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Refugee Roulette: Disparities in Asylum Adjudication[1]

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

Abstract

Addressing consistency in the application of the law, former Attorney General Robert Jackson told Congress in 1940: "It 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." 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.

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This study analyzes databases of decisions from all four levels of the asylum adjudication process: 133,000 decisions involving nationals from 11 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 six years; and 4215 decisions of the U.S. Courts of Appeal 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 significantly affected grant rates.

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 so 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 judge. 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 can not 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. . . ."[2] 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. He concluded that the political composition of three-judge panels often mattered a great deal.[3]

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[2] Harry T. Edwards, *Public Misperceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 UNIV. OF COLO. L. REV. 619, 620 (1985).

[3] 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

Judge Edwards wrote a surprisingly harsh critique of the Revesz "so-called empirical stud[y]," claiming that its interpretations were "bogus."[4] Revesz then rebutted this critique,[5] 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.[6]

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 percentage 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 EPA. Republican judges voted nearly twice as often as Democratic judges to sustain those challenges.[7] In other words, a judge might be nearly 100% more likely to vote for an industry-requested remand if the judge were Republican than Democratic, statistics that may again suggest cause for concern. (Those percentages are far larger than the 17% disparity (5 months) in the lengths of sentences meted out by federal judges in 1986-87 before federal sentencing guidelines took effect, a disparity thought so great as to warrant a federal statute imposing those guidelines).[8]

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 court house?[9] Or where

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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 the magnitude of the correlation between the party of a judge's appointing President and a decision to reverse the EPA was much greater when two judges on the panel were of the party expected to disagree with the EPA's rule (i.e., at least two Republicans hearing an industry challenge or two Democrats hearing an environmentalist challenge). In other words, "the 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, the members of a majority party hostile to the decision being reviewed would have power to change or at least force the lower body to reconsider that decision.

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

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

[6] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639 (2003).

[7] Revesz, *supra* note 3 at 1750.

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

[9] *See* text after n.69, *infra* (difference in grant rate of two New York immigration judges for Albanian applicants).

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?[10]

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 77,000 asylum decisions annually.[11] Almost all of them involve claims that an 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 judicial circuit 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 court rooms of the same immigration court. When an asylum seeker stands before an official or court who will decide whether she will be deported or can 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 arguably arbitrary factors of place and time are particularly discomfiting in asylum cases, because the result of an erroneous decision that is unfavorable to the bona fide applicant is an order of deportation to a nation where she is in grave danger.

We can not 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.[12] In this

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[10] *See* text at n. 122, *infra* (difference in remand rates of 4th and 7th circuits when considering asylum claims from the same group of 15 countries from which asylum is frequently granted).

[11] 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). See text at n. __, infra. In the same year, immigration judges made 30,903 decisions on the merits in asylum cases. U.S. Dep't. of Justice, Immigration Courts, FY 2005 Asylum Statistics, *at* http://www.usdoj.gov/eoir/efoia/FY05AsyStats.pdf. During that year, the Board decided 15,646 asylum cases (this number excludes about 2000 cases that the Board is not able to characterize as favoring either party). See text at n. __, infra. Finally, during calendar year 2005, the U.S. Courts of Appeal decided 2163 asylum cases, as described in Part V of this article.

[12] *See, e.g.*, Robert G. Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 4 DUKE L.J. 681, 717 (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

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 policy-makers.[13]

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.

The new statistics show disconcerting variability among individual adjudicators in at least three of these four institutions.[14] 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 for fiscal years 1999-2005. 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 this 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 2000-2004. We investigated disparities in grant rates between different Immigration Courts, but more important, we examined disparities in the grant rates of

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the time, and 26 reversed 21% to 30% of the time, a "striking and disturbing" disparity); John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 10 FED. CIR. B. J. 435, 436 (2000) (finding "judges do not fit easily into pro-patent or anti-patent categories, or into affirmers and reversers"); 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) ("weighted taxpayer prevalence scores demolish the assertions that Tax Court judges make decisions in congruity with their backgrounds"); Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (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 28 immigration courts) and briefly examines reversal rates in the Courts of Appeals (looking only at the 7th 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. IMMIG. L.J. 1 (2006). That article does not analyze the Asylum Office and BIA data that we obtained, and does not engage as comprehensively with the data on the Immigration Courts and Courts of Appeals, instead focusing 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 fn. 125.

[14] We would have liked to have studied the fourth institution, the Board of Immigration Appeals, but were unable to do so because it does not maintain statistical records tabulating the disposition of cases by its individual members.

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,[15] and it does not make public the vast majority of its asylum decisions.[16] 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.[17] Although we 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 15 countries that generate a particularly large number and 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

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[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 and 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. IMMIG. 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 (July 2003) (study conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono), *at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

more by law and less by a spin of the wheel of fate that assigns her case to a particular government official.[18]

I
The Asylum Process

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 court.[19] A successful defensive applicant is granted asylum and is not ordered removed.

The Department of Homeland Security is the executive agency primarily responsible for overseeing immigration processes, including affirmative asylum applications. The Department's office of Citizenship and Immigration Services (CIS) 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 (ICE) includes the trial attorneys who oppose asylum claims before the immigration courts.

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 CIS Asylum Offices. Within each regional office, cases are assigned randomly to particular asylum officers.[20] 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 United States, deny the asylum claim.[21] About 35% of adjudicated cases in

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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. IMMIG. L. J. 619, 622 (2000).

[19] 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.

[20] E-mail from Joanna Ruppel, Deputy Director, Headquarters Asylum Office, U.S. Citizenship and Immigration Services, Department of Homeland Security, to Andrew Schoenholtz (Dec. 18, 2006) (on file with author).

[21] 8 C.F.R. §§1208.1(b), 1208.9, 1208.14(b),(c). Denials comprise only a small fraction of asylum officer decisions, as only 7% of asylum seekers apply while they are still in a lawful immigration status. *See*

most recent years are grants of asylum. Most asylum officer decisions, however, result in referrals to Immigration Court.

The Asylum Office keeps separate statistics on three different types of referrals, though all three result in removal hearings in immigration court. 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. Regular referrals occur when the asylum officer either (1) does not believe that the applicant has carried her burden of proving that she has a well-founded fear of persecution in her home country and that at least one central reason for the persecution will be the individual's race, religion, nationality, political opinion or membership in a particular social group,[22] or (2) accepts the proffered facts as true but does not believe that those facts qualify the applicant for asylum as a matter of 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.[23] 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.[24] 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 for 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.

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.[25] 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."

Department of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS, *at* 55-64, Tables 18 and 19.

[22] 8 U.S.C. §§ 1158(b)(1), 1101(a)(42).

[23] 8 U.S.C. § 1158(a)(2)(B).

[24] INA § 208(a)(2)(D), interpreted by 8 CFR § 208.4(a)(4) and (5). *See* Philip G. Schrag, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (Routledge, 2000) (history of the enactment of the deadline); Michele R. Pistone and Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIG. L. J. 1 (2001) (analysis of the exceptions to the deadline, and their limitations).

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

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[26] or protection under the Convention Against Torture,[27] 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.[28]

The Immigration Court also hears defensive asylum claims. A detained individual may file an asylum application in Immigration Court but does not also have the opportunity to present a claim to an asylum officer.

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.

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 11 to 15 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.

The U.S. 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.[29] The circuit courts

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[26] 8 U.S.C. sec. 1231(b)(3). An important distinction between asylum and withholding is that to win asylum, an applicant must demonstrate only well-founded fear, 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, a fifty-one percent chance.
[27] 8 C.F.R. §§ 1208.16-18.
[28] 8 C.F.R. §§1208.21, 1209.2.
[29] 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, Yale-Loehr and Cronin, *supra* n. 15, at 38, n. 203.

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.[30] Except in rare instances, the Courts of Appeals can only remand a decision to the Board; they cannot grant asylum.[31]

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.

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[30] The standard of deference that courts should grant to the Board varied between 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. IMMIG. 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). Credibility determinations must be sustained unless they are not supported by specific, cogent and relevant reasoning. *See, e.g.*, *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004); *Gjerazi v. Gonzales*, 435 F.3d 800 (7th Cir. 2006). In actual practice, however, the federal circuits appear to vary dramatically in how they apply those standards. *See infra*, Part V.

[31] *I.N.S. v. Ventura*, 537 U.S. 12 (2002).

II
The Regional Asylum Offices

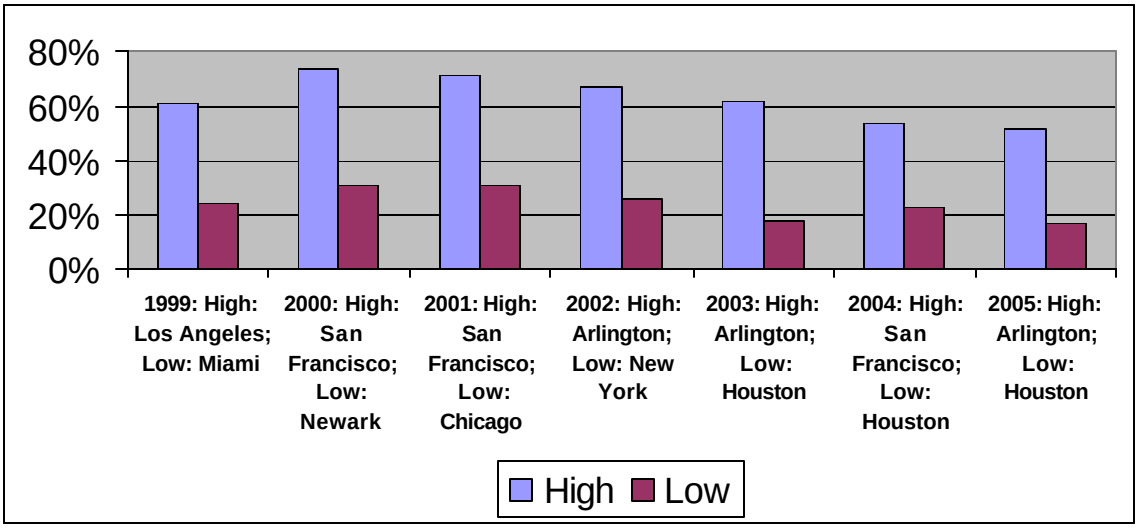
The Asylum Office, part of the Department of Homeland Security, makes decisions in the first instance when asylum seekers come forward on their own to assert claims. Asylum seekers file such claims knowing that they will be placed into removal proceedings if they are not successful and have no lawful immigration status in the United States. These "affirmative" claims, assessed at eight regional asylum offices, constitute the vast majority of first-instance asylum cases.[32]

Grant Rate Disparities Among Asylum Offices

We begin by looking at the regional offices. Graph 1 shows the disparities between the lowest and highest annual grant rates by regional asylum office for FY 1999 through FY 2005. Each year, there was very substantial variation from office to office. For example, in FY 2003, the Houston office granted asylum in only 18% of cases, while the Arlington office granted asylum in 62% of cases, a rate 244% higher than Houston's. In FY 1999, the Los Angeles office granted asylum at a rate more than 150% higher than the Miami office (61% v. 24%). In FY 2005, the Houston and New York offices granted asylum at a rate of 20% or less, while the Arlington office granted asylum at a rate of 52%, or 160% higher.

[32] *See* EOIR, Immigration Court Asylum Receipts, *FY 2005 Statistical Year Book*, I1 (35,049 affirmative cases and 15,551 defensive ones) *at* http://www.usdoj.gov/eoir/statspub/fy05syb.pdf. On the different stages of the asylum process, *see generally* U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States: Two Paths to Asylum, at* http://uscis.gov/graphics/services/asylum/paths.htm. The eight regional Asylum Offices are located in Arlington (VA), Chicago, Houston, Los 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. H. R. L. REV. 323, 340-344 (2005). This article shows 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.

High and Low Asylum Approval Rates
Graph 1



What might explain these major disparities? One important factor that might account for some variation is nationality. For example, the disparities might be explained by differences in the office caseload—more or fewer cases from countries that produce significant numbers of refugees. Another possibility is that offices might differ in how they assess the same nationalities. If San Francisco granted asylum in 61% of Russian cases and Newark did in 17% of those cases, then differing views about the degree of persecution in Russia rather than differing types of caseloads could explain an important part of the disparity.

In order to account for nationality differences in caseloads, we based comparisons of grant rates only on cases of nationals from countries that we call Asylee Producing Countries, or APCs. The countries on this list had at least 500 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.[33]

[33] 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. The Methodological Appendix includes the USCIS Asylum Office's full explanation of this phenomenon.

Graph 2 shows the highest and lowest grant rates for each nationality for those Asylum Offices in which at least 100 cases of that nationality were decided during FY 2000-2005.[34] The high rate for Mauritania (Arlington, 40%) is more than 600% higher than the low rate (Chicago, 6%). Chinese claimants in San Francisco are granted asylum at a rate more than 300% higher than the rate in Newark (74% v. 18%). For two other nationalities (India and Russia), the high grant rate is, respectively, 218% and 255% higher than the low rate. And for six nationalities (Albania, Armenia, Colombia, Guinea, Liberia and Pakistan), the high rate is 109% to 178% higher than the low rate.

[34] Graph 2 does not include Venezuelan cases, since only one office decided at least 100 such cases during this period.

Graph 2

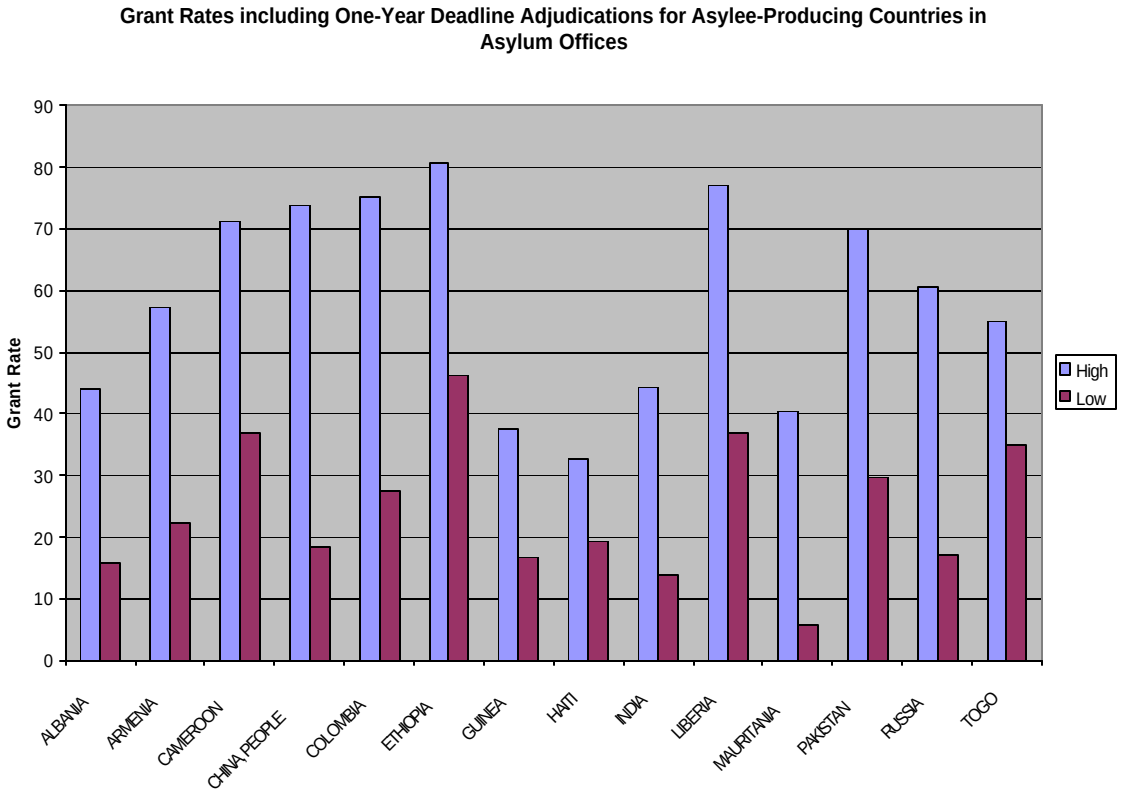


Table I

Asylum Approval Rates by Office

FY	1999	2000	2001	2002	2003	2004	2005
Asylum Office							
Arlington	55	66	68	**67**	**62**	50	**52**
Chicago	37	32	***31***	33	30	38	31
Houston	40	41	44	35	***18***	***23***	***17***
Los Angeles	**61**	61	70	63	40	31	38
Miami	***24***	44	54	40	43	47	46
Newark	28	***31***	43	40	30	31	22
New York	37	44	39	***26***	25	25	20
San Francisco	49	**74**	**71**	63	54	**54**	39
Total % (w	44	53	57	50	41	41	38

The disparities go well beyond an individual office with a very high or very low grant rate with regards to one or two particular nationalities. The data show that several offices tend to be outliers in terms of granting asylum claims from APC nationalities. Four of the eight regional offices had the highest or lowest grant rates for at least four of the APC nationalities regarding clear merits decisions. Chicago, Houston, and Newark each granted asylum at the lowest rates of any office with regard to four nationalities. Table I above shows the affected nationalities: for Chicago, Albanians, Colombians, Mauritanians and Pakistanis; for Houston, Armenians, Cameroonians, Ethiopians, and

Liberians; for Newark, Chinese, Guineans, Russians, and Togolese. San Francisco had the highest grant rates for eight nationalities: Armenians, Cameroonians, Chinese, Colombians, Ethiopians, Indians, Liberians, and Russians.

The regional data, then, has led to several important findings regarding different types of general disparities—among offices every year, and within offices over time. Most importantly, the nationality analysis has demonstrated that asylum seekers from the same Asylee Producing Countries are being treated completely differently depending on where they file their claim.

Why do these disparities exist between different offices? Is there something about the culture of an office that orients its asylum officers to favor or disfavor applicants from certain countries?

Grant Rate Disparities Among Individual Asylum Officers

To unpack these findings further, we next analyzed individual decision making. The Asylum Office provided us with data on decision making by 928 asylum officers from all 8 regional offices over a period of 6 years, from 1999-2005.[35] For security and privacy reasons, the Asylum Office provided this 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).

In order to continue the analysis of decisions involving nationals of APC countries, we first examined the data from 11 countries[36] where there was enough data on individual asylum officers to compare certain nationalities fairly. We studied the grant rates only of the 884 officers who decided at least 50 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 grant rate for the same population in the decision maker's own regional asylum office.[37] Some might argue that this measure tolerates too much deviation within an office, but even using this benchmark, there is a great deal of disparity in asylum adjudication.

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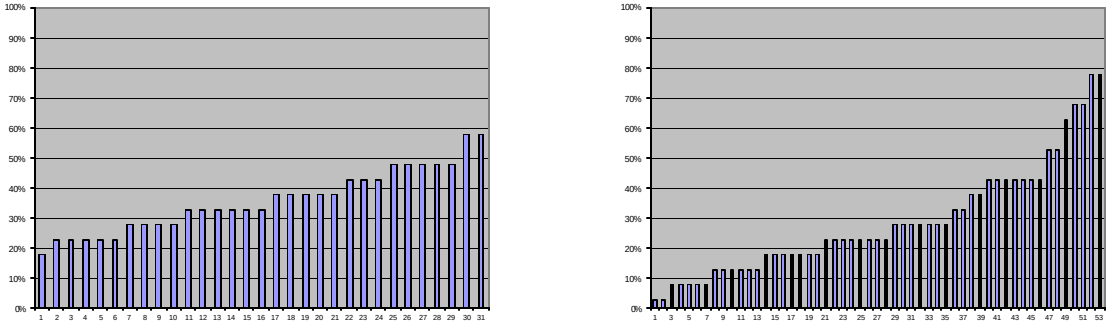
[35] The Methodological Appendix includes the Terms and Definitions established by the Asylum Office for this data set, along with other relevant materials.

[36] 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* App. I.

[37] Our rationale for adopting this measure of consistency is explained in more detail in the Methodological Appendix.

Individual Grant Rates for APC Cases in Regions A and H

Graph 3



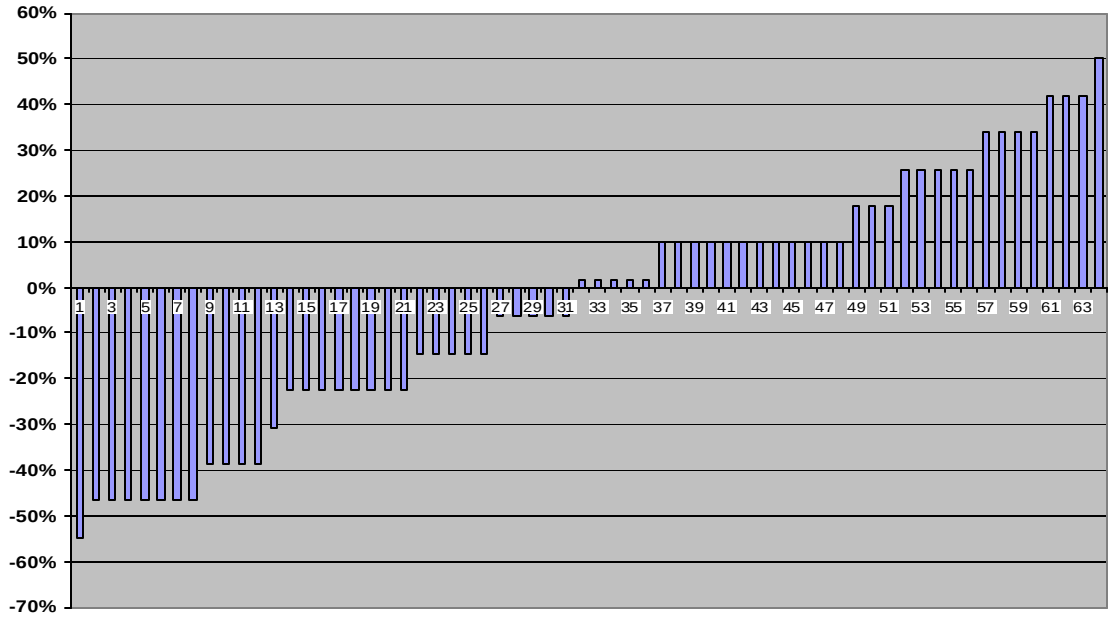
Region A **Region H**

Graph 3 provides a picture of individual officers' grant rates in APC cases in two regions. Each bar shows the grant rate of an individual officer. This graph provides one way of viewing the degree of consistency—the flatter the grant rate bars in a Regional Office, the more consistent the decision making. In principle, since clerks in the asylum offices assign cases to asylum officers randomly,[38] 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 30% and 45%. But Region H, on the right, 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. What follows, then, are comparisons of the degree to which various regions' asylum officers' individual grant rates deviate from the mean APC grant rate for that region.

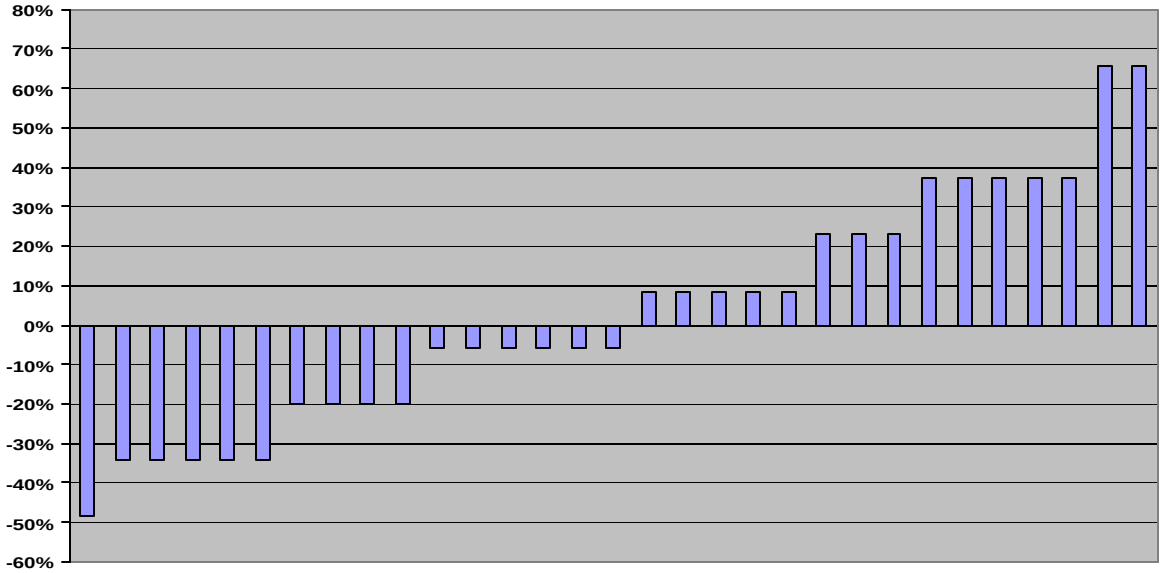
[38] *See supra* n. 20 and text.

