Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals

Mary Hoopes*

While there is consensus among practitioners and scholars alike that immigration adjudication is in a state of crisis, very few studies have examined the role that federal courts play in reviewing this system. This Article focuses on asylum appeals at the federal appellate level and constructs an original database of cases across five circuits over seven years. It reveals that the Courts of Appeals have created a wide variety of court-fashioned rules that serve to either expand or constrict the scope of judicial review, with important implications for the likelihood of remand. In these data, having one's asylum appeal heard in the Seventh or Ninth Circuits was associated with a significantly higher likelihood of remand than in the First, Tenth, or Eleventh Circuits. This variation does not merely reflect a difference in the types of cases across circuits. Rather, a qualitative analysis reveals very different approaches to reviewing the agency's decision-making. Across these five circuits, the Seventh and Ninth Circuits have adopted a much more searching level of review that arguably reflects a distrust of the agency's competence.

As this analysis demonstrates, the elasticity of the appellate review model permits this wide variation, as courts applying a nearly identical standard of review are reaching starkly different results. I argue that the more expansive approach to review is normatively beneficial, as we ought to have an appellate review model that permits courts to be responsive to evidence of a compromised

https://doi.org/10.15779/Z383X83M6R

* Director of Research, Berkeley Judicial Institute. I am grateful to Irene Bloemraad, Jason Cantone, Parker Douglas, Jim Eaglin, Smita Ghosh, Taeku Lee, David Martin, Jeff Minear, Brent Nakamura, Kevin Quinn, Stephen Sachs, Michael Shenkman, Matthew Sipe, Fred Smith, and Leti Volpp for their feedback on this work. This paper also benefited from presentations at the Supreme Court Fellows writing workshops, the Judicial Council Committee on Federal-State Jurisdiction, and the Notre Dame Workshop on Legal Academia. I am particularly grateful for feedback from Judges Richard Clifton, Jeremy Fogel, Harris Hartz, and Patti Saris. Excellent research assistance was provided by Kara Anderson, William Bassett, Roma Bhojwani, Samantha Ho, Rotem Litinski, Maria Milekhina, Sophie Paeng, Rachel Park, and Nathan Theobold. I am also grateful to the editors of the Berkeley Journal of International Law for their tireless and meticulous work. All errors are my own.

system of adjudication. This is particularly compelling in the context of asylum seekers, as their lack of political power has enabled both a long history of politicization of the adjudication process and a disregard for quality assurance initiatives within the agency. Since larger changes aimed at addressing the underlying flaws at the agency level are unlikely to be forthcoming soon, federal courts may be the only institutions equipped to meaningfully address problems within asylum adjudication.

INTRODUCTION

Thousands of asylum seekers who enter the United States each year depend entirely upon a system of adjudication that both scholars and practitioners agree is severely compromised. A long line of scholarship has illuminated its many shortcomings, describing a system that is plagued by inadequate resources, far too little time for judges to adjudicate each case, and a lack of independence in decision-making. For asylum applicants, their last recourse lies with the federal courts. However, as one groundbreaking study, *Refugee Roulette*, demonstrated,

there are large disparities between an asylum applicant's likelihood of succeeding across every level of asylum adjudication, including the Courts of Appeals.[1] This finding invites further inquiry into which factors might be driving these differences across the appellate courts, and how we may situate the role of the federal courts in reviewing this agency in crisis. Given that the immigration adjudication system is widely perceived to be compromised and that structural changes are unlikely to be forthcoming soon, federal courts may be the only meaningful level of review for the few asylum seekers who reach them.

Using data collected over seven years in five different Courts of Appeals, this Article finds that the variation between remand rates cannot be explained by a difference in the types of claims heard across the circuit courts; in other words, the data do not simply reflect the fact that circuits with very low remand rates are hearing fundamentally different types of cases than circuits with higher remand rates. Rather, these disparities reflect very different approaches across circuits in reviewing the immigration agency. While the standard of review imposed by Congress appears to be very constraining, a qualitative analysis of this data reveals that circuit courts have fashioned rules that effectively narrow or broaden the scope of their review of the agency's factual findings.

The Article proceeds in five parts. Part I provides the relevant context, setting forth the process by which an asylum case reaches the federal circuit courts and the relevant standards of review. Part II presents the data and methods. As Part III demonstrates, the disparities in remand rates cannot be explained by differences in the composition of cases. Rather, even when controlling for a wide variety of characteristics across a range of logistic regression models, having one's case heard in the Seventh or Ninth Circuits was associated with a significantly higher likelihood of remand than those in the First, Tenth, or Eleventh Circuits. This analysis also reveals the need for a closer qualitative analysis of the doctrinal differences between courts, such as variation in how courts treat a prior adverse credibility finding by the agency. Accordingly, Part IV digs deeper into the data, exploring qualitatively the ways in which the courts vary in their application of the standard of review, and how those differing applications affect the likelihood of remand.

Finally, Part V turns to the implications, and begins by analyzing how the federal courts' role in asylum adjudication comports with existing theories of judicial review. In part, these data reflect the elasticity of the appellate review model: even as courts purport to apply an identical and constraining standard of review, they reach starkly different results. Recent work by Jonah Gelbach and David Marcus suggests that courts can play a previously unrecognized function when reviewing agencies with high volumes of adjudication, which they term

1. JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ & PHILLIP SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

"problem-oriented oversight."[2] This type of oversight arguably allows judges to identify agencies in crisis, as in this context, and permits them to recognize persistent problems that go unaddressed by the agency. It also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As scholars such as Adam Cox have recognized and the data in this project reinforce, some courts are not according the immigration agency the deference envisioned by the *Chevron* doctrine. Indeed, the analysis below reveals that this lack of deference extends far beyond those cases explicitly governed by *Chevron*. A distrust of the agency's competence has arguably seeped into every aspect of how some circuits interpret the standards in asylum law and has led them to read additional requirements into nearly every component of the substantial evidence standard. While Cox rightly argues that traditional deference doctrines do not contemplate courts assessing the competence of individual agencies, the notion of problem-oriented oversight suggests that courts might be quite capable of doing so in high volume adjudication contexts and of adjusting their level of scrutiny accordingly. As I argue below, not only are courts capable of this type of assessment in the asylum context, but this type of oversight also provides a basis for justifying resource-intensive judicial review.

This approach would be normatively desirable, as it would result in a deference doctrine that permits courts to be more responsive to agencies in crisis. The alternative affords the courts very little latitude to adjust their level of deference to major changes in the quality of adjudication, other than through the adoption of the court-fashioned rules examined here. As I explore, this has resulted in two very different approaches across circuits in reviewing asylum adjudication. In the more narrow approach that some circuits have taken, appellate review has remained invariant to clear signs that the quality of adjudication has been seriously compromised. By contrast, other circuits have engaged in closer scrutiny, but this has often resulted in strained interpretations. These courts struggle to demonstrate that their review comports with the narrow standard, rather than perhaps being more forthright that the repeated recognition of errors in the agency's adjudication has prompted closer scrutiny. The notion of what I term a more "responsive" doctrine of deference is particularly compelling in the asylum context, where the need for judicial review to legitimize the actions of the agency is at its most pressing. As I outline below, there is virtually no evidence that the immigration agency is politically responsive to asylum seekers. Rather, asylum seekers are politically powerless, and this status has arguably enabled a long history of politicization of the adjudication process and disregard for quality assurance initiatives within the agency. This history renders the typical political accountability justification much less forceful in this context. Moreover, as Michael Kagan contends, there are compelling reasons to question the expertise

2. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1100 (2018).

rationale in this context.[3] Accordingly, I argue that we ought to develop a doctrine of deference that permits courts to better respond to evidence of a compromised system.

I.
BACKGROUND AND CONTEXT

A. The Asylum Process in the United States

As many scholars have recognized, asylum law is distinctive as "one of the most thoroughly international areas of U.S. law."[4] Indeed, Congress passed the Refugee Act of 1980 with the explicit intention of bringing the United States into conformity with its obligations under the international Protocol Relating to the Status of Refugees.[5] To establish eligibility for asylum, an applicant must demonstrate that he or she is a "refugee," or a "person who is . . . unable or unwilling to return to . . . [her home] country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[6]

For the few asylum seekers who reach the federal courts, their claim first proceeds through up to three levels of review. If one applies for asylum affirmatively with the U.S. Citizenship and Immigration Services (USCIS), the applicant first receives an interview with an asylum officer, who may directly grant the application, or refer the case to an immigration judge, before whom the applicant may renew the application *de novo*.[7] Asylum officers refer approximately 65 percent of affirmative applications to the immigration courts.[8] Alternatively, if the Department of Homeland Security has initiated removal proceedings, one may apply for asylum defensively, and receive a merits hearing in an immigration court.[9] Immigration courts are housed within the Executive Office of Immigration Review (EOIR), a branch of the Department of Justice

3. Michael Kagan, *Chevron's Asylum: Re-Assessing Deference in Refugee Cases* 30 (Ctr. for the Study of the Administrative State, Antonin Scalia Law School, Working Paper No. 19-29, 2019), https://administrativestate.gmu.edu/research/working-papers/.

4. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1061 (2011).

5. *Id.* at 1061–62.

6. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A).

7. 8 C.F.R § 208.4(b)(3)(2012).

8. RAMJI-NOGALES ET AL., *supra* note 1, at 31.

9. Work by several scholars has confirmed that the disparities across immigration judges' rates of remand are also very large. *See id.* at 38; *see also* David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1187 (2016) (showing that the average standard deviation of judge relief rates within the nineteen largest immigration courts between 1998 and 2004 was approximately nine percentage points).

