts we have not."<sup>149</sup> We applaud EOIR's January 2007 statement that it would expand and improve training for all immigration judges.<sup>150</sup>

Training for immigration judges should include units on judicial temperament.<sup>151</sup> For example, immigration lawyers have sometimes

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Selection Process for Governor in Council Appointments to the Immigration and Refugee Board of Canada, [http://www.irb-cisr.gc.ca/en/about/employment/members/process\\_e.htm](http://www.irb-cisr.gc.ca/en/about/employment/members/process_e.htm), and in Immigration and Refugee Board of Canada, Backgrounder – Immigration and Refugee Board of Canada Governor in Council Competency Profile, [http://www.irb-cisr.gc.ca/en/media/background/back\\_comp\\_e.htm](http://www.irb-cisr.gc.ca/en/media/background/back_comp_e.htm).

148. Ruppel, *supra* note 21.

149. Jennifer Ludden, *Complaints Prompt Government Review of Immigration Courts*, MORNING EDITION (National Public Radio broadcast Feb. 9, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5198044>.

150. The statement was made to a federal commission that has been very critical of EOIR's protection of asylum seekers. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, EXPEDITED REMOVAL STUDY REPORT CARD: TWO YEARS LATER 10 (2007), available at [http://www.uscirf.gov/reports/scorecard\\_FINAL.pdf](http://www.uscirf.gov/reports/scorecard_FINAL.pdf). The Department of Justice held a training conference for immigration judges in August 2006, and it held another conference in 2007, at which Andrew Schoenholtz presented the research published in this law review article. *Id.*

151. In 2006, Attorney General Alberto Gonzales took note of "reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice." Memorandum from Alberto Gonzales, Att'y Gen., to Immigration Judges (Jan. 9, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>. In view of these reports, he commissioned a study of the work of the immigration judges. After receiving the study, he announced that he would "establish regular procedures [for the Board of Immigration Appeals] . . . to report adjudications that reflect immigration judge temperament problems." U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 3 (2006), available at



complained that after an immigration judge is lied to several times by nationals of a particular country, the judge tends to suspect that all nationals of that country are liars. The training could include counseling on impartiality, avoiding stereotyping, and not taking personally the misconduct that the judges sometimes encounter from people who are desperate to remain in the United States.

Moreover, within each regional asylum office and within each immigration court, adjudicators with particularly high and particularly low grant rates should confer with each other and try to ascertain the cause of this phenomenon.<sup>152</sup> If simple conversation does not reveal why such great disparities exist, the adjudicators might sit on several cases jointly, or in panels of three, which would require them to debate and discover the causes of their differences. If the differences are based on ideologies or preconceptions of the adjudicators, these should be discussed with the regional or national director (in the case of an asylum office) or chief immigration judge (in the case of immigration court). Merely discovering the origins of statistical disparities could help to remedy them.<sup>153</sup>

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<http://trac.syr.edu/tracatwork/detail/P104.pdf>. In April 2007, the outgoing director of the Executive Office for Immigration Review announced that “Board members now report instances where an immigration judge failed to display the appropriate level of professionalism so that the Office of the Chief Immigration Judge can take appropriate action.” Memorandum from Kevin D. Rooney, Dir., Executive Office for Immigration Review, to EOIR Employees, in 12 BENDER’S IMMIGR. BULL. 597, 601 (2007).

152. In January 2007, the Department of Justice advised the U.S. Commission on International Religious Freedom that it would explore mechanisms (for example, peer review) to reduce “the significant variations in approval and denial rates among immigration judges.” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 150, at 10. Three months later, the outgoing director of the Executive Office for Immigration Review announced that its objective had been to “[r]eview a study [apparently the TRAC report, cited *supra* note 56] which highlights disparities in asylum grant rates among immigration judges and make recommendations with respect to this issue” and that this objective had been “[i]mplemented.” Rooney, *supra* note 151, at 601. However, the director’s explanation of what he meant by his statement that the objective had been “implemented” suggests that little had yet been done. He reported that “the Office of the Chief Immigration Judge is improving training for judges, is developing a peer observation and mentoring program to encourage immigration judges to share best practices, and is closely supervising those immigration judges who have unusually high or low asylum grant rates.” *Id.* The Department of Justice did hold a national training conference for immigration judges in August 2006 and another in August 2007, but it has not committed itself to serious initial and regular training through conferences and other educational events.

153. Canada’s Immigration and Refugee Board (IRB) was concerned about substantial disparities in grant rates from one regional office to another and took steps to address the problem in the late 1990s. It set as a standard a thirty percentage point spread in the grant rates between two regions for awards of asylum to applicants from any particular country that produced a substantial number of cases. Note that this measure, a spread of thirty percentage points, rather than 30%, was in many cases considerably more tolerant of disparity than the 50% standard used in our study. When the standard was exceeded, the Board would focus its attention on reducing the disparity through such means as reviewing whether the country of origin information was current and promoting discussion among the

Our fourth recommendation is that Congress and the Department of Justice should provide immigration courts with the resources that are necessary to enable the judges to work at the standards expected of bodies that adjudicate important cases. At present, the immigration courts are severely understaffed. As Second Circuit Chief Judge John M. Walker told Congress in 2006:

The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien's testimony.<sup>154</sup>

An increase in the number of judges is only a start on improving resources. Few if any immigration judges have law clerks; in many courts, four or more judges share a single clerk. There are no court stenographers; judges record their hearings on tape recorders and are personally responsible for changing the cassettes whenever they run out. Court interpreters are of mixed ability. Every immigration judge should be assigned at least one law clerk, and the quality of recording and interpretation should be improved.<sup>155</sup>

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decision makers. Over time the number of countries with a significant variance in decision-making was reduced from over ten to only one or two. More recently, the Canadian headquarters office began to code cases by type of claim as well as by country (for example, claims by Iranian monarchists are classified separately from those by Iranian converts to Christianity). It began to focus on disparities within as well as among regional offices. In addition, the Board has at times designated decisions as jurisprudential guides or as persuasive authorities, with a view to promoting consistency in adjudication with respect to particular types of claims. Telephone Interview with Paul D. Aterman, Dir. Gen. of Operations, Immigration and Refugee Bd. of Canada (June 14, 2007); *see also* Immigration and Refugee Board of Canada, Legal and Policy References, [http://www.irb-cisr.gc.ca/en/references/policy/index\\_e.htm](http://www.irb-cisr.gc.ca/en/references/policy/index_e.htm). Of course, expressing a preferred position on legal issues or on the state of human rights protection in a country of origin cannot resolve differences among adjudicators in their judgments of the credibility of applicants.

154. *Immigration Litigation Reduction Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5-7 (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), available at <http://www.aila.org/content/default.aspx?docid=18996>.

155. The Attorney General has announced plans to upgrade the recording equipment in immigration courts, but how long this process will take remains to be seen. *See* U.S. DEP'T OF JUSTICE, *supra* note 151. Section 701(b)(3) of Senate Bill 1348 and section 701(b)(3) of House Bill 1645 would have created at least twenty new immigration judges and "not less than 80" new positions to support the immigration judges. S. 1348, 110th Cong. § 701(b)(3) (2007); H.R. 1645, 110th Cong. § 701(b)(3) (2007).

Fifth, we suggest that the government provide appointed counsel for any indigent asylum applicant who must defend himself in a removal proceeding in immigration court. People who are trying to prove that they are refugees within the meaning of federal law should not be required to compile supporting affidavits and make highly technical legal arguments without professional advocates, when the consequence of losing may be deportation to countries in which they face imprisonment, torture, and death. Some of the gap between the unrepresented affirmative asylum applicants in immigration court who win at a rate of 16% and the represented applicants who win at a rate of 46% may be explained by lawyers' refusals to accept cases that appear very weak, but we suspect that if the currently unrepresented applicants had counsel, the gap would close appreciably.<sup>156</sup> This suggestion is consistent with the more general movement toward a regime of "civil *Gideon*." The American Bar Association, for example, has urged that the government should provide counsel for indigents in proceedings in which "basic human needs are at stake, such as those involving shelter, sustenance, *safety*, health, or child custody." The ABA specifically supports the provision of counsel at government expense to all those in removal proceedings.<sup>157</sup> Of course providing counsel to indigent asylum applicants has fiscal implications, but to some extent, the cost of providing counsel will be offset by saving the time of the judges and other court personnel. Lawyers make proceedings more efficient by screening out irrelevant testimony and focusing the issues for the judge.

We also have suggestions to improve the Board of Immigration Appeals. To begin with, the Board should catch up to the Asylum Office and the immigration courts by keeping and publishing statistics on the decisions of individual members, at least in asylum cases. If one member is granting asylum or remanding asylum cases at ten times the rate of another member, the Board itself, and the public, should at least be aware of this fact.

Second, the Department of Justice should amend the BIA's operating regulations to prohibit the Board from assigning asylum cases to a single member for decision. Given the apparently huge differences of opinion among adjudicators about who deserves asylum, more than one member should review each case, and the reviewers should discuss the reasons for any differences of opinion. Also, Board decisions in asylum cases that are briefed by the appellant should no longer be decided by summary affirmances or even by two or three sentence conclusory opinions. At least in asylum cases, every Board affirmance should respond in writing to the contentions of the appellant or his representative, just as federal district court opinions systematically address the

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156. For a well-reasoned argument describing several affordable options for publicly-funded legal support for indigent respondents in immigration court, see Kerwin, *supra* note 73.