Deviations from the Regional Office Mean APC Grant Rate for Region D
Graph 4



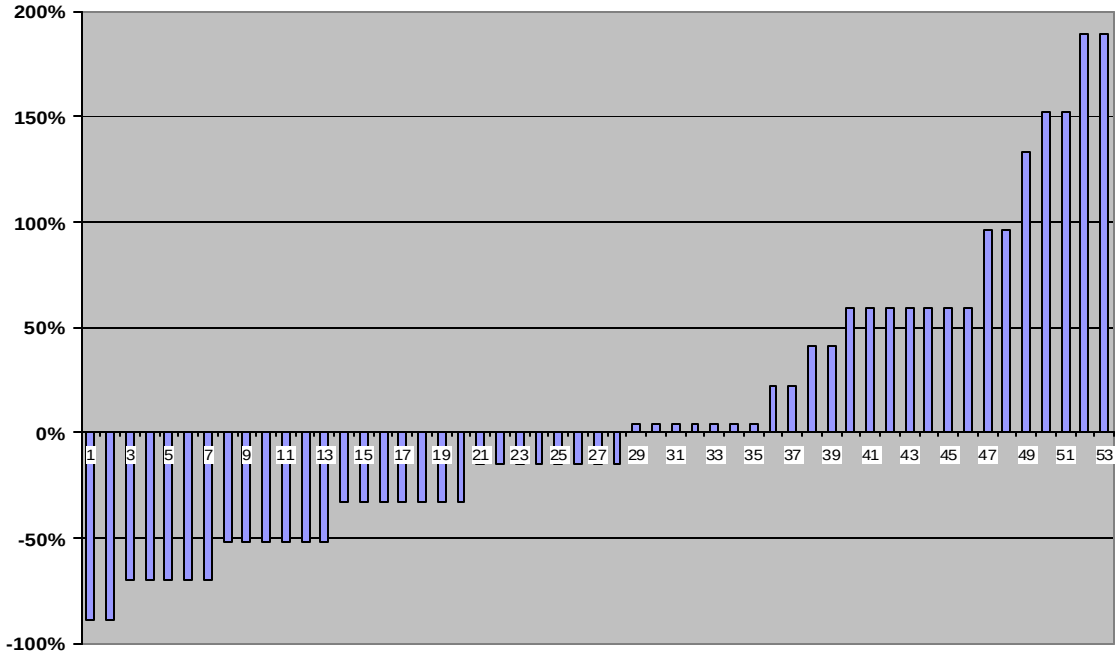
Graph 4 and the other deviation graphs in this article display the degree to which each officer deviated from the mean APC grant rate for the region in question. The horizontal lines at the 50% and –50% levels quickly reveal how many officers exceeded this level of deviation. Graph 4 shows exceptional consistency in Region D as measured by this standard. Only 1 of 64 officers deviated from the Region D mean by more than 50%.

Deviations from the Regional Office Mean APC Grant Rate for Region A
Graph 5



Similarly, in Region A shown in Graph 5, only 2 of 31 Officers deviated by more than 50% from the Regional Office mean APC grant rate.

Deviations from the Regional Office Mean APC Grant Rate for Region H
Graph 6



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% (Graph 6). In fact, 5 Officers deviated as much as 130-190%.

Grant and Deviation Rates for All Regional Offices[39]
Table II

Region	*APC Grant Rate*	*Percentage of Officers Deviating from Regional APC Grant Rate by Over 50%*
D	62%	2%
A	35%	6%
C	56%	9%
B	39%	11%
E	26%	18%
F	52%	22%
G	38%	35%
H	27%	51%

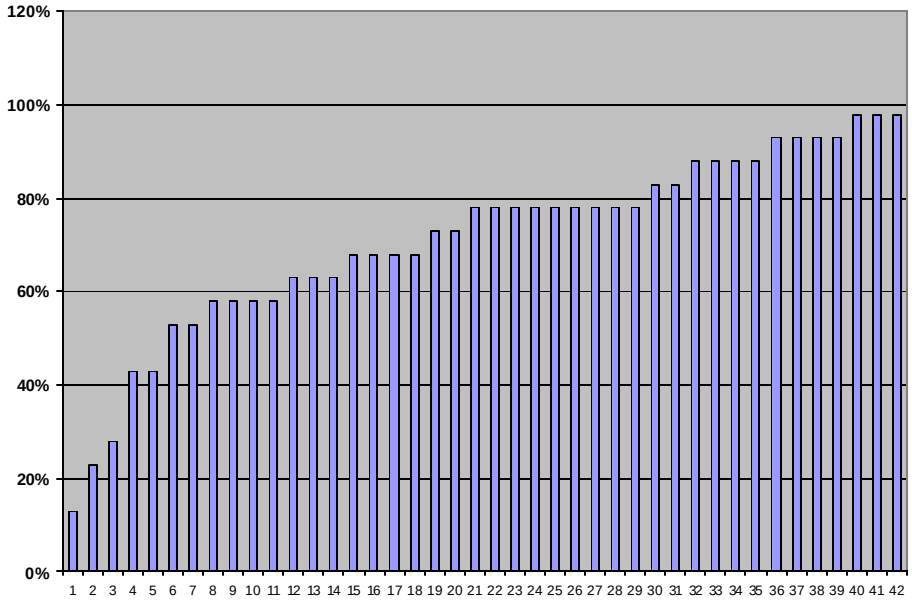
[39] This table is based on 132,754 cases decided by asylum officers with at least 50 cases.

When we compare the grant and deviation rates for all of the Asylum Offices, we see significant variation. As Table II shows, the regional deviation rates vary tremendously—from 2% to 51%. Interestingly, these disparities do not depend 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 are six times greater in Region G (35% deviation rate) than in Region A (6% deviation rate).

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 II.[40] 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. To ensure sufficient data for a single country's grants, however, we had to reduce to 25 the minimum number of cases that an asylum officer decided to warrant inclusion in the study.

Our first analysis examines cases from China. Some regions have high consistency among asylum officers.

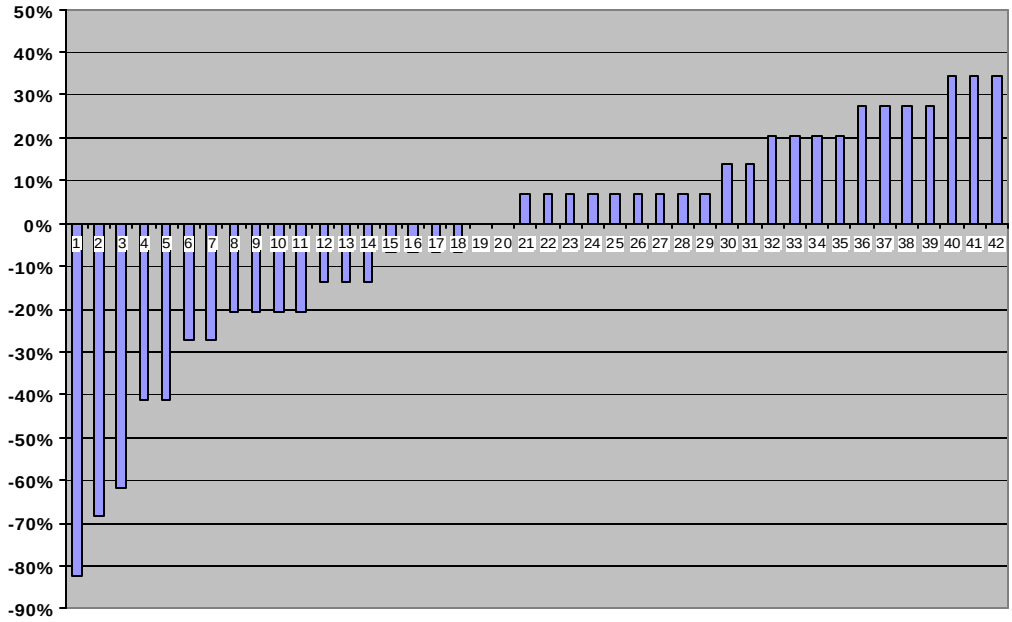
Individual Asylum officer Grant Rates in Chinese Cases for Region C
Graph 7



In Region C, for example, grant rates were pretty consistent (Graph 7).

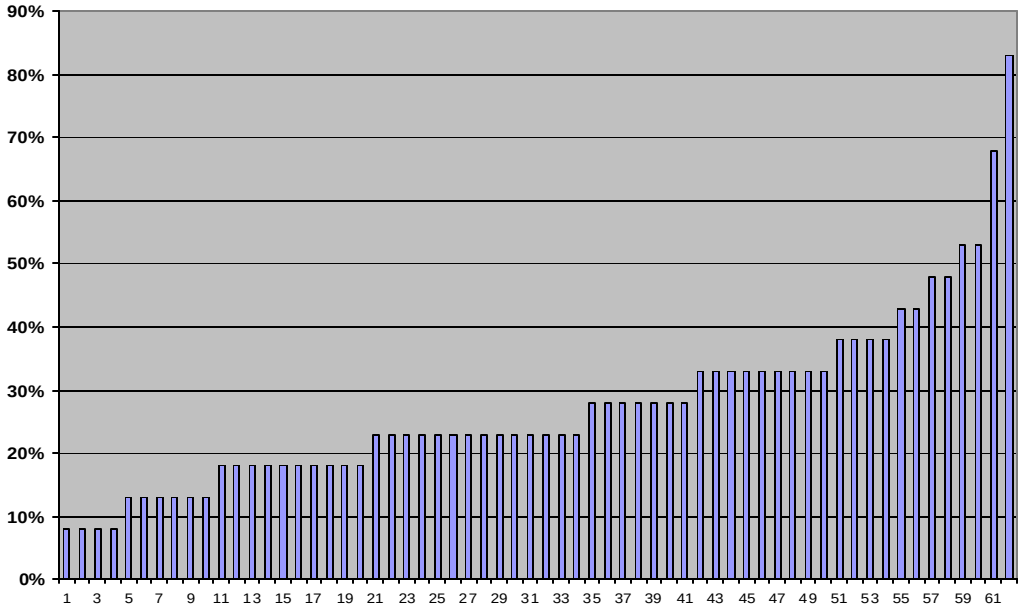
[40] Differences in the mix would not, however, explain the differences in rates of consistency.

Individual Asylum Officer Deviation Rates from Regional China Mean, Region C
Graph 8



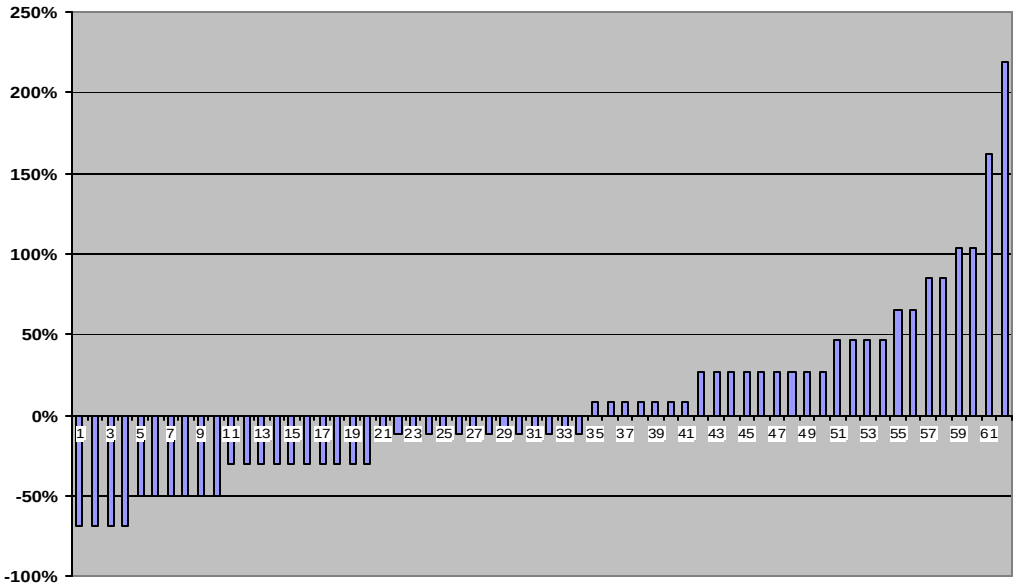
As Graph 8 shows, only 3 of 42 officers deviated from the Region C China mean by more than 50%.

Individual Asylum officer Grant Rates in Chinese Cases for Region E
Graph 9



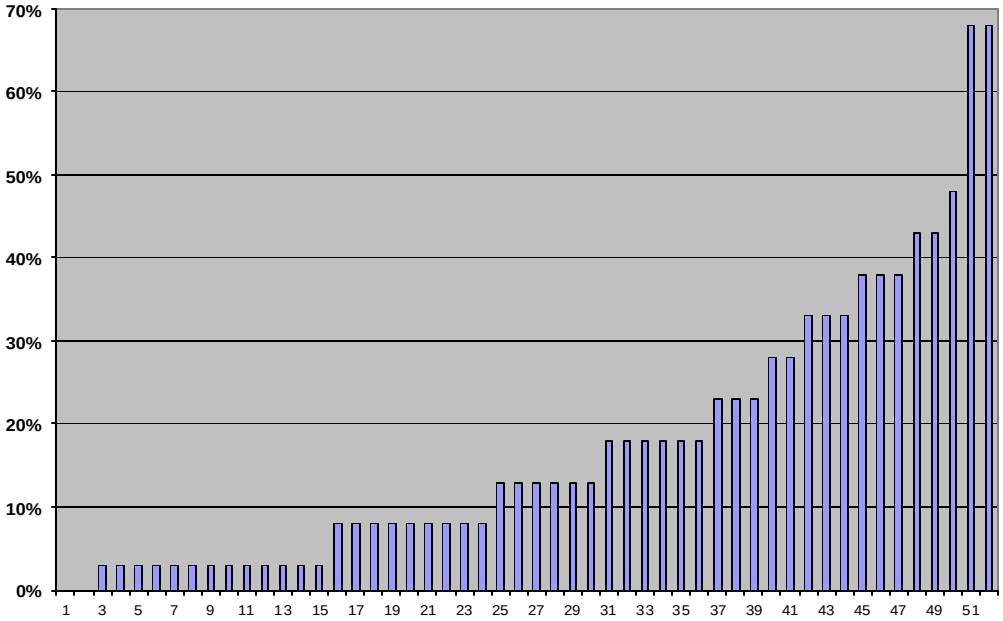
However, in Region E, there is considerably less consistency (Graph 9).

Individual Asylum officer Deviation Rates from Regional China Mean for Region E
Graph 10



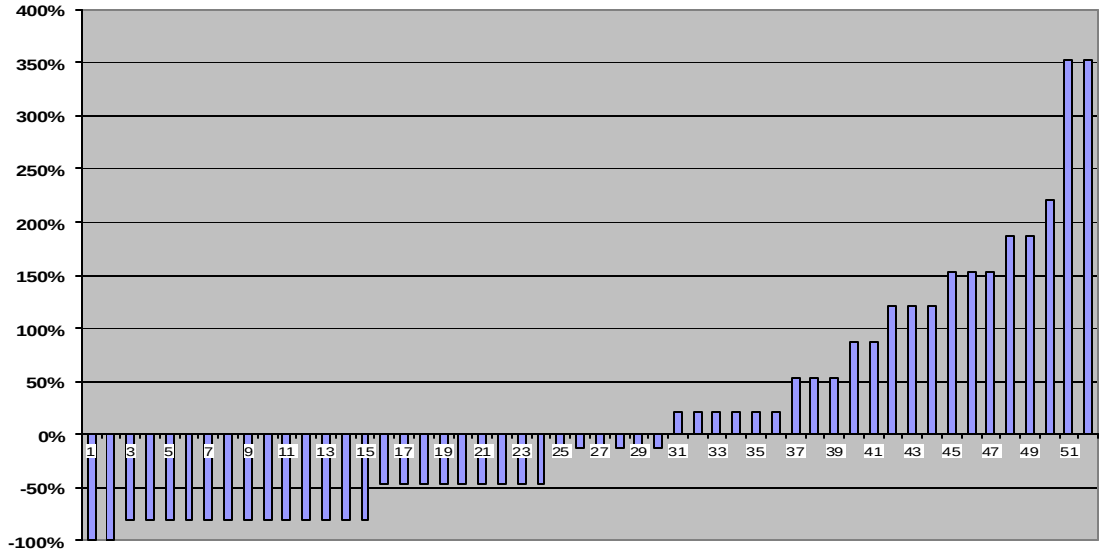
As Graph 10 shows, 17 of 57 asylum officers, or about 30%, deviated from the regional China mean by more than 50%. This graph also shows extensive differences in just how much beyond 50% certain officers deviated.

Individual Asylum officer Grant Rates in Chinese Cases for Region H
Graph 11



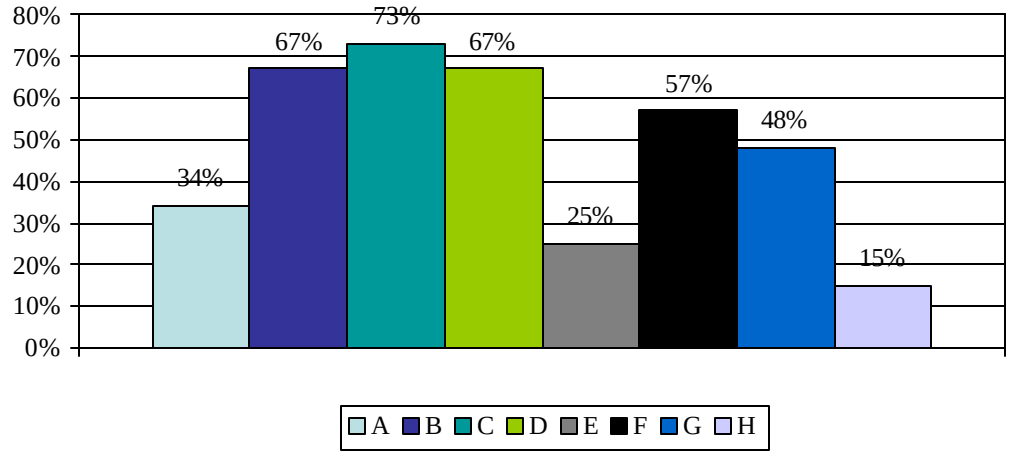
Some regions are even less consistent that this, despite the fact that the officers are deciding essentially the same pool of cases. In Region H, the grant rates vary between 0% and 68% (Graph 11).

Individual Asylum Officer Deviation Rates from Regional China Mean for Region H
Graph 12



In this region, 31 of 52 officers, or 60%, who decided more than 25 China cases deviated from the regional China mean by more than 50% (Graph 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.

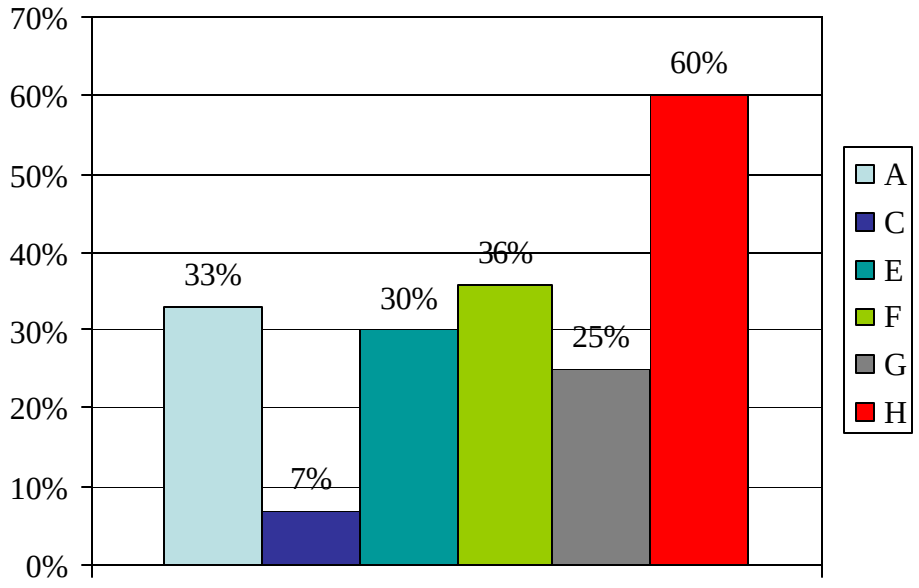
Asylum Officer Grant Rates in Chinese Cases for All Regions[41]
Graph 13



[41] 38,748 cases total.

Graph 13 compares the China case grant rates among the eight Regional Offices. 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 73% 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. In addition, it could not possibly explain the differences in grant rates from officer to officer within regional asylum offices.

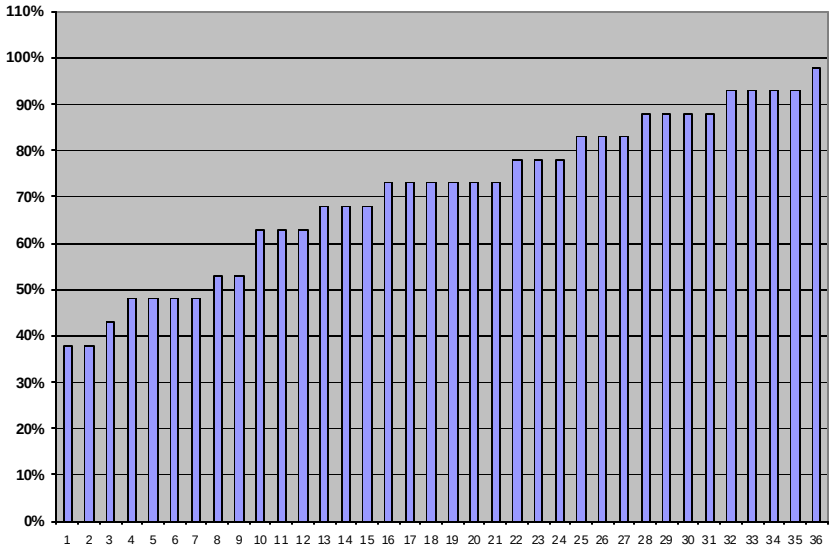
Percentage of Asylum Officers Deviating from Regional China Mean Grant Rates, By Region
Graph 14



Graph 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 25 or more China cases. The deviation rate is extraordinary, varying from about 6% in Region C to about 60% in Region H.

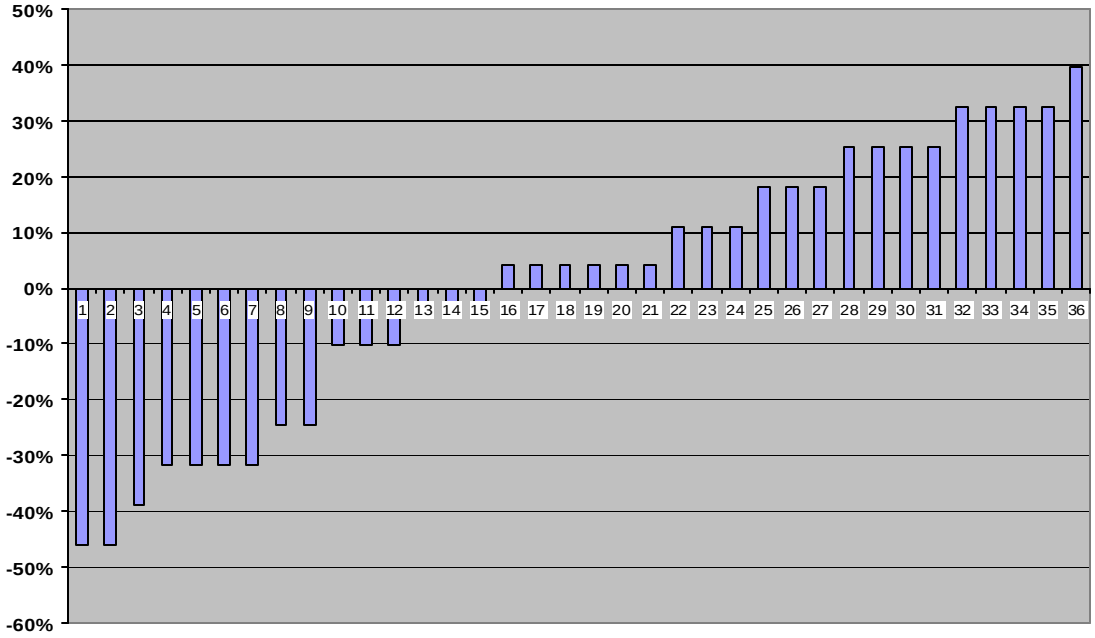
The last graphs in this section examine the degree of consistency within a Regional Office with respect to single countries other than China. Region D decides many Ethiopian cases, and Graph 15 and Graph 16 show that it does so with a good deal of consistency.

Individual Asylum Officer Grant Rates in Ethiopian Cases, Region D
Graph 15



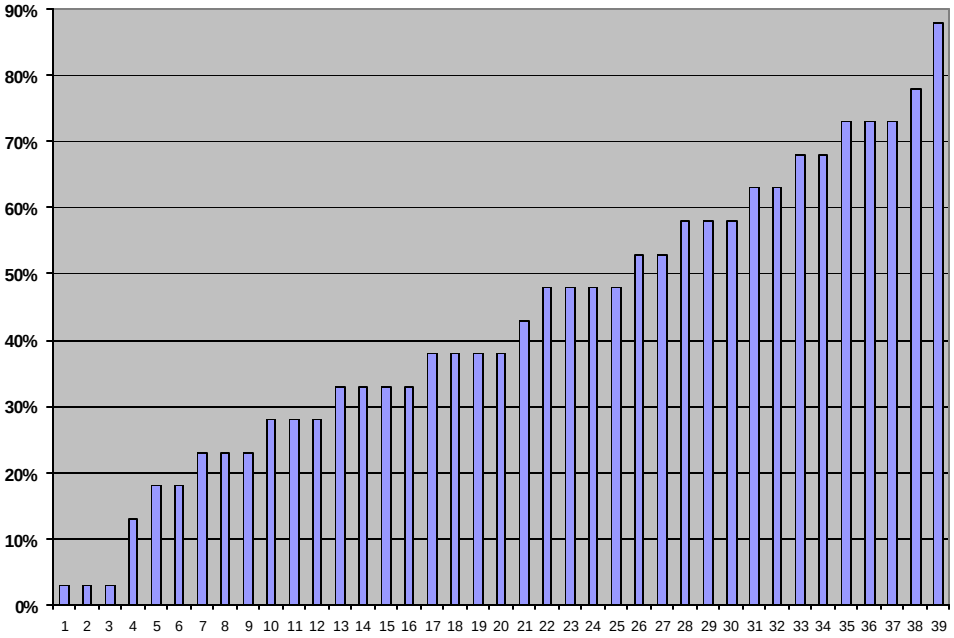
Graph 15 shows that many Asylum officers in this region seem to grant at similar rates in these cases.