(DOJ).[10] Following an immigration judge's decision in either an affirmative or a defensive case, either the government or the applicant may appeal to the Board of Immigration Appeals ("the Board"),[11] which is located within the EOIR. From the Board's decision, the asylum applicant may appeal to the federal circuit courts.[12] While an applicant may then appeal from a circuit court to the Supreme Court, the Courts of Appeals effectively function as the "court of last resort" for the vast majority of asylum applicants, as the Supreme Court rarely hears asylum claims. As one Ninth Circuit judge explained, "That's why we are important. The U.S. Courts of Appeals is the end of the line."[13]

While asylum applicants have the right to obtain counsel, they do not have the right to government-provided counsel. Then Chief Judge Katzmann of the Second Circuit argued that the lack of representation for noncitizens in removal proceedings constitutes a "substantial threat to the fair and effective administration of justice."[14] Ingrid Eagly and Steven Shafer found that immigrants with representation were five-and-a-half times more likely to obtain relief from removal in immigration court.[15] David Hausman's work shows that the appeals process is almost exclusively used by immigrants who have representation.[16] Hausman further demonstrates that the appeals process for the immigration courts does not promote uniformity, as the removal orders of harsher immigration judges are no more likely to be reversed on appeal by the Board than by federal circuit courts.[17] As Hausman finds, this is because the circuit courts are reviewing an unrepresentative sample of cases, as immigration judges with lower grant rates more often order applicants deported earlier in their proceedings, before they have found a lawyer or filed an application for relief. Thus, the Board rarely reviews the case of a meritorious claim of an applicant who lacked

10. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., FISCAL YEAR 2016 STATISTICS YEARBOOK A1 (2017), https://www.justice.gov/eoir/page/file/fysb16/download [hereinafter EOIR FY 2016 Statistics Yearbook].

11. The percentage of cases appealed from the immigration courts to the Board tends to fluctuate, ranging from 35-58 percent of all cases since 1990. BANKS MILLER, LINDA CAMP KEITH, & JENNIFER HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 43 (2015).

12. *See* Anna Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 664 (2011).

13. *Id.*

14. Sam Dolnick, *Improving Immigrant Access to Lawyers*, N.Y. TIMES, May 4, 2011, at A24.

15. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015). In addition, the authors of *Refugee Roulette* note that applicants represented by Georgetown's Clinic, for example, are nearly twice as likely to be granted asylum as applicants represented by other counsel in immigration court. RAMJI-NOGALES ET AL., *supra* note 1, at 45.

16. Hausman, *supra* note 9, at 1194.

17. *Id.*

representation initially and was assigned an immigration judge with a very low grant rate.[18]

B. The History of Asylum Adjudication

The corps of immigration judges has expanded rapidly over the past decade. There are now approximately 460 immigration judges located in 67 immigration courts across the nation,[19] and they collectively hear roughly 300,000 cases per year.[20] The Board is also a component of EOIR, and currently has 23 members[21] who hear roughly 35,000 cases per year.[22] Asylum adjudication takes place within a larger context of a severe backlog in the immigration courts. From 1998 to 2018, the number of deportation cases increased eight-fold, while the number of immigration judges increased by a third.[23] At their current completion rate, it would take over three-and-a-half years to clear the immigration courts' backlog if they were to take no new cases.[24] Many immigrants wait more than 1,000 days for their cases to be resolved.[25] Several judges in the Courts of Appeals have testified that this vast under-resourcing inevitably affects immigration judges' ability to decide cases with the requisite care and thoroughness.[26] As Judge Bea noted in his 2007 speech to the Board of Immigration Appeals and Immigration Judges, many immigration judges' decisions reflect the reality that they do not have adequate time to review the entire record before rendering a decision.[27] It appears little has changed since Judge Bea's testimony in 2007; in a 2017 report to the Government Accountability Office (GAO), immigration judges reported that they do not have sufficient time to conduct essential tasks such as "case-

18. *Id.* at 1195.

19. U.S. DEP'T OF JUST., *Office of the Chief Immigration Judge* (2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios.

20. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICAL YEARBOOK, FISCAL YEAR 2018 7 (2019), https://www.justice.gov/eoir/file/1198896/download.

21. *See* U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV, *Board of Immigration Appeals,* https://www.justice.gov/eoir/board-of-immigration-appeals.

22. EOIR FY 2016 Statistics Yearbook, *supra* note 10, at Q2.

23. *Immigration Court Backlog Tool,* TRAC: IMMIGR. (July 2020), https://trac.syr.edu/phptools/immigration/court_backlog/.

24. *Immigration Court Backlog Surpasses One Million Cases,* TRAC: IMMIGR. (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/.

25. *Asylum in the United States*, AM. IMMIGR.COUNCIL (June 11, 2020), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

26. *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5, 6 (2006) (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf.

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

related legal research or staying updated on changes to immigration law."[28] Further, immigration judges sorely lack adequate support staff; immigration judges average approximately one law clerk for every four judges.[29] As Andrew Kim argues, such shortages are acutely felt in a court in which many asylum seekers lack representation and do not speak English, and where the immigration judges have a duty to establish and develop the factual record.[30]

A variety of changes to the Board's decision-making process have rendered its review much less meaningful. Prior to 2002, the majority of appeals from immigration judges were decided by a three-member panel.[31] This changed in 2002 when then Attorney General John Ashcroft instituted significant changes in how the Board decides immigration cases. Chief among these changes was a new policy permitting a single-member panel of the Board to decide most appeals by an "affirmance without an opinion" (AWO). Between 2006 and 2015, more than 90 percent of appeals were reviewed by a single Board member.[32] These decisions often contained only a single line that had no reasoning or analysis.[33] A GAO report found that three-member panels ruled in favor of noncitizens in 52 percent of cases, whereas the single-member opinions did so in only 7 percent of cases.[34] These "streamlining" changes resulted in a dramatic increase in the number of immigration cases appealed to the federal courts.[35] At the peak of the resulting "surge" in 2004, immigration cases consisted of 88.2 percent of all administrative appeals and 17.2 percent of all federal appeals.[36] While the surge has leveled off to some degree, federal courts still now receive a steady rate of immigration appeals, often hovering at around 10-14 percent of all federal appeals.[37]

Scholars have long criticized this system for its failure to separate the enforcement and adjudicative functions, and the related overt efforts to politicize the process. In the most dramatic example of the politicization of immigration

28. U.S. GOV'T ACCOUNTABILITY OFF., GAO17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 31 (June 2017) [hereinafter GAO 17-438].

29. Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652–53 (2010).

30. Andrew Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 611 (2013).

31. Stacy Caplow, *After the Flood: The Legacy of the 'Surge' of Federal Immigration Adjudication*, 7 NW. J.L. & SOC. POL'Y 1, 4–5 (2012).

32. GAO 17-438, *supra* note 28, at 32.

33. Caplow, *supra* note 31, at 5.

34. GAO 17-438, *supra* note 28, at 10.

35. Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 102 (2012).

36. Caplow, *supra* note 31, at 2-3; LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR TABLE B-3 (2004).

37. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1100 (2018).

adjudication, John Ashcroft reduced the size of the Board from 23 members to 11 in 2002.[38] One study by former congressional counsel Peter Levinson demonstrated that the Board members whom Ashcroft "re-assigned" were those with decision rates most favorable to noncitizens.[39] Following these changes, the success rate of asylum applicants before the Board dropped from 37 percent in 2001, to about 11 percent in 2005.[40] These changes were felt acutely at the federal appellate level, as well; the Ninth and Second Circuits (that together hear approximately 70 percent of all asylum appeals) saw an "astounding 1,400% increase in appeals." The Second Circuit's docket became so overburdened that it eliminated oral arguments for asylum appeals in September 2005 and began a process of staff attorney review instead.[41] Based upon interviews with fifteen former immigration judges and supervisory officials, Amit Jain argues that immigration courts "exhibit core features of a tightly hierarchical bureaucracy" rather than adversarial courts.[42]

Scholars have proposed a number of means of improving these structural problems in the asylum system. Stephen Legomsky, for example, proposes giving more decisional independence to immigration judges by moving them from the DOJ into a new executive branch tribunal independent from the Attorney General's oversight.[43] He further recommends eliminating the Board entirely, and replacing the appellate phase with a single round of review by a new Article III immigration court, comprised of district and circuit judges serving two-year assignments.[44] Lindsay Vaala provides a number of ways to train immigration judges in order to decrease the likelihood of bias and increase the quality of decision-making.[45]

C. The Standard of Judicial Review

The scope of the courts' review depends upon the type of Board analysis. When the Board has not conducted its own review, such as when it issues an affirmance without an opinion, the circuit courts review the opinion of the

38. Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications,* 9 BENDER'S IMMIGR. BULL. 1154, 1155–56 (2004).

39. *Id.*

40. RAMJI-NOGALES ET AL., *supra* note 1, at 68.

41. John R.B. Palmer, *The Second Circuit's 'New Asylum Seekers': Responses to an Expanded Immigration Docket*, 55 CATH. UNIV. L. REV. 965, 971 (2006). In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket. Legomsky, *supra* note 29, at 1647.

42. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L. J. 261, 261 (2019).

43. Stephen Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1208 (1989).

44. Legomsky, *supra* note 29, at 1686.

45. Lindsay R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1036 (2017).

immigration judge. When the Board has conducted its own review, the courts limit their review to the Board's decision, unless it expressly adopts part or all of the immigration judge's opinion.[46] Thus, the courts are sometimes reviewing only the immigration judge's opinion, sometimes only the Board's opinion, and sometimes a combination of both. Several of the traditional standards applied in the review of agency actions also apply in the asylum context. Courts review questions of law *de novo* but defer to the agency's reasonable interpretations of the statutes and regulations it administers.[47] Constitutional challenges are also reviewed *de novo*.[48] For issues reliant upon the discretionary judgment of the agency, such as a motion to reopen, appellate courts review for an abuse of discretion.[49] Courts employ the substantial evidence standard in reviewing the factual findings of the agency, which includes a determination of whether the applicant is credible.[50] In this Article's dataset, courts all describe this standard in nearly identical language: the agency's factual findings are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,"[51] and the Board's decision must be "supported by reasonable, substantial, and probative evidence on the record, considered as a whole."[52] Under the Immigration and Nationality Act, "the administrative findings of facts are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."[53] This requirement derives its origin from the Supreme Court's 1992 decision in *INS v. Elias-Zacarias*.[54] As the Ninth Circuit recently pointed out, the substantial evidence standard is stricter than the review of district courts in at least one way.[55] When appellate courts review a decision of a district court, they may "affirm on any ground supported by the record even if the district court did not consider the issue."[56] When the courts review an administrative decision, however, they "cannot deny a petition for review on a ground [in which] the [the Board] itself did not base its decision."[57]

Several scholars have proposed changing the standard of review in the asylum context. Michael Kagan suggests that it is long overdue for reconsideration, as the standard of review is based upon the presumption that

46. Seck v. U.S. Att'y Gen., 663 F.3d 1356, 1364 (11th Cir. 2011).

47. Baraket v. Holder, 632 F.3d 56, 58 (2d Cir. 2011).

48. Vicente-Elias v. Mukasey, 532 F.3d 1086, 1094 (10th Cir. 2008).

49. Singh v. Holder, 658 F.3d 879, 885 (9th Cir. 2011).

50. *See, e.g.*, Ismaiel v. Mukasey, 516 F.3d 1198, 1204 (10th Cir. 2008); Khup v. Ashcroft, 376 F.3d 898, 904 (9th Cir. 2004).