157. ABA House of Delegates, Resolution 112A (2006), <http://www.abanet.org/media/docs/112Arevised.pdf> (emphasis added); ABA House of Delegates, Resolution 107A (2006), [http://www.abanet.org/publicserv/immigration/107a\\_right\\_to\\_counsel.pdf](http://www.abanet.org/publicserv/immigration/107a_right_to_counsel.pdf).

contentions of the losing party.<sup>158</sup> This process is an essential element if losing parties, and their counsel, are to believe that they were at least heard and understood.<sup>159</sup> If the Board addressed the contentions of counsel, the rate of appeals to federal court might come down, and even if it did not, the Courts of Appeals would have a clear and complete statement of views from the Board, which would place them in a better position to decide whether to affirm or remand the Board's decision. These two suggestions—requiring multi-member decisions in asylum cases, and addressing the contentions of counsel—would require an increase in resources for the Board, but in our view, such an increase is well-justified by the important role that the Board could once again play as a reviewing body in life-or-death cases.<sup>160</sup>

In 2006, the Attorney General seemed to agree that the streamlining “reforms” of 2002 went too far in the direction of allowing single members to make so many decisions, although the Department of Justice concluded that “it is neither necessary nor feasible to return to three-member review of all cases.” The Attorney General determined that “[s]ome adjustments to streamlining, however, are appropriate” and stated that new rules will “allow the limited use of three-member written opinions—as opposed to one-member written opinions—to provide greater legal analysis in a small class of particularly complex cases.”<sup>161</sup> This vague and apparently very limited reform does not go nearly far enough, unless the Department of Justice ultimately adopts our view that all asylum cases in which an appealing respondent contends that an

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158. In January 2007, EOIR advised a federal commission that it was drafting a new rule to allow the Board to “increase” the number of written decisions and to refer more cases to three judge panels, but the commission noted “that this does not respond directly to the [commission’s previous] recommendation that all asylum appeals receive written decisions.” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 152, at 11.

159. Social psychology studies have found that the perception that the decision maker has given “due consideration” to the “respondent’s views and arguments” is crucial to individuals’ acceptance of both the decision and the authority of the institution that imposes the decision. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 80-81, 104-06 (1988).

160. We would not necessarily require the restoration of three-member panels in every asylum case. It might be sufficient to assign two members to review each case and to discuss their views on it. If, after discussion, the two members continued to disagree, they could either remand the case to the immigration judge (thereby giving the benefit of the doubt—but not granting asylum—to the alien) or request the assignment of a third member to break the tie. This system would presumably be more expensive than one-member decision-making but less expensive than assigning three members to each appeal.

161. U.S. DEP’T OF JUSTICE, *supra* note 151, at 4. Apparently the key word in this pronouncement is “allow,” as opposed to “require.” The Executive Office for Immigration Review has stated that it will issue a rule that “will provide a Board member with the ability to refer a case to a three-member panel if the case presents complex or unusual issues of law or fact.” Rooney, *supra* note 151, at 603. If this is how the final rule reads, the individual member will have discretion to decide a complex or novel case individually rather than referring the case for a more extensive opinion by a panel.

immigration judge has erred are, in view of the many factual and legal issues present in each such proceeding, “particularly complex.”

The structure of the immigration courts and the Board should be improved along with their decisional processes.<sup>162</sup> Congress should establish the Board as a statutory Article I court and should remove it from the Department of Justice, where it has become overly politicized by the Attorney General through his authority to hire and fire its members at will and to erode its review procedures and powers.<sup>163</sup> The Board should become an independent federal agency (not part of any federal department), and its members should be appointed by the President and confirmed by the Senate for terms of ten to fifteen years. No political official should have the power to fire members of the Board who disagree with a current administration on policy issues. Instead, changes in policy should occur incrementally through Board adjudication and through notice and comment rulemaking, rather than through purges of judges. This structural change would imbue the Board with a culture of professionalism and with the independence necessary to perform its duties impartially. It would also enable the Board to play a more effective appellate role in restoring consistency in the decisions of the immigration courts.

A combination of events in 2002 and 2006 reveals just how much a presidential administration is willing and able to manipulate Board membership to serve partisan political ends and to control the Board’s decision making. As noted above,<sup>164</sup> in 2002, Attorney General John Ashcroft decided that a Board of only eleven members was appropriate, “based on judgments made about the historic capacity of appellate courts and administrative appellate bodies to adjudicate the law in a cohesive manner, the ability of individuals to reach consensus on legal issues, and the requirements of the existing and projected caseload.”<sup>165</sup> To achieve the desired efficiency, he removed five members appointed by the previous Democratic Administration. Fewer than five years later, however, when the Board had only nine members (as a result of the downsizing and two retirements), the Bush Administration decided that the correct size of the Board was fifteen rather than eleven.<sup>166</sup> The Administration did not suggest that the members who had been appointed under a Democratic Administration and removed to other jobs in the Department of Justice would

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162. For a thoughtful exploration of the question of decisional independence in the immigration courts and the BIA, see Steven H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

163. In response to concerns about politicization of the asylum process, there have been “repeated calls for the transfer of decision-making to an independent agency immune from political pressure” in the United Kingdom. Robert Thomas, *Risk Legitimacy and Asylum Adjudication*, 58 N. IR. LEGAL Q. 49, 72 (2007).

164. See *supra* note 105.

165. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002).

166. Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006).

be restored to the Board. The net effect of the downsizing and upsizing actions, therefore, was to provide the Bush Administration with the opportunity to replace five Democratic appointees with five Republican appointees.

The immigration courts should also be made more professional and should be insulated from politics by giving them statutory independence from the Department of Justice.<sup>167</sup> The press has called attention to the Department's use of partisan considerations to select immigration judges, which may or may not have been legal.<sup>168</sup> But the Department's apparent ability to remove immigration judges for no reason, invoking the same lack of statutory structure that it relied on when a Republican Administration removed five Board members appointed under a Democratic Administration, is even more troubling, because the lack of any tenure in office could cause some immigration judges to decide cases based on their desire to please an administration rather than on the law. Immigration judges are at present components of the same Executive Office for Immigration Review as the Board, and they should become part of the same new independent agency as the Board. New judges should be hired as appointees of a Senate-confirmed executive director of the new independent agency. We believe that the important issues of asylum and immigration deserve such a professionalization of the review function.

Our suggestion to remove the immigration court and the Board of Immigration Appeals from the Department of Justice and to place these bodies in an independent agency is neither new nor radical. The United States Commission on Immigration Reform recommended in 1997 that "administrative review of all immigration-related decisions" should be vested in a "newly-created independent agency . . . within the Executive Branch."<sup>169</sup> The Commission added presciently that EOIR's location within the Department of Justice "injects into a quasi-judicial appellate process the possibility of intervention by the highest ranking law enforcement official in the land, and, generally, can undermine the BIA's autonomy and stature."<sup>170</sup>

Finally, the U.S. Courts of Appeals should set an example for the lower bodies in the asylum adjudication process by reducing the disparities in their own remand rates. We do not know why the Seventh Circuit consistently remands cases at rate 700% or 800% higher than any of the three southern circuits, but if the answer is simply that the South is more conservative than the Upper Midwest, that is cold comfort to asylum seekers who arrive in the United

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167. Scholars and immigration judges themselves have previously proposed an independent immigration court. See Legomsky, *supra* note 162, at 373, 404-05.

168. *E.g.*, Schwartz & McLure, *supra* note 146.

169. U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 174 (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>. In the interests of full disclosure, Andrew Schoenholtz was the Deputy Director of this Commission.

170. *Id.* at 178.

States unaware that regional cultural differences in our country may determine the course of their lives if they need to appeal orders of removal. We suggest that the Federal Judicial Center convene a national conference of appellate judges to discuss immigration in general and asylum in particular. The conference agenda should include panels of experts on the work of the immigration courts and the BIA, and on persecution around the world. More importantly, the conference should offer ample opportunity for informal discussion among judges from different circuits. The conference format should include small group discussions among judges who rarely vote to remand and those who often vote to remand, in an effort to reach a better national consensus on the standard for review of the Board's decisions and on the application of that standard. These recommendations are far more modest than the proposal, made by former Senate Majority Leader Bill Frist, to confine all judicial review of the Board of Immigration Appeals to the Court of Appeals for the Federal Circuit.<sup>171</sup> That consolidation proposal would, by definition, have ended geographical disparities in the adjudication of asylum cases at the Court of Appeals level. But it had many drawbacks, including creating incentives for Presidents to appoint judges based on their expected votes in immigration cases; depriving the judges in question of the perspective of generalists who decide many different kinds of cases; risking "capture" of the court by the Department of Justice, which would appear before it in virtually every case; and overwhelming a court that now decides intellectual property and a few other types of cases.<sup>172</sup> The courts, too, should refrain from affirming removal orders without any opinion when an asylum applicant has made substantial contentions challenging a decision of the Board. Applicants for asylum are neither citizens nor permanent residents of the United States. Nevertheless, their claims are extremely serious, as errors of adjudication can deliver them into the hands of their persecutors. Rejections of their claims on appeal therefore warrant explanations from the court as well as from the Board.