Individual Asylum Officer Deviation Rates from Regional Ethiopian Mean, Region D
Graph 16



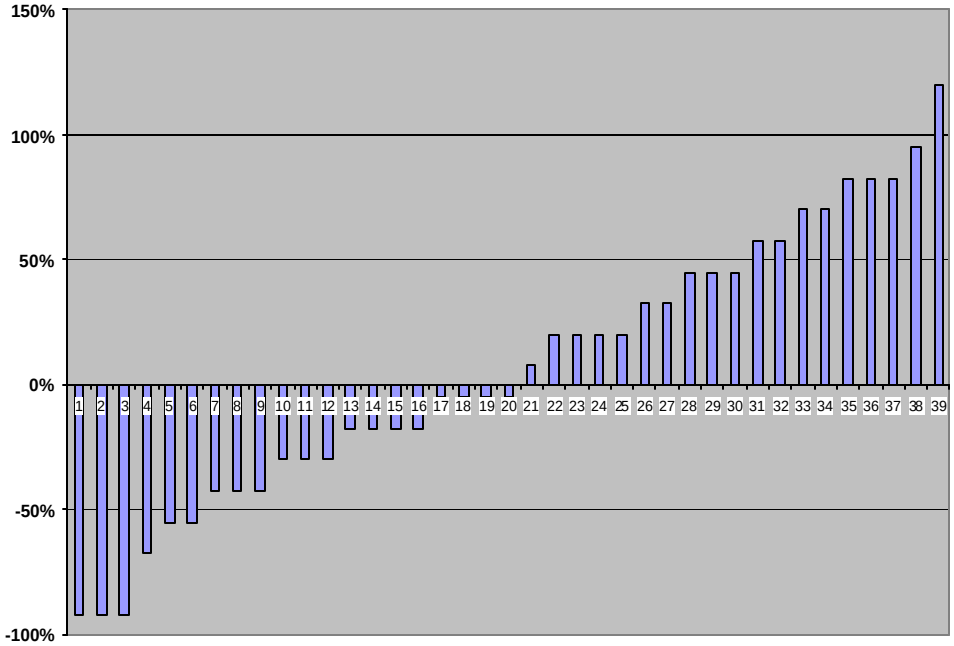
In fact, *no* officer deviates from the mean by more than 50% (Graph 16).

Individual Asylum officer Grant Rates in Indian Cases for Region C
Graph 17



By contrast, in Region C, the grant rates for Indian cases ranges considerably, from 3% to 88% (Graph 17).

Individual Asylum Officer Deviation Rates from Regional Indian Mean, Region C
Graph 18



In Region C, 15 of 39 officers deviate from the mean Indian grant rate by more than 50%. We find this of particular interest because only 1 in 11 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.

In order to help us understand one factor that might affect consistency in decision making, the Asylum Office provided us with information regarding training and quality control.[42] Every new asylum officer completes an intensive five-week basic training course with testing. 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 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 Headquarters Office 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.

Training, supervisory review and these other mechanisms could well account for the high degree of consistency that exists in several Offices. But the existing mechanisms have not created a just system in all Regional Offices for those that America wants to protect. New approaches need to be developed to achieve such a result.

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[42] Email from Joanna Ruppel, Deputy Director, Asylum Division, Office of Refugee, Asylum, and International Operations, U.S. Citizenship & Immigration Services, U.S. Department of Homeland Security, to Andrew Schoenholtz (December 18, 2006) (on file with author).

III
The Immigration Courts

As explained in Part I, immigration courts are the "trial-level" administrative agencies responsible for conducting removal hearings – hearings to determine whether non-citizens may remain in the United States.[43] For represented asylum seekers, these hearings are generally conducted like other court hearings, with the direct and cross examination of the asylum seeker, testimony from other supporting witnesses where available, and opening or closing statements by both sides. One-third of asylum seekers in immigration court are unrepresented;[44] in these cases, the immigration judge must play a more active role in questioning the applicant and building the factual record.[45] 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, which was also responsible for enforcement of immigration laws and housed the INS trial attorneys who opposed asylum claims in court.[46] In January of that year, the Executive Office for Immigration Review was created, placing the immigration courts in a separate agency within the Department of Justice.[47] 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 200 immigration judges sit on these courts.[48] Asylum cases are assigned to immigration courts according to the asylum seeker's geographic residence.[49] The court administrators in each immigration court assign cases to immigration judges to distribute the work load 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.[50]

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[43] 8 C.F.R. §1240.1(a)(1)(i). *See infra* Part I for further information on removal hearings.

[44] A. Schoenholtz and J. Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIG. L.J. 739, 742 (2002).

[45] 8 U.S.C. §1229a(b)(1) ("The immigration judge shall . . . interrogate, examine, and cross-examine the alien and any witnesses.")

[46] 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 enforcing immigration laws. These officials were retitled "immigration judges" in 1973. Aleinikoff and Martin, IMMIGRATION PROCESS AND POLICY 107-09 (2d ed. 1991).

[47] See 48 Fed. Reg. 8038 (1983) (amending 8 C.F.R. pts. 1, 3, 100) (final rule).

[48] United States Department of Justice, Executive Office of Immigration Review, *Office of the Chief Immigration Judge*, *at* http://www.usdoj.gov/eoir/ocijinfo.htm

[49] 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) *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).

[50] The only exception is that in some courts, a particular judge may be designated to hear cases initiated against unaccompanied minors, cases 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 correspondence from Executive Office of Immigration Review to Andrew Schoenholtz (Feb. 1, 2007).

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*.[51] 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 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 Tulsky'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;[52] the asylumlaw.org website, which provides data received in response to their FOIA request to the Department of Homeland Security; and the Transactional Records Access Clearinghouse website, which analyzes the data from the first two requests and provides extensive biographical information on many of the immigration judges. We are indebted to Tulsky, asylumlaw.org, and TRAC for obtaining and sharing this data.

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 asylee-producing countries as well as cases involving asylum seekers from individual countries.[53] Second, we used the immigration judges' biographical information and a database of 68,005 cases to run a computerized cross-tabulation analysis that showed us how characteristics such as age, gender, and prior employment experience correlated with their decisions in asylum cases.[54] This analysis also looked at individual 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 a logit regression analysis to confirm the results of the bivariate cross-tabulations. The methodological challenges we faced and choices we made are described in Part III of the Methodological Appendix.

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[51] 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.

[52] Frederick N. Tulsky, *Asylum seekers face capricious legal system*, SAN JOSE MERCURY NEWS, at 1A (Oct. 18, 2000).

[53] For the criteria by which these "asylee-producing countries" were selected, *see* text at *supra* n. 33. 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. 26, 2007).

[54] 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* Correspondence from Executive Office of Immigration Review to Andrew Schoenholtz (Feb. 6, 2007).

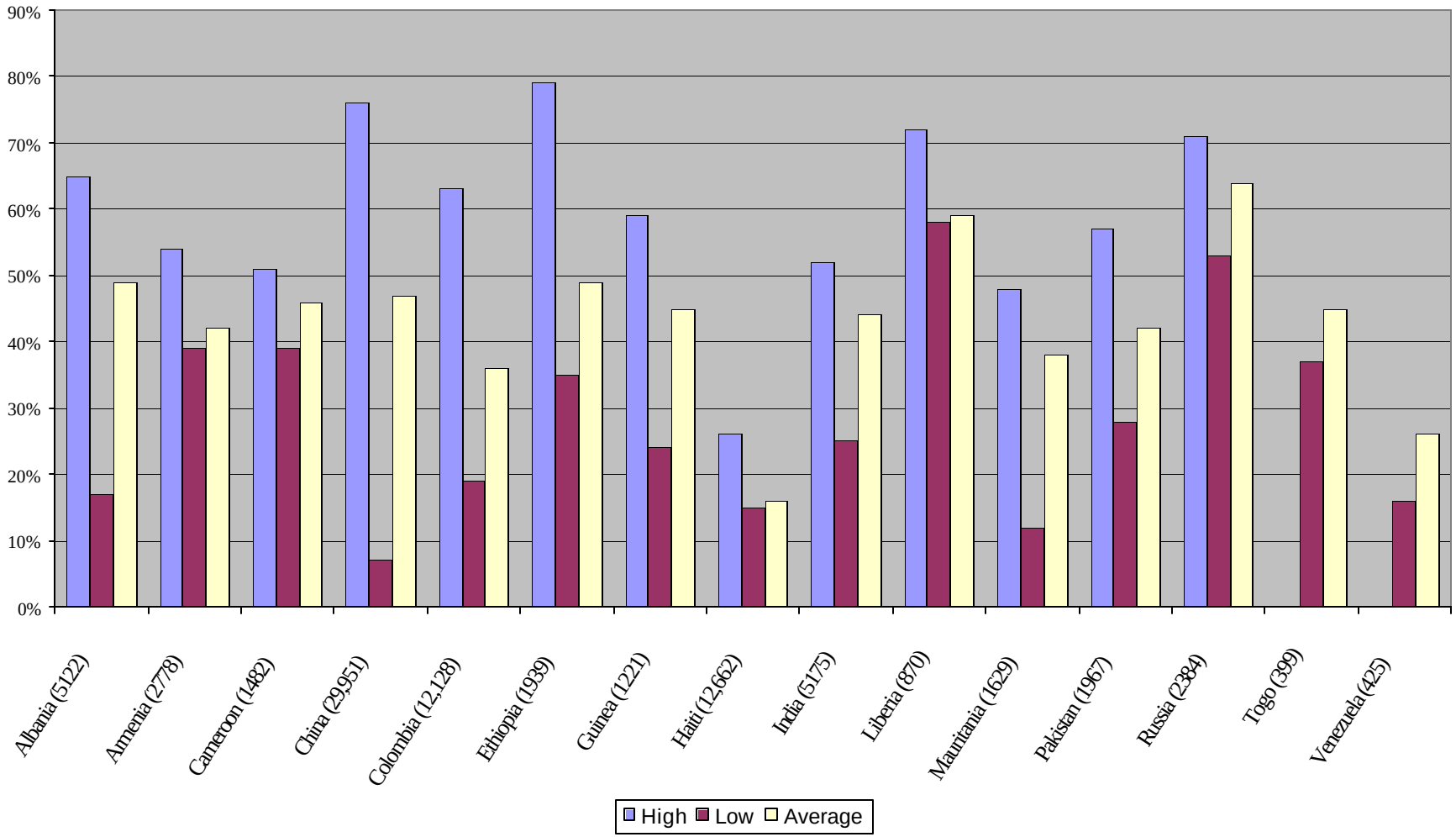
Discrepancies Between Courts

Table III shows, for each asylee-producing country, the grant rate in the immigration court with the highest and lowest grant rate for nationals of that country. Graph 19 presents some of the same data in a different format. The table and graph reveal 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 rate 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 one of these countries.[55]

[55] As further explained in Part III of the Methodological Appendix, the "national average" is limited to cases from "asylee-producing countries" decided in "high volume immigration courts," terms defined in the appendix.

Graph 19

Grant Rates for Asylee-Producing Countries in High-Volume Immigration Courts



High and Low Asylum Grant Rates
for Asylee-Producing Countries in High Volume Immigration Courts[56]
Table III

Country	High Grant Rate	Court (Number of Cases Decided)	Low Grant Rate	Court (Number of Cases Decided)	Average Grant Rate[57]
Albania	65%	New York (2635)	***17%***	***Detroit (859)***	49%
Armenia	54%	San Francisco (444)	39%	Los Angeles (2161)	42%
Cameroon	51%	Houston (119)	39%	Baltimore (774)	46%
China	***76%***	***Orlando (135)***	***7%***	***Atlanta (265)***	47%
Colombia	***63%***	***Orlando (1618)***	19%	Atlanta (160)	36%
Ethiopia	***79%***	***San Francisco (164)***	35%	Arlington (486)	49%
Guinea	60%	New York (561)	24%	Baltimore (101)	46%
Haiti	***27%***	***New York (274)***	15%	Miami (10,132)	16%
India	52%	Los Angeles (386)	25%	Newark (154)	45%
Liberia	72%	Newark (157)	58%	Philadelphia (165)	59%
Mauritania	49%	New York (838)	***12%***	***Detroit (161)***	38%
Pakistan	57%	Philadelphia (106)	28%	Houston (114)	43%
Russia	71%	San Francisco (150)	53%	Newark (100)	64%
Togo	n/a	n/a[58]	37%	Baltimore (205)	45%
Venezuela	n/a	n/a[59]	16%	Miami (310)	26%

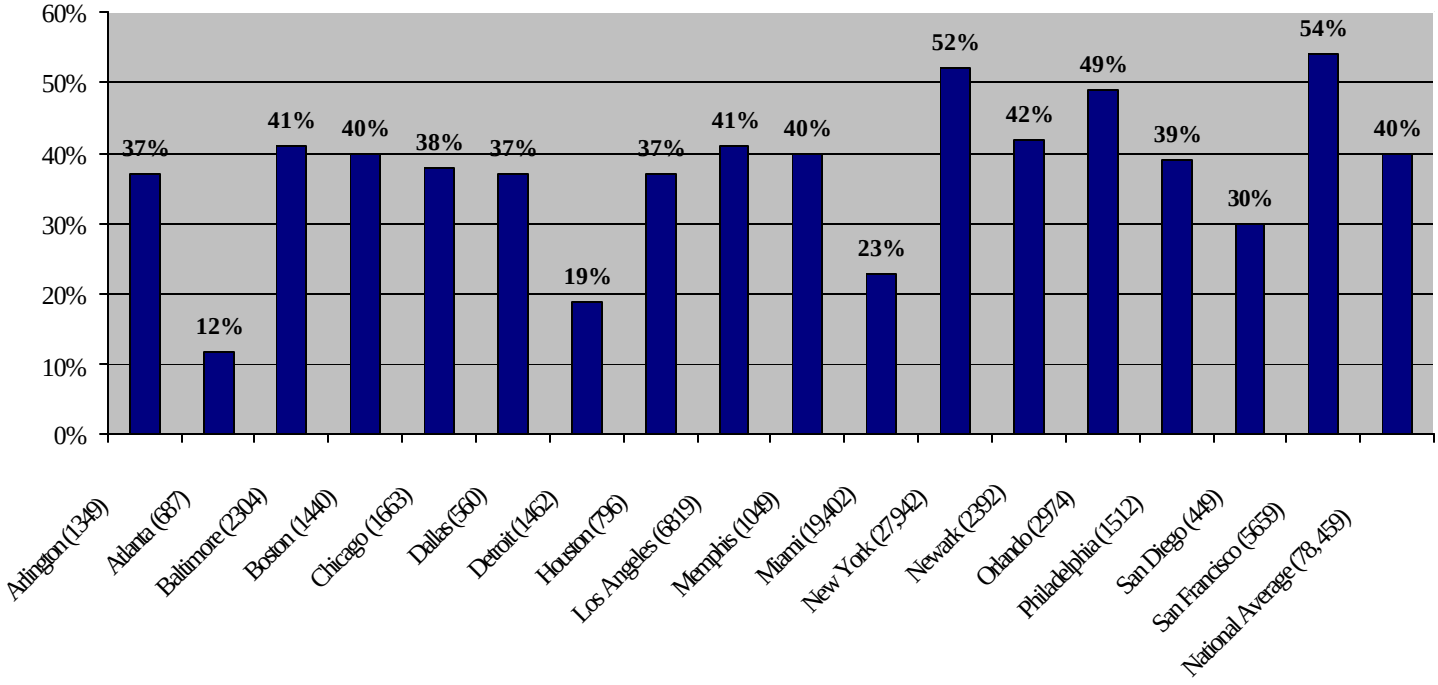
We found serious disparities in decision-making in six of the fifteen asylee-producing countries.[60] Asylum seekers from three of these countries faced a grant rate in at least one court that was more than 50% below the national average, and applicants from four of these countries enjoyed a grant rate in at least one court that was more than 50% above the national average. For one of these countries, China, both the high and low grant rates deviated in at least one high volume immigration court more than 50% from the national average.

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. Moreover, if this same 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, almost ten times higher than in Atlanta. 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

[56] Bold and italicized type indicates a grant rate more than 50% above or below than the national average grant rate for the country in question. As explained in the Methodological Appendix, we examined only courts that decided 100 or more cases from the country in question.
[57] "Average grant rate" refers to the grant rate for this country across all High Volume Immigration Courts.
[58] Baltimore was the only immigration court that decided 100 or more cases from Togo.
[59] Miami was the only immigration court that decided 100 or more cases from Venezuela.
[60] The numbers in parentheses in Table III indicate the number of asylum cases decided by all high-volume immigration courts for the country in question.

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?

Average Grant Rates for All Asylee-Producing Countries by High Volume Immigration Courts[61]
Graph 20



One answer is that some Immigration Courts grant asylum cases from the aggregate of all asylee-producing countries at a rate much lower (Atlanta, Detroit, Miami, and San Diego) or much higher (New York, Orlando, and San Francisco) than the national average. In Table II above, 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 Graph 20 shows, the average grant rate in high volume immigration courts for asylee-producing countries 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 similar upward disparities in the high-granting courts. The San Francisco Immigration Court, which granted asylum to Ethiopians at a rate more than

[61] The numbers in parentheses after the court name indicate the number of cases from all asylee-producing countries decided by the court in question.

50% greater than the national average rate, had an average grant rate for all APCs that was 35% above the national average. In addition, the New York Immigration Court, which had the high grant rate for Haiti, had an average grant rate for APCs that was 30% above 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, although components of a single national Executive Office for Immigration Review, are especially tough on all asylum seekers.

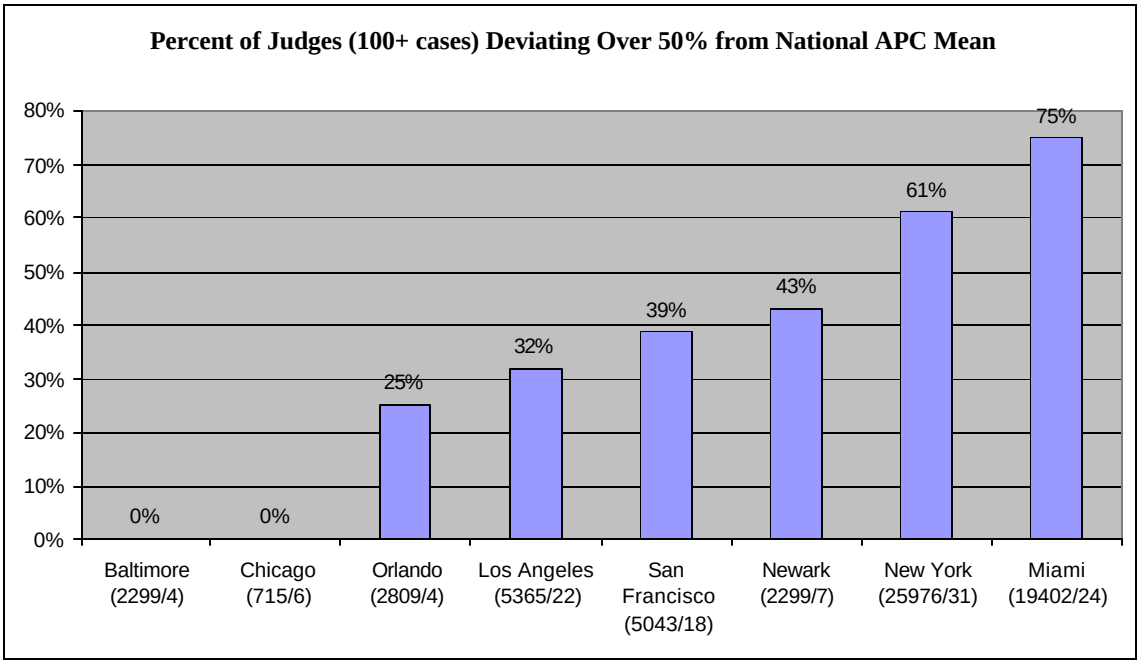
It is theoretically possible that these differences across courts may be due to differences in the populations of asylum seekers in different geographic locations, though we know of no reason why Orlando should attract a much higher proportion of bona fide asylum applicants from APCs than Atlanta. Within a court, however, no such geographic variable should exist, as nearly all cases are assigned randomly to the judges.[62] 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.

Discrepancies within Immigration Courts

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.[63] With the national APC mean of 40% as a starting point, we determined for each court how many judges' APC grant rates were more than 50% deviant from that mean.

[62] *See supra* text at n. 50.
[63] 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 more APC cases are indicated in parentheses after the name of the court on each graph in this section.

Graph 21[64]



Discrepancies from the Court Mean

The statistics tell us that the large courts have consistent outliers;[65] that is, from one-third to three-quarters of the judges on these courts grant asylum for the aggregate of all of the cases from asylee-producing countries at rates more than 50% below or more than 50% above 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; so, 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 diverse, resulting in greater disparities in claim viability. As a result, judges in Miami might be more discrepant from the national mean than those in Chicago.

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

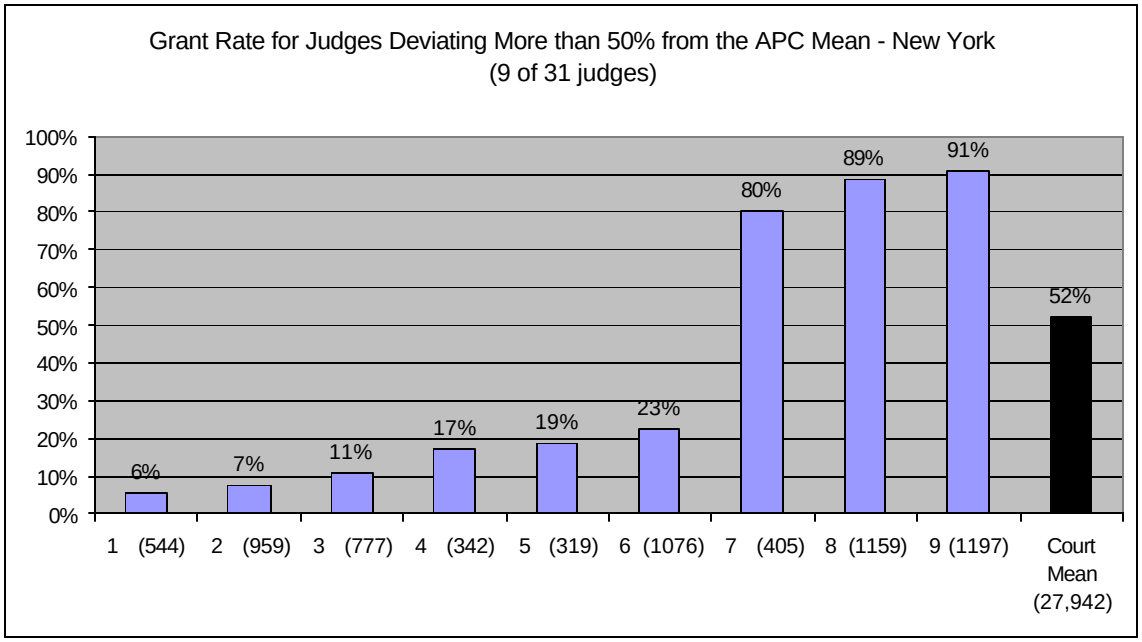
[64] The x-axis shows city, cases decided, and number of judges.

[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.

APCs.[66] We focused on the four largest courts: San Francisco, Miami, New York, and Los Angeles, with eighteen, twenty-one, twenty-six, and twenty-seven judges respectively.[67] In other words, we asked whether the judges who are inconsistent with national norms are also out of step with the other judges in their own courthouse. The data reveal that in three out of four courts they are.[68]

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 Miami judge who visited New York frequently during the time period studied granted asylum in 11% of the APC cases he saw in New York (as compared to 6% in Miami). Three more judges granted less than a quarter of the cases that came before them, at rates of 17%, 19%, and 23% respectively. The New York Immigration Court also has 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%.

Graph 22

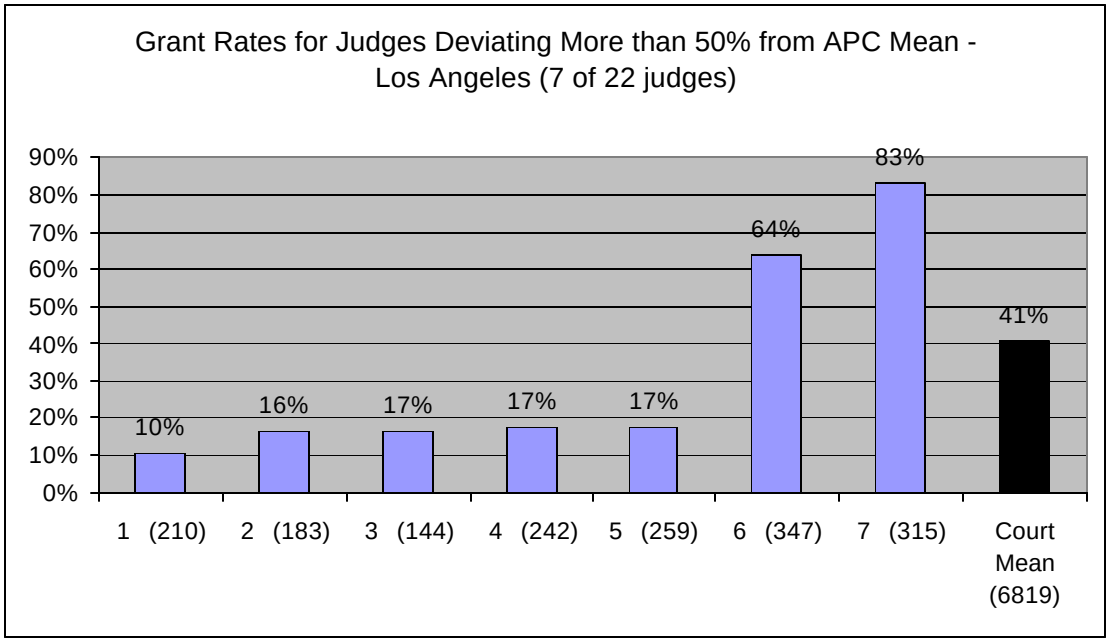


In Los Angeles, one judge granted asylum to only 10% of the applicants from APCs who came before him; another judge approved only 16% of the APC asylum cases she heard; and three judges granted only 17% of the APC asylum claims in their courts. Against these five, the highest-granting judge approved 83% of the asylum cases from

[66] We looked only at judges hearing 100 or more APC cases. The number of APC cases decided by each judge is noted in parentheses along the x-axis of each chart. The number of APC cases decided by all judges on each court is noted in parentheses next to the "Court Mean" label.
[67] The numbers of judges per court are as of July 2004. As further explained in the Methodological Appendix, the Miami court numbers exclude judges at Krome Detention Center and the New York court numbers exclude judges at the Varick Street court, as these judges hear predominantly detained cases.
[68] Only two of 18 San Francisco judges deviated by more than 50% from that court's mean grant rate.