51. *Seck*, 663 F.3d at 1364 (internal citations omitted).

52. *Id.*

53. 8 U.S.C. § 1252(b)(4)(B).

54. 502 U.S. 478, 481 & n.1.

55. Dai v. Sessions, 884 F.3d 858, 869 (9th Cir. 2018).

56. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 794 (9th Cir. 2007).

57. Hernandez-Cruz v. Holder, 651 F.3d 1094, 1110 (9th Cir. 2011).

judges ought to leave in place a decision with which they disagree, overturning only if any reasonable adjudicator would be so compelled. As he argues, the standard of review is based upon largely discredited assumptions about immigration judges' ability to assess factors like an applicant's credibility, and he proposes that the standard of review shift to a balancing test akin to the one articulated in *Mathews v. Eldridge*.[58] Andrew Kim argues that the question of whether a noncitizen meets the statutory definition of refugee is truly a mixed question of law and fact, rather than purely one of fact.[59] Accordingly, he argues, it is not appropriate to assess refugee determinations under the deferential substantial evidence standard, and courts should provide less deference to these determinations in asylum cases.[60]

In addition, federal appellate review of agency decisions has long been guided by the Supreme Court's decision in *Chevron*.[61] *Chevron* expanded the sphere of mandatory judicial deference to agencies "through one simple shift in doctrine: it posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering."[62] In dictum, the Supreme Court stated that the Board should receive *Chevron* deference in interpreting the asylum and withholding of removal provisions of the Immigration and Nationality Act (INA).[63] Thus, in asylum cases, *Chevron* deference is given to precedential opinions of the Board that interpret governing legal standards, or non-precedential decisions that rely on applicable Board precedent.[64]

As in the case of the substantial evidence standard, several scholars have questioned whether *Chevron* deference is appropriate in the asylum context, as discussed *infra* in Part V. For example, Michael Kagan argues that Chevron deference is not appropriate in asylum law, as it does not involve the type of technical expertise that would make an agency better suited to address these cases.[65] He further argues that the politicization of immigration adjudication is at odds with the stability that Congress meant to formalize with the passage of the Refugee Act.[66] Similarly, Maureen Sweeney argues that there should be no *Chevron* deference in interpreting the Refugee Act of 1980, as the institutional

58. Kagan, *supra* note 35, at 106.

59. Kim, *supra* note 30, at 610–11.

60. *Id.*

61. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

62. Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833 (2001).

63. Immigr. Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).

64. *See also* Escobar v. Holder, 657 F.3d 537, 542 (7th Cir. 2011).

65. Kagan, *supra* note 3.

66. *Id.* at 40.

location of asylum adjudication within an enforcement branch makes it critical for the courts to serve as a check on agency power.[67]

D. Studies of Immigration Adjudication

For a long while, empirical work on immigration adjudication remained curiously absent from both the administrative law scholarship and the courts literature within the political science scholarship. Writing in 2007, Margaret Taylor lamented that immigration law was one of the only areas of administrative decision-making that had been left largely unexplored.[68] Recent scholarship has answered this call and has painted a much richer and nuanced portrait of how immigration cases are decided. Schoenholtz, Schrag, and Ramji-Nogales provide the most comprehensive treatment of asylum officer decision-making, analyzing more than 300,000 cases.[69] They find that the location where an applicant first seeks asylum has an enormous effect on the likelihood of success. Additionally, an applicant's level of success depends on several factors specific to the officer, such as the officer's educational background. They propose a number of reforms to mitigate these effects, such as requiring officers to have law degrees and increasing the level of engagement between individual officers and regional offices.[70]

Much of the empirical work on asylum has focused on decision-making at the immigration judge level. A vast body of work in international relations has examined the competing roles of human rights interests and geopolitical or material interests.[71] More recent work has shown that immigration judges are responsive to the humanitarian needs of applicants, but that they are often also influenced by national interests, including national security and economic concerns.[72] Analyzing a novel database of more than 400,000 immigration court cases, David Hausman finds that disparities across immigration judges are large and statistically significant, as the average standard deviation of the relief rates within the nineteen largest immigration courts was approximately nine percentage

67. Maureen Sweeney, *Enforcing/Protection: The Danger of Chevron in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 134–35 (2019).

68. Margaret Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

69. ANDREW SCHOENHOLTZ, PHILLIP SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

70. *Id.* at 230.

71. *See, e.g.*, GIL LOESCHER & JOHN SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (1986).

72. Marc Rosenblum & Idean Salehyan, *Norms and Interests in US Asylum Enforcement*, 41 J. PEACE

RES. 677 (2004); Jennifer Holmes & Linda Camp Keith, *Does the Fear of Terrorists Trump the Fear of Persecution in Asylum Outcomes in the Post September 11 Era?*, 43 POL. SCI. & POLS. 431 (2010).

points between 1998 and 2004.[73] Most importantly, Hausman finds that the decisions of the harshest immigration judges are not more likely to be overturned through the appellate process, as these judges are more likely to refuse to grant a motion for continuance in order to allow litigants to find counsel. Banks Miller, Linda Camp Keith, and Jennifer Holmes examine more than half a million cases over two decades, and argue that the decisions of immigration judges are sensitive to their ideological beliefs as well as the local and demographic conditions where the courts are located.[74] Similarly, Daniel Chand and colleagues find that immigration judges in communities where citizens more often vote Republican grant asylum less often than states with Democratic governors and state legislative majorities.[75] Most recently, Catherine Kim demonstrates that immigration judges have been more likely to deny asylum claims during the Trump administration.[76] Taking a cross-national perspective, Rebecca Hamlin contrasts the process of refugee status determination in the United States, Canada, and Australia in rich detail, and finds that the level of insulation from political interference and judicial review are critical factors in explaining differences in outcomes across systems.[77]

Refugee Roulette was the seminal work that spurred much of the preceding literature, as it analyzed disparities in every level of asylum adjudication in the years 2004 and 2005.[78] In the most comprehensive study of asylum adjudication to date, they documented that asylum grant rates varied dramatically from one asylum officer to the next, and demonstrated that political changes in the composition of the Board had resulted in decreased remand rates.[79] Crucially, the authors of *Refugee Roulette* also uncovered the wide disparities between remand rates in asylum appeals across the Courts of Appeals, even when limiting their analysis to appeals from the fifteen countries from which the most asylum seekers originate.[80] With a few notable exceptions,[81] there has been very little further empirical work on asylum decision-making within the federal appellate courts. Given this paucity of scholarship, *Refugee Roulette* invites further inquiry into which factors may be driving these differences, as this was outside the scope of their already broad work. Accordingly, this Article answers this call, examining

73. Hausman, *supra* note 9, at 1187.

74. BANKS MILLER ET AL., *supra* note 11.

75. Daniel E. Chand, William D. Shrackhise & Marianne L. Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 27 J. PUB. ADMIN. RES. & THEORY 182 (2016).

76. Catherine Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1 (2018).

77. REBECCA HAMLIN, LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA 19–20 (2014).

78. RAMJI-NOGALES ET AL., *supra* note 1, at 31.

79. *Id.* at 56.

80. *Id.* at 365.

81. For example, David Law demonstrates that judges are more likely to vote according to their ideological preferences in published decisions, and less likely to do so in unpublished opinions. David Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit,* 73 U. OF CINN. L. REV. 817, 864 (2005).

the opinions in five circuits across seven years in order to better understand the differences in how the courts are reviewing asylum claims.

II.
DATA AND METHODS

To better understand the role played by judicial review in the asylum context, this project selected a range of circuit courts to examine: the First, Seventh, Ninth, Tenth, and Eleventh, in order to maximize variation in size, remand rate, and the number of asylum appeals typically heard each year. In part, this choice was also based upon the nature of the opinions across circuits, as some circuits' opinions were so brief that many of the variables of interest could not be identified. Asylum appeals were coded over a seven-year period, 2007-2013, which was chosen in order to exclude several significant events that had happened on either side of this period. The inquiry begins in 2007, once the large surge in appeals that followed the streamlining measures had somewhat stabilized, and the Courts of Appeals had adapted to these cases becoming a steady part of the courts' docket.[82] The concluding year, 2013, was prior to when many of the asylum cases from the surge of unaccompanied children would have reached the Courts of Appeals, which also brought important changes to the adjudication environment that might have complicated this analysis.[83] These cases were collected from Lexis Nexis, and accordingly the data only include those cases that were available there.[84]

In every circuit but the Ninth, every opinion that constituted a merits opinion on an asylum claim was included in the dataset. In the Ninth Circuit, which hears far more asylum appeals than any other circuit in the country, a sample of 100 opinions per year was randomly chosen. Cases that may have mentioned the term "asylum," but were not in fact asylum cases decided on the merits, were eliminated from the dataset. This might include, for example, a mention that the petitioner had previously sought asylum but was now appealing a criminal conviction. Similarly, motions to reopen and motions for reconsideration were excluded, in order to compare the most similar claims. This process yielded approximately 2,111 cases, or observations.

The data were coded for 29 variables. In part, these variables focused on factors related to attributes of the applicant, such as the applicant's gender, whether the applicant had dependents, and whether the applicant had legal representation. Factors relating to the case were also coded, such as the basis of

82. Caplow, *supra* note 31, at 4.

83. Kari Hong, *Weaponizing Misery: The 20-Year Attack on Asylum*, 22 LEWIS & CLARK L. REV. 542, 553 (2018).

84. Prior scholarship has demonstrated that while Lexis includes more immigration cases than Westlaw, they do not include all cases. Many of these cases are available on PACER, but their contents are often unavailable to non-parties. Michael Kagan, Rebecca Gill, & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals,* 106 GEO. L. J. 683, 685 –86 (2018).

the claim (political opinion, membership in a social group, nationality, religion, or race), whether there was an adverse credibility finding below at either level, whether the court reviewed the immigration judges and/or the Board's opinion, and whether the case was published. Attributes relating to the court were also coded, including the identity of the judges deciding the case, and the party of each judge's nominating President. All of these factors were included in order to control for as many characteristics about the asylum seekers and panels as possible, and to generate a rich descriptive account of which asylum cases reach the Courts of Appeals.