In view of the results of this study, Congress should also amend the judicial review provision of the Immigration and Nationality Act to restore a more normal role for the federal courts in their review of asylum decisions. Currently, the federal courts defer excessively, especially in the Southern circuits, to decisions of immigration courts and the Board of Immigration Appeals, even though those decisions appear to depend to a large extent on the identity, personal characteristics, and prior work experience of the adjudicator, as well as on whether or not the asylum applicant had representation or dependents in the United States. As amended in 1996, the law directs that on review, "the administrative findings of fact [of the BIA or of an immigration judge whose findings are not rejected by the BIA] are conclusive unless any

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171. S. 2454, 109th Cong. § 501 (2006).

172. We are grateful to Jonathan Le, a student at Georgetown University Law Center, for sharing with us his unpublished paper that identifies these defects with the Frist proposal.

reasonable adjudicator would be compelled to conclude to the contrary.”<sup>173</sup> This extreme standard should be replaced with the more usual rule requiring deference to findings that are supported by substantial evidence. Meanwhile, the courts should interpret the review statute narrowly, deferring strongly only to formal findings of fact, and not to applications of law to fact (such as whether a certain number of beatings constitute “persecution,” or whether an asylum applicant’s reason to fear persecution was so great as to be “well-founded”). Perhaps some courts are already following this guidance; differences in the circuits’ willingness to defer to these applications of law to fact may account for the immense differences in their remand rates that we discovered in this study.

Accuracy, consistency, and public acceptance are among the most important goals of any adjudicative system.<sup>174</sup> This study shows that disparities are deeply ingrained in the U.S. asylum system, and that the government must now take significant steps to achieve greater consistency in decision making. We believe that the recommendations discussed above are crucial to the government’s efforts to achieve such a result.

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173. 8 U.S.C. § 1252(b)(4)(B) (2000).

174. See Legomsky, *supra* note 18, at 622.



## METHODOLOGICAL APPENDIX

*I. Benchmarks for Counting and Comparing the Number of Outlying Adjudicators*

In order to evaluate consistency within an adjudication body, we needed to select a benchmark for counting the number of adjudicators (asylum officers, immigration judges, or appellate judges) who deviated significantly from the mean. To begin, we had to decide whether to measure deviation in terms of the difference from the national mean or the mean for the office in which the adjudicator worked. We decided on the latter standard; therefore, unless otherwise indicated, we measured deviation from a mean for asylum officers only in terms of the mean of the regional office in which the asylum officer works, and deviation from a mean by immigration judges only by measuring their grant rates against the mean grant rate for the judges in the city in which they sit. (In a small number of instances, we compared regions or cities, but these are clearly indicated in the text.) We believe that making local comparisons is appropriate because the national origin of the population of asylum seekers varies considerably from region to region. For example, Haitians and Colombians apply for asylum in much larger proportions in Miami than in other cities. Even when we considered only asylum-seekers from one country, those who migrate to one U.S. city may be significantly different from those who migrate to another city (for example, asylum seekers from one province may tend to flee to the East Coast of the United States while those from another province may flee via a different route and end up on the West Coast.)

To compute mean regional or city grant rates, we included all cases from the time period of the study. For regional asylum office grant rates, we multiplied each adjudicator's grant rate by the number of cases decided by that adjudicator; the product represented the total of that adjudicator's grants. For immigration court grant rates by city, the data provided by the government included numbers of cases granted. In both cases, we added total adjudicator grants, and then divided that sum by the total number of cases decided on their merits by all adjudicators in the region or city. We reported and evaluated the grant rates of only those adjudicators who decided at least the threshold number of cases reported in the text (one hundred cases in most instances, fifty in others, and twenty-five in two instances: studies of decisions of asylum officers deciding cases from China and remands by federal courts of appeals). We were concerned that grant rates of adjudicators who decided fewer than twenty-five cases might not accurately represent the grant rates of those adjudicators if they

had decided more cases.<sup>175</sup> That is, an adjudicator who decided only five cases might have been assigned five weak or five strong cases by chance.

We also had to decide how to count the number of adjudicators who are “outliers” in a particular region or court. Any benchmark is necessarily arbitrary, but we selected one that we thought was relatively conservative and that many people would agree represented a measure of significant deviation from the norm. By our measure, an adjudicator is an outlier if that adjudicator’s grant rate was more than 50% higher or lower than the regional or city mean. Thus for a region or city with a 30% mean grant rate for the type of case under consideration, an adjudicator is not an outlier for our purposes unless his or her grant rate is lower than 15% or higher than 45%. Many people might think that a deviation of 50% above and below the mean is too large a range and that our study therefore understates the degree of disparity in asylum grant rates. Others might think that we were too intolerant of differences in perspective among adjudicators. Since we are publishing our raw data on a website<sup>176</sup> in Microsoft Access and Excel formats, others may easily count the number of outliers using benchmarks of their own choosing, such as deviations of 30% or 70% rather than 50%.

In most of the studies reported in this Article, the mean grant rate falls in a relatively narrow range, between 25% and 50%. However, there are a few studies (relating to particular asylum applicant populations) in which the mean grant rate is particularly low (e.g., 15%) or high (e.g., 73%). When the mean grant rate falls significantly, the range of percentages in which an adjudicator is not deviant becomes smaller. For example, when the mean is only 15%, the non-deviant range runs from 7.5% to 22.5%, a difference of only fifteen percentage points rather than forty percentage points, and when the mean is 70%, the non-deviant range is 35% to 100%, a range of sixty-five percentage points.

For this reason, we also considered defining outliers as those who deviated from the local mean by more than a fixed number of percentage points. We seriously considered an alternative definition of outliers as those adjudicators whose grant rates were more than fifteen percentage points higher or lower than the regional mean. However, this computation also had its problems. For a study in which the regional grant rate was 15% or less, by definition there could be no outliers on the low side. In our view, the fact that a region’s mean grant rate is as low as 15% does not exclude the possibility of outlying adjudicators; for example, an adjudicator with a 3% grant rate in such a region seems out of step with the norm. Therefore, we believed that our chosen method is a more accurate representation of deviance. By contrast, a fixed-

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175. In one instance (our study of the votes of judges in the Sixth Circuit during 2004 and 2005), we dropped the threshold to twenty-three, which added two more judges to the sample.

176. See <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

percentage-point method tends to understate low-side deviations and overstate high-side deviations in a study with low regional means, and it tends to understate high-side deviations and overstate low-side deviations in studies with high regional means. Of course any reader who wants to examine the adjudicators' deviations by using a measure based on a fixed percentage point spread rather than by measuring the percentage of deviation from the mean may do so by working with the raw data on the website.

## II. *The Asylum Office*

The Asylum Office of the U.S. Department of Homeland Security provided us with data on all asylum applications decided by its asylum officers from FY 1999 through FY 2005. For each of the 928 officers who served during this period, the Office provided us with the number of cases decided by that officer, the officer's approximate grant rate, and the region in which the officer worked. In addition, for the 884 officers who decided cases from the fifteen APCs, the Asylum Office provided us with the number of cases the officer decided from each country, the identity of the country in question, the officer's approximate grant rate for nationals from that country, the region in which the officer worked, and the officer's gender.<sup>177</sup> Our analysis of adjudications by asylum officers included only asylum applications because those officers do not have authority to grant withholding of removal,<sup>178</sup> and Convention Against Torture cases are rare.

All the data exclude Mexican asylum applicants. According to the Asylum Office, Mexican nationals voluntarily entered the affirmative asylum system in large numbers during this period principally in order to be placed into immigration court proceedings where they could seek relief other than asylum. Since they were generally not seeking asylum, they are not included in the analysis articulated in this Article.<sup>179</sup>

For privacy and security reasons, the Asylum Office data did not reveal the identity of either the individual officer or the regional office. Numbers were assigned randomly to each of the asylum officers on a nationwide basis. Letters A through H were assigned randomly to each of the eight Asylum Offices.

The grant rates for each officer were provided to us in ranges of 5%: that is, 1-5%, 6-10%, 11-15%, etc. We took the middle of the range in computing and graphing our analysis. For example, an 11-15% range is calculated as 13%. We assume that because our APC data cover more than 875 officers and more

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177. See Letter from Andrew Schoenholtz to Joseph Langlois (Jan. 5, 2006) (on file with authors). For further explanation of the term Asylee Producing Country, see *supra* text accompanying note 37.

178. 8 C.F.R. § 208.16(a) (2007).

179. For a full explanation, see Schoenholtz, *supra* note 33, at 338 n.62.

than 133,000 cases, this rounding off of some rates higher than the midpoint and some rates lower than the midpoint averages out in the analysis.