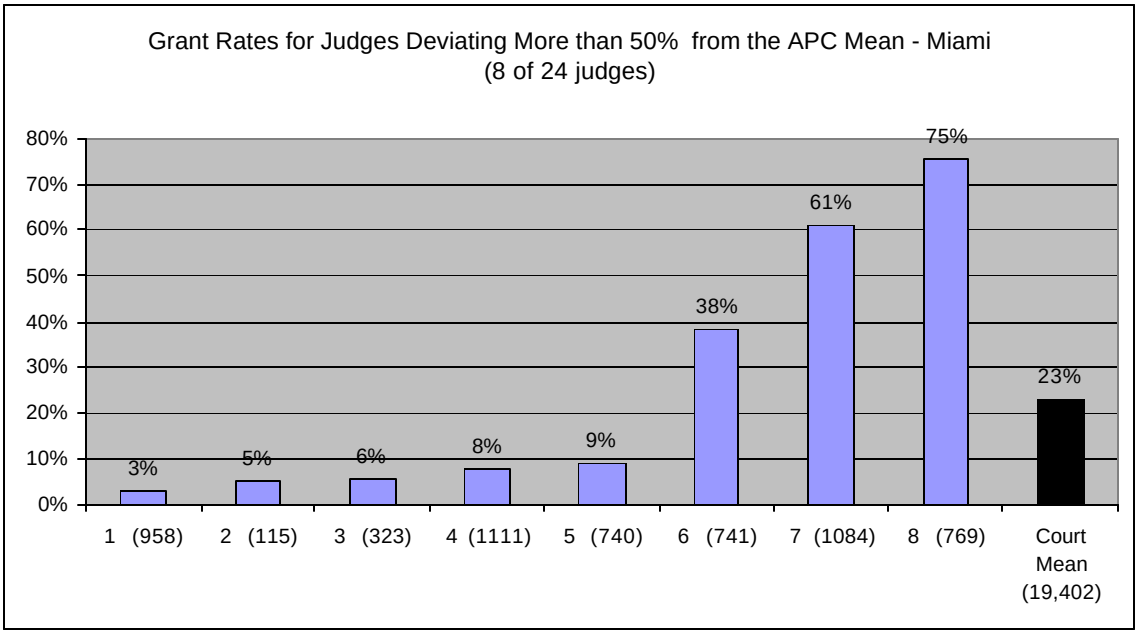
APCs in his court and another judge granted 64% of the cases from APCs before him. In the end, 32% of the Los Angeles judges deviated more than 50% from the court's APC mean of 41%.

Graph 23



In Miami, the numbers are similar: 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% respectively. In sum, 33% of the Miami judges decided APC asylum cases at rates more than 50% deviant from the court's mean of 23%.

Graph 24



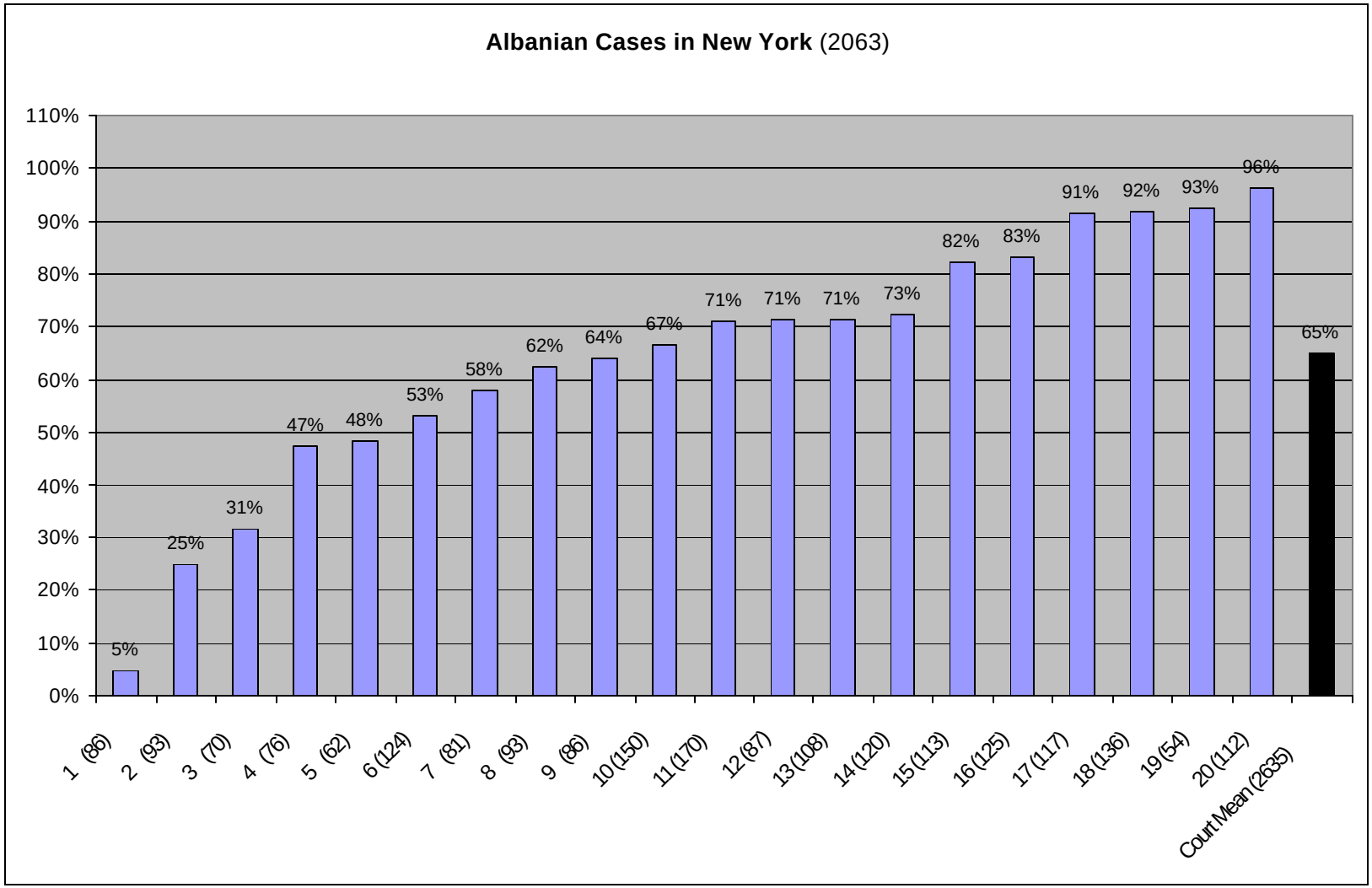
In total, in the large immigration courts, we found nine judges whose average grant rates for all asylum seekers from APCs during the period studied were more than 50% above their court's mean and eighteen judges whose rates were more than 50% below their court's mean. From a pool of approximately 92 judges, almost thirty percent decided asylum cases from APCs at rates significantly discrepant from their court's average grant rate. Asylum seekers from APCs who came before the highest granting judge were almost thirty times more likely to win asylum than asylum seekers from APCs before the lowest granting judge. Why the enormous disparities between judges in these courts?

Discrepancies from the Court Mean, Holding Nationality Constant

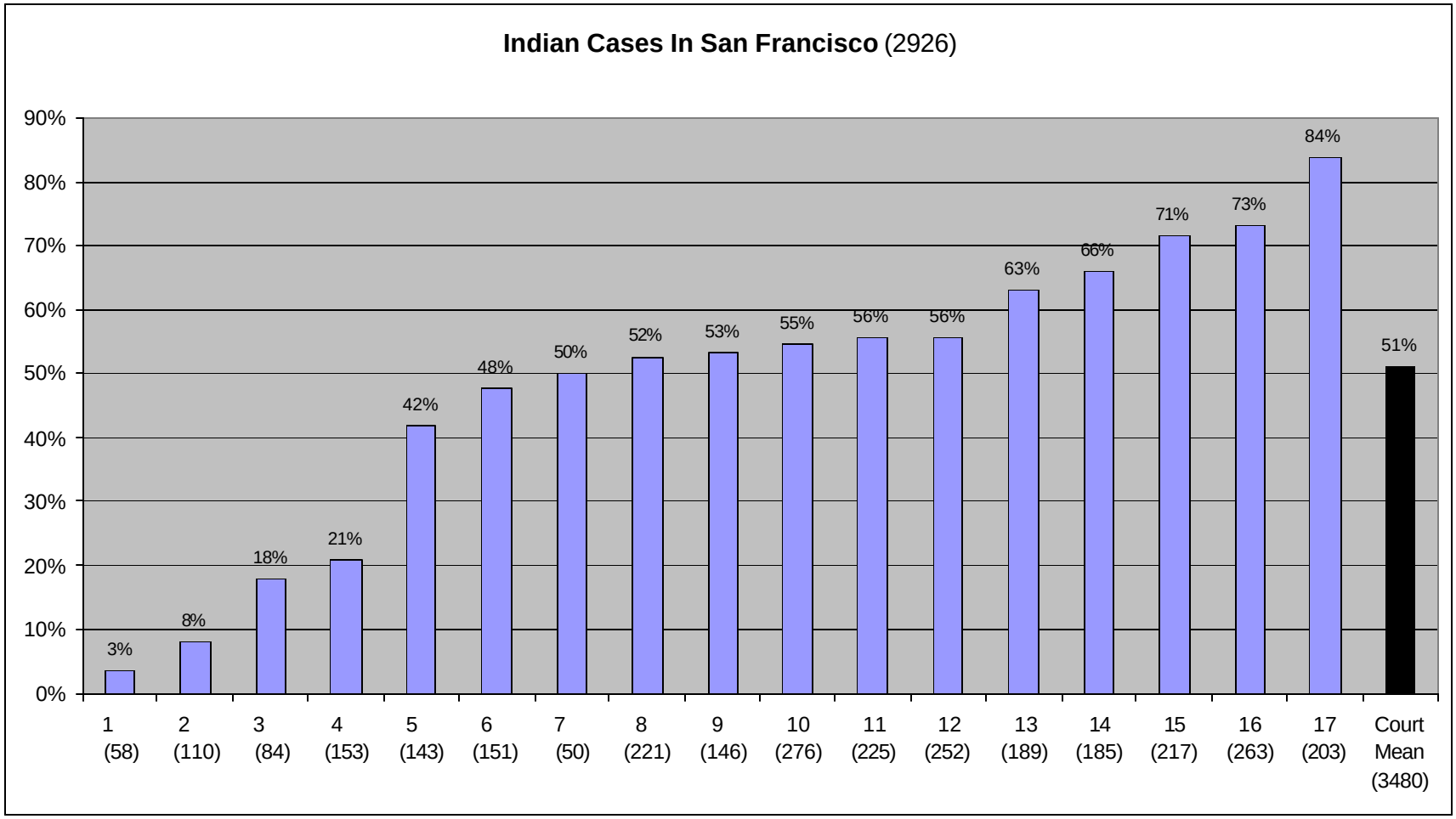
Even when examining disparities from each court's mean, thus correcting for any geographical differences in populations of asylum seekers, there are serious discrepancies in the grant rates of individual immigration judges on the same court. To delve more deeply into the causes of these disparities, 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.[69]

[69] We excluded judges who had decided fewer than 50 asylum cases from the country in question as well as immigration judges detailed to the court in question. The data by court includes judges who retired or were hired during the January 2000 to August 2004 time frame. 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 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 asylee-producing countries, 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.

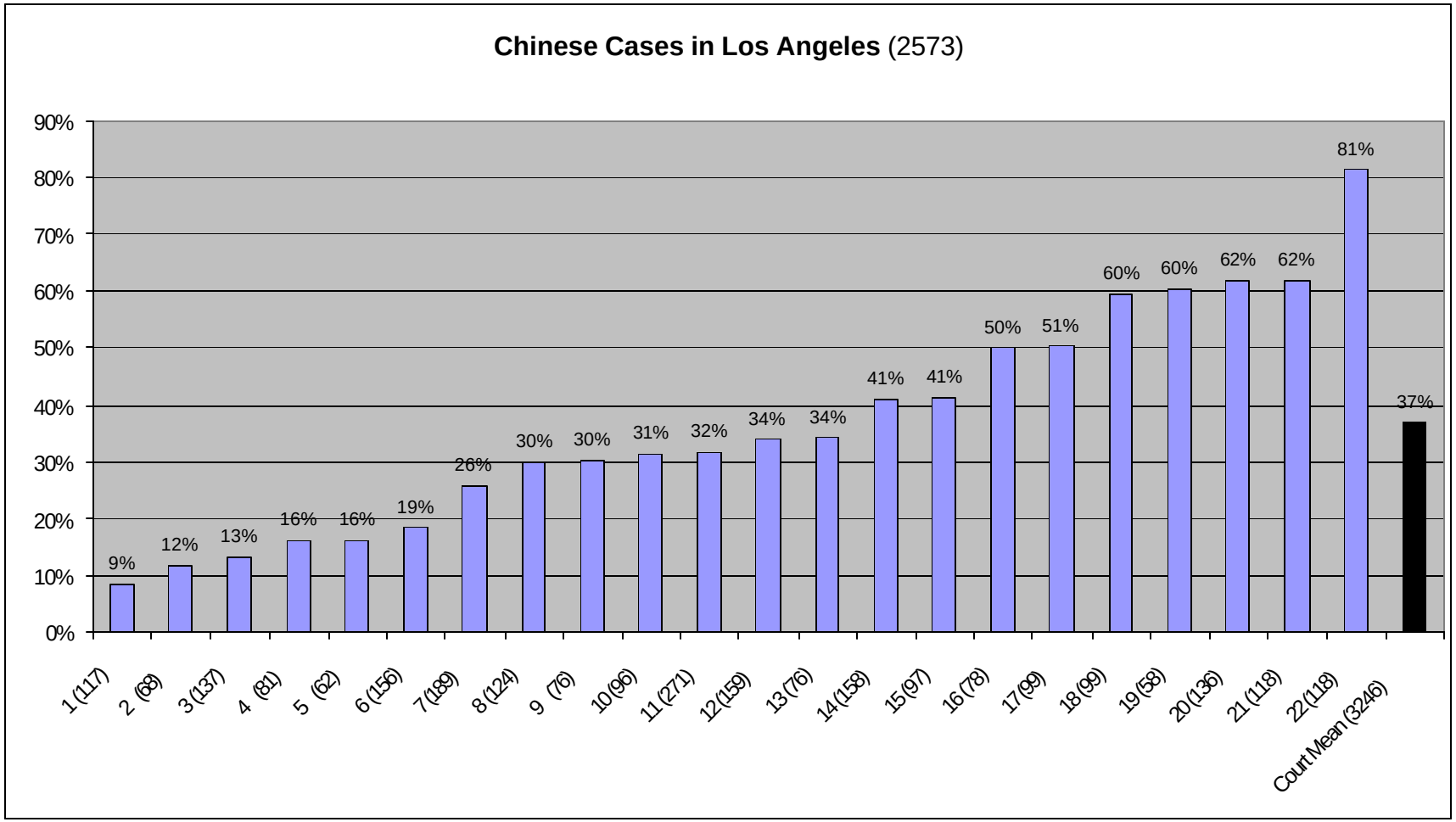
Graph 25


Albanian Cases in New York (2063)
110%
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
5%
25%
31%
47%
48%
53%
58%
62%
64%
67%
71%
71%
71%
73%
82%
83%
91%
92%
93%
96%
65%
1 (86)
2 (93)
3 (70)
4 (76)
5 (62)
6 (124)
7 (81)
8 (93)
9 (86)
10 (150)
11 (170)
12 (87)
13 (108)
14 (120)
15 (113)
16 (125)
17 (117)
18 (136)
19 (54)
20 (112)
Court Mean (2635)

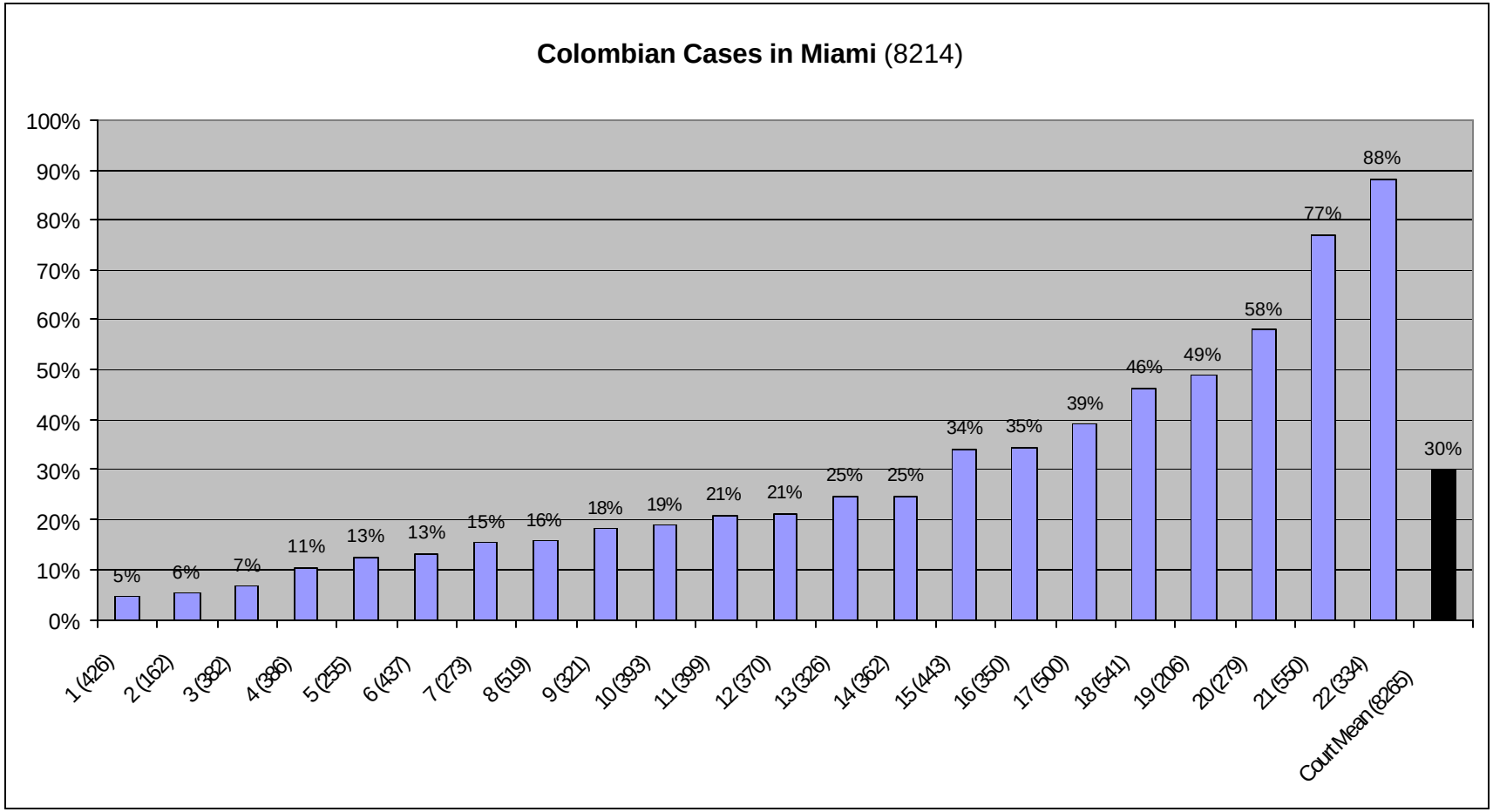
Graph 26


Indian Cases In San Francisco (2926)
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
3%
8%
18%
21%
42%
48%
50%
52%
53%
55%
56%
56%
63%
66%
71%
73%
84%
51%
1 (58)
2 (110)
3 (84)
4 (153)
5 (143)
6 (151)
7 (50)
8 (221)
9 (146)
10 (276)
11 (225)
12 (252)
13 (189)
14 (185)
15 (217)
16 (263)
17 (203)
Court Mean (3480)

Graph 27


Chinese Cases in Los Angeles (2573)
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
9%
12%
13%
16%
16%
19%
26%
30%
30%
31%
32%
34%
34%
41%
41%
50%
51%
60%
60%
62%
62%
81%
37%
1 (117)
2 (68)
3 (137)
4 (81)
5 (62)
6 (156)
7 (189)
8 (124)
9 (76)
10 (96)
11 (271)
12 (159)
13 (76)
14 (158)
15 (97)
16 (78)
17 (99)
18 (99)
19 (58)
20 (136)
21 (118)
22 (118)
Court Mean (3246)

Graph 28


Colombian Cases in Miami (8214)
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
5%
6%
7%
11%
13%
13%
15%
16%
18%
19%
21%
21%
25%
25%
34%
35%
39%
46%
49%
58%
77%
88%
30%
1 (426)
2 (162)
3 (382)
4 (386)
5 (255)
6 (437)
7 (273)
8 (519)
9 (321)
10 (393)
11 (399)
12 (370)
13 (326)
14 (362)
15 (443)
16 (350)
17 (500)
18 (541)
19 (206)
20 (279)
21 (550)
22 (334)
Court Mean (8265)

Graph 25 through Graph 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 final bar 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 average – meaning that 15% of the judges ruled at a rate considerably at odds with the court's mean of 65%. 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 the mean; 29% of the judges deviated by more than 50% from the court's average of 51%. The situation was even worse in Los Angeles for Chinese cases, which six judges granted at a rate 50% lower than and five judges granted at rate 50% higher than the mean, so that 50% of the judges were out of step with the court's average of 37% in these cases. Similarly, in Miami six judges decided Colombian cases at rates 50% below and five judges decided at rates 50% above the mean; 50% of these judges decided asylum cases at a rate that varied 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 81% of 118 Chinese applicants – more than 9 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 21 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 works in the same suite of offices as the first judge but was 23 times more likely to grant asylum. And San Francisco is even more dramatic; one judge granted 3% of Indian asylum cases before him, compared to another judge who granted 84% of these cases, approximately a 2700% difference.

Variables Impacting Judges' Decisions

We also conducted a computerized cross-tabulation analysis of the decisions of the judges during the time frame discussed above.[70] We examined the following variables, all of which were statistically significant, to determine their impact on the judges' grant rates: whether the asylum seeker was represented, the number of dependents the asylum seeker had, whether the asylum seeker came from an "asylee-producing country", the caseload of the judge and the court, the gender of the judge, the age of the judge, the president who appointed the judge, and the prior work experience of the judge. The latter category was broken out into experience working in the following fields: for the Immigration and Naturalization Service, for the government (except the INS), in the military, for a non-governmental organization, in private practice, and in academia. We confirmed the statistical significance of the cross-tabulation analysis with Chi Square and

[70] The results of the cross-tabulation analysis as well as the regression analysis confirming these results we used can be found in Appendix II. An explanation of the methods we used can be found in the Methodological Appendix.

performed a logit regression analysis to ensure that the results of the cross-tabulation analysis would remain consistent with all other variables held constant.

The results of the cross-tabulation analysis confirm earlier studies showing that whether or not an asylum seeker is represented in court is the single most important factor affecting the outcome of her case.[71] Represented asylum seekers were granted asylum at a rate of 45.6%, as compared to a rate of 16.3% for those without legal counsel – a difference of 180%.[72] The regression analysis also found that, with all other variables in the study held constant, represented asylum seekers were significantly more likely to win their case than those without representation. 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 does 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.[73] 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.[74]

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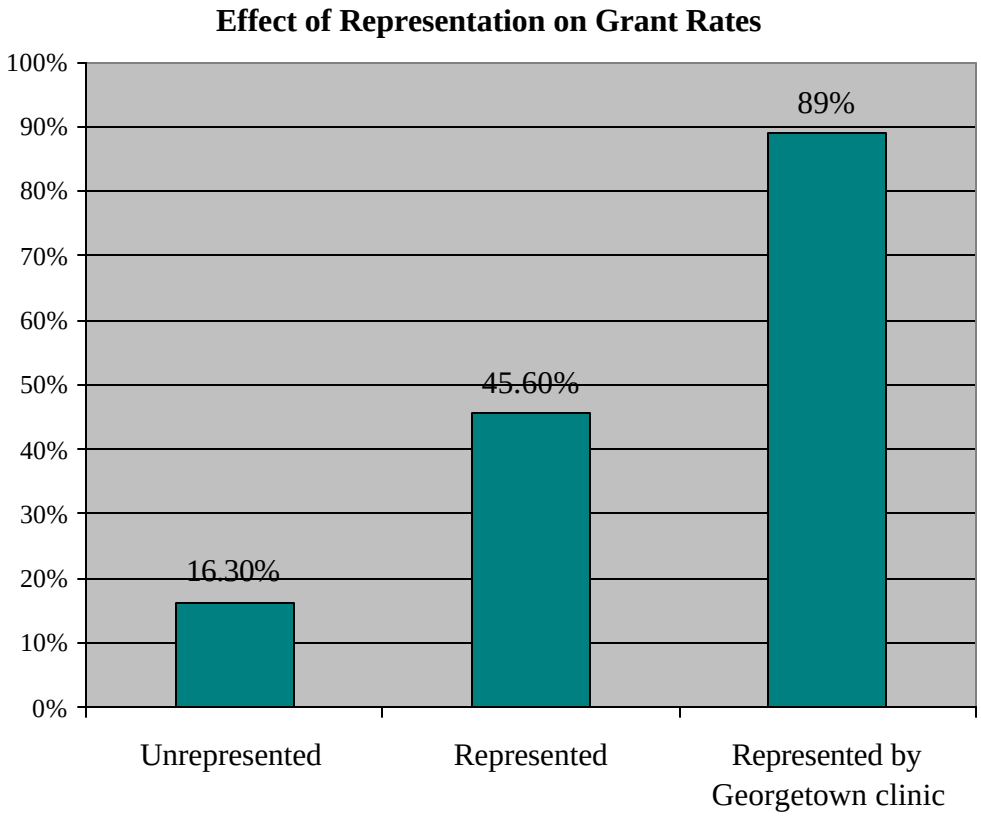
[71] *See* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute, April 2005); Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, *in* United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* 239, 232-280 (Feb. 2005); A. Schoenholtz and J. Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIG. L.J. 739 (2002). .