III.
RESULTS

A. Summary Statistics and Regression Analysis

The figure below provides summary statistics in order to give a sense of the full range of cases appealed across the courts. Figure 1 first provides the percentage of claims brought under each of the five possible bases for asylum. It also provides the percentage of applicants who were represented before the Court of Appeals, the percentage of women who filed (alone) for asylum claims, and the percentage of cases that mentioned that the applicant had one or more children. An applicant may assert several bases for an asylum claim (membership in a social group, political opinion, nationality, religion, and/or race), so these claims total more than one hundred percent in each court. Additionally, in a small percentage of the opinions, particularly in the Ninth Circuit, the basis for the asylum claim was not explicitly stated and could not be coded.

As Figure 1 reveals, most of the asylum seekers before the Courts of Appeals had representation. This is partially due to the fact that only represented asylum seekers tend to avail themselves of the appeals process, and it also reflects the efforts of some judges to initiate programs in their circuits to provide such representation.[85] It shows that certain types of asylum claims are made more and less frequently across circuits: for example, claims based upon one's nationality were quite rare in all courts. Claims based upon one's ethnicity were similarly less common, though they were made more frequently in the Tenth Circuit. Unsurprisingly, claims based upon one's political opinion were the most common in all circuits, which likely reflects the origins of asylum law. Indeed, prior to the 1980s, the prototypical refugee was an Eastern European or Vietnamese refugee fleeing a Communist regime, and scholarship has probed the relative advantage of these types of claims.[86] It also reflects that men bring asylum appeals more often than women.

85. *See, e.g.*, Dolnick*, supra* note 14, at A24; Hausman, *supra* note 9, at 1194.

86. *See* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582 (1998) (noting that such refugees "presented an opportunity to create powerful propaganda about the relative virtues" of Democratic governments).

Figure 1: Summary Case Statistics

Case Attribute	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Membership in a Social Group	23.9%	26.2%	12.8%	19.3%	25.1%	21.2%
Political Opinion	51.4%	41.2%	21.4%	40.7%	60.3%	44.9%
Nationality	0.8%	3.6%	0.2%	0.0%	1.3%	1.1%
Religion	30.5%	22.6%	17.7%	40%	15.8%	20.3%
Ethnicity	11.9%	10%	7.8%	18.6%	8%	9.3%
Representation	100.0%	92.3%	84.2%	88.6%	87.9%	88.7%
Female Applicants	28.8%	22.2%	22.3%	15%	29.5%	25.6%
Applicants with Children	43.0%	35.3%	10%	37.4%	29.8%	27.8%

In addition, Figure 2 divides applicants by country of origin using two different measures. The first measure shows the composition of applicants from each region of the world within each circuit: Africa, Europe, Asia, Latin America, Central America and the Caribbean, and Oceania. The second measure, labeled "Asylum-Producing Countries," uses a method employed by the authors of *Refugee Roulette,* and includes countries from which at least five hundred claims came before asylum offices or immigration courts over this period, and from which at least 30% of claims were granted.[87] This is one way of narrowing the cases in order to examine a roughly comparable set of claims across circuits.

87. RAMJI-NOGALES ET AL., *supra* note 1, at 18.

Figure 2: Summary Case Country of Origin Statistics

Region	First Circuit	Seventh Circuit	Ninth Circuit	Tenth Circuit	Eleventh Circuit	Overall Average
Europe	11.5%	16.3%	2.5%	1.4%	10.7%	8.4%
Africa	9.1%	15.8%	4.8%	11.4%	4.1%	6.6%
Asia	38.3%	33.0%	38.0%	61.4%	21.9%	32.2%
Oceania	5.3%	8.1%	1.3%	0.0%	0.1%	1.9%
Latin America	9.9%	3.2%	1.8%	7.1%	28.1%	14.5%
Central America & Caribbean	21.8%	5.9%	19.1%	15.7%	14.9%	16%
Asylum-Producing Country	34.6%	46.6%	27.4%	27.9%	51.4%	40.5%

As Figure 2 reveals, there are important differences in the regions from which asylum seekers originate across circuits. Asylum seekers may only file appeals in the circuit in which the immigration judge decided the underlying immigration case.[88] Thus, the origin of many asylum seekers in each circuit tends to track already well-established migration patterns. For example, the Eleventh Circuit receives a significant number of asylum seekers from Central and South America, whereas the Ninth Circuit receives many asylum seekers from Asia. These geographic differences might lead one to wonder if any difference in remand rates reflect differences in the composition of cases, at least in part. Accordingly, I control for these geographic differences in the regression analysis that follows, using two alternative measures: the region of the applicant's country of origin and whether the applicant was from an Asylum-Producing Country.

Figure 3 presents a summary of the characteristics of the judicial panels represented in the data. Of the 2,111 cases, two were decided *en banc*, and two were decided by two-judge panels. The remaining 2,107 cases were decided by a three-judge panel, and each of the three judges' race, ethnicity, and political

88. *Id.* at 77.

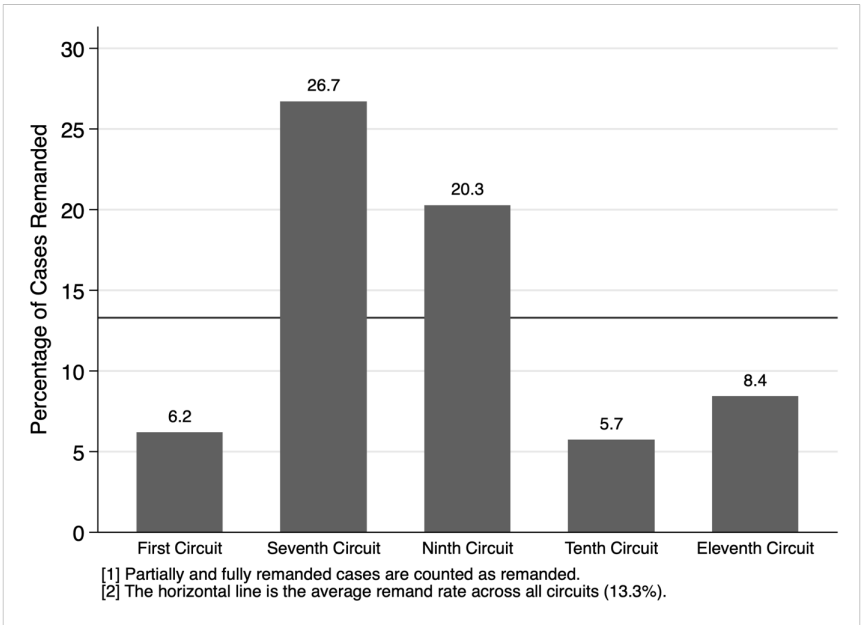
ideology were coded. The party of the appointing President was used as a proxy for each judge's political ideology, though this has been shown to be an imperfect measure, at best. As Figure 3 demonstrates, nearly half of the panels had at least one female judge on panel, and about one third of panels had at least one judge of color. More cases in the data were heard by a Republican majority panel (57.6%) than by a Democratic majority.

Figure 3: Panel Characteristics

Panel Characteristics	Overall Average
At least one female judge on panel	46.1%
At least two female judges on panel	15.4%
At least one judge of color on panel	33.4%
Two or more Republican appointed judges on panel	57.6%

As reflected in Figure 4, the data also show large differences in the remand rates across circuits, consistent with the findings in *Refugee Roulette*. The authors of *Refugee Roulette* found even more dramatic differences in 2004–2005, which likely reflects a number of factors. First, in 2004–2005, the courts were dealing with the effect of a "surge" of appeals following changes to the composition of the Board, discussed *supra*. In addition, the current project excluded motions to reopen and motions for reconsideration in order to limit comparison to cases reviewing the most similar types of claims. These results show that, from 2007–2013, the remand rates vary from as low as 5.7% in the Tenth Circuit, to as high as 26.7% in the Seventh Circuit.

Figure 4: Average Remand Rate by Circuit Court



A key finding of the regression analysis is that one factor remained significant, even when controlling for a wide range of case-specific variables: whether a case came from the Seventh or Ninth Circuit. This factor remained significant across all of the estimated models, and positively predicted remand. In other words, even when controlling for a wide variety of relevant variables, Figure 5 shows that an asylum case was more likely to be totally or partially remanded if it was heard by the Seventh or Ninth Circuits. Thus, it appears that the Seventh and Ninth Circuits' larger remand rates cannot be explained by the fact that they are hearing different types of claims than the other courts in this study. These effects were strong and stable across different logistic regression models that took into account whether an adverse credibility determination was made below. In Models 3-5, these effects remained significant when controlling for case-specific characteristics, such as the basis for the asylum petition, the applicant's gender, whether the applicant had representation, and two different means of controlling for the applicant's country of origin. Model 6 introduced judge and panel-level characteristics, such as whether the panel had a majority of judges appointed by a Republican president, whether the panel had one or more female judges, and whether the panel had one or more minority judges.[89] The circuit effects were robust to these characteristics as well, and remained significant in all models,

89. The purpose of this limited inquiry was to test whether the circuit effects were robust to judicial characteristics. Future work could fruitfully explore the relationship between the likelihood of remand and panel characteristics in much more detail.

including Model 9, which controlled for the widest variety of case and judicial characteristics.

Whether a case was heard by the Seventh or Ninth Circuits was not the only significant factor. At the conventional statistical significance threshold ($p<0.05$), the models also showed that an applicant from the Central American and Caribbean regions was significantly less likely to receive remand (Model 5). This result warrants further investigation in future research to determine whether any country-specific effects are strongly influencing the results.[90] Having one's case heard by a majority of Republican-appointed judges was significant only when considering the circuit and judicial characteristics, though this became less important ($p<.10$) when controlling for other case characteristics.

While representation was not significant in any of the models, this likely reflects the fact that the vast majority of applicants in the data had representation before the Courts of Appeals. The *quality* of representation is not measured here, and future work should explore this factor as well. As discussed *supra,* previous scholarship has found that representation plays an enormous role in one's likelihood of success in immigration court.[91] In addition, no scholarship has yet explored the effect of the quality of representation in asylum appeals in the federal courts.[92]

90. For example, further analysis should parse the effects of high-volume countries, such as El Salvador. Prior work has explored the effect of country of origin on asylum grant rates. *See, e.g.,* AJ Rottman, Christopher Fariss & Steven Poe, *The Path to Asylum in the U.S. and the Determinants For Who Gets In and Why*, 43 INT'L MIGRATION REV. 3 (2009) (finding that applicants from Spanish and Arabic speaking countries are significantly less likely to be successful at the immigration judge level); *cf.* Margaret S. Williams & Anna O. Law, *Understanding Judicial Decision Making in Immigration Cases at the U.S. Courts of Appeals*, 33 JUST. SYS. J. 97, 107 (2012) (finding that applicants from less democratic countries were not significantly more likely to be granted remand).