This study focuses on merits decisions only. Grants and denials are clearly merits decisions, as are referrals to immigration courts based on interviews where the asylum officers did not regard the merits as strong enough for grants. We also treat rejections based on failure to meet the one-year filing deadline or an exception to it as merits decisions, as filing on time is a criterion for eligibility.<sup>180</sup>

Accordingly, our grant rate calculation divides the number of grants by the number of cases decided on the merits. Cases decided on the merits include grants; denials of applications filed by aliens in valid immigration statuses; referrals of out-of-status aliens to immigration court because the applicants failed, after interviews, to prove eligibility for asylum; and referrals of out-of-status aliens to immigration court because the applicants did not prove either that they had met the one-year application deadline or had a suitable explanation for late filing.

To compare each office to office, and officer to officer, and account for nationality differences in caseloads, we based comparisons on grant rates regarding nationals from countries that, as noted above, we call Asylee Producing Countries (APCs). To make this list, a country had to have had at least 500 cases before the Asylum Office or immigration court in FY 2004, and a national grant rate of at least 30% either before the Asylum Office or immigration courts. These criteria ensure, first, that the database includes a statistically significant number of applicants and grantees. Second, the minimal grant rate requirement provides for a set of decisions where asylum officers or immigration judges as a group have reached a reasonable degree of consensus in concluding that many applicants from these countries are bona fide. Fifteen countries met these criteria: Albania, Armenia, Cameroon, China, Colombia, Ethiopia, Guinea, Haiti, India, Liberia, Mauritania, Pakistan, Russia, Togo, and Venezuela. Countries that generated low grant rates, such as El Salvador and Guatemala, are not on this list.

With regard to the Asylum Office data, we refined the set of APC countries to ensure that there were enough data on individual asylum officers at enough offices to compare certain nationalities fairly. For four nationalities, that was not the case. From the list of fifteen APC countries used for the national and regional data analysis, we could not use data concerning Guinea, Mauritania, Togo, and Venezuela. For example, only one office decided the vast majority of Venezuelan cases. So the analysis of individual decision making at the Asylum Office consists of decisions regarding asylum seekers from the eleven remaining APC countries. In our APC analyses, we included all officers who had adjudicated at least fifty cases.

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180. For more information about the one-year filing deadline, see *supra* notes 23-24 and accompanying text.

In a second approach, we looked for a way to correct for differences in the particular mix of APC countries in a region's pool of cases adjudicated in a particular region which might affect that region's grant rate and explain at least some of the APC grant rate disparity between offices. To accomplish this, we looked at whether regional office grant rates continued to vary when we narrowed our focus to applicants from a single country. To obtain enough data on cases from particular countries that were adjudicated by an individual officer, however, we had to reduce to twenty-five the minimum number of cases decided by an asylum officer.

We computed mean grant rates for the group of applicants in question by including all decisions for each office by all asylum officers in that office during the period of analysis, even though we report the grant and deviation rates only for officers who decided at least a certain threshold number of cases.

### III. *The Immigration Courts*

The immigration court data were analyzed in two separate ways. First, we examined grant rate data on their own. Second, we conducted a cross-tabulation analysis of grant rate data in conjunction with biographical data and certain data about the cases. Each section of analysis merits its own Subpart in this methodology, as different methods were used for each.

#### A. *Grant Rate Data Analysis*

There are ample data on the asylum grant rates of particular immigration courts and immigration judges; for this we are indebted to [asylumlaw.org](http://asylumlaw.org),<sup>181</sup> which filed a Freedom of Information Act request with the Executive Office of Immigration Review to obtain this information.<sup>182</sup> This Article focuses on asylum cases decided in immigration court between January 1, 2000, and August 31, 2004, the period covered by that request.<sup>183</sup>

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181. These data can be found on the [asylumlaw.org](http://asylumlaw.org) website. US Immigration Judge Decisions in Asylum Cases, Jan. 2000 to Aug. 2004, [http://www.asylumlaw.org/legal\\_tools/index.cfm?fuseaction=showJudges2004](http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=showJudges2004).

182. The FOIA request sought the following information on decisions by immigration judges on requests for asylum, withholding of removal, and claims for relief under the Convention Against Torture: "the country of origin or asserted citizenship of each applicant; the number of subsidiary applicants, if any; the immigration judge's name; the location (city) in which the immigration court is located; the date of the hearing; the date of the decision; and the decision, with respect to each form of relief requested." It also sought information on whether the asylum seeker was represented, and whether her case was referred from the Asylum Office. Letter from David Berten, President, [asylumlaw.org](http://asylumlaw.org), to Charles Adkins-Blanch, Gen. Counsel, Executive Office for Immigration Review, U.S. Dep't of Justice (Aug. 3, 2004) (on file with authors).

183. This database includes only asylum decisions, and does not include decisions on claims of withholding of removal or protection under the Convention Against Torture. Telephone Conversation with David Berten, [asylumlaw.org](http://asylumlaw.org), (Nov. 16, 2007). Denials

The available data are vast, including 140,428 decisions on the merits. We focused on significant comparisons between immigration courts and between immigration judges on the same court. First, we looked only at immigration courts that decided at least 1500 asylum cases during the relevant time frame. We use the term “high-volume immigration courts,” or “HVCs,” to refer to these seventeen courts. The seventeen high-volume courts are located in Arlington, Atlanta, Baltimore, Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Memphis, Miami, Newark, New York City, Orlando, Philadelphia, San Diego, and San Francisco. Then, to keep the countries of origin constant, we limited our analysis to applications for asylum by nationals of the fifteen APCs.<sup>184</sup> The term “national averages” includes only the cases from APC countries decided by high volume courts.

We excluded detained cases from the data as best we could. This allowed us to better compare decision making regarding the affirmative asylum cases at the Asylum Offices with decision making at immigration courts. The Elizabeth Immigration Court would have been among the top eighteen courts by volume of cases (having heard over 1500 cases during this time period), but we excluded Elizabeth from the study because this court hears almost exclusively the cases of detained asylum seekers. We also excluded the cases heard by the judges assigned to Miami’s Krome Detention Center and those heard by the judges assigned to New York’s Varick Street Detention Center; again, the judges in question were not assigned cases randomly. They were, instead, assigned almost exclusively the cases of detained respondents. Such respondents request asylum as a defense to removal and face much greater obstacles to obtaining representation and corroborating evidence; both of these factors could contribute to significantly lower grant rates. The cases of some detained asylum seekers who are seeking asylum defensively remain in the data, but we have removed from the study the judges who hear claims from detained persons almost exclusively.<sup>185</sup>

We also applied minimum case decision requirements in the following ways. When analyzing grant rates in individual courts on asylum claims from individual APCs, we examined only HVCs that had decided at least one hundred applications by nationals of that country during the period in question. Similarly, in comparing decisions by immigration judges in the same court on asylum claims from all APCs, we looked only at judges who had decided at least one hundred asylum claims from APCs. In comparing decisions by immigration judges in the same court on asylum claims from a particular APC, we looked only at judges who had decided at least fifty cases involving the

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resulting from legal bars—such as for missing the one-year filing deadline—are included in these statistics as denials.

184. See *supra* Methodological Appendix Part I (listing the criteria by which we selected these fifteen countries).

185. Due to resource constraints, we were not able to use the more reliable method of removing defensive cases from the data, which would eliminate 95% of the detained cases.

country in question and excluded decisions by immigration judges detailed to the court in question.<sup>186</sup> For judges who switched courts during the time frame studied, we placed them on the court in which the judge practiced the longest; if there was a tie, we placed the judge on the court in which she sat between 2000 and 2002.

### B. Cross-Tabulation Analysis

In addition to the simple grant rate analysis, we conducted a cross-tabulation analysis to describe the effects of independent variables drawn from biographical data and other asylum seeker data on asylum grant rates. While we used the same grant rate data on which we relied on for the simple grant rate analysis, we approached the data differently, thus requiring a separate methodology Subpart for the cross-tabulation analysis.

We used immigration judges' biographical data, provided by the Executive Office of Immigration Review, in conjunction with the grant rate data described above to run this cross-tabulation analysis, as well as the regression analyses to confirm the initial results. Again, we worked only with asylum cases, and did not examine withholding of removal and Convention Against Torture claims. The database includes 269,756 decisions. For the cross-tabulation and regression analysis, we examined only grants and denials, and eliminated cases that were abandoned, withdrawn, or disposed of in some other way.<sup>187</sup> This step excluded 129,328 cases, leaving 140,428 cases in the database.

We also looked only at primary cases, excluding the cases of dependents. Primary cases were identified in the following way: where the database contained identical entries for more than one decision in all of the column variables (date, court, nationality, decision, representation, type of claim), we determined that these decisions came from the same "family." This method may be overinclusive in some instances but is the most effective method available using the data provided to us.<sup>188</sup> From this "family," we selected a

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186. In order to address caseload imbalances, EOIR solicits volunteers from among the immigration judges to work on a different immigration court for a short period of time. This process is known as "detailing." For further explanation of the process of and reasons for detailing immigration judges to different courts, see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 52, at 18.