[72] Our analysis does not control for other variables, while the multivariate regression analysis does control for other variables. The bivariate analysis excludes all Mexican cases and defensive cases; see Methodological Appendix for our method and reasoning.

[73] Because two of the authors of the article have selected cases for the Georgetown asylum clinic, they can verify that these case are not selected based on the likelihood of success. The clinic's standard for acceptance of asylum clients is that they a genuine, non-frivolous claim; often, the clinic chooses the more complex and difficult claims. The main selection principle is that the case has to be one that will have a hearing in April or November, when our students, who arrive in August and January, will be fully trained.

[74] 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.

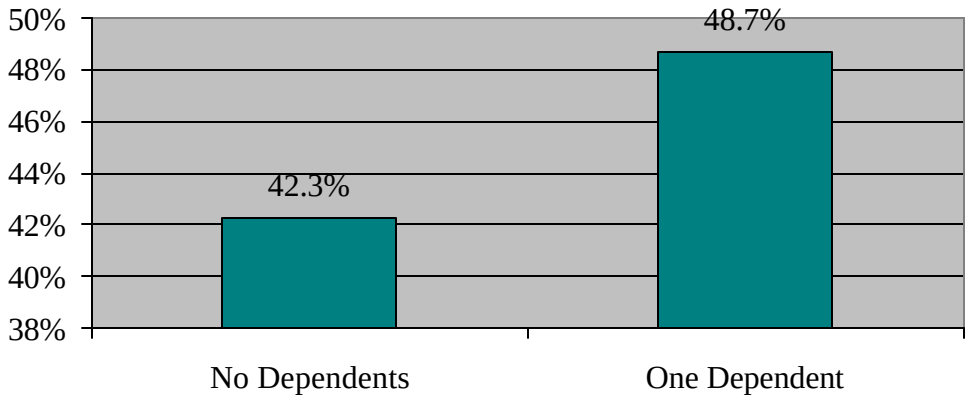
Graph 29



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 bivariate analysis, while asylum seekers with no dependents have a 42.3% grant rate, having one dependent increases the grant rate to 48.7%. 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 analysis confirms that this factor significantly affected judges' determination whether or not to grant an asylum.

Graph 30

Effect of Dependents on Grant Rates

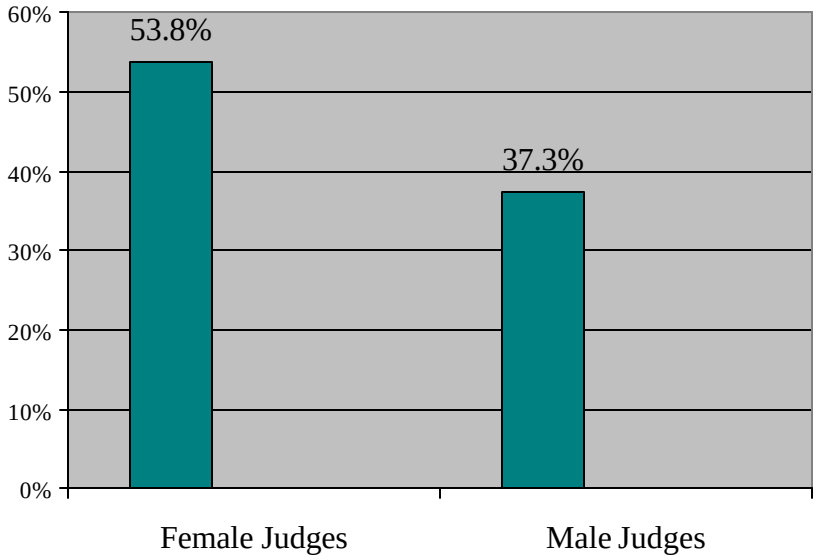


We also looked at characteristics of the judges that impacted the asylum decision. Perhaps the most interesting result of our cross-tabulation study was that the gender of the judge had a significant impact on the likelihood that asylum would be granted. Female immigration judges granted asylum at a rate of 53.8%, while male judges granted asylum at a rate of 37.3%.[75] 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.[76] In contrast, no appreciable difference exists in the grant rates of male and female asylum officers. Our study of the grant rates of 264 male and 257 female officers who decided 50 or more APC cases from FY 1999 through FY 2005 shows only a 3% difference, with male officers granting asylum at a rate of 44% and female officers granting at a rate of 41%.

[75] Our regression analysis confirms that with all other variables held equal, female gender is correlated with higher grant rates. *See* Appendix II, Regression Results.
[76] The study included 78 female judges and 169 male judges.

Graph 31

Effect of Judge's Gender on Grant Rates



Several political scientists have studied the effect of gender on judicial decision-making in federal and state courts. Our bivariate study, 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.[77] The literature in this area offers several possible reasons for gender

[77] 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.*, Elaine Martin and Barry Pyle, *Gender Race, and Partisanship on the Michigan Supreme Court*, 63 ALBANY L. REV. 1205, 1225 (2000) (finding differences in the voting patterns of 12 male and female justices on the Michigan Supreme Court from 1985 through 1998 in 36 divorce cases, in which women were 32.9% more likely to cast a liberal vote, and in 40 discrimination cases, in which men were 36.5% more likely to vote liberally, but finding no gender disparity in 21 feminist issues cases); Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 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 62 cases involving race issues decided by 20 judges, in which women were 74.8% more likely to vote in favor of the minority position, but finding no gender disparity in 24 cases involving women's issues decided by 16 judges); David W. Allen and Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 156, 165 (1993) (finding that 24 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); Sue Davis, Susan Haire, and Donald R. Songer, *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 131 (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); *but see* Orley Ashenfelter, Theodore Eisenberg, and Stewart J. Schwab, *Politics and the Judiciary: The Influences of Judicial Background on Case Outcomes*, 24 J. LEGAL STUDIES 257 (1995) (finding that gender and other variables did not affect outcomes in 2,258 federal civil rights and prisoner cases filed in three federal

differentials in judicial decision-making.[78] One survey of federal judges found that while 81% of female judges had experienced sex discrimination, only 18.5% of men had experienced race or class discrimination.[79] This experience may have an impact in the court room: 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."[80] 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.[81] Finally, Judith Resnik argues that feminist approaches to judging focus on caretaking and an understanding of connections to those before them.[82] 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.

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districts and decided by 47 district judges in fiscal 1981); Jon Gottschall, *Carter's Judicial Appointments: the Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 JUDICATURE 165 (1983-1984) (finding no gender impact on 121 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).

[78] *See, e.g.*, Martin and Pyle, *supra* note 77 at 1214-20 (discussing three groups of studies of gender differences, namely tokenist, feminist jurisprudence, and "different voice" judicial studies); Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in LAWYERS IN SOCIETY: AN OVERVIEW 221 (Richard L. Abel and 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 (1986) (finding a different, feminine voice in Justice O'Connor's jurisprudence); *see also* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 SOUTHERN CAL. L. REV. 1877, 1906-1928 (1988) (discussing implications of feminist theories for the judiciary). These studies all reference Carol Gilligan, IN A DIFFERENT VOICE (1982); though not a legal study, it remains perhaps the most influential book in prompting academics to examine the question of whether men and women reason differently.

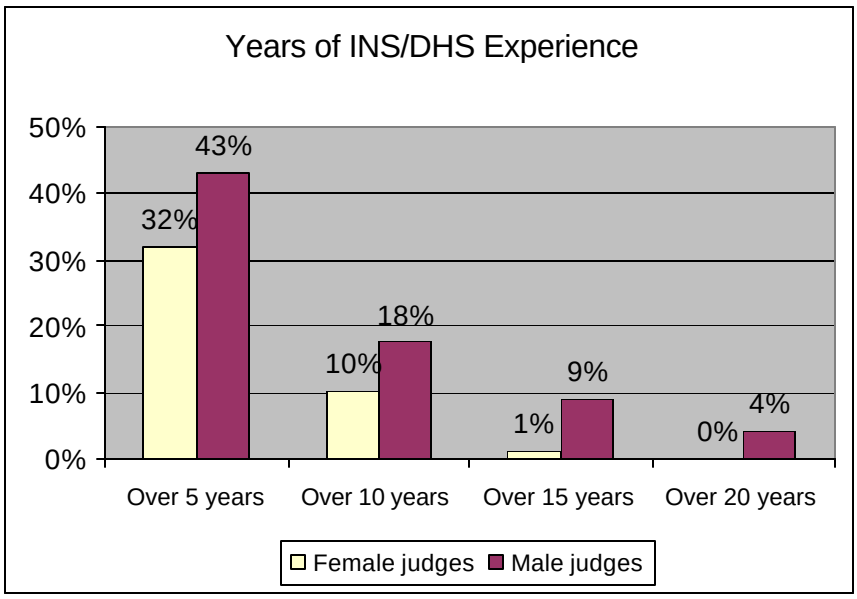
[79] *See* Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 207 (1989-1990) (relying on data gathered directly from federal judges appointed by President Carter through a mailed survey; 75% of female judges and 42% of male judges responded to the survey, the date of which is unclear from this source).

[80] Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897, 915 (1986) (quoting from "Women in the Legal Workforce" (University of Southern California Conference, March 1983)).

[81] *See* Physicians for Human Rights, EXAMINING ASYLUM SEEKERS: A HEALTH PROFESSIONAL'S GUIDE TO MEDICAL AND PSYCHOLOGICAL EVALUATIONS OF TORTURE 23-25 (2001), *at* http://physiciansforhumanrights.org/library/documents/reports/examining-asylum-seekers-a.pdf.

[82] Resnik, *supra* note 78 at 1921, 1927.

Graph 32



Some of the "gender effect" on asylum decisionmaking may be related to the different prior work experience of male and female judges.[83] Of 78 female judges studied, 27% had previously worked for non-governmental organizations, defending the rights of immigrants or indigent populations. But of 169 male judges studied, only 8% had worked for NGOs. In contrast, 57% of male judges had previously worked for the INS or DHS, and 83% of male judges had worked for the government in some capacity before their appointment to the bench. Only 51% of female judges had prior work experience with INS or DHS, and just 72% of women had previous government experience. As Graph 33 illustrates, this differential in previous INS or DHS experience becomes even more striking with time; while 32% of female judges and 43% of male judges had over 5 years of INS/DHS experience, 10% of females and 18% of males had worked for INS/DHS for more than 10 years, 1% of females and 9% of males had over 15 years INS/DHS experience, and none of the females but 4% of the males had over 20 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.

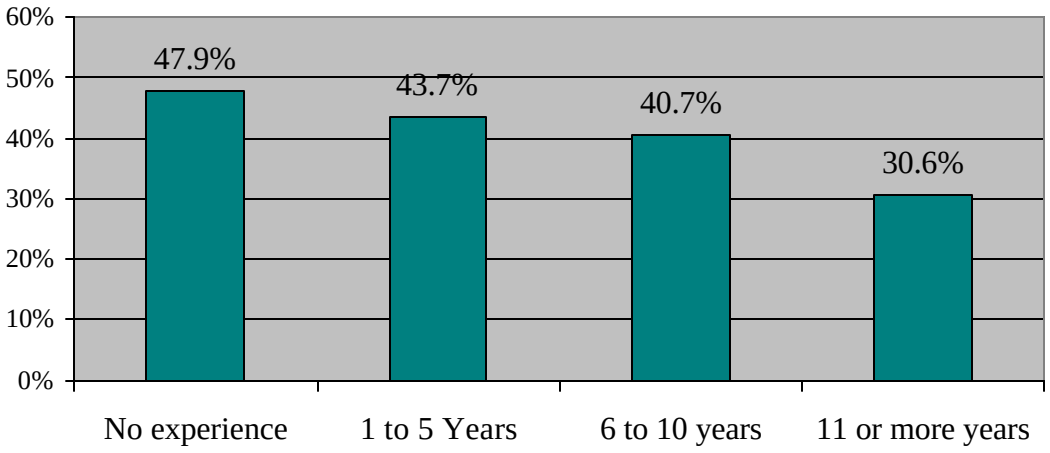
Prior work experience of all types had a significant impact on a judge's grant rate. We discovered that work experience in an enforcement capacity with the former Immigration and Naturalization Service or the current Department of Homeland Security made judges less likely to grant asylum. This effect became more pronounced with years of service. The bivariate analysis tells us that Judges who worked for the INS or DHS for one to five years had a grant rate of 43.7% while judges who had not worked there granted asylum at a rate of 47.9%. Moreover, judges with 11 or more years in the INS or DHS granted asylum to only 30.6% of the asylum seekers before them. Perhaps people

[83] This does not indicate a multicollinearity problem. *See* Appendix II, Correlation Matrix.

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.

Graph 33[84]

Effect of INS/DHS Experience on Grant Rates

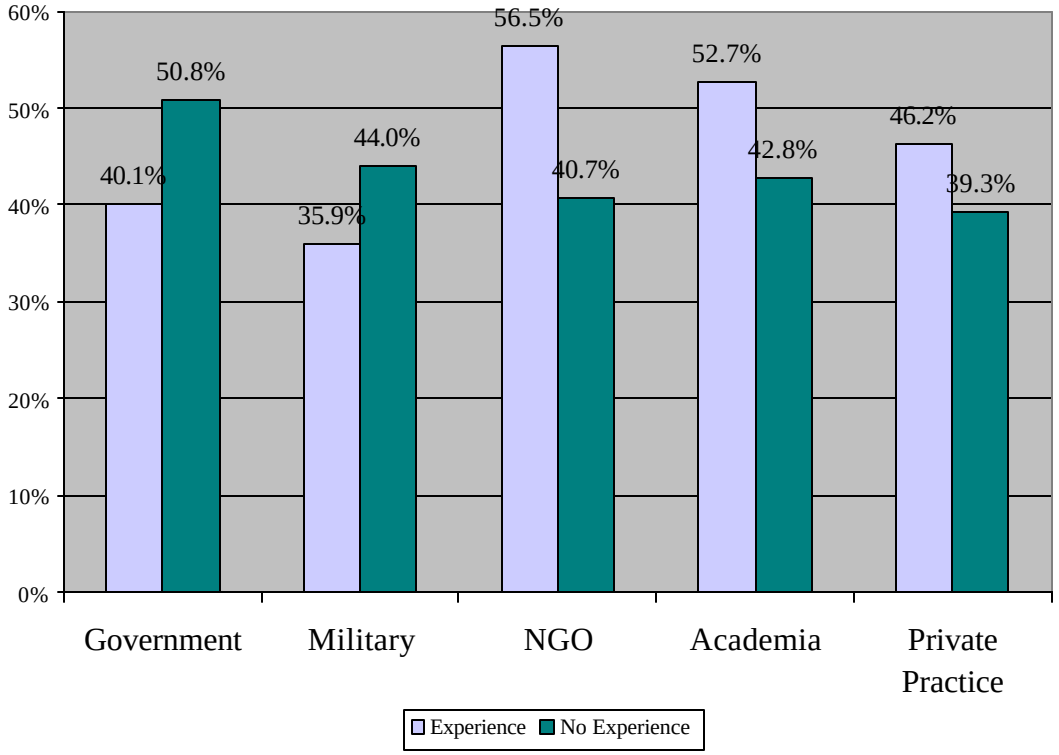


Judges with prior government experience (including INS or DHS) granted asylum at a rate of 40.1%, contrasted with a grant rate of 50.8% for those with no prior government experience, a difference of 27%.[85] Judges with military experience granted asylum at a rate of 35.9%, compared with a rate of 44% for those without military experience, a difference of 31%. On the other end of the spectrum, judges who had worked for non-profit organizations granted asylum at a rate of 56.6%, compared with a rate of 40.7% for those without such experience, a difference of 39%. And judges with prior experience in academia granted asylum at a rate of 52.7%, in contrast to a rate of 42.8% for those without experience as an academic, a disparity of 23%.[86] Finally, judges who had worked in private practice granted asylum at a rate of 46.2%, compared to 39.3% for judges without experience in a private firm, a difference of 18%.

[84] The regression analysis confirms that, with all other variables held equal, 1 to 5 or 11 or more years of INS experience make it less likely that a judge will grant asylum. The variable "INS Experience 6-10 years" was positively correlated with grant rates, but was only 81% likely to be statistically significant.
[85] This bivariate analysis was not confirmed by the regression analysis because of potential multicollinearity problems with the INS experience variables.
[86] This relationship was not found to be statistically significant in the regression analysis.

Graph 34

Effect of Prior Work Experience on Grant Rates



The remaining variables had less significant effects on judge grant rates. The appointing president had an impact on grant rates, with judges appointed by President George H.W. Bush the most likely to grant (50.2%). Judges appointed by President Clinton (43.6%) had the next highest grant rate, followed by judges appointed by Reagan (43.5%) and George W. Bush (39.85).[87] Both the age and caseload of judges had little impact on asylum decisionmaking.[88]

[87] Immigration judges are appointed by the Attorney General, not by the President, but we assume that the Attorney General shares the political party of the President who appointed her.

[88] While the caseload of the court appeared to have a positive correlation with grant rates in the cross-tabulation analysis, the regression analysis revealed that, when all other independent variables were held constant, court caseload did not impact grant rate.

IV
The Board of Immigration Appeals

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 this adjudication system.[89] 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 United States Court of Appeals may disagree with a Board interpretation, the BIA must follow that Court's jurisprudence only for appeals from immigration courts in the court's own circuit. Moreover, the federal courts often defer to the BIA.[90]

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.[91] 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 Immigration and Naturalization Service 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, as well as several lawyers from private practice, advocacy and academia.[92] The latter appointments aimed to balance somewhat the predominant government experience of existing members and of her own 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

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[89] Schoenholtz *supra* note 32, at 352-353.
[90] See text at *supra* n. 30.
[91] The Board was created by the Attorney General in 1940, after a transfer of functions from the Department of Labor. Reorg. Plan V (May 22, 1940); 3 CFR Comp. 1940, Supp. tit.3, 336. The Board is not a statutory body; it was created wholly by the Attorney General from the functions transferred. A.G. Order 3888, 5 FR 2454 (July 1, 1940); *see Matter of L-*, 1 I&N Dec. 1 (BIA; A.G. 1940).
[92] See, e.g., Board of Immigration Appeals Biographical Information, Fact Sheet, October 2006 (Revised), http://www.usdoj.gov/eoir/fs/biabios.htm (Juan P. Osuna, Gerald S. Hurwitz, Patricia A. Cole, Lauri S. Filppu, Edward R. Grant, David B. Holmes, Neil P. Miller, Anthony C. Moscato); http://www.usdoj.gov/eoir/fs/ogcbio.htm (Gustavo D. Villageliu and Cecelia M. Espenoza; Peter J. Levinson, "The Façade of Quasi-Judicial Independence in Immigration Appellate Litigation, 9 BENDER'S IMMIG. BULL. 1154 (2004) (Paul W. Schmidt, Noel A. Brennan, John W. Guendelsberger).

summary affirmances—decisions without any written analysis.[93] Instead of having all appeals decided by three-member or *en banc* panels, the BIA began to issue individual member summary affirmances in certain limited categories of cases.[94] The Board issued its first summary affirmances in September 2000.[95] The BIA Chairman did not authorize affirmances without opinion (AWO's) at this time in any asylum, withholding, or CAT claims.

In December 2001, an independent audit determined that this streamlining was an unqualified success. First, the Board completed fifty-three percent more cases using summary affirmances in a circumscribed manner during its implementation period from September 2000-August 2001, as compared to the previous twelve-month period. Second, for the first time in a number of years, the Board completed 4,000 more cases than it received.[96]

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,"[97] 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.[98] In March 2002,

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[93] *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 46135-46142 (Oct. 18, 1999).

[94] Under the 1999 streamlining regulation, the BIA Chairman could designate certain categories of cases eligible for single member summary affirmance 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 was squarely controlled by existing BIA or federal court precedent and did 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. Sec. 3.1(a)(7)(ii) (2006). Even this relatively modest regulatory change allowing some cases to be decided without opinions drew criticism from the Bar. Most of the 23 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." Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 F.R. 56135, 56139 (Oct. 18, 1999). *See also* Philip G. Schrag, *The Summary Affirmance Proposal of the Board Of Immigration Appeals*, 12 GEO. IMMIG. L.J. 531 (1998).

[95] See Memorandum from Chairman Paul Schmidt to Board Members, *Streamlining Implementation - Phase III*, (Aug. 28, 2000) *at* http://www.usdoj.gov/eoir/vll/genifo/streamimplem.pdf.

[96] Arthur Andersen, *Board of Immigration Appeals (BIA) Streamlining Pilot Project Assessment Report*,5, 6 (Dec. 2001), in Dorsey & Whitney, *supra* n.17, Appendix 21; U.S Dept. of Justice, EOIR, *2002 Statistical Year Book*, p. S2, *at* http://www.usdoj.gov/eoir/statspub/fy02syb.pdf.

[97] U.S. Dept. of Justice, Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (codified at 8 C.F.R. Part 1003).

[98] 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 Board Members. Those six categories are where there is a need to: (1) settle inconsistencies between the rulings of different immigration judges; (2)

Acting Chairman Lori Scialabba authorized the expansion of affirmances without opinion to several new types of cases, including asylum, withholding of deportation, and Convention against Torture claims.[99] The final rule also authorized single members to issue short orders affirming immigration judge decisions or dismissing appeals on procedural grounds.[100] 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. . ."[101] 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.[102]

The new rule also reduced the membership of the Board from twenty-three to eleven authorized positions. In downsizing, the Attorney General removed members on political grounds, targeting those who came from the practice of asylum and immigration law, advocacy and law schools.[103]

Finally, during the downsizing transition, the Attorney General required BIA members to clear their current backlog of 55,000 cases within 180 days.[104] 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."[105]

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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; and (6) reverse the decision of an immigration judge or DHS, other than reversal under 8 C.F.R. Sec. 3.1(e)(5). 8 C.F.R. Sec. 1003.1(e)(6) (2007); http://www.usdoj.gov/eoir/vll/genifo/stream.htm The new rule also largely stripped the Board of its *de novo* review authority. See 67 Fed. Reg. at 54888-54891, *supra* note 97

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

[100] 67 Fed. Reg. at 54,880, *supra* note 97.

[101] 8 CFR Part 1003.1(e)(5) (2007).

[102] For examples of more fully reasoned panel decisions, *see*, e.g., Deborah E. Anker, THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW, App. VI (2d ed. 1991)

[103] *See Several BIA Members To Begin New Assignments*, AILA Infonet. Doc. No. 03042443 (posted Apr. 24, 2003) (on file with author). In September 2006, Attorney General Gonzalez announced that he would increase the size of the Board from 11 to 15 members. U.S. Dept. of Justice, *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals* (Aug. 9, 2006), *at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. He did not suggest that he would offer the new positions to the members that Attorney General Ashcroft fired. Since then, two existing Board Members have retired, leaving six vacancies.

[104] 67 Fed. Reg. at 54,903, *supra* note 97.

[105] Human Rights First, Press Release, *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), *at* http://www.humanrightsfirst.org/media/2002_alerts/0828.htm.

The 2002 streamlining changes were controversial. An independent study concluded that the Board's remand rate declined significantly, and the Board's Chairwoman responded that the data on which the study was based was "outdated and unsubstantiated."[106]

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: "Our 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 appeal for the first time. We think this fundamental shift was triggered by the high volume of final expulsion orders that began to be issued in March 2002 and a general dissatisfaction with the BIA's review."[107]

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 1998-2005. 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 (panel, single member short opinions, 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.[108]

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 of granting or remanding denials at which individual members rendered decisions that benefited asylum applicants. Therefore, we were not able to analyze 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.

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[106] Dorsey and Whitney, *supra* note 17 at ___; Letter from Lori Scialabba, Chairman, Board of Immigration Appeals, to the American Bar Association, Commission on Immigration Policy, Practice, and Pro Bono (Dec. 22, 2003), *at* http://www.usdoj.gov/eoir/press/03/ABA.pdf.
[107] Palmer, Yale-Loehr, and Cronin, *supra* note 15 at ____.
[108] See Letter from Andrew Schoenholtz to The Honorable Lori Scialabba, January 30, 2006 (on file with authors).

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 2001.

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.[109]

Findings

In examining the BIA data,[110] 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: significant increased caseloads at the Federal Courts of Appeals.[111]

In February 2002, the month before Attorney General Ashcroft changed the procedures, 200 cases were appealed to the courts each month. One year later, 900 cases a month were appealed, and by April 2004, more than a thousand cases per month were being appealed.[112] The second impact that Graph 35 shows concerns the important issue of outcome—the grant and remand rates declined significantly as the number of panel decisions dramatically dropped.