91. *See*, Eagly & Shafer, *supra* note 15, at 9.

92. Exploring the barriers that asylum seekers face in securing quality representation, Sabrina Ardalan develops a model for holistic representation. Sabrina Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM. 1001 (2016).

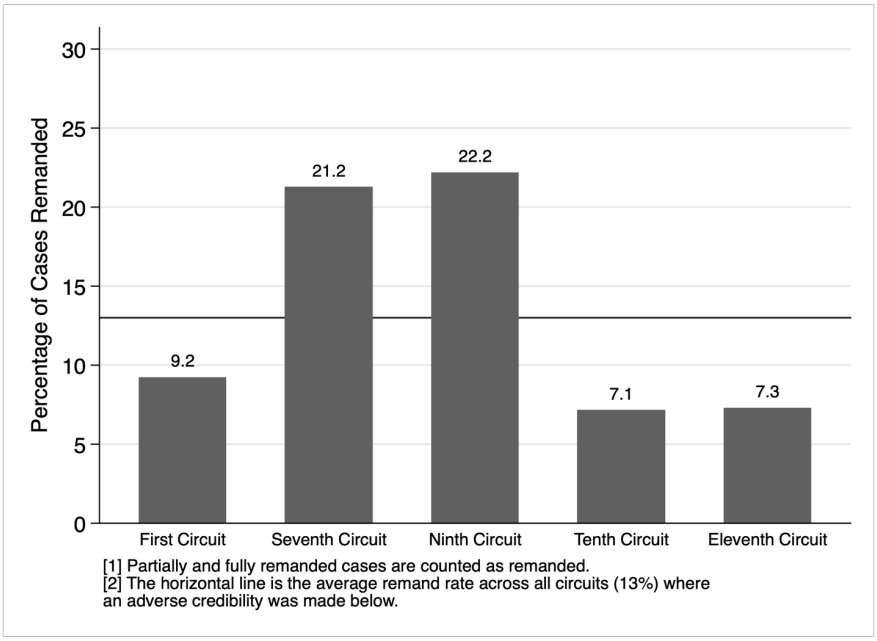
Figure 5: Logistic Regression Results

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8	Model 9
Any adverse credibilty		-0.036	-0.077	0.108	-0.160		-0.051	-0.060	-0.183
determination below		(0.796)	(0.613)	(0.506)	(0.301)		(0.715)	(0.696)	(0.239)
Circuit-level variables									
First Circuit	-0.332	-0.336	-0.468	-0.254	-0.381	-0.327	-0.333	-0.521	-0.422
	(0.256)	(0.253)	(0.128)	(0.426)	(0.243)	(0.282)	(0.275)	(0.103)	(0.206)
Seventh Circuit	1.379 **	1.378 **	1.429 **	1.580 **	1.321 **	1.465 **	1.463 **	1.466 **	1.355 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Ninth Circuit	1.020 **	1.018 **	1.118 **	1.388 **	1.265 **	1.016 **	1.013 **	1.077 **	1.232 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Tenth Circuit	-0.414	-0.417	-0.318	-0.258	-0.229	-0.301	-0.306	-0.288	-0.165
	(0.280)	(0.278)	(0.425)	(0.532)	(0.566)	(0.443)	(0.437)	(0.488)	(0.686)
Individual effects									
Female applicant			0.309	0.417	0.333			0.310	0.325
			(0.289)	(0.254)	(0.264)			(0.288)	(0.276)
Male applicant			0.211	0.283	0.240			0.197	0.219
			(0.435)	(0.415)	(0.386)			(0.467)	(0.428)
Child			0.024	0.0646	-0.016			0.040	-0.009
			(0.888)	(0.717)	(0.927)			(0.811)	(0.956)
Basis of claim									
Membership in a			-0.225	-0.0181	-0.080			-0.283	-0.099
social group			(0.217)	(0.924)	(0.664)			(0.126)	(0.595)
Political opinion			0.191	0.301	0.185			0.212	0.189
			(0.234)	(0.076)	(0.271)			(0.190)	(0.261)
Nationality			-0.0984	-0.0908	-0.309			-0.114	-0.287
			(0.876)	(0.894)	(0.635)			(0.858)	(0.666)
Ethnicity			-0.101	-0.0336	-0.195			-0.188	-0.220
			(0.688)	(0.900)	(0.448)			(0.472)	(0.392)
Religion			0.216	0.309	0.148			0.230	0.154
			(0.239)	(0.102)	(0.430)			(0.210)	(0.409)
Representation by counsel			0.353	0.227	0.235			0.351	0.226
			(0.141)	(0.311)	(0.333)			(0.143)	(0.351)
Country-level characteristics									
Asylum-producing				-0.219				-0.219	
country				(0.155)				(0.158)	
Europe					0.089				0.057
					(0.745)				(0.836)
Africa					0.238				0.245
					(0.402)				(0.387)
Asia					-0.346				-0.345
					(0.104)				(0.106)
Oceania					-0.471				-0.464
					(0.345)				(0.350)
Latin America					-0.361				-0.408
					(0.175)				(0.129)
Central America					-1.400 **				-1.394 **
& Carribbean					(0.000)				(0.000)
Judge & panel-level variables									
Majority republican-						-0.363 *	-0.363 *	-0.270 †	-0.278 †
appointed						(0.012)	(0.012)	(0.077)	(0.071)
One or more female						0.0921	0.0942	0.079	0.052
judges						(0.526)	(0.517)	(0.604)	(0.736)
One or more minority						-0.0291	-0.0297	-0.074	-0.066
judges						(0.841)	(0.838)	(0.632)	(0.669)
Constant	-2.389 **	-2.375 **	-3.002 **	-2.925 **	-2.602 **	-2.265 **	-2.246 **	-2.775 **	-2.420 **
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)
Observations	2,111	2,111	1,947	1,947	1,947	2,109	2,109	1,945	1,945

Robust p-value in parentheses; † p<0.10, * p<0.05, ** p<0.01

As the figure below demonstrates, there was wide variation in the proportion of cases remanded where there had been a prior finding that the applicant was not credible (termed an "adverse credibility determination"). While this factor was not significant in the regression analysis, this is likely because many factors are driving differences across circuits. The Seventh and Ninth Circuits were nearly three times more likely to remand than the First, Tenth, or Eleventh Circuits. This deserves further exploration and indicates that a qualitative analysis of the doctrinal differences between the courts is warranted in order to better understand the differences in how these courts treat asylum appeals.

Figure 6: Remand with Adverse Credibility Determination Below



IV.
DIVERGENCE IN THE CASE LAW ACROSS CIRCUITS

As this section will discuss, a qualitative analysis of the opinions reveals that the circuits have developed a variety of court-fashioned rules that affect the likelihood of remand, even though all of these circuits are using the same legislatively imposed standard of review. These rules serve to either constrict or expand the scope of review. In the Seventh and Ninth Circuits, these rules permit courts to engage in a more searching review of the agency's decision-making. In the First, Tenth, and Eleventh Circuits, the courts have interpreted the standard in a way that restricts the scope of review, making remand much less likely.

A. Credibility Determinations

An asylum seeker's credibility has been aptly described as "the most crucial aspect of any asylum case and the single biggest substantive hurdle facing asylum applicants."[93] As Judge Easterbrook has explained, these determinations are so

93. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 186–87 (internal citations omitted).

challenging, in part, because "[m]ost claims of persecution can be neither confirmed nor refuted by documentary evidence."[94] Accordingly, much of the case hinges upon whether an immigration judge finds the asylum seeker to be credible, through a combination of factors such as the applicant's testimony and demeanor, any corroborating evidence, and the consistency of the claims. If an applicant appeals a credibility determination to the Board, the Board reviews the immigration judge's reasons, and determines whether the factual finding is clearly erroneous.[95] As discussed above, the circuit courts then review the Board's finding for substantial evidence.[96] If the Board adopts the immigration judge's opinion, the court then reviews the immigration judge's analysis [97]

A review of the cases suggests significant differences in the level of deference circuits accord to the agency's credibility determinations. The REAL ID Act, affecting applications for asylum made on or after May 11, 2005, plays an important role in understanding the courts' treatment of these determinations. In addition to a number of provisions that increased the burden of proof for asylum seekers,[98] and decreased judicial review of immigration decisions,[99] the REAL ID Act also gave specific guidance on how courts must treat the agency's assessment of an applicant's credibility. The Act prescribed that credibility determinations must be made on the "totality of the circumstances," and that the immigration judge may look beyond factors such as demeanor, responsiveness, and inconsistency, to "any other relevant factor" in assessing credibility.[100] The Act was based upon the notion that an "immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth."[101] For the most part, courts have agreed with the sentiment that the immigration judge possesses a unique advantage, noting that "[w]eight is given to the administrative law judge's determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify, while the Board and the reviewing court look

94. Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008).

95. 8 C.F.R. § 1003.1(d) (2009).

96. *See supra*, Part II.

97. Musollari v. Mukasey, 545 F.3d 505, 508 (7th Cir. 2008).

98. The Act instituted a requirement that there be a clear nexus between the applicant's alleged persecution and the protected ground (such as race or religion), and also placed a burden on applicants to provide evidence to corroborate otherwise credible testimony, if requested by the trier of fact, unless "the applicant does not have the evidence and cannot reasonably obtain the evidence." 8 U.S.C. § 1158(b)(1)(B)(i)-(iii).

99. The Act also restricted habeas corpus review under 28 U.S.C. § 2241 of final orders of removal, deportation, and exclusion.

100. 8 U.S.C. § 1158(b)(1)(B)(iii).

101. H.R. Rep. No. 109-72, at 167 (quoting Sarvia-Quintanilla v. United States, 767 F.2d 1387, 1395 (9th Cir. 1985)).

only at cold [documentary] records."[102] The REAL ID Act implemented one important substantive change related to inconsistencies. Following its implementation, inconsistencies no longer need to "go to the heart" of the petitioner's claim in order to form the basis of an adverse credibility determination.[103] As described below, some circuits have interpreted the Act as narrowly circumscribing their review and vesting the agency with much more discretion in these determinations, while other courts have maintained a more searching level of review.