187. Grants included conditional grants of asylum, which were awarded to individuals granted asylum statutorily under the coercive population control provision of the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(42)(B) (2000). This provision awards asylum to individuals persecuted through or on account of coercive population control measures, but because there was a cap of 1000 grants of asylum each year under this measure during the timeframe of the study, asylum was granted conditionally until a final approval could be awarded. See Executive Office for Immigration Review, U.S. Dep't of Justice, Fact Sheet: Conditional Grants of Asylum Based on Coercive Population Control Policies (Dec. 16, 2004), available at <http://www.usdoj.gov/eoir/press/04/CPCAsylumFactSheetDec04.htm>.

188. For example, we identified one such "family" with twenty-five members, which

“primary case” and eliminated all the others as “dependent cases.” This step excluded 26,572 cases, leaving 113,856 cases in the database.

Additionally, we removed defensive cases from the data. We did this because defensive cases are a good proxy for detained cases; we know that 94.5% of detained cases in the full database (excluding Mexican cases) were defensive.<sup>189</sup> The defensive or affirmative nature of the case was determined by the “C\_ASY\_TYPE” column in the data; an entry of “E” represented a defensive case and an entry of “I” represented an affirmative case.<sup>190</sup> This method excluded 46,042 cases (including 191 missing observations), leaving 67,814 cases in the database.

Finally, we removed Mexican cases from the data, for reasons explained at Part II of the Methodological Appendix. This was easily accomplished as the database included the country of origin for each asylum seeker. This step excluded 1371 cases (including fourteen missing observations), leaving 66,443 cases in the database.<sup>191</sup>

We used cross-tabulations to examine the impact of nine independent variables on the dependent variable, grant rate. These variables, further explained below, include how many dependents the asylum seeker had in the United States; whether the asylum seeker was represented by an attorney or other accredited representative; gender of the judge; and previous work experience: for the Immigration and Naturalization Service or Department of Homeland Security, for the government, in the military, in a non-governmental organization, in private practice, or in academia.

We determined the independent variables concerning asylum seekers from the data provided in response to asylumlaw.org’s FOIA request. Specifically, dependents could be discerned through the method described above.<sup>192</sup> Representation was determined by EOIR’s “ALIEN\_ATTYY\_CODE” column; cells in this column including a code were interpreted to mean that the asylum seeker was represented and blank cells to mean that the asylum seeker was unrepresented.

We determined the independent variables concerning immigration judges largely through biographical data from the Executive Office of Immigration Review. Some biographies were available on the EOIR website, and others could be found at the very helpful Transactional Records Access Center

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may imply that at least this categorization was overbroad. However, such large “families” were not common in the database.

189. See E-mail from Executive Office of Immigration Review to Jaya Ramji-Nogales (Jan. 25, 2007) (on file with authors).

190. E-mail from Executive Office of Immigration Review to Jaya Ramji-Nogales (Jan. 22, 2007) (on file with authors).

191. For some independent variables, there were additional missing observations that decreased the number of cases included in the analysis.

192. See *supra* note 188 and accompanying text.



(TRAC) website.<sup>193</sup> For four judges, we obtained biographical information from news articles. Of 249 immigration judges whose decisions were analyzed, we were unable to obtain biographical data for two: Richard Knuck and Terry Christian. Moreover, there were some time gaps as to employment before appointment in some of the biographical information provided by EOIR. The gaps are as follows: twenty-three biographies with imprecise employment information; ten biographies with one to two years of employment information missing; twenty-two biographies with three to five years of employment information missing; ten biographies with six to nine years of employment information missing; and fifteen biographies with ten or more years of employment information missing. We requested assistance in filling in these holes from the Office of the Chief Immigration Judge, who sought but was unable to provide us with further information. We mailed individual questionnaires to each of the eighty immigration judges whose biographies were missing information; we received responses from eight of these judges. We made educated guesses concerning the bios with imprecise information, but could not do so for the other holes in the biographies.

We pulled seven variables from the immigration judges' biographies. The simplest to determine was gender. The most complicated biographical information concerned employment history. We analyzed only post-law school experience prior to appointment as an immigration judge. We broke this out into six categories: government, INS or DHS, military, non-governmental organization, private practice, and academia. Government included all non-military employment in federal, state, or local government, but excluded prior INS or DHS experience. INS or DHS comprised all employment in a role adversarial to immigrants (including trial attorney, Office of Immigration Litigation, special Assistant United States Attorney, border patrol, etc.). Military experience included all post-law-school service; work in the reserves did not count but work as a military judge did count. We categorized as non-governmental organization experience all work for non-profit organizations that involved the provision of legal assistance to indigent or marginalized populations, including legal services and public defender organizations. Private practice included all for-profit legal or non-legal work, including the World Bank, Wells Fargo, and independent contract work for different law firms. Finally, we included in the academia category only full-time law school teaching jobs, whether they were clinical or classroom positions. Adjunct positions were not counted. For periods in which the judge had two jobs, we looked only at the judge's primary job—for example, we excluded time spent in the Reserves, in the National Guard, or as an adjunct professor.

We ran a simple cross-tabulation analysis of grant rates by each of the nine variables. We checked the statistical significance of these results using chi-

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193. TRAC, IMMIGRATION JUDGE REPORTS—ASYLUM, <http://trac.syr.edu/immigration/reports/judgereports>.

square tests and found that all variables were statistically significant.<sup>194</sup> This analysis produced the results that are discussed in Part III of this Article.<sup>195</sup> The theories underlying the inclusion of each variable follow.

*Number of dependents.* We were interested in examining the number of dependents that each asylum seeker had with them in the United States to determine the impact that the welfare of additional family members might have on the immigration judge's decision. The Immigration and Nationality Act limits the definition of dependents to the asylum seeker's spouse and unmarried children under the age of twenty-one. Our hypothesis was that an asylum seeker who brings his family with him to the United States might be more credible than either a single asylum seeker or one who leaves his family behind in his home country.

*Representation.* We were interested in knowing whether asylum seekers were represented in immigration court by an attorney or other accredited representative. As discussed above, several studies have found that representation is a very important factor in winning asylum.<sup>196</sup>

*Gender of the judge.* We had no reason to think that male and female judges might grant asylum at different rates. We included this variable in our analysis, however, because we were able to determine the gender of the judge easily from the pronouns used in the biographical data. When the cross-tabulation revealed significant differences, we retained the variable in our study.

*Government experience.* We wondered whether judges who had previously worked for the government would be more or less supportive of the government trial attorney's position in asylum cases.

*INS/DHS experience.* We wanted to know whether the data supported our hypothesis that many years of work enforcing immigration laws against non-citizens influenced the judge's approach to asylum cases.

*Military experience.* We wanted to know what kind of impact military experience had on grant rates. On the one hand, patriotism and affinity with the government might make these judges less likely to grant asylum claims. On the other hand, the military justice system includes thorough training for its judges and attorneys, and those judges who worked in the military after law school may have had experience in this system and thus be more likely to decide cases based on the merits rather than based on pre-existing biases.

*NGO experience.* We suspected that judges who had worked for non-governmental organizations or in a defense capacity would both be more

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194. The chi-square test examines the relationship between two variables, assessing the difference between a situation in which no relationship exists between two variables and the actual relationship between the variables being analyzed. Where the chi-square outcome is statistically significant, a causal relationship between the variables may exist.

195. The full cross-tabulation results are reported at <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

196. See *supra* note 73.

sympathetic to asylum seekers and have a greater understanding of how difficult it is to present a successful asylum claims. As a result, we thought these judges would be more likely to grant asylum claims.

*Private practice experience.* We were interested to learn whether employment in the private sector had any impact on judges' decision making process. Judges who represented immigrants in their private practice might be more inclined to grant asylum claims. Judges who represented plaintiffs in private practice would understand the difficulties posed in presenting any type of case and might be more sympathetic to asylum seekers.

*Academic experience.* We wondered whether immigration judges who had taught full time would be more open to seeing all sides of every issue and therefore less likely to dismiss novel claims or those that alleged types of persecution as to which State Department human rights reports were silent.

We ran three regression analyses to test for the general robustness of the bivariate findings. These analyses select one variable at a time and equalize all of the other variables in the database. They report the likelihood of a grant of asylum if the selected variable is altered. We added seven variables to the regression analyses to increase accuracy of our models: age of the judge, President whose Attorney General appointed the judge, caseload of the judge, caseload of the judge's court, national freedom ranking for the asylum seeker's country of origin, weekly earnings in the state in which the judge's court sits, and years on the bench.

To determine age, we used the year of graduation from college and assumed each judge was age twenty-two when she graduated from college. For judges who obtained their first law degree in a foreign country and did not have a college graduation date, we used the date of the first law degree and added twenty-two because in many countries, a law degree is a college degree. Age was calculated to the date of each case. The country of origin of the asylum seeker was determined by the "NAT\_NAME" column in the data. We used national freedom rankings from Freedom House to categorize these countries as free, partially free, or not free.<sup>197</sup> We determined weekly earnings in the state in which the judge's court was located by tabulating Current Population Survey microdata.<sup>198</sup> We used the date of the first appointment to determine the political party of the appointing President. Cases decided by each immigration judge and by each court on which those judges sat were determined using the data provided in response to asylumlaw.org's FOIA request. Finally, we calculated years on the bench by looking at date of initial appointment, and,

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197. The freedom rating scores created by Freedom House and Freedom House's description of its methodology are available through Freedom House, Freedom in the World, <http://www.freedomhouse.org/template.cfm?page=15>.