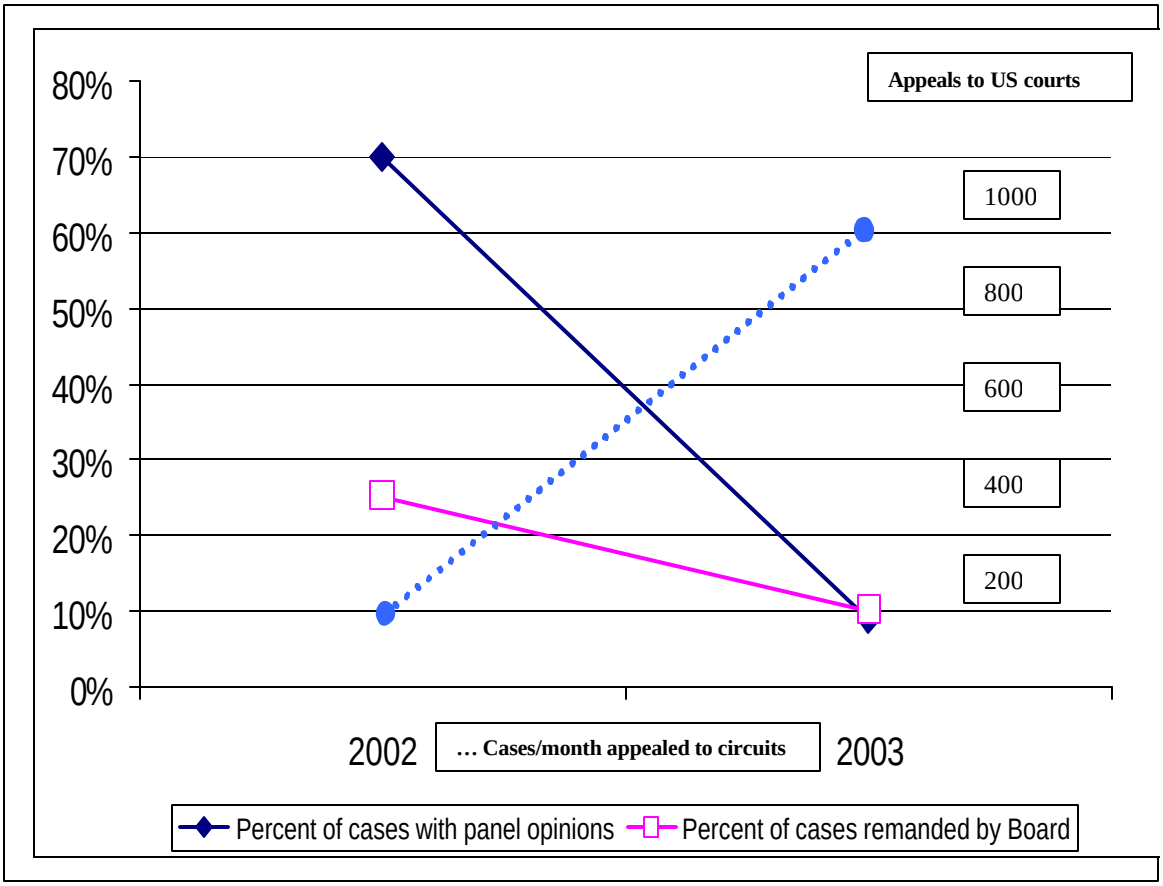
[109] With appropriate resources, EOIR has proven that it is capable of improving its data systems with regards to the Immigration Court. Improved reporting based on these data systems, such as EOIR's Statistical Year Books, has made it possible for government and independent researchers to examine trends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

[110] The Methodological Appendix more fully describes the data set and the decisions on the merits at the Board.

[111] Palmer, Yale-Loehr, and Cronin, *supra* note 15

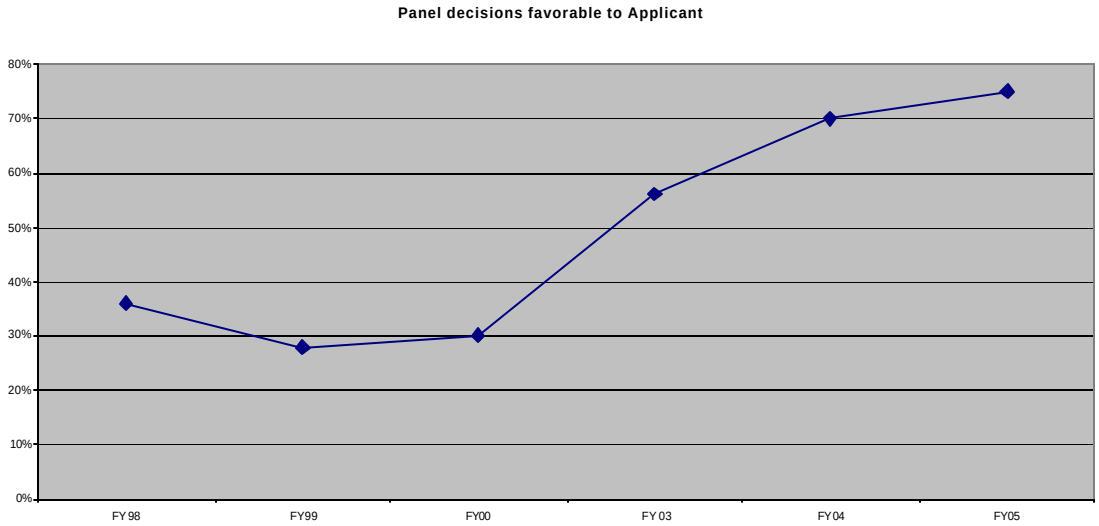
[112] These monthly caseload numbers include asylum as well as other immigration law appeals.

All Immigration Cases Appealed
from Board of Immigration Appeals to Federal Courts of Appeals
Graph 35



The decline in remand rates of all Board decisions was mirrored in its asylum decisions.[113] 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 decision making (for the six years with reliable data). As Graph 36 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*,[114] 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 percent of the *panel* adjudications favored asylum applicants.

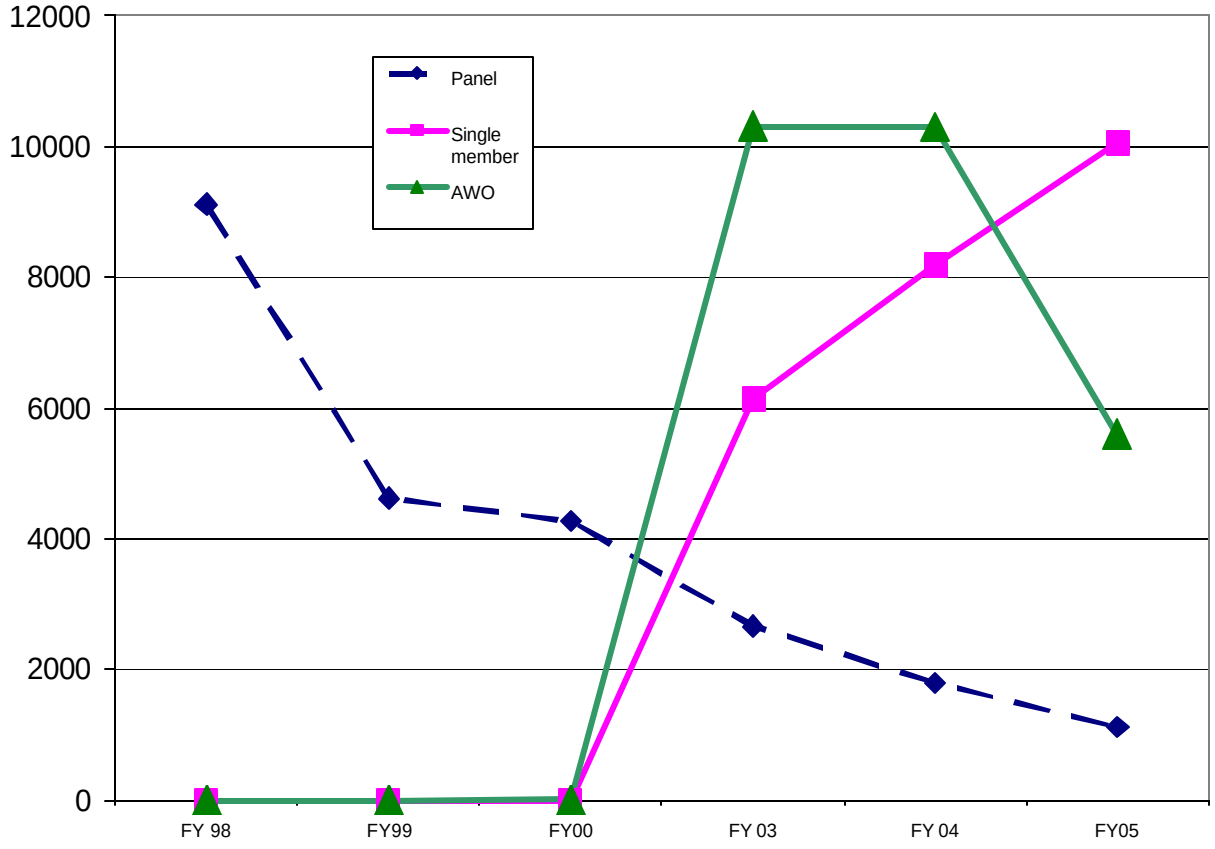
Grant and Remand Rates in Panel Asylum Decisions
Graph 36



[113] *See* Graph 39, *infra*.
[114] AWO's 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.

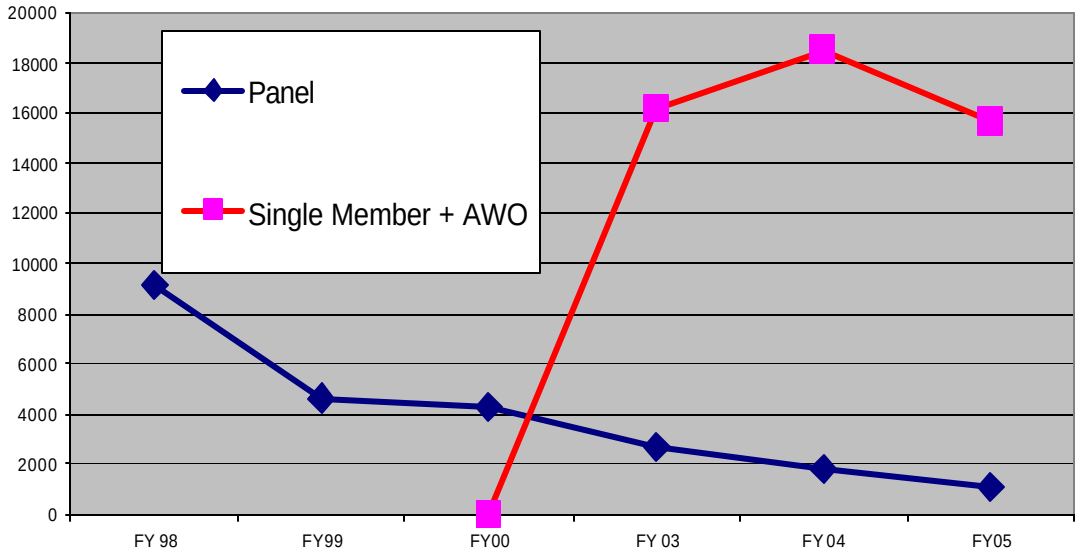
But as Graph 37 shows, the number of panel decisions decreased significantly, from about 9,000 in FY 1998 to 1,100 in FY 2005. The number of affirmances without opinions rose to over 10,000 in FY 2003, as did the number of single member short opinions in FY 2005. Initially following the Ashcroft changes, the affirmances without opinion dominated Board decision making. That changed in FY 2005, when single member short opinions began to dominate.

Number of Decisions by Year and Type
(Fiscal Years 1998-2000 and 2003-2005)
Graph 37



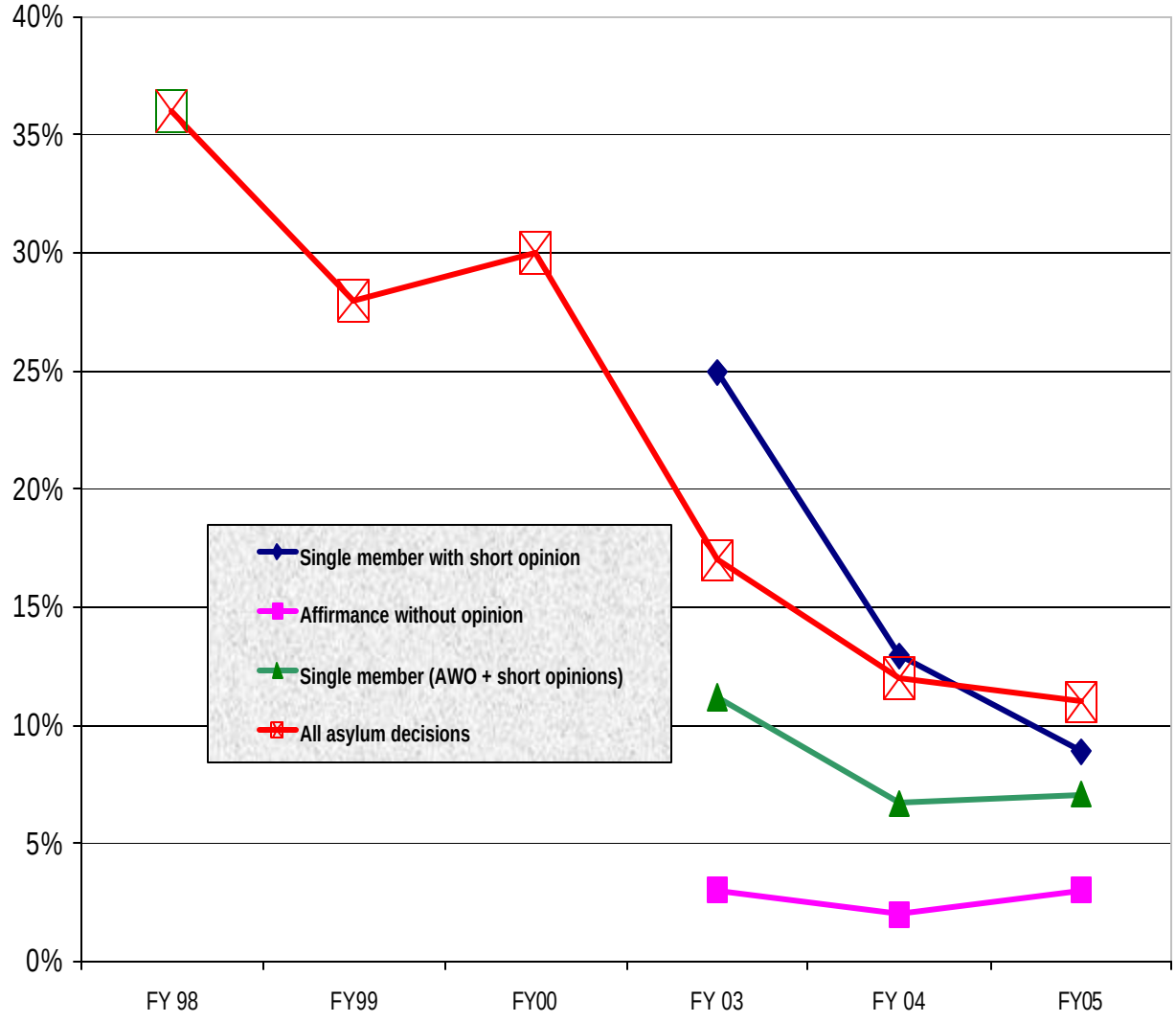
By FY 2005, single member decisions (affirmances without opinions and short opinions combined) totaled some 16,000 compared to the 1,100 panel decisions. With this major change in the mode of decision making, what happened to the outcomes in these cases?

Number of Decisions by Panel and by Single Member
Graph 38



Graph 39 shows a steep drop in remand rates favorable to asylum applicants. From FY 1998-2000, asylum applicants received favorable decisions in over 30% of the cases. For the period FY 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.

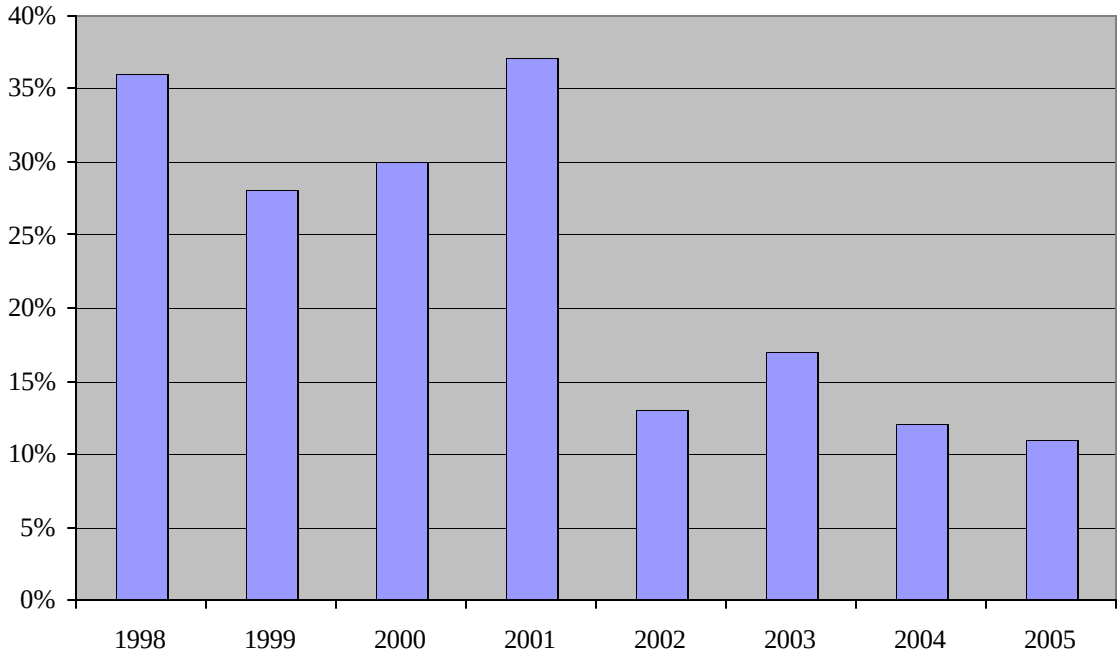
Remand Rates in Asylum Cases[115]
Graph 39



[115] In order to present an understandable graph, we did not include a separate line for panel decisions. When 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 Graph 36.

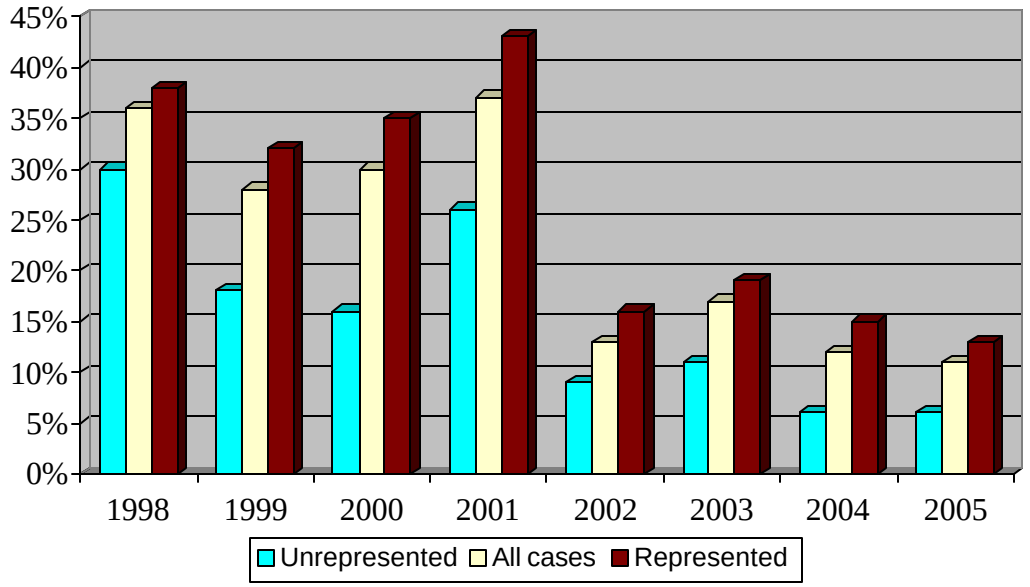
Viewed as a simple bar graph, we see in Graph 40 that the success rate for all asylum applicants fell from 37% in FY 2001 to 11% in FY 2005, a drop of 70%.

Asylum Grant and Remand Rates
Graph 40



We also wanted to understand the degree to which representation affected outcomes as the Board changed its mode of decision making. Graph 41 shows that the change in outcomes connected to 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 Graph 41 shows, the success rate of represented asylum applicants fell from 43% in FY 2001 to 13% in FY 2005, a decrease of 230%. 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 333%.

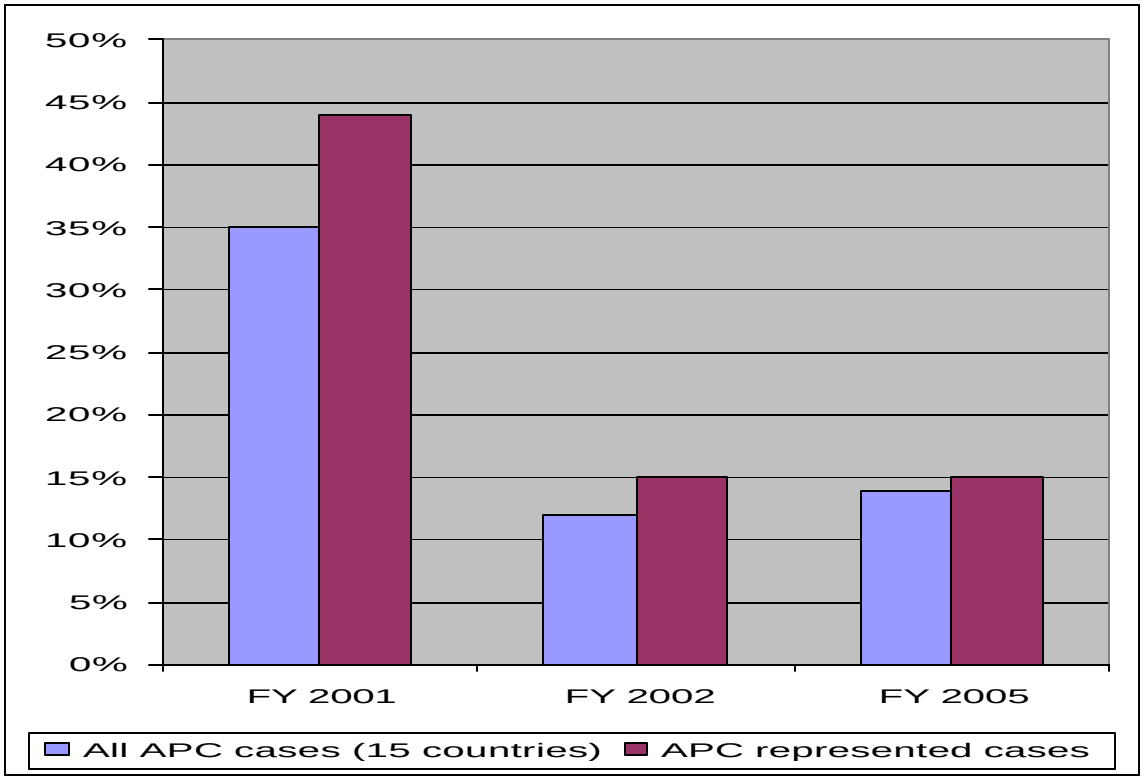
Asylum Grant and Remand Rates, Including Representation[116]
Graph 41



[116] Based on 9365 appeals.

Even when only cases from asylee-producing countries are considered, an extraordinary decline occurred.[117] As Graph 42 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%.

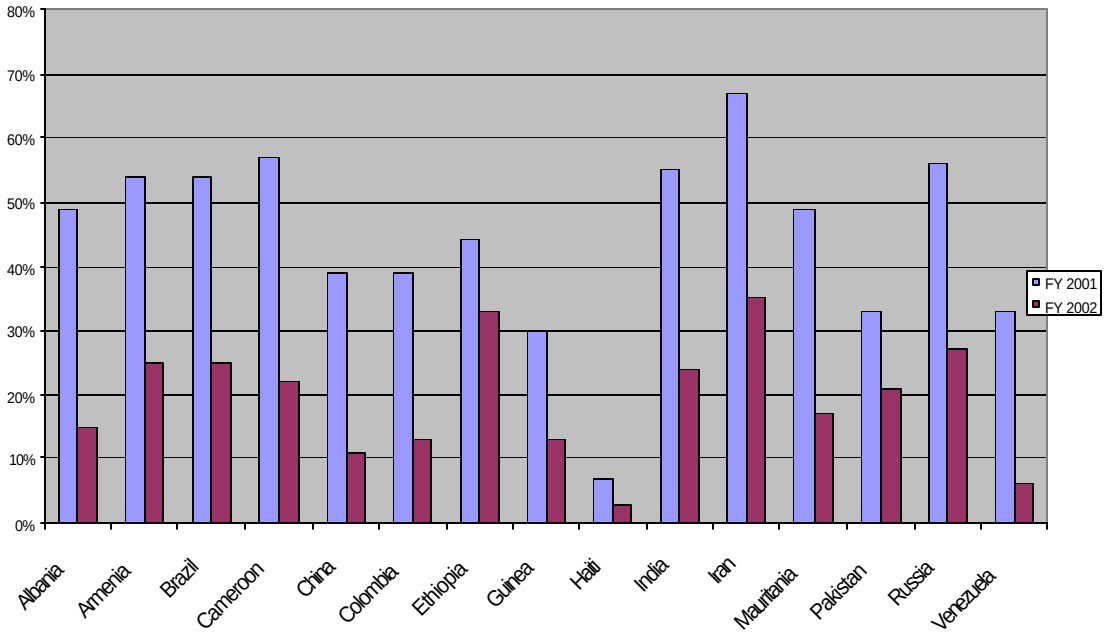
Asylum Grant and Remand Rates for Applicants from Asylee-Producing Countries
Graph 42



[117] *See supra* text at n. 33 for a list of "asylee-producing countries"and the criteria by which we selected them.

Finally, as Graph 43 shows, the success rates of asylum seekers from each of the 15 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). Eleven of the fifteen APC countries declined more than 50%.

Asylum Grant and Remand Rates by Asylee-Producing Country
Graph 43



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.[118] Appeals can be taken only to the circuit in which the immigration judge decided the underlying asylum case.[119] 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.[120] 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 from one circuit to another. We therefore investigated whether any such disparity existed.[121]

Table IV and Graph 44 show the results of our data compilation. They demonstrate a surprising degree of variation among circuits.

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[118] *See* text following n. 29, *supra*.

[119] 8 U.S.C. Sec. 242(b)(2).

[120] 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. I.N.S. v Ventura, 537 U.S. 12 (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.

[121] See the Methodological Appendix for our case identification criteria and search methods.