All of the courts purport to require the agency to provide specific reasons for an adverse determination, and all of them impose a reasonableness requirement on the determination.[104] However, as described below, the circuits have developed varying approaches in assessing the agency's credibility determination. Some circuits, such as the Ninth and Seventh in this sample, have taken pains to make the limitations of the Act explicit, and have developed tools of interpretation that limit the types of inconsistencies that could serve as a basis for an adverse determination. As the Ninth Circuit declares, "The REAL ID Act did not strip us of our ability to rely on the institutional tools that we have developed, such as the requirement that an agency provide specific and cogent reasons supporting an adverse credibility determination, to aid our review."[105] It further explained, "[d]espite our recognition that agency credibility determinations deserve substantial deference, the REAL ID Act does not give a blank check to the IJ [immigration judge] enabling him or her to insulate an adverse credibility determination from our review of the reasonableness of that determination."[106] In other words, the Ninth Circuit has imported "a rule of reason" into the assessment of the standard governing a credibility determination.[107] As the Ninth Circuit emphasized, the REAL ID Act does not permit the immigration judge to "rely on nothing more than a vague reference to the 'totality of the circumstances' or

102. Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003).

103. 8 U.S.C. § 1158(b)(1)(B)(iii); Malkandi v. Holder, 576 F.3d 906, 917 (9th Cir. 2009).

104. As the Ninth Circuit explains, "[w]e have consistently required that the IJ state explicitly the factors supporting his or her adverse credibility determination." Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010). The Seventh Circuit cautions that an "IJ cannot selectively examine evidence in determining credibility, but must present a reasoned analysis of the evidence as a whole." Hanaj v. Gonzales, 446 F.3d 694, 700 (7th Cir. 2006). The First Circuit has cautioned that credibility determinations under the REAL ID Act must be "reasonable" and must "take into consideration the individual circumstances of the applicant." Lin v. Mukasey, 521 F.3d 22, 28 n.3 (1st Cir. 2008). The Tenth Circuit states that "[w]e do not question credibility findings that are substantially reasonable." *Ismaiel*, 516 F.3d at 1205. However, "the IJ must give specific, cogent reasons for disbelieving" an applicant's testimony. *Id.*; *see also* Li Shan Chen v. U.S. Att'y Gen., 672 F.3d 961, 964 (11th Cir. 2011) (also requiring "specific, cogent reasons").

105. *Shrestha*, 590 F.3d at 1042.

106. *Id.*

107. *Id.* at 1041. *See also* Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 382 (2011).

recitation of naked conclusions that a petitioner's testimony was inconsistent or implausible, that the petitioner was unresponsive, or that the petitioner's demeanor undermined the petitioner's credibility."[108] Rather, the agency must enumerate the factors underlying the credibility determination, and the agency must explicitly make an adverse credibility finding in order for the Ninth Circuit to discredit the petitioner's claims. As one opinion explained, where the agency identifies an applicant's failure to disclose a fact and indicates that the agency did not believe the applicant's explanation for omitting it, this constitutes the sort of "passing statement" that "does not constitute an adverse credibility finding."[109] In addition, even a "statement that a petitioner is 'not entirely credible' is not enough" to be deemed an adverse credibility finding.[110] Rather, the finding must provide explicit reasoning, and in its absence, the Ninth Circuit will treat the petitioner's testimony as credible.[111]

The Seventh and Ninth Circuits have remanded cases in which the record revealed that the applicant had proffered an explanation for the inconsistency, and the agency did not explicitly consider the explanation in its decision.[112] As the court reasoned, to "ignore a petitioner's explanation for a perceived inconsistency and relevant record evidence would be to make a credibility determination on less than the total circumstances in contravention of the REAL ID Act's text."[113] The Ninth Circuit has also concluded that credibility determinations may not be based upon trivial inconsistencies, and has further held that the immigration judge must weigh any relevant evidence that may contravene a conclusion that a given factor undermines credibility.[114] Inconsistencies may be deemed trivial where they are due to an "unscrupulous preparer" of the asylum application,[115] or lack a close nexus to the asserted grounds of persecution.[116] Similarly, the Seventh Circuit imposes a similar requirement that the determination may not be based upon trivial details or easily explained discrepancies; it emphasizes that while the immigration judge may consider inaccuracies that don't go to the heart of the

108. *Shrestha*, 590 F.3d at 1042.

109. Kaur v. Holder, 561 F.3d 957, 962–63 (9th Cir. 2009).

110. Aguilera-Cota v. Immigr. Nat. Serv., 914 F.2d 1375, 1383 (9th Cir. 1990).

111. Kalubi v. Ashcroft, 364 F.3d 1134, 1137 (9th Cir. 2004) (explaining that the REAL ID requires this, providing that where no adverse credibility determination is explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal).

112. *See, e.g.*, Solo-Olarte v. Holder, 555 F.3d 1089, 1091 (9th Cir. 2009) (explaining that the "lack of consideration given to [the applicant's] proffered explanation was error and prevents the underlying inconsistency from serving as substantial evidence to support the IJ's adverse credibility finding"); *cf.* Nan Ling Guo v. U.S. Att'y Gen., 380 Fed. App'x 826, 829 (11th Cir. 2010) ("Generally, tenable explanations for implausibilities in an applicant's testimony will not compel a reasonable fact finder to reverse a credibility determination, especially if corroborating evidence is absent").

113. *Shrestha*, 590 F.3d at 1044.

114. *Id.*

115. *Singh*, 406 Fed. App'x at 169.

116. Rizk v. Holder, 629 F.3d 1083, 1088 (9th Cir. 2011).

applicant's claim, "he can do so only as part of his consideration of the totality of the circumstances, and all relevant factors."[117]

In contrast, the three other circuits in this sample have interpreted the REAL ID Act to narrowly circumscribe their review of credibility determinations. In particular, the First Circuit treats the Act's language "as a revival of the doctrine of *falso in uno, falso in omnibus*[,]" meaning that if a petitioner is inconsistent with respect to one thing, he may be inconsistent (or untruthful) with respect to the entirety of his claim.[118] Similarly, the Tenth Circuit has interpreted this rule to mean that inconsistency with respect to matters that may be incidental to the applicant's claim may still serve as a basis for an adverse determination. Explicitly recognizing the contrary approach taken by the Seventh and Ninth Circuits in addressing the agency's treatment of inconsistencies, the Tenth Circuit reasoned: "Experienced litigators do not limit their challenges to adverse testimony to matters at the heart of the case. Cross-examination often seeks to undermine the witness's credibility by probing into inconsistencies and improbabilities regarding 'incidental' matters."[119] Thus, in the Tenth Circuit's view, an inconsistency about an incidental matter may well serve as the basis for an adverse credibility determination.

All five circuits distinguish between determinations based upon the applicant's testimony and those that are based upon the applicant's demeanor, in part because of the fact-finder's unique ability to assess the applicant's demeanor. As they explain, "credibility determinations that are based on the IJ's analysis of testimony, as opposed to demeanor, are granted less deference."[120] These courts reason that the fact-finder does not enjoy the distinct advantage in analyzing testimony, since the appellate court is similarly capable of analyzing testimony. By contrast, the fact-finder is in a unique position to assess demeanor, and the appellate courts are accordingly more deferential to these findings. In the years reviewed here, however, the First, Tenth, and Eleventh Circuits were much less likely to reverse an adverse credibility determination based upon either ground. This difference was most stark in cases in which the agency had made a demeanor-based credibility finding. As described below, despite the purported heightened deference that such a finding would receive, the Ninth and Seventh Circuits remanded many of these cases, whereas the First, Tenth, and Eleventh Circuits were extremely deferential to demeanor-based credibility findings over the seven-year period, and very rarely remanded in such a situation.

117. Kadia v. Gonzales, 501 F.3d 817, 822 (7th Cir. 2007).

118. *Id.* at 821 (explaining that the Seventh Circuit is "dubious" of this interpretation).

119. *Id.*

120. Gao v. Bd. of Immigr. Appeals 767 F.2d 1387, 127 (2d Cir. 2007); *Kadia*, 501 F.3d at 819; Arulampalam v. Ashcroft, 353 F.3d 679, 685–86 (9th Cir. 2003); Cordero-Trejo v. Immigr. Naturalization Serv., 40 F.3d 482, 487 (1st Cir. 1994).

While affording heightened deference to demeanor-based findings, the Ninth Circuit still scrutinizes the fact-finder's underlying reasons for an adverse, demeanor-based finding. The Ninth Circuit will reverse such findings where they appear to be "boilerplate," for example, and requires the immigration judge to "specifically point out the noncredible aspects of the petitioner's demeanor."[121] For example, where an immigration judge determines that the applicant was not credible because he was unresponsive, the Ninth Circuit requires the immigration judge to support this finding with "particular instances in the record where the petitioner refused to answer questions asked of him."[122] The Seventh Circuit has more boldly expressed concern about the immigration judges' ability to assess demeanor, which is reflected in its higher remand rates in these cases. It has explicitly questioned the competence of immigration judges to adequately assess demeanor, stating: "Immigration judges' insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American is a disturbing feature of many immigration cases, and immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor."[123] As Judge Easterbrook put it, "if you want to find a liar you should close your eyes and pay attention to what is said, not how it is said or what the witness looks like while saying it. And even then the error rate is high."[124] In the Tenth Circuit, on the other hand, the data revealed very few cases in which the court found that a demeanor-based determination was not supported by substantial evidence. In other words, the Tenth Circuit appeared to be extremely deferential to the immigration judge's assessment of the applicant's demeanor, and the Eleventh Circuit displayed a similar pattern. While it emphasized that credibility determinations must "rest on substantial evidence, rather than conjecture or speculation," it also stated that "[c]redibility determinations, so far as they involve demeanor, have thus been characterized as largely unreviewable."[125] In a context in which an assessment of demeanor is one of the largest substantive components of an applicant's case, this approach can have significant implications. Thus, in the few cases in which these circuits remanded a demeanor-based finding, the immigration judges' behavior was particularly egregious.[126] For example, both the Tenth and Eleventh Circuits made this finding when judges had blatantly introduced their own prejudices, basing the credibility determination on the judges' own conclusion that the

121. *Shrestha*, 590 F.3d at 1042 (noting that the REAL ID Act did not alter this rule).

122. *Id.*

123. *Kadia*, 501 F.3d at 819 (internal citations omitted).

124. *Mitondo*, 523 F.3d at 788 (internal citations omitted) (summarizing empirical research to conclude that the "major clue" in giving a liar away is the amount of detail, as truth-tellers have normal amounts of memory failure, while "liars" seem to "develop super-powered memories and often recall the smallest of details").