198. See U.S. Census Bureau, Current Population Survey (CPS), <http://www.census.gov/cps>.

where relevant, dates of termination of employment and reappointment. The theories underlying the inclusion of these variables follow.

*Age of the judge.* We were interested in learning whether a judge's age impacted grant rate. There could be many reasons for this: older judges might be more jaded and cynical about asylum cases, having presumably seen more fraudulent cases than the younger judges. Older judges might see only certain kinds of claims (e.g., political cases) from certain regions (e.g., Communist countries) as worthy of asylum, and may not have adapted to changes in asylum law. On the other hand, as grandparents and parents, older judges might be more sympathetic and protective towards asylum seekers.

*Appointing President.* We wondered whether the political leanings of the President in office when the Attorney General appointed the judge would impact the judge's rulings in asylum cases. This question goes back to the Edwards-Revesz debate described in the Introduction to this Article—do judges vote their political convictions or do they decide cases based on the law? We were interested in the answer to this question.

*Caseload and cases per court.* These two variables, the first being the number of cases that the judge in question decided during the period studied and the second being the number of cases that the immigration court in which the judge in question sat during the period studied, could impact decision making in several ways. A judge who hears many cases might be likely to hear and decide cases quickly, which might lead to a lower grant rate. Particularly if the immigration court on which she sits hears a high volume of cases, the judges might be under pressure to move their docket by denying many cases. On the other hand, such a judge and her colleagues might become more familiar with country conditions in certain countries after seeing particularly well-prepared asylum cases from that country, and might be more likely to grant these cases.

*Local weekly earnings.* We wondered whether local affluence would impact judges' grant rates.

*National freedom ranking.* We investigated whether an asylum seeker's country of origin impacts the possibility of being granted asylum. In a system based on the merits of the cases, one might expect that asylum seekers from countries with poor human rights records (i.e., partially free or not free countries) would be regarded by judges as more likely to win asylum than asylum seekers from countries viewed as free in this index. It is possible that the stronger cases from the not free or partially free countries are granted in the asylum office (especially given that our database includes only affirmative cases); either way, this variable is of interest.

*Years on the bench.* We wondered whether the number of years a judge had served on the immigration bench might impact their grant rate, independent of their age. A judge with more years on the bench might understand the law more thoroughly and decide cases more impartially, or may become jaded by the process and skeptical of all asylum claims before her.

The first regression, using the logistic model, confirmed the results of the cross-tabulation.<sup>199</sup> We next ran a logistic regression with fixed effects for court. Five variables were less than 95% likely to be statistically significant: caseload of the judge, years the judge had sat on the immigration bench, appointment under President Reagan, prior military experience, and prior private practice experience. Prior military experience was found to be slightly positively correlated with grant rate. Otherwise, the regression confirmed the results of the cross-tabulation analysis. We also ran a hierarchical linear regression, which confirmed the results of our cross-tabulations. The results of these regression analyses are reported at <http://www.law.georgetown.edu/humanrightsinstitute/refugeeroulette.htm>.

#### IV. *The Board of Immigration Appeals*

We requested data from the Board regarding asylum determinations for fiscal years 1998-2005. We specifically asked for statistics that would enable us to examine individual member decision making on the merits of claims for asylum. We also requested data regarding the mode of decision making (i.e., panel, single member short opinions, or affirmances without opinion). Finally, we asked for information on nationality and representation.<sup>200</sup>

The Board provided us with data on nationality and representation, as well as on mode of decision making. Two important problems surfaced, however, with regard to the data that the Board collects and how it does so. First, the Board knows the period of service of every Board member, and it knows the outcome of each Board decision, but it does not keep records from which it can ascertain which members made or participated in which decisions, or from which it could calculate the rate at which individual members rendered decisions (asylum grants or remands) that benefited asylum applicants. Therefore, we were not able to perform an analysis of disparities in the decisions from one member to the next, as we were able to do for asylum officers and immigration judges. Nor could we explore the possible effect of the genders or prior experiences of the adjudicators. Second, for fiscal years 2001 and 2002, the Board did not have reliable data on the mode of decision making—whether particular decisions were rendered by a single member or by a three-member panel. The coding of the decision modes changed during that period. Unfortunately, the very helpful EOIR staff responsible for statistical reports did not have the information needed to decipher the meaning of the codes used in those years.

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199. The appointment under President Reagan variable, which was not part of the cross-tabulation analysis, was less than 95% likely to be statistically significant.

200. See Letter from Andrew Schoenholtz to Lori Scialabba, Chairman, Bd. of Immigration Appeals (Jan. 30, 2006) (on file with authors).

The BIA provided us with a set of decision and disposition codes that it uses to describe the full range of its procedural and substantive determinations.<sup>201</sup> As discussed above, our study focused on asylum merits decisions only. Accordingly, we analyzed only those asylum decisions in which a merits decision was either favorable to the non-citizen or to the government. Our analysis excluded immigration appeals that did not involve asylum, as well as asylum cases which the Board coded as outcomes which it could not determine to be either favorable or unfavorable to the applicant.

Most of the BIA analyses included all nationalities. In certain instances, we examined only APC merits decisions. In those analyses, we include decisions on all fifteen APC countries. In one analysis, we report the individual APC grant rates for individual countries. Where we were not examining the mode of decision making, we included the data for all the fiscal years provided. Any of our analyses that specifically examine three-member panel decisions, single member short opinions, or single member affirmances without opinion only included fiscal years 1998-2000 and 2003-2005, for the reason discussed above.

Despite the limits on the data set, we were able to measure the degree of change that occurred once the BIA implemented the major streamlining reforms proposed in February 2002. We compared changes in the rates of decisions favorable to asylum applicants for the three decision modes individually, comparatively, and combined.

### *V. The United States Courts of Appeals*

The U.S. Courts of Appeals do not keep separate statistics showing their dispositions of cases involving asylum, withholding, or the Convention Against Torture. We therefore had to construct a database containing all of these decisions over a representative period of time. We chose the calendar years 2004 and 2005 as the period for our consideration.<sup>202</sup>

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201. Board of Immigration Appeals, Board of Immigration Appeals Decision and Disposition Codes (June 2005) (unpublished code sheet, on file with the authors).

202. In retrospect, it might have been better to have used FY 2004 and 2005 (October 1, 2003, through September 30, 2005) as the database, for purposes of better comparison with federal statistics which are usually kept by fiscal year. However, by the time we realized this, we had already compiled the calendar year 2004 database. We do not know of any reason why our use of a time frame that starts and ends three months later than the fiscal year would appreciably change any of the statistical information. The database of cases in most courts of appeals is relatively small, so in our study of decisions of these courts, we searched for remands after denials by the Board of Convention Against Torture cases as well as remands after denials of asylum. Asylum cases are, however, the vast majority of the cases in our database. We did not specifically search for appeals involving denials of withholding of removal because foreign nationals who appeal from denials of withholding also appeal from denials of their applications for asylum.

Most asylum decisions are unpublished, non-precedential decisions, so we could not obtain the necessary data from printed reports. However, six circuits (the First Circuit through the Sixth Circuit) have searchable websites on which they have posted the full texts of all of their calendar year 2004 and 2005 precedential and non-precedential decisions. For these circuits, we began by searching for all cases in which one of the parties was identified as “Ashcroft” (for 2004), “Gonzales” (for 2005) or “Attorney General.”<sup>203</sup> We inspected these cases individually, rejecting from the database those that were not appeals from the Board of Immigration Appeals.<sup>204</sup> From this preliminary database, we excluded all cases that did not involve appeals from denials of asylum, withholding of removal, or claims under the Convention Against Torture.<sup>205</sup> We also excluded cases that involved only procedural issues rather than any consideration of the merits. Specifically, we excluded those in which the court decided that a motion to reopen or a motion to reconsider had not been timely filed, or other procedural prerequisites (such as filing a promised brief) had not been met, and those in which the foreign national claimed only that the process of adjudication itself (e.g., the summary affirmance procedure of the Board) violated due process.<sup>206</sup> Cases in which the court characterized its decision as either an “affirmance” of the Board’s decision or a “denial” or “dismissal” of the appeal (or “petition for review”) were regarded as losses for the foreign

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203. All appeals from Board decisions to the U.S. Courts of Appeals are taken by foreign nationals; the United States does not appeal decisions rendered by its own Department of Justice. *See supra* note 30. All asylum appeals considered by the courts in 2004 appeared to have been filed against John Ashcroft in his capacity as Attorney General. Appeals from decisions of his predecessor Janet Reno, who left office in January 2001, had been resolved or had been renamed to reflect the appointment of Attorney General Ashcroft. Alberto R. Gonzales became Attorney General on January 3, 2005. Nine First Circuit cases from early 2004 were denominated as cases against the Immigration and Naturalization Service, or INS, an agency within the Department of Justice whose functions were transferred to the Department of Homeland Security in 2003, but these nine cases were located and included in the database. The Department of Homeland Security is not the named respondent in these cases because the appeals are technically Petitions for Review of a decision of the Attorney General.