Asylum and Related Appellate Decisions by Circuit

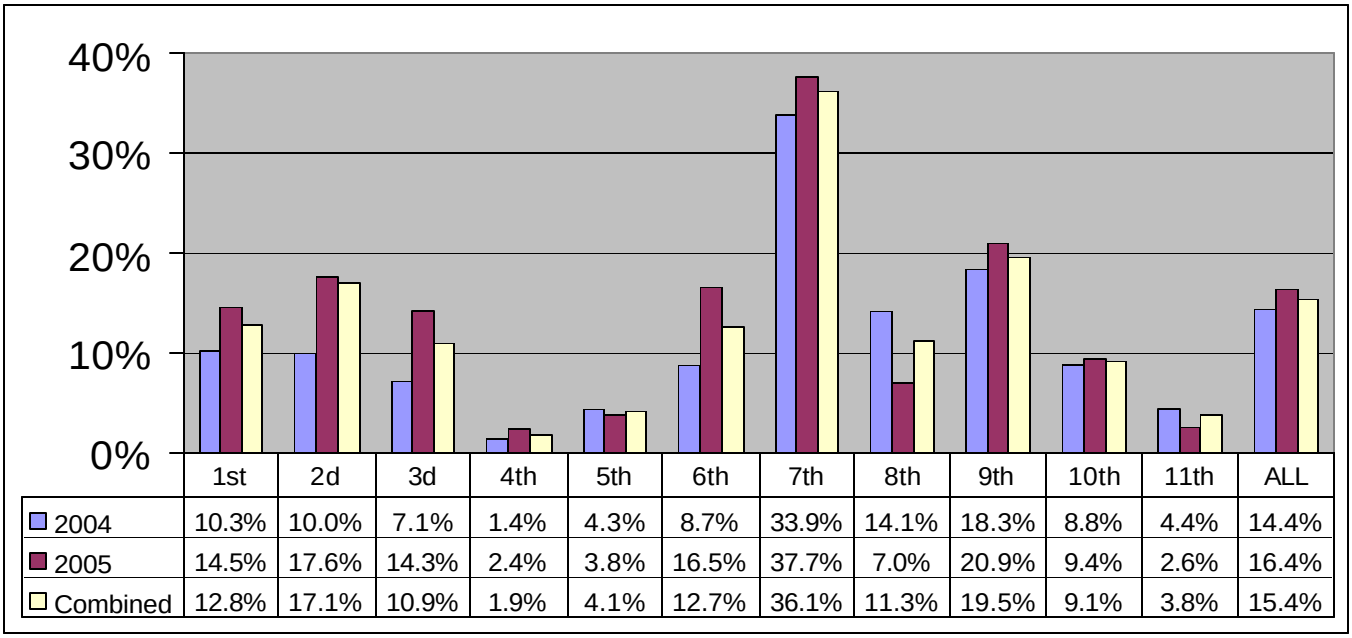
(Calendar Years 2004 and 2005)[122]

Table IV

Circuit	Number of merits decisions 2004	Number of cases remanded 2004	Percentage of cases remanded 2004	Number of merits decisions 2005	Number of cases remanded 2005	Percentage of cases remanded 2005	Number of merits decisions 2004-05	Number of cases remanded 2004-05	Percentage of cases remanded 2004-05
1	39	4	10.3%	55	8	14.5%	94	12	12.8%
2	30	3	10.0%	421	74	17.6%	451	77	17.1%
3	156	12	7.7%	174	27	15.5%	330	39	11.8%
4	143	2	1.4%	126	3	2.4%	269	5	1.9%
5	94	4	4.3%	78	3	3.8%	172	7	4.1%
6	104	9	8.7%	109	18	16.5%	213	27	12.7%
7	56	19	33.9%	77	29	37.7%	133	48	36.1%
8	85	12	14.1%	57	4	7.0%	142	16	11.3%
9	1220	225	18.3%	877	183	20.9%	2097	408	19.5%
10	34	3	8.8%	32	3	9.4%	66	6	9.1%
11	91	4	4.4%	156	4	2.6%	247	8	3.8%
ALL	2052	296	14.4%	2163	354	16.4%	4215	650	15.4%

Remand Rates in Asylum and Related Cases, 2004-05, by Circuit

Graph 44



[122] 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.

The table and graph show that an asylum applicant who lives in the Fourth Circuit, known generally among lawyers as the most conservative circuit,[123] has only a 1.9% chance of winning a remand, whereas in the 7th 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 a 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 7th Circuit than in the 4th Circuit if the *immigration judges* in the 7th Circuit had been inappropriately reluctant to grant asylum, compared to the immigration judges in the 4th Circuit. However, the only immigration court in the 7th Circuit (Chicago) does not seem to be less inclined to grant asylum than its counterparts in the 4th 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 4th 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, 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.[124] The

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[123] 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 Masters, *4th Circuit Pushing to the Right; Federal Court Tests Supreme Intentions*, WASH. POST, Dec. 19, 1999. See also Laura Sullivan, *4th Circuit's reputation is polite, conservative; Bush administration steers sensitive cases to friendly panel of judges*, BALTIMORE SUN, Nov. 18, 2003; Tony Mauro, *4th Circuit seen to be the 'right' place*, USA TODAY, March 9, 1999.

[124] The 7th Circuit's skepticism is plain from the first paragraph of *Benslimane v. Gonzales*, 421 F. 3d 595 (7th Cir. 2005). Judge Posner wrote:

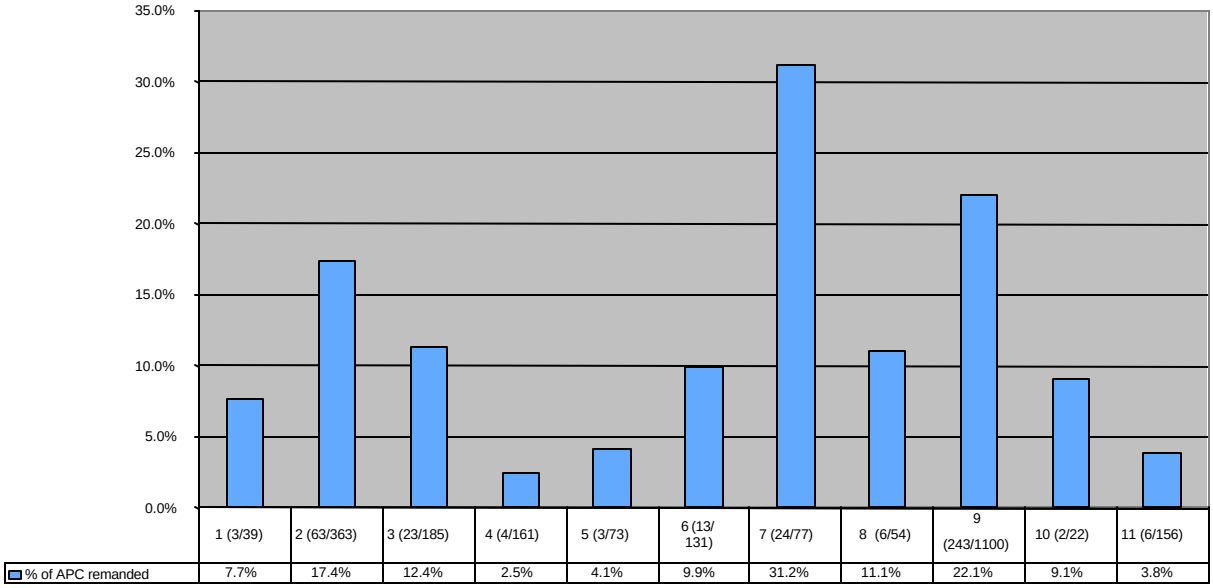
> "Our criticisms of the Board and of the immigration judges have frequently been severe. E.g., *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) ("the [immigration judge's] opinion is riddled with inappropriate and extraneous comments"); *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("this 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. *Qun Wang v. AG of the United States*, 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"); *Jin Chen v. United States DOJ*, 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]

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.

It may be objected that this comparison across circuits 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 year 2004 and 2005 in appeals from the Board by nationals of the fifteen nations that we denominated as "Asylee Producing Countries (APC)."[125] Neither Mexico nor any Central American countries are among the fifteen APC countries.

Graph 45 shows the remand rates for cases filed by APC nationals and decided during calendar years 2004 and 2005:

Percentage of APC Cases Remanded, 2004-05, by Circuit
Graph 45



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

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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'").

[125] *See supra* text at n. 33 for a list of those countries and the criteria by which we selected them.

levels of the system), we would find a significantly lower level of disparity among circuits than that revealed by Table IV. 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 the single asylee-producing country with the largest number of asylum cases, China. In order to increase the number of cases considered, we have included in Table V all asylum cases decided in three years (2003, 2004 and 2005), rather than only two years as in the previous analysis.[126]

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

[126] We did not have the resources to conduct this type of examination for cases from all countries for a three year period. See 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 between circuits, because we did not sample; we looked at every case from China for the three year period reported by the table.

Circuit	Number of Merits decisions	Number of cases remanded	Percentage of cases remanded
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%
ALL	771	161	20.9%

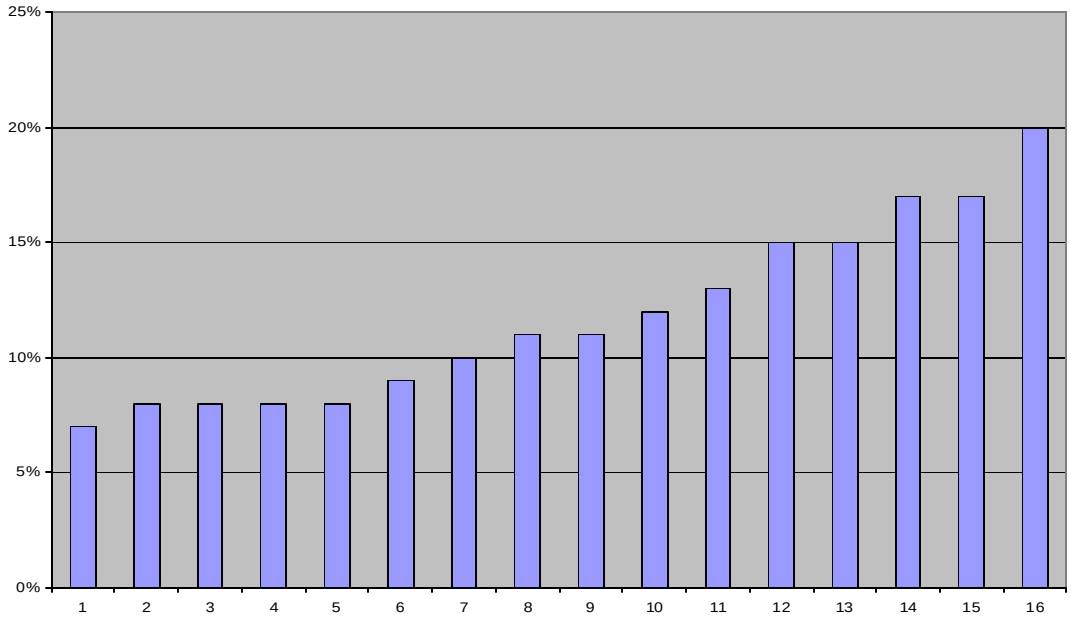
This table suggests that even for a set of cases that are likely to be the most similar, because they all involve claims of persecution by the same country, there is wide variation in the remand rate from circuit to circuit.[127] In three circuits, the remand rate was in single digits or lower (the Fourth Circuit remanded none of its 28 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 as 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. 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.

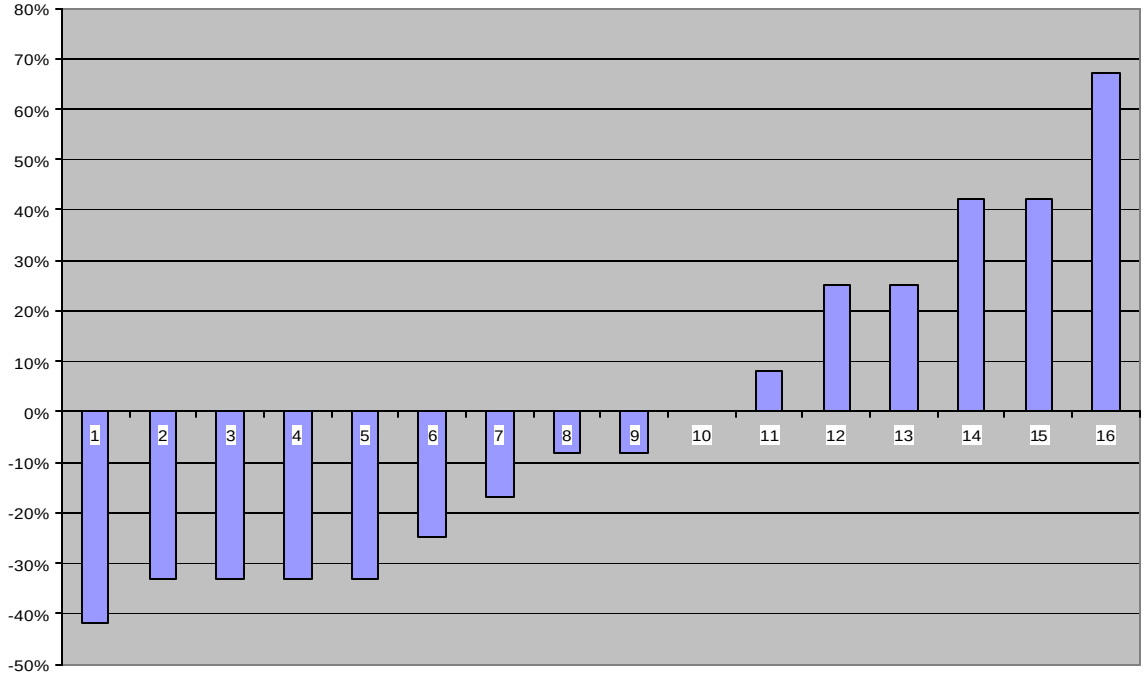
In the Third Circuit, sixteen judges voted in 25 or more asylum cases. Graph 46 and Graph 47 show their grant rates and their rates of deviation from the 11.8% circuit mean:

[127] The difference between the 0% rate in the 4th Circuit and the 30% rate in the 7th Circuit can not be explained by the possibility that immigration judges in the 4th circuit were overly generous to Chinese applicants, compared to their counterparts in the 7th Circuit. The grant rates in Chinese cases in the 4th 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%.

Remand Rates of Third Circuit Judges, 2004-05
Graph 46



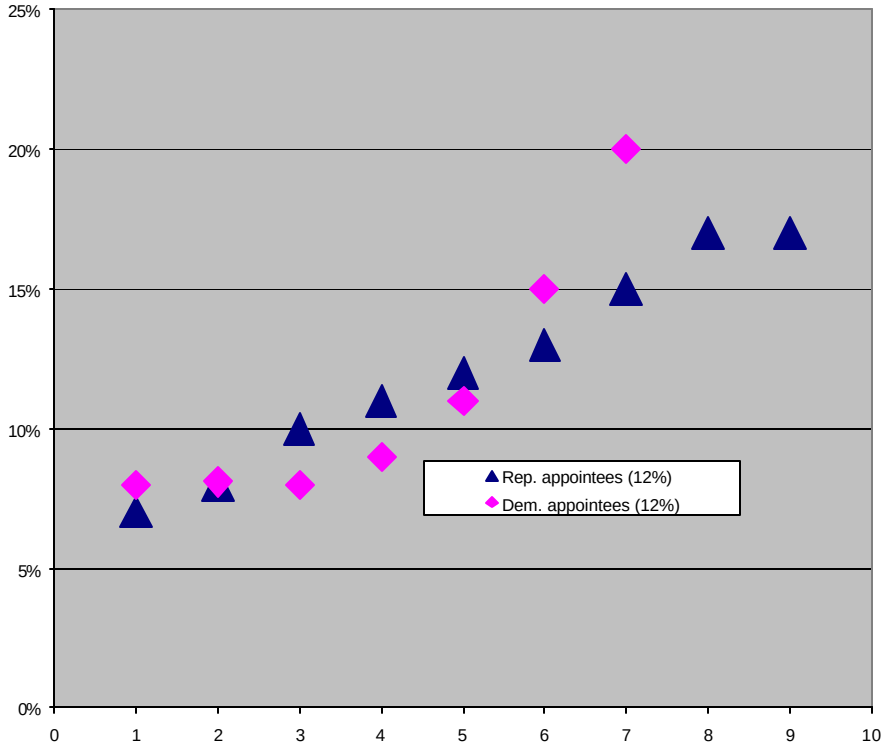
Third Circuit Judges' Deviation from Circuit Vote-to-Remand Mean
Graph 47



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 25 asylum or asylum-related cases in 2004 and 2005. Triangles represent Republican appointees, and diamonds represent Democratic appointees.[128]

Third Circuit Remand Vote Rates by Party of Appointing President
Graph 48

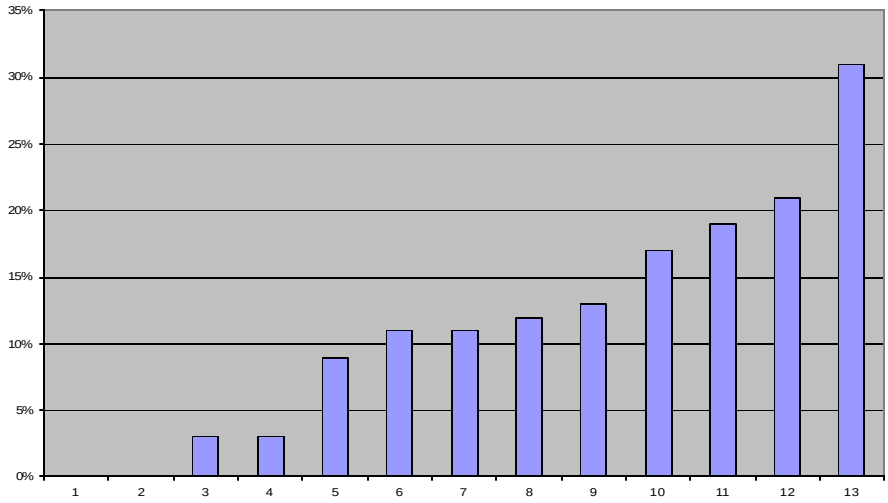


The remand rate in the Sixth Circuit was nearly identical to that of the Third Circuit (12.7% vs. 11.8%),[129] but a close investigation of voting shows a much more scattered pattern. Graph 49 and Graph 50 show the grant rates, and the rates of deviation

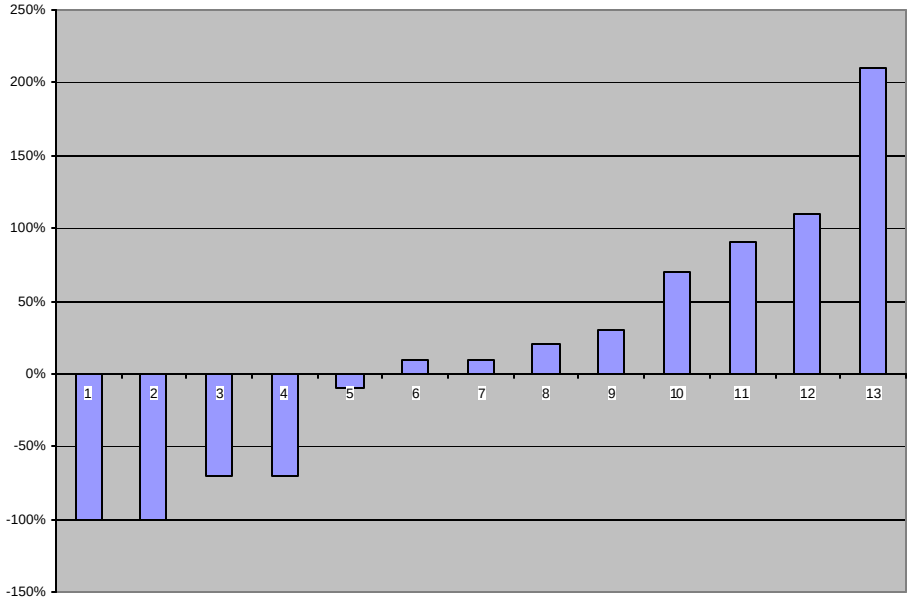
[128] The 12% vote-to-remand rate for each party's appointees is the mean rate for all 22 judges of the party in question, not only the 16 judges who met the threshold number of votes for display in the diagram.
[129] The political composition of the circuits was also similar during the time period of this study. The Third Circuit had 9 Republican and 7 Democratic appointees who voted in at least 23 asylum and asylum-related cases (in fact the minimum number of votes cast by any of these 16 judges was 28), while the 6th Circuit had 8 Republican and 5 Democratic appointees who cast at least 23 votes.

from the circuit mean, of the 13 judges who voted in 23 or more asylum and related cases:[130]

Remand Rates of Sixth Circuit Judges, 2004-05
Graph 49



Sixth Circuit Judges' Deviation from Circuit Vote-to-Remand Mean
Graph 50

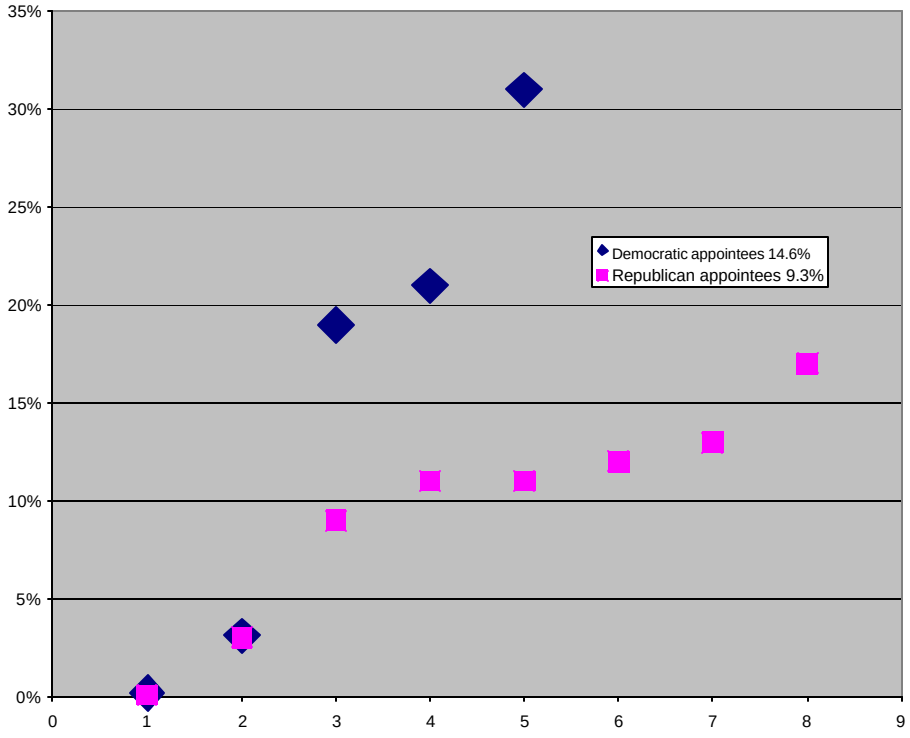


Votes on the Sixth Circuit showed much greater disparity than in the Third Circuit. Eight of the 13 judges who voted in at least 23 cases deviated from the circuit mean by more than 50%.

[130] We lowered our usual minimum threshold slightly to capture more data. Eleven of these thirteen judges voted in at least 25 asylum cases. The two others voted in 23 and 24 cases, respectively.

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. Graph 51 compares individual vote-to-remand rates on the Sixth Circuit:

Sixth Circuit Remand Vote Rates by Party of Appointing President
Graph 51



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.

VI.
Conclusions

In 1940, Attorney General Robert H. Jackson wrote to Congress that "it 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."[131] 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 courts deciding cases from nationals of the same country or group of countries in the same time frame.

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 "asylee-producing countries" 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 8 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 asylee-producing countries that deviated from the regional norm by more than 50%. In only 3 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 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

[131] Annual Report of the Attorney General (1940) at 5-6, quoted in Anderson, Kling and Stith, *supra* note 8, at 275. The Attorney General was referring to criminal sentencing.

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, 31 of the 52 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).[132] 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 12 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 three of the four largest immigration courts, more than 25% of the judges have asylum grant rates in cases from asylee-producing countries 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 (11 of 22) in the Miami Immigration Court who adjudicated at least 50 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%. An 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 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

[132] In each of these regions, the officers whose grant rates are reported here adjudicated at least 25 cases from FY 1999 through FY 2005.

individually thousands of unpublished decisions to determine which ones were in fact appeals from the BIA of denials of asylum, withholding, or torture convention protection. 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, eight 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. We hope to expand this study to a larger database of cases, and to additional circuits.

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 11 asylee-producing countries varied between 26% in one region and 62% in another region. 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. The officers in one regional asylum office granted, in the aggregate, 16% of those applications, while in another office, the officers granted 44% of them, a rate 175% higher than those in the first office.[133] 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%.[134]

Among immigration courts, there is some consistency from city to city. In cases from the asylee producing countries, 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

[133] *See supra* Graph 2.

[134] This conclusion is based on an examination of the disparity between the highest and lowest grant rates nationally among the five asylee-producing countries (Armenia, China, Colombia, Ethiopia and Haiti) that accounted for 78% of all cases from the 11 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).

than 54%. However, four immigration courts – in Atlanta, Miami, Detroit and San Diego – grant asylum at a rate that is significantly lower than 37.

We also compared the remand rates of the circuits in cases involving nationals of fifteen asylee-producing countries (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, and it seems odd to us that the rights of refugees seeking asylum in the United States should turn significantly on the region of the United States in which they happen to file their applications.

Possible causes of disparities among immigration judges

Thanks to modern computer technology, and to the fact that the Executive Office for Immigration Review publishes biographical information on immigration judges, we were able to correlate judges' grant rates with personal and sociological 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 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, served on the staff of a nonprofit organization, or had experience as a full-time law teacher.

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.[135] 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 and with increased fear of aliens after the 9/11 attacks, and that it also coincided with the institution of new procedures that provided less scrutiny for 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.

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[135] *See supra* note 17.

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, 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; 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 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.[136]

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,

[136] 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 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.

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 15 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 keeps 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.