125. Todorovic v. U.S. Att'y Gen, 621 F.3d 1318, 1325 (11th Cir. 2010).

126. *Id.* at 1324; Lin Lin Tang v. U.S. Att'y Gen, 578 F.3d 1270 (11th Cir. 2009).

applicants did not appear "effeminate" in their dress or appearance, and therefore could not have been persecuted on account of their sexuality. [127]

The Ninth Circuit is the only circuit to go so far as directing the agency to consider the applicant credible on remand in certain cases. In cases in which it finds an adverse credibility decision is not supported by substantial evidence, the Ninth Circuit sometimes applies the "deemed credible" rule, where it directs the agency on remand to consider the petitioner credible.[128] While many of its opinions characterize its jurisprudence as lying well within the limits of the REAL ID Act's statutory language, it is worth noting that not every judge in the Ninth Circuit agrees with its approach, and some judges believe that the court has exceeded the bounds of its authority. In a strongly worded dissent, Judge Trott recently complained: "Over the years, our Circuit has manufactured a plethora of misguided rules regarding the credibility of political asylum seekers."[129] He recognized that these rules may stem from "humanitarian intentions," but argued that the Ninth Circuit "has pursued these intentions with untenable methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security ('DHS') and the BIA in the process."[130] A previous Ninth Circuit panel similarly characterized its jurisprudence as engaging in "sly subordination" by promulgating rules "that tend to obscure" the clear standard that governs the review of an adverse credibility finding, which has "flummox[ed] immigration judges, who must contort what should be a simple factual finding to satisfy our often irreconcilable precedents."[131]

Taken as a whole, these rules of interpretation provide further explanation for the quantitative result described above, in which the Ninth and Seventh Circuits are up to three times more likely to remand when there was an adverse credibility finding than the First, Tenth, and Eleventh Circuits. A close reading of these cases suggests that the circuits have adopted differing approaches to the appropriate level of deference in assessing the agency's credibility finding. In addition, as described below, these cases reveal several other differing rules of interpretation that also affect the likelihood of remand across circuits.

127. *Todorovic*, 621 F.3d at 1325; Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009).

128. *Solo-Olarte*, 555 F.3d at 1095 (explaining that the "deemed credible" rule is fact dependent, and that there are cases in which it is appropriate to allow the Board to reexamine the credibility upon remand).

129. *Dai*, 884 F.3d at 877 (J. Trott, dissenting) ("These result-oriented ad hoc hurdles for the government stem from humanitarian intentions [.]").

130. *Id.*

131. Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005).

B. Review of the Record Below

A review of the cases reveals another important difference in the relevant facts and sources that a court is likely to rely upon in assessing the reasonableness of the agency's decision. Under the substantial evidence standard, a court assesses reasonableness by considering the agency's inferences against the record as a whole, rather than the particular facts cited by the agency. However, in the sample, courts differed in the extent to which they were inclined to review evidence that wasn't cited by the agency. The Seventh and Ninth Circuits routinely reviewed evidence that the agency did not cite in support of its decision, sometimes determining that this evidence undermined the reasonableness of the agency's inferences. In *Oiu Yun Chen v. Holder,* for example, the Seventh Circuit faulted the Board for its failure to explicitly address a document that the petitioner had presented from a Chinese government website on sterilization.[132] In cases where the agency's opinion did not mention a piece of evidence that the court viewed as outcome-determinative, these circuits also remanded, concluding that the record was too ambiguous to permit adequate review.[133] The Seventh Circuit has gone so far as to say that "ignoring even inconclusive corroborating evidence can undermine the decisions of an immigration court."[134] Significantly, it treats the question of whether the agency failed to consider evidence put forth by a petitioner as an allegation of legal error, and thus subject to the more stringent standard of *de novo* review.[135]

The Seventh and Ninth Circuits were also more likely to scrutinize the evidence relied upon by the agency in order to determine whether it supported the agency's conclusion. For example, the Ninth Circuit was unconvinced by cases in which an immigration judge merely cited State Department Reports for the proposition that the harm alleged by the petitioner was uncommon; as it emphasized, the question was not whether the harm was uncommon, but rather, whether the petitioner's "individual experiences are consistent with the country report."[136] In these types of decisions, the court cited parts of the State Department Report that the agency had not relied upon in its decision, and explained that these other statements "provide the context for evaluating [the petitioner's] credibility," and were "relevant to [the petitioner's] specific and individualized experiences."[137] Similarly, the Ninth Circuit remanded in situations in which the Board or immigration judge relied upon "broad statements" from the State

132. 715 F.3d 207, 212 (7th Cir. 2013). Of course, these courts also routinely reject the argument that the Board failed to consider all of the relevant evidence. *See, e.g.*, Singh v. Holder, 430 Fed. App'x. 641 (9th Cir. 2011). On the whole, however, they were more likely to closely scrutinize evidence not cited by the agency than the Tenth and Eleventh Circuits over the seven-year period.

133. *See, e.g.*, Escobar v. Holder, 657 F.3d 537 (7th Cir. 2011).

134. Terezov v. Gonzales, 480 F.3d 558, 565 (7th Cir. 2007).

135. *See, e.g.*, Cruz-Moyaho v. Holder, 703 F.3d 991, 997 (7th Cir. 2012).

136. Nosa v. Mukasey, 263 Fed. App'x 591, 593 (9th Cir. 2008) (citing Singh v. Gonzales, 439 F.3d 1100, 1110–11 (9th Cir. 2006)).

137. *Id.*

Department, rather than conducting the requisite individualized analysis of the petitioner's claims.[138] Occasionally, the Eleventh Circuit also scrutinized evidence not cited in the agency's decision, and in the rare case that the circuit did remand, it commonly did so on the basis of the agency's failure to consider such evidence.[139] In opinions where the Eleventh Circuit declined to issue a remand, it emphasized that "[w]here the BIA has given reasoned consideration to the petition, we will not require that it address specifically each claim the petitioner made or each piece of evidence the petitioner presented."[140] In the First and the Tenth Circuits, on the other hand, the courts very rarely remanded cases because the agency had not explicitly addressed evidence that was in the record.

Relatedly, there were also important differences in the extent to which the courts would scrutinize the agency's decision-making regarding record formation. Further, the Seventh and Ninth Circuits were also more inclined to criticize how the agency treated the question of whether proffered documents could form part of the record. These circuits emphasized that the standards should be less restrictive than the Federal Rules of Evidence, and they appeared to expect the agency to err on the side of inclusion. In one case, for example, the Seventh Circuit criticized the Board's dismissal of documents as improperly authenticated, saying that the "Board has a pinched conception of 'authentication[,]'" and noting that "documents may be authenticated in immigration proceedings through any recognized procedure."[141] Similarly, the Ninth Circuit emphasized that the immigration judge "may consider evidence if it is probative and its admission is fundamentally fair."[142] Thus, these differences in how likely the courts were to treat evidence that was not cited by the agency as warranting remand accounted for some of the differences in remand rates across circuits.

C. The Meaning of Persecution

A close reading of the cases also reveals differences in how circuits interpret whether the petitioner's alleged harm rises to the level of persecution, and how circuits interpret the question of nexus, which is the requirement that the persecutor target the petitioner "on account of" a protected ground.[143] From a review of the data, it is fair to say that all of the courts prefer a definition of

138. Dawwod v. Mukasey, 263 Fed. App'x 547, 549 (9th Cir. 2008).

139. *See, e.g.*, Bao Chai Lin v. U.S. Att'y Gen, 253 Fed. App'x 909 (11th Cir. 2007) (remanding based upon the immigration judge's failure to consider the petitioner's evidence of China's family law); Seck v. U.S. Att'y Gen, 663 F.3d 1356 (11th Cir. 2011) (remanding for the Board's failure to consider important evidence relating to the petitioner's daughter's risk of genital mutilation).

140. *Seck*, 663 F.3d at 1364.

141. Qiu Yun Chen v. Holder, 715 F.3d 207 (7th Cir. 2013) (internal citations omitted).

142. Singh v. Mukasey, 278 Fed. App'x 792, 793 (9th Cir. 2008) (internal citations omitted). Notably, this doctrine applies to evidence introduced by the government or the petitioner.

143. Li v. Holder, 559 F.3d 1096, 1102 (9th Cir. 2009).

persecution that involves physical harm.[144] However, in practice, the courts differ in the extent to which they appear to nearly require a credible allegation of severe physical harm in order to find that the evidence compelled a finding of persecution. For instance, the Tenth Circuit has emphasized that threats or harassment, without further incident, are very rarely sufficient to compel such a finding.[145] As one judge in the Tenth Circuit explained, "[o]ur cases do seem to require very violent, pervasive harassment and even injury."[146] A review of the Eleventh Circuit reveals a very similar pattern.[147] In the Ninth Circuit, however, while "[i]t is well established that physical violence is persecution[,]"[148] the court often emphasized that "evidence of physical harm is not required to establish persecution,"[149] and was generally more likely to find that a petitioner demonstrated persecution despite the absence of physical harm.[150]

In addition, there are differences in how courts analyze the question of whether the petitioner can satisfy the question of nexus, or whether the alleged persecutor targeted the petitioner *because of* a protected ground. In the sample reviewed, the Tenth and Eleventh Circuits appeared to interpret this standard very stringently, in a way that strains credulity. For example, the Eleventh Circuit held that "[e]ven if the evidence compels the conclusion that the petitioner refused to cooperate with the guerillas because of his political opinion, the petitioner still has to establish that the record also compels the conclusion that he has a well-founded fear that the guerillas will persecute him *because of* that political opinion, rather than because of his refusal to cooperate with them."[151] Similarly, in a Tenth Circuit case, *Tello v. Holder,* the petitioner argued that he feared persecution from

144. For a broader discussion of this issue, see Scott Rempell, *Defining Persecution*, 1 UT. L. REV. 283 (2013). *See also* Sheng En Liu v. Holder, 557 Fed. App'x 562, 565 (7th Cir. 2014) ("Persecution requires the application of 'significant physical force against a person's body, . . . the infliction of comparable physical harm without direct application of force,' or the infliction of 'nonphysical harm of equal gravity.'") (internal citations omitted).