204. In some cases, aliens in detention sought writs of habeas corpus from the district courts and appealed denials to the Court of Appeals. These cases were excluded from the database.

205. The texts of a small number of non-precedential Fifth Circuit decisions were so summary that we could not even tell whether these cases involved asylum. We excluded these cases from the database.

206. However, we included such a case if the foreign national also challenged the merits of the Board’s individualized decision and the court considered those merits. In a few cases, a foreign national appealed both the denial of an asylum claim and the denial of a motion to reopen. These cases were included in the database if the Court of Appeals evaluated the merits of the asylum claim or the fairness of the immigration judge hearing in connection with either appeal, even if it dismissed the other appeal without reaching its merits.

national; any remand of the case to the Board, in whole or in part, was considered a success for the foreign national.<sup>207</sup>

The courts' official websites for the Seventh through the Eleventh Circuits were not as complete in that they did not include all of the unpublished decisions for the two years in question. For the Seventh, Eighth, and Tenth Circuits, we relied on a Westlaw search to collect the preliminary database and to exclude decisions that were merely procedural.<sup>208</sup> We restricted the database by applying the same criteria that we used in the first six circuits, again examining each decision individually to characterize it as a denial or a remand.

The Ninth and Eleventh Circuits presented special challenges. Until April 2005, the Eleventh Circuit neither posted its unpublished decisions on its website nor supplied them to Westlaw. However, Westlaw did post the briefs for the Eleventh Circuit cases during this period in its CTA11 database. Because the dates on the briefs predated the dates of the corresponding

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207. The statistics for the Second Circuit understate both the number of asylum appeals disposed of by that circuit and the number of cases remanded. In most circuits, the Office of Immigration Litigation (OIL) of the Department of Justice represents the government in immigration appeals, including asylum cases. Except in very rare instances, OIL lawyers have not negotiated with lawyers representing foreign nationals or agreed to stipulate for remands. For historical reasons, however, the U.S. Attorney's Office for the Southern District of New York (USAO-SDNY), rather than OIL, has represented the government in Second Circuit immigration cases. USAO-SDNY has been willing to discuss cases with foreign nationals' lawyers and to stipulate to remands when it appears that the Board of Immigration Appeals has affirmed an erroneous or doubtful immigration court decision. These negotiated remands do not show up in any searchable database of court opinions. Along with stipulated withdrawals of appeals, they do show up in the PACER records of Second Circuit cases, but unfortunately, although the docket sheets show that the case was resolved without a decision by the court, those docket sheets do not usually reveal whether the disposition was a voluntary withdrawal, a negotiated withdrawal, or a negotiated remand. USAO-SDNY does not keep statistics on the disposition of asylum cases in which it engaged in discussion or negotiation before the case removed from the docket of the circuit. It may seem surprising that the Second Circuit decided only about thirty-six asylum cases during 2004, although it disposed of 421 such cases during 2005. During 2004, the Second Circuit received more than 2000 appeals from BIA decisions. *See* Palmer et al., *supra* note 15, at 54 tbl.1 (showing 945 appeals from the BIA to the Second Circuit from June through September 2004). However, the USAO-SDNY and the court were so unprepared for the sudden increase in caseload that most cases were simply put into a backlog, which built up to about 5000 cases before the Second Circuit decided, in August 2005, to adopt a "non-argument calendar" to dispose of most BIA appeals without oral argument. Press Release, U.S. Court of Appeals for the Second Circuit, Non-Argument Calendar in the Second Circuit Court of Appeals (Aug. 4, 2005), <http://www.nywd.uscourts.gov/document/Non-Argument%20Calendar.pdf>.

208. For 2004 cases, we used the following search string for each circuit: (asylum torture & ashcroft "attorney general") & da(aft 12/31/2003 & bef 1/1/2005) % bg(habeas "motion to reopen" "motion to reconsider" "cancellation of removal" "adjustment of status" "suspension of deportation"). For 2005 cases the search string sought cases in which Gonzales rather than Ashcroft was a party and substituted dates in 2005. The searches excluded appeals from the BIA that may have mentioned asylum in passing but were actually claims of erroneous denial of other forms of relief from removal. It also excluded habeas corpus appeals and appeals from motions to reopen.



opinions, we expanded the search dates for 2004 to begin with March 1, 2003, and to end with October 31, 2004.<sup>209</sup> This search produced 253 hits. We examined both the briefs and the docket sheets<sup>210</sup> in these cases and found that 89 cases were appeals from the Board involving the merits of asylum, withholding of removal, or the torture convention.<sup>211</sup>

The Westlaw search of Ninth Circuit cases revealed 1229 cases in calendar year 2004 that qualified for our preliminary database, a much larger volume of decided cases than in any of the other circuits. The volume in 2005 was only slightly smaller (877 cases). We could not examine so many cases individually to determine whether the outcome was an affirmance or a remand. Instead, beginning with the 1229 and 877 cases, we searched for the term “remand.” That search yielded 291 cases for 2004 and 235 cases for 2005, which we examined individually. We found that 225 of the 291 cases in 2004 were actually remands; the rest mentioned the word “remand” somewhere in the opinion but affirmed the Board’s denial of relief. For 2005, the comparable number was 183 actual remands. Therefore, we computed the remand rate for the Ninth Circuit in 2004 as 18.3% (225 actual remands out of 1229 asylum cases). For 2005, the remand rate was 20.9% (183 remands out of 877 cases).

For our analysis of remand rates from the fifteen APC countries, we had to determine the nationality of each appellant. For cases in circuits other than the Ninth Circuit, we obtained the nationality of the applicant by examining the decisions (or for the Eleventh Circuit, the briefs). To find the approximate number of APC cases in the Ninth Circuit, we did a string search in the Westlaw database for that circuit, using the same criteria as those described above but limiting the search further by requiring the name of one of the fifteen countries. This search yielded 552 cases, too many to examine individually, so there are undoubtedly a few “false positives,” such as decisions that mentioned flight through one of the listed countries rather than specifying the country in question as that of the applicant’s nationality. We then added the term “remand” to the string and then examined all of the resulting cases individually to eliminate those that were not true remands. This process showed 243 remands, again a slight overstatement because some of those cases named countries that were not the country of the applicant’s nationality. We encourage other researchers to do a more careful study of the Ninth Circuit’s remand rate

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209. We assume that all Eleventh Circuit appeals that were briefed before March 2003 were decided in 2003, not 2004, and that no case in which the foreign national’s brief was filed in November or December 2004 would have resulted in an opinion during the calendar year 2004. In the CTA11 database for 2004 decisions, we used the following search string to expand the search: (asylum torture) & (Ashcroft “attorney general”) & da(aft 3/1/2003 & bef 10/31/2004) % bg (habeas “motion to reopen”).

210. The docket sheets may be inspected for a fee on the government’s PACER system, PACER Service Center, <http://pacer.psc.uscourts.gov>.

211. Seven other cases may have qualified by our criteria, but the court had not posted the docket sheet or opinion, so we could not tell the result. We excluded those seven cases from our analysis.

by examining each published and unpublished case individually rather than relying on the searching method that we had to use because our resources were limited.

For our analysis of remand rates from China, we used the same search string we used for APC decisions, but limited the search to decisions that used the word "China." We then manually eliminated cases that were not actually asylum appeals by nationals of China (e.g., cases in which asylum seekers from other nations had traveled in China).

We analyzed only the Third and Sixth Circuits for internal consistency. As noted in the text, the judges of the Fourth, Fifth and Eleventh Circuits did not vote to remand very often, so although consistency was quite high in these circuits, there were not enough votes to study the effect of appointments by different presidential administrations. The total number of cases in the First and Tenth Circuits was not large enough for analysis. Evaluation of the Second Circuit was complicated by the fact that because of the docket explosion described in the text, many of its more difficult cases were held for 2006. We chose not to evaluate consistency in the Seventh Circuit because it was not typical, in that it had an unusually high remand rate. The Ninth Circuit had too many cases for us to count individual votes of judges. That left only the Third, Sixth, and Eighth Circuits, and of those circuits, we evaluated consistency in the two circuits with the largest numbers of asylum cases.

## NINTH CIRCUIT APPENDIX

Professor David Law studied the votes in asylum cases in the Ninth Circuit between 1992 and 2001. His primary focus was a study of whether judges made strategic use of publication rules to shape the development of case law.<sup>212</sup> He concluded, among other things, that “to some extent, judges vote strategically and bargain amongst themselves so as to maximize the amount of ‘good law’ and minimize the amount of ‘bad law’ that will appear in the pages of the *Federal Reporter* and bind their colleagues in subsequent cases.”<sup>213</sup>

Professor Law was kind enough to share with us his data on how each judge voted in the nearly 2000 cases in his study.<sup>214</sup> The method by which he selected cases was similar to ours, with these exceptions: (a) he included affirmances of habeas corpus denials in his study, whereas we excluded them, and he reports that there were not many such decisions; (b) he included both grants of asylum and remands to the Board as decisions favorable to asylum applicant; in our study, there were virtually no grants, because the Supreme Court in *Ventura* had directed the appellate courts to affirm or remand in nearly all cases.<sup>215</sup>

From his data set, we excluded all judges who cast fewer than 25 votes during the period in question.