We do believe, however, that worthwhile steps can be taken to improve decision making. First, we suggest that within each regional asylum office and within each immigration court, the adjudicators with particularly high and particularly low grant rates should confer with each other and try to ascertain the cause of this phenomenon.[137] If simple conversation does not reveal why such great disparities exist, the adjudicators

[137] 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." However, no action had yet been taken because the process remained "under internal review within the Department." U.S. Commission on International Religious Freedom, Expedited Removal Study Report Card: Two Years Later, (Feb. 2007) at http://www.uscirf.gov/reports/ScoreCards/02062007_ScoreCard_long.html. The Department of Justice did hold a national training conference for immigration judges in August 2006 and scheduled another for August, 2007, but it has not committed itself to annual conferences.

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.

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.[138] 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 that "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."[139] We applaud EOIR's January 2007 statement that it would expand and improve training for all immigration judges.[140]

Training for immigration judges should include units on judicial temperament.[141] For example, immigration lawyers have sometimes 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

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[138] Email to Andrew Schoenholtz from Joanna Ruppel, Dec. 18, 2006.

[139] Jennifer Ludden, *Complaints Prompt Government Review of Immigration Courts*, MORNING EDITION, NATIONAL PUBLIC RADIO (Feb. 9, 2006), *at* http://www.npr.org/templates/story/story.php?storyId=5198044

[140] The statement was made to a federal commission that has been very critical of EOIR's protection of asylum seekers. U.S. Commission on International Religious Freedom, *supra* n. 137. The Department of Justice held a training conference for immigration judges in August, 2006, and it announced that a similar conference would be held in 2007. *Id*.

[141] 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." In view of these reports, he commissioned a study of the work of the immigration judges. Memorandum to Immigration Judges from Attorney General Alberto Gonzales (Jan. 9, 2006), *at* http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo -ijs.pdf. After receiving the study, he announced 22 "measures" to improve the immigration courts and the Board of Immigration Appeals. Dept. of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug 9, 2006), *at* http://trac.syr.edu/tracatwork/detail/P104.pdf. However, most of the measures are formulated in very general terms, and may be ineffective in improving the administration of justice in the immigration courts.

judges sometimes encounter from people who are desperate to remain in the United States.

Along with better training for immigration judges, EOIR should implement more rigorous hiring standards. 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.

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.[142]

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.[143] Every immigration judge should be assigned at least one law clerk, and the quality of recording and interpretation should be improved.

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[142] Statement of Hon. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, before the Senate Judiciary Committee (Apr. 6, 2006), *at* http://www.aila.org/content/default.aspx?docid=18996.

[143] The Attorney General has announced plans to upgrade the recording equipment in immigration court, but how long this process will take remains to be seen. See Dept. of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals, supra n. 141.

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.[144] The presence of counsel helps the judge as much as it helps the asylum seeker, because by channeling the evidence into legal categories, lawyers help to screen out irrelevant testimony and focus the issues for the judges.

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 contentions of the losing party.[145] This process is an essential element if losing parties, and their counsel, are to believe that they were at least heard and understood.[146] 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

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[144] For a well-reasoned argument describing several affordable options for publicly funded legal support for indigent respondents in immigration court, *see* Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute, Apr. 2005).

[145] 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 Commission on International Religious Freedom, *supra* n. 137.

[146] 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* Tom R. Tyler and E. Allan Lind, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 80- 81, 104-106 (1988).

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.[147]

In 2006, the Attorney General seemed to agree with us 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 "some 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."[148] 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 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. 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. 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 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.

Similarly, the Immigration Courts should be made more professional by providing them as well with statutory independence from the Department of Justice (which now controls appointments and by giving the judges long terms of office. They are now 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

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[147] 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.

[148] Measures to Improve the Immigraton Courts and the Board of Immigration Appeals, *supra* n.141, at 4, Recommendation 12.

should be hired as appointees of a Senate-confirmed executive director of the new independent agency. We believe that the United States has reached the point where the important issues of asylum and immigration deserve such a professionalization of the review function.

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 States unaware that regional cultural difference 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 important, however, 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. 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 reasonable adjudicator would be compelled to conclude to the contrary."[149] 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'

[149] 8 U.S.C. Sec. 242(a)(4)(B).

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.[150] 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 decisionmaking. We believe that the recommendations discussed above are crucial to the government's efforts to achieve such a result.

[150] See Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIG. L. J. 619, 622 (2000).

Appendix I: Methodology

Part 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 with, we had to decide whether to measure deviation in terms of 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 measure 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 compare 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 consider 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. This is particularly true of asylum-seekers from certain large countries, such as China; those from one province may tend to flee to the east coast of the United States while those from another province may flee by 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 (100 cases in most instances, 50 in others, and 25 in two instances: studies of decisions of asylum officers deciding cases from China and remands by Federal Courts of Appeals). We believe that grant rates of adjudicators who decided fewer than 25 cases might not accurately represent the grant rates of those adjudicators if they had decided more cases.[151] 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

[151] In one instance (our study of the votes of judges in the 6th circuit during 2004 and 2005), we dropped the threshold to 23, which added two more judges to the sample.

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 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[152] in the form of Microsoft Excel tables and charts, others may easily count the number of outliers using benchmarks of their own choosing, such as deviations of 30% or 70% rather than 50%, or deviations of more than a fixed number of percentage points from the regional mean.

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 15 percentage points rather than 40 percentage points, and when the mean is 70%, the non-deviant range is 35% to 100%, a range of 65 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 15 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-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.

Part 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

[152] [The URL for the raw data from which our studies were prepared will be included in the article when it is published in the Stanford Law Review.]

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 15 asylee-producing countries, 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' approximate grant rate for nationals from that country, the region in which the officer worked, and the officer's gender.[153] Our analysis of adjudications by asylum officers included only asylum applications, because those officers do not have authority to grant withholding of removal,[154] and Convention Against Torture cases are rare.

All the data excludes 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.[155]

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-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 percent: 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 covers more than 875 officers and more 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 court based on interviews where the asylum officer did not regard the merits as strong enough for a grant. 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.[156]

Accordingly, our grant rate calculation divides the number of grants by the number of cases decided on the merits; that is, 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 the 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.

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[153] See Letter from Andrew Schoenholtz to Joseph Langlois, January 5, 2006 (on file with author). For further explanation of the term asylee-producing country, see text at *supra* n. 33.
[154] 8 C.F.R. Sec. 208.16(a).
[155] For a full explanation, *see* Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. H.R. L. REV. 323, at n. 62 (2005).
[156] For more information about the one-year filing deadline, *see supra* n, 23 & 24 and text.

We examined grant rates in three different ways throughout the study. First, in some instances, we analyzed all cases at a particular regional office, including those from countries that did not produce significant numbers of refugees during this period. In these analyses, we reported findings only where at least 100 cases of a particular nationality had been decided during the relevant time period.

Second, in order to compare office to office, and officer to officer, and account for nationality differences in caseloads, we thought a fairer method would be to base comparisons on grant rates regarding nationals from countries that we call Asylee Producing Countries, or 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 the Immigration Court. 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 was 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 15 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 11 remaining APC countries. In our APC analyses, we included all officers who had adjudicated at least 50 cases.

In a third 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 25 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.

Part III. Immigration Courts

The immigration court data was analyzed in two separate ways. First, we examined grant rate data on its 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 section in this methodology, as the methods were different.

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,[157] which filed a Freedom of Information Act request with the Executive Office of Immigration Review to obtain this information.[158] This article focuses on asylum cases decided in immigration court between January 1, 2000 and August 31, 2004, the period covered by that request.[159] Because we did not have the resources to separate out withholding and Convention Against Torture claims from asylum claims in this section of the analysis, it includes all three types of claims. Nearly all applications for withholding of removal or torture convention protection also involve requests for asylum, and the vast majority of immigration court cases either grant asylum or deny all three of these forms of relief. The unusual case in which asylum was denied but one of these other forms of relief was granted is counted as a "grant" in our analysis.

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 HVC 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

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[157] This data can be found on the website www.asylumlaw.org. From the "Legal Tools" drop-down menu, select "United States." Scroll down to "Judge Decisions in Asylum Cases 2000-04," and click on that link.

[158] 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, asylumlaw.org, to Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, Department of Justice, of 8/3/04, at 1.

[159] "During this period, EOIR disposed of approximately 275,000 applications for asylum, withholding of removal, or relief based on the Convention Against Torture. Of these, approximately half the cases were abandoned, withdrawn, or were disposed of in some 'other' way. Immigration Judges entered decisions in the other half of the cases---granting the application (either fully or conditionally) or denying it. Only cases in which decisions were made (grant/conditional grant/deny) are reflected in the data here." http://www.asylumlaw.org/legal_tools/index.cfm?fuseaction=showJudges2004. Denials resulting from legal bars – such as for missing the one-year filing deadline – are included in these statistics as denials.

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 countries that we designated as "asylee-producing countries," or "APC's."[160] The term "national averages" refers to the average grant rates of high volume courts hearing cases from asylee-producing countries only.

We excluded detained cases from the data as best we could. This allowed us to better compare decisionmaking regarding the affirmative asylum cases at the Asylum Offices with decisionmaking 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 (Foster and Hurewitz) in Miami's Krome Detention Center and those heard by the judges (Page and Vomacka) in 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 only judges who hear claims from detained persons almost exclusively.[161]

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 100 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 100 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 50 cases involving the country in question and excluded decisions by immigration judges detailed to the court in question. 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.

Cross-Tabulation Analysis

In addition to the simple grant rate analysis, we conducted a cross-tabulation analysis to determine 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

[160] See Methodological Appendix Part I for the criteria by which we selected these 15 countries.

[161] 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. [Note to editors: we are currently discussing with our statistician methods of removing defensive cases from the data, and hope to be able to do so in time for the final draft.]

data that we relied on for the simple grant rate analysis, we approached the data differently, thus requiring a separate methodology section 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 analysis to confirm the initial results. We worked only with asylum cases and did not include decisions on withholding of removal or 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.[162] This step excluded 129,325 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.[163] From this "family," we selected a "primary case" and eliminated all the others as "dependent cases." This step excluded 26,572 cases, leaving 115,705 cases in the database.

Additionally, 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 1849 cases, leaving 113,856 cases in the database.

Finally, 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.[164] This method excluded 45,851 cases, leaving 68,005 cases in the database.

We examined the impact of fourteen 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; whether the asylum seeker came from an asylee-producing country; caseload of the judge; caseload of the court on which the judge

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[162] 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). This provision awards asylum to individuals persecuted through or on account of coercive population control measures, but because there was a cap of 1,000 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* http://www.usdoj.gov/eoir/press/04/CPCAsylumFactSheetDec04.htm

[163] For example, we identified one such "family" with 25 members, which may imply that at least this categorization was overbroad. However, such large "families" were not common in the database.

[164] *See* E-mail from Executive Office of Immigration Review to Jaya Ramji-Nogales (Jan. 27, 2007) (on file with author).

sits; age of the judge; gender of the judge; president whose Attorney General appointed the judge; 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.[165] Representation was determined by EOIR's "ALIEN_ATTY_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. The country of origin of the asylum seeker was determined by the "NAT_NAME" column in the data. 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.[166] Cases decided by each immigration judge and by each court on which those judges sat were determined using this data as well.

We determined the independent variables concerning immigration judges largely through biographical data from the Executive Office of Immigration Review. Some bios were available on the EOIR website, and others could be found at the very helpful Transactional Records Access Center (TRAC) website.[167] 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. We have requested assistance in filling in these holes from the Office of the Chief Immigration Judge, who sought but has been unable to provide us with further information. The gaps are as follows: 23 bios with imprecise employment information; 10 bios with 1-2 years of employment information missing; 22 bios with 3-5 years of employment information missing; 10 bios with 6-9 years of employment information missing; and 15 bios with 10 or more years of employment information missing. We made educated guesses concerning the bios with imprecise information, but could not do so for the other holes in the bios.[168]

We pulled nine variables from the immigration judges' bios. The simplest to determine were gender and years on the bench (which includes years served by judges who left the immigration bench and were subsequently reappointed). We used the date of the first appointment to determine the political party of the appointing president. To determine age, we used the year of graduation from college and assumed each judge was age 22 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

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[165] *See infra* fn. 163 and accompanying text.
[166] *See* E-mail from Executive Office of Immigration Review to Jaya Ramji-Nogales (Jan. 22, 2007).
[167] http://trac.syr.edu/immigration/reports/judgereports/.
[168] [NOTE TO EDITORS: We are continuing our efforts to obtain this data by contacting judges individually, and expect to obtain further biographical information for the final data run.]

first law degree because in many countries, a law degree is a college degree. Age was calculated to the date of each case.

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. 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.). We broke out INS/DHS experience into ranges of zero to five years, six to ten years, and eleven or more years. 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 fifteen variables. We checked the statistical significance of these results using Chi-square tests, and found that all variables were statistically significant.[169] This analysis produced the results that are discussed in Section III of this article. The full cross-tabulation results, including Chi-square tests, are reported in Appendix II. 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 21. 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

[169] 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.

discussed above, several studies have found that representation is a very important factor in winning asylum.[170]

Asylee-producing country. 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 would be more likely to win asylum than asylum seekers from other countries. It is possible that the stronger cases from asylee producing countries as we have defined them are granted in the asylum office (especially given that our database includes only affirmative cases); either way, this variable is of interest.

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 decisionmaking in several ways 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.

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.

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 (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.

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.[171]

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[170] *See infra* n. 71.

[171] Note that this variable was not entered into the regression analysis because of multicollinearity problems with the INS/DHS experience variable (as the latter is included in the former). In the final regression run, we intend to rectify this.

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 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.

Academia 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 also ran a regression analysis, using the logistic model in SPSS, to test for the general robustness of the bivariate findings. Such an analysis selects one variable at a time and equalizes all of the other variables in the database. It reports the likelihood of a grant of asylum if the selected variable is altered.[172] The regression confirmed the results of the cross-tabulation, with three exceptions. The academia variable was less than 95% likely to be statistically significant, and the 6-10 years INS/DHS experience variable was positively correlated with grant rates and was only 81% likely to be statistically significant. We did not include the government experience variable in the regression analysis because of multicollinearity problems with the INS/DHS experience variable. The results of the regression, including a correlation matrix and descriptive statistics, are reported in Appendix II.

Part IV. The Board of Immigration Appeals

[172] The analysis investigates only the variables in the model, which in the case of our database are fourteen of the fifteen variables listed above. If any variable were added or deleted, the result might change.

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 (panel, single member short opinions, affirmances without opinion). Finally, we asked for information on nationality and representation.[173]

The Board provided us with data on nationality and representation, as well as on mode of decision making. Two important problems surfaced, however, with regards 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.

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.[174] As discussed above, our study focused on asylum merits decisions only. Accordingly, we analyzed only those asylum decisions where 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 15 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

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[173] See Letter from Andrew Schoenholtz to The Honorable Lori Scialabba, January 30, 2006 (on file with authors).
[174] The "Board of Immigration Appeals Decision and Disposition Codes" is on file with the authors.

February 2002. We examined changes in the rates of decisions favorable to asylum applicants for the three decision modes individually, comparatively, and combined.

Part V. The United States Courts of Appeal

The Courts of Appeal 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.[175]

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."[176] We inspected these cases individually, rejecting from the database those that were not appeals from the Board of Immigration Appeals.[177] 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.[178] 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

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[175] 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 appeal 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.

[176] All appeals from Board decisions to the U.S. Courts of Appeals are taken by foreign nationals; the U.S. does not appeal decisions rendered by its own Department of Justice. See supra n. 29 . 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 until 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.

[177] 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.

[178] The texts of a small number of non-precedential 5th circuit decisions were so summary that we could not even tell whether these cases involved asylum. We excluded these cases from the database.

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.[179] 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 national; any remand of the case to the Board, in whole or in part, was considered a success for the foreign national.[180]

The courts' official websites for the 7th through the 11th circuits were not as complete in that they did not include all of the unpublished decisions for the two years in question. For the 7th, 8th, and 10th circuits, we relied on a Westlaw search to collect the preliminary database and to exclude decisions that were merely procedural.[181] 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.

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[179] 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.

[180] 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 (USAO) for the Southern District of New York, rather than OIL, has represented the government in Second Circuit immigration cases. USAO 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 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 2d Circuit decided only about 36 asylum cases during 2004 although it disposed of 421 such cases during 2005. During 2004, the 2d Circuit received more than 2000 appeals from BIA decisions. See Palmer, Yale-Loehr, and Cronin, *supra* n. 15, *at* Table 1 (showing 945 appeals from the BIA to the Second Circuit from June through September, 2004). However, the USAO 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 September, 2005, to adopt a "non-argument calendar" to dispose of most BIA appeals without oral argument.

[181] 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.

The 9th and 11th circuits presented special challenges. Until April 2005, the 11th Circuit neither posted its unpublished decisions on its website nor supplied them to Westlaw. However, Westlaw did post the briefs for 11th Circuit cases during this period in its CTA11 database. Because the dates on the briefs predated the dates of the corresponding opinions, we expanded the search dates for 2004 to begin with March 1, 2003 and to end with October 31, 2004.[182] This search produced 253 hits. We examined both the briefs and the docket sheets[183] 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.[184]

The Westlaw search of 9th circuit cases revealed 1229 cases in calendar 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 9th 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 15 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 11th 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

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[182] We assume that all 11th 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").

[183] The docket sheets may be inspected for a fee on the government's PACER system, http://pacer.psc.uscourts.gov/

[184] 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.

rate 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.).

Appendix II: Cross-Tabulation Results, Immigration Court

CROSS-TABULATION RESULTS

Representation by Attorney or Accredited Representative

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Whether the asylum seeker is represented	Not represented	83.7%	16.3%	100.0%
	Represented	54.4%	45.6%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	1633.506(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 2197.92.

Number of Dependents

		Whether the case is granted or not		Total
		Deny	Grant/Conditional Grant	
Number of dependents	0	57.7%	42.3%	100.0%
	1	51.3%	48.7%	100.0%
	2	53.7%	46.3%	100.0%
	3	51.3%	48.8%	100.0%
	4 or More	51.2%	48.8%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	144.202(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 299.81.

The Asylum Seeker's Country of Origin: APC or non-APC

		Whether the case is granted or not		Total
		Deny	Grant/Conditional Grant	
Whether the asylum seeker comes from an asylee-producing country	Other countries	59.1%	40.9%	100.0%
	APC	55.3%	44.7%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	91.234(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 10321.09.

Caseload of the Court in which the Judge Sits

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Number of cases heard by court	0-1493,low third	63.1%	36.9%	100.0%
	1494-8603,mid third	57.6%	42.4%	100.0%
	8604+, hi third	51.1%	48.9%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	635.865(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 8088.94.

Caseload of the Judge

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Number of cases heard by the judge	0-272,low third	56.3%	43.7%	100.0%
	273-385,mid third	58.0%	42.0%	100.0%
	386+, hi third	55.7%	44.3%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	26.693(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 7581.16.

Gender of the Judge

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Whether the judge is female	.00	62.7%	37.3%	100.0%
	1.00	46.2%	53.8%	100.0%
Total		56.4%	43.6%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	1694.391(a)	.000
N of Valid Cases	64521	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 10811.96.

Age of the Judge

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Age of the judge	0-48,low third	55.2%	44.8%	100.0%
	49-53,mid third	55.2%	44.8%	100.0%
	54+, hi third	58.1%	41.9%	100.0%
Total		56.3%	43.7%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	52.512(a)	.000
N of Valid Cases	63973	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 8455.01.

President Whose Attorney General Appointed the Judge

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
President		66.5%	33.5%	100.0%
	Bush I	49.8%	50.2%	100.0%
	Bush II	60.2%	39.8%	100.0%
	Carter	70.6%	29.4%	100.0%
	Clinton	56.4%	43.6%	100.0%
	Ford	78.2%	21.8%	100.0%
	Nixon	77.5%	22.5%	100.0%
	Reagan	56.5%	43.5%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	339.504(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 75.39.

Years of Prior Employment with the INS or DHS

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
INS or DHS Experience	None	52.1%	47.9%	100.0%
	1-5 years	56.3%	43.7%	100.0%
	6-10 years	59.3%	40.7%	100.0%
	11 or more years	69.4%	30.6%	100.0%
Total		56.4%	43.6%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	807.935(a)	.000
N of Valid Cases	64465	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 3278.23.

Prior Government Employment

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Employment with the government	.00	49.2%	50.8%	100.0%
	1.00	59.9%	40.1%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	660.564(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 8712.83.

Prior Military Employment

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Employment with the military	.00	56.0%	44.0%	100.0%
	1.00	64.1%	35.9%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	139.706(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 2444.88.

Prior Non-Governmental Organization Employment

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Employment with an NGO	.00	59.3%	40.7%	100.0%
	1.00	43.5%	56.5%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	947.248(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 4858.56.

Prior Private Practice Employment

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Employment in Private Practice	.00	60.7%	39.3%	100.0%
	1.00	53.8%	46.2%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	311.923(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 11899.88.

Prior Academic Employment

		Whether the case is granted or not		
		Deny	Grant/Conditional Grant	Total
Employment in Academia	.00	57.2%	42.8%	100.0%
	1.00	47.3%	52.7%	100.0%
Total		56.7%	43.3%	100.0%

Chi-Square Test

	Value	Asymp. Sig. (2-sided)
Pearson Chi-Square	122.850(a)	.000
N of Valid Cases	66443	

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 1416.76.

REGRESSION RESULTS

Regression Variables

		B	S.E.	Wald	Sig.	Exp(B)
Step 1(a)	Representation	1.364	.040	1138.517	.000	3.910
	Number of dependents	.127	.011	142.828	.000	1.135
	APC national origin	.066	.018	14.159	.000	1.069
	Court caseload	.000	.000	209.273	.000	1.000
	Judge caseload	-.001	.000	71.227	.000	.999
	Appointment by Reagan	-.108	.037	8.514	.004	.898
	Appointment by Clinton	-.093	.029	10.001	.002	.911
	Appointment by Bush_II	-.134	.047	7.997	.005	.875
	1-5 yrs. INS/DHS employment	-.068	.025	7.371	.007	.934
	6-10 yrs. INS/DHS employment	.032	.024	1.720	.190	1.032
	11 or more yrs. INS/DHS employment	-.487	.032	225.270	.000	.614
	Military employment	-.119	.033	13.435	.000	.887
	NGO employment	.371	.024	240.643	.000	1.449
	Employment in private practice	.090	.020	21.124	.000	1.094
	Employment in academia	.074	.040	3.407	.065	1.077
	Judge's age	.008	.001	37.074	.000	1.008
	Judge's gender (female)	.517	.018	824.809	.000	1.678
	Constant	-2.329	.089	683.614	.000	.097

a Variable(s) entered on step 1: Attorney_representation, Number_of_dependents, APC, Cases_court, Cases_judge, Reagan, Clinton, Bush_II, INS_exp_1_5, INS_exp_6_10, INS_exp_11orMore, Military_exp, NGO_exp, Privateprac_exp, Academia_exp, Age_judge, Female_judge.

Correlation Matrix

	Constant	Representation	Dependents	APC origin	Court case-load	Judge case-load	Reagan	Clinton	GW Bush	1-5 yrs. INS	6-10 yrs. INS	11+ yrs. INS	Military	NGO	Priv. practice	Academia	Judge age	Judge gender
Constant	1.000	-.421	-.146	-.090	-.038	-.163	-.030	-.378	-.252	-.021	-.131	.127	.125	-.009	.029	-.089	-.782	-.100
Representation	-.421	1.000	-.010	-.058	-.008	.022	-.006	-.015	-.020	.012	.019	.005	.002	-.026	-.005	.021	-.006	-.014
Dependents	-.146	-.010	1.000	.024	.060	-.059	.001	-.017	-.009	.000	.020	.010	.019	.029	.028	-.004	-.008	.030
APC origin	-.090	-.058	.024	1.000	-.126	-.022	-.029	-.038	.005	.015	-.001	.012	.019	.030	.006	-.013	.024	.004
Court caseload	-.038	-.008	.060	-.126	1.000	-.512	-.061	-.029	-.179	.078	.192	.069	.023	-.083	-.072	.130	.067	-.114
Judge caseload	-.163	.022	-.059	-.022	-.512	1.000	.013	-.074	.050	-.046	-.117	-.056	-.097	.022	-.058	-.063	-.029	.016
Reagan appointee	-.030	-.006	.001	-.029	-.061	.013	1.000	.616	.396	.005	-.227	.028	.058	-.049	.064	.170	-.211	-.014
Clinton appointee	-.378	-.015	-.017	-.038	-.029	-.074	.616	1.000	.563	-.093	-.091	-.146	-.111	-.092	-.087	.211	.216	-.042
George W. Bush appointee	-.252	-.020	-.009	.005	-.179	.050	.396	.563	1.000	-.074	-.117	-.190	-.159	-.033	.042	.083	.144	-.006
1-5 yrs. INS/DHS	-.021	.012	.000	.015	.078	-.046	.005	-.093	-.074	1.000	.293	.258	.062	.194	.132	.000	-.068	-.086
6-10 yrs. INS/DHS	-.131	.019	.020	-.001	.192	-.117	-.227	-.091	-.117	.293	1.000	.322	.116	.243	.241	.080	.026	.058
11 or more yrs. INS/DHS	.127	.005	.010	.012	.069	-.056	.028	-.146	-.190	.258	.322	1.000	.240	.184	.371	.070	-.293	.052
Military	.125	.002	.019	.019	.023	-.097	.058	-.111	-.159	.062	.116	.240	1.000	.092	.244	.042	-.231	.184
NGO	-.009	-.026	.029	.030	-.083	.022	-.049	-.092	-.033	.194	.243	.184	.092	1.000	.177	-.215	-.058	-.117
Private practice	.029	-.005	.028	.006	-.072	-.058	.064	-.087	.042	.132	.241	.371	.244	.177	1.000	.000	-.219	-.014
Academia	-.089	.021	-.004	-.013	.130	-.063	.170	.211	.083	.000	.080	.070	.042	-.215	.000	1.000	.001	-.054
Judge age	-.782	-.006	-.008	.024	.067	-.029	-.211	.216	.144	-.068	.026	-.293	-.231	-.058	-.219	.001	1.000	.060
Judge gender (female)	-.100	-.014	.030	.004	-.114	.016	-.014	-.042	-.006	-.086	.058	.052	.184	-.117	-.014	-.054	.060	1.000