Figure 55 shows the grant rates of the Ninth Circuit judges.

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212. His study appears as David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 819 (2005).

213. *Id.* at 864.

214. Like us, Professor Law had to create the data set by examining each published and unpublished decision that mentioned asylum; the U.S. courts do not code asylum decisions of the Courts of Appeals as such. He did so with the financial support of the National Science Foundation. We also received help from Professor Joshua Fischman, who has written an article based on Prof. Law’s data. See Joshua B. Fischman, *Decision-Making Under a Norm of Consensus: A Structural Analysis of Three-Judge Panels* (Amer. Law & Econ. Ass’n Working Paper Series, Paper No. 58, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=912299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912299).

215. See *INS v. Ventura*, 537 U.S. 12 (2002). Professor Law separately coded decisions that were merely procedural, and we have excluded those decisions from the data we report here.

**Figure 55. Rate of Votes of Ninth Circuit Judges Favorable to Asylum Applicants, by Judge**

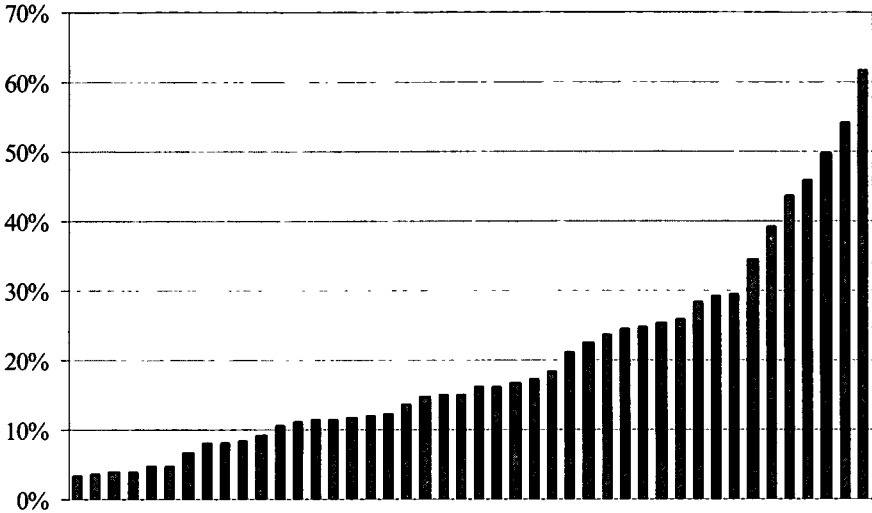
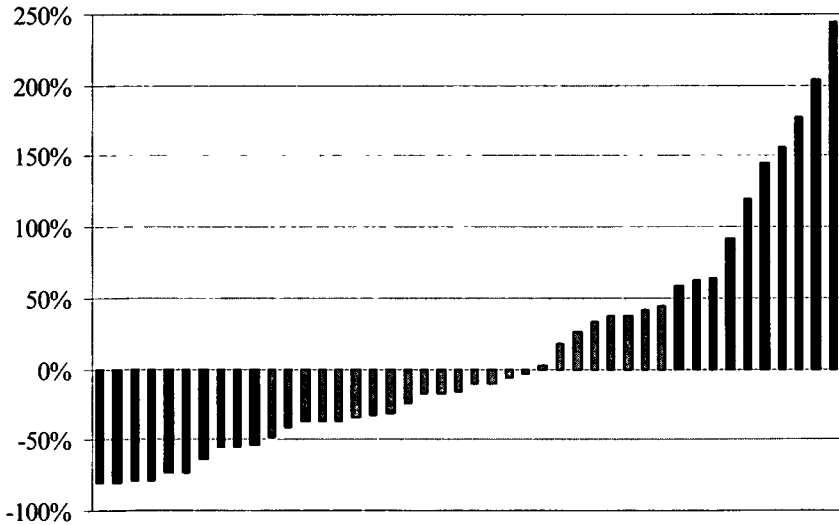


Figure 56 shows that twenty of the forty-four judges (45%) voted for the applicant at a rate that was more than 50% higher or lower than the 17.9% mean rate at which judges in the Ninth Circuit voted in favor of the asylum applicant on the merits.

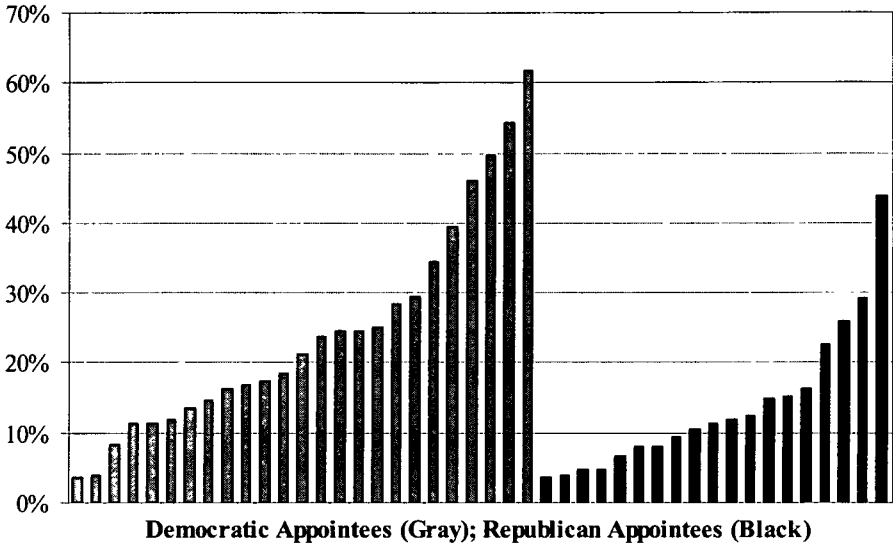
**Figure 56. Disparities in Ninth Circuit Voting**



*Note:* The black bars indicate those judges who deviated from the mean by more than 50%.

Figure 57 shows that as in the Sixth Circuit, judges appointed by Democrats voted for asylum applicants at a rate much higher than those appointed by Republicans.

**Figure 57. Grant Rates by Party of Appointing President**



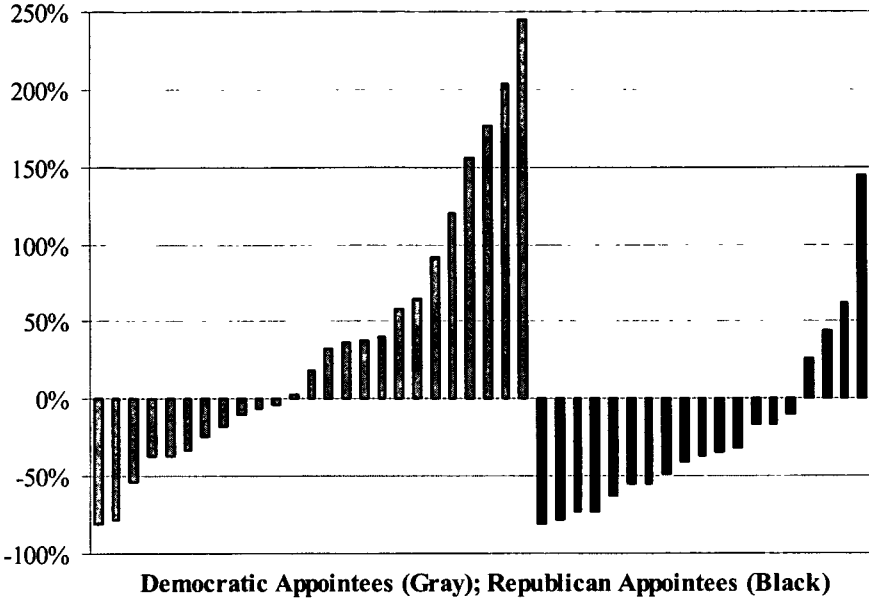
This visual representation may actually understate the degree of the differences among the parties' appointees. In fact Democrats voted, in the aggregate, to support the applicant 24.0% of the time, while Republicans voted to support the applicant 10.9% of the time, less than half as often. Looking at the effect of voting on panels, Professor Law concluded that:

With an all-Republican panel, the likelihood that an unpublished decision will favor the asylum seeker is just 4%. The addition of one Democrat to the panel triples that probability to 12%. With two Democrats on the panel, the probability increases again to just over 20%, and with an all-Democrat panel, the asylum seeker's chances top 30%.<sup>216</sup>

A final way to look at the data by party is to examine the extent to which disparities from the mean were on the low side or the high side by party:

216. Law, *supra* note 212, at 847-48.

Figure 58. Disparities by Party



This graph shows that of the nine Republican judges who voted lower or higher than the mean by more than 50%, seven were on the low side, whereas of the eleven Democrats who so voted, eight were on the high side. This is yet another way of saying that political party seems to matter, even when judges are applying a federal refugee statute.