145. Soewarsono v. Holder, 353 Fed. App'x 143, 145–46 (10th Cir. 2009).

146. Nalwamba v. Holder, 375 Fed. App'x 859, 865 (10th Cir. 2010) (Henry, C.J., concurring); Sidabutar v. Gonzales, 503 F.3d 1116, 1118, 1124 (10th Cir. 2007) (concluding that an Indonesian Christian man who had suffered repeated "beatings and robberies at the hands of Muslims" had not established past persecution); Jian Hui Li v. Keisler, 248 Fed. App'x 852, 854 (10th Cir. 2007) (affirming an immigration judge's ruling that, even if true, the deprivation of petitioner's right to education for three months and the broken arm he received during his fight with population control officials "constituted at most harassment and discrimination, but not past persecution within the meaning of the asylum statute").

147. *See, e.g.*, Ruiz v. U.S. Att'y Gen., 367 Fed. App'x 51, 54 (11th Cir. 2010) (noting that in the absence of physical harm, the "apprehension of imminent serious physical harm or death" was a prerequisite to finding persecution) (internal citations omitted).

148. *Li*, 559 F.3d at 1107.

149. Nguyen v. Holder, 339 Fed. App'x 773, 774 (9th Cir. 2009).

150. Of course, as Scott Rempell demonstrates, persecution assessments can be widely divergent even within the same circuit. Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 176 (2014).

151. Rivera v. U.S. Att'y Gen., 487 F.3d 815, 822 (11th Cir. 2007).

a Communist terrorist group, the Shining Path, based on his extensive past involvement with an opposing Peruvian political party.[152] He testified that after receiving death threats by phone, he was assaulted by men claiming to be Shining Path members.[153] After he was forced out of his car and beaten until he was unconscious, the alleged persecutors left Shining Path pamphlets and shouted "notorious statements" of the Shining Path to observers.[154] Here, the Tenth Circuit affirmed the Board's holding that "even if [his] attackers yelled platitudes about the Shining Path, that did not establish that they targeted *him* on account of *his past* political activity."[155] Thus, this analysis revealed differences in the level of harm sufficient to meet the definition of persecution, as well as variability in interpreting the nexus requirement.

D. Questions of Law and Fact

Finally, the Ninth Circuit has expanded the scope of its review by interpreting the REAL ID Act as permitting review of the question of whether an applicant can demonstrate changed circumstances to provide an exception to a one-year filing limit, when the underlying facts are not in dispute.[156] Other circuits, by contrast, have interpreted this issue as precluded, either concluding that it entails an unreviewable exercise of agency discretion, or that the statute's term, "questions of law," does not include mixed questions of law and fact.[157] This interpretative difference, of course, permitted the Ninth Circuit to review more cases than other circuits, though the Ninth Circuit rarely remanded on this basis in the seven years this Article reviewed.

152. Tello v. Holder, 404 Fed. App'x 260 (10th Cir. 2010).

153. *Id.* at 262.

154. *Id.*

155. *Id.* at 264.

156. *See, e.g.*, Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011); Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007) ("We now hold that our jurisdiction over 'questions of law' as defined in the REAL ID Act includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact."); *cf.* Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954 (11th Cir. 2005) (holding that the court lacks jurisdiction to consider the question of whether the applicant demonstrated changed circumstances, as it is purely a question of fact).

157. Al Ramahi v. Holder, 725 F.3d 1133, 1138 n.2 (9th Cir. 2013) (collecting cases from sister circuits).

V.
IMPLICATIONS

A. The Value of Judicial Review in Asylum Law

As Justice Breyer has argued, the technical nature of modern society has brought laws that delegate enormous decision-making power and responsibility to administrators who are not themselves elected. This, in turn, imposes a challenge to ensure that related administrative decisions are fair and reasonable. In other words, "who will regulate the regulators?"[158] Judicial review is one critical way of addressing this concern and has been described as conferring "an imprimatur of legitimacy for administrative action."[159] As I argue in Section C *infra*, legitimacy plays an important normative role in justifying judicial review in this context because asylum seekers are politically powerless. This vulnerability renders the legitimizing function of judicial review all the more important.

Of course, legitimacy is just one of several justifications for judicial review that have been developed in a long line of scholarship. As I argue below, several of these functions are critical in the asylum context, including the newer function of "problem-oriented oversight" that Jonah Gelbach and David Marcus developed.[160] In 1978, Jerry Mashaw and his colleagues set forth the seminal account of judicial review.[161] In addition to the legitimizing function, they developed four additional, core functions. First, they argued, appellate courts provide a "corrective" function in reviewing agency action, as they are able to serve as a check by correcting erroneous agency decisions. Second, they perform a related, "critical" function by offering a steady stream of feedback to the agency. Third, they perform a "regulative" function by inducing the agency to decide cases more accurately out of either a fear of being reversed, or the mandate to follow judicial precedent. Finally, they perform an "information" function by drawing the agency's internal operations into the public eye.[162]

The broad range of court-fashioned rules identified above suggests that courts can play important corrective and critical functions in the asylum context. Indeed, the cases provide many examples of clear errors in the agency's decision-making that were remedied by the courts. In addition, these courts appear to be serving the information function of drawing the agency's operations into the public eye, as the strong language in the opinions has attracted the attention of the

158. Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190–92 (2011).

159. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 942 (1988).

160. *See* Gelbach & Marcus, *supra* note 2.

161. JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978).

162. *Id.* at 136–37.

media, practitioners, and legal scholars.[163] However, this analysis also reveals that the appellate courts are performing these functions unevenly in the asylum context, and that the varying rules of interpretation adopted by different circuits affect how often they may correct an error by the agency. As I argue below, the approach taken by the Seventh and Ninth Circuits is normatively beneficial and more closely fulfills the aims of judicial review.

Mashaw and his colleagues were skeptical that courts were well-suited to perform these functions, concluding that the costs outweigh any benefits of judicial review, and that internal agency quality measures are better suited to achieve these aims.[164] In the asylum context, this debate is of less pragmatic value, as such internal measures are nearly non-existent within the immigration agency. Recent work has examined the history of the EOIR's efforts to ensure quality adjudication and has concluded that the agency has displayed a "near-total disregard for quality assurance initiatives."[165] Thus, given the constraints of this institutional history, judicial review is one of the only meaningful checks on agency action.

Furthermore, the skepticism of Mashaw and his colleagues stemmed, in part, from what they termed the "baseline" problem, or the fact that the appellate courts review a small fraction of cases adjudicated by the agency, and therefore have a skewed perspective that doesn't reflect the wide range of cases.[166] In the asylum context, this could make it difficult to assess whether an asylum seeker's testimony was coached, for example, if one is not accustomed to hearing such cases routinely. However, David Hausman's analysis provides evidence that the difference in their baselines may actually run in the opposite direction; as Hausman demonstrates, the Board and the Courts of Appeals are less likely to review the decisions of harsher immigration judges, and therefore review a skewed sample of more lenient immigration judges.[167]

In recent work, Jonah Gelbach and David Marcus argue that courts perform a previously unappreciated function when they review high volume agency adjudication, which they term "problem-oriented oversight."[168] They view Mashaw's skepticism as well-founded, but argue that this new function, when added to the existing justifications for judicial review, tips the balance in favor of the current system.[169] Their focus is on "high volume" agencies, or those whose

163. *See, e.g.*, Lynne Marek, *Posner Blasts Immigration Courts as "Inadequate" and Ill-trained*, NAT'L L.J., (Apr. 22, 2008).

164. *Id.*

165. David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 41 (2019).

166. *Id.* at 139.

167. *See* Hausman, *supra* note 9, at 1207.

168. Gelbach & Marcus, *supra* note 2, at 1100.

169. *Id.* at 1102.

large caseloads and scarce resources mean that they are required to devote only a minimal amount of time to each case. As they argue, there is no doubt that these cases play an important role in federal courts; in 2013, immigration appeals increased the federal appellate docket by nearly 13%.[170] However, since the federal courts review a very small percentage of agency decisions, it is not as obvious that they are as important to immigration judges with crushing caseloads. As Gelbach and Marcus explain, "Whatever legitimacy the Article III courts promise must seem like a distant mirage for the vast majority of immigrants, claimants, and others as they litigate in obscure hearing rooms, far away from the grandeur of the federal courts."[171]

Nonetheless, Gelbach and Marcus argue federal courts do play an important and previously underappreciated role in reviewing high volume agencies.[172] Adding to the list developed by Mashaw and his colleagues, they contend that courts are able to recognize and address problems that go unaddressed by the agency through their review of fact-intensive, high volume adjudication. When an immigration judge persistently demonstrates bias, for example, a federal court may address this when the agency fails to correct it.[173] As they argue, judges occasionally break from the more day-to-day opinions to offer commentary on patterns or trends that they have observed.[174] Gelbach and Marcus contend that this commentary reflects a judicial attempt to "influence agency decision-making through means beyond the correction of discrete errors in individual cases or the issuance of binding precedent."[175] They view this as the judicial equivalent of legislators publicly criticizing an agency based upon information that they have assembled.[176] In performing this form of oversight, courts are able to spot problems that involve patterns of flaws, rather than more isolated errors.[177] This concept has not been without its critics, who question whether appellate judges are well-suited to a managerial function that requires them to aggregate and assess data.[178]

170. ADMIN OFF. OF THE U.S. COURTS, TABLE B-3: U.S. COURTS OF APPEALS - SOURCES OF APPEALS AND ORIGINAL PROCEEDINGS COMMENCED, BY CIRCUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2009 THROUGH 2013 (2013), https://www.uscourts.gov/sites/default/files/statistics_import_dir/B03Sep13.pdf.

171. Gelbach & Marcus, *supra* note 2, at 1100.

172. *Id.* at 1129.

173. *Id.* at 1101. Of course, as Hausman's work demonstrates, judicial review is only effective when cases routinely reach the courts. As he demonstrates, immigration judges exercise some control over this through hasty denials of a motion for a continuance, for example, which terminate an immigrant's case before it ever reaches a federal court. Hausman, *supra* note 9, at 1198–200.

174. Gelbach & Marcus, *supra* note 2, at 1129.

175. *Id.*

176. *Id.* at 1129-30.

177. *Id.* at 1141.

178. Jennifer Nou, *Symposium: Commemorating the Career of Judge Richard A. Posner: Dismissing Decisional Independence Suits*, 86 U. CHI. L. REV. 1187, 1197 (2019).

In the data considered here, there is some evidence to suggest that the Seventh and Ninth Circuits are engaging in the type of oversight that Gelbach and Marcus envision. While these two circuits may not be systematically gathering data in the more technical way that Gelbach and Marcus suggest,[179] at times they explicitly mention that the problem they are addressing is a recurring one.[180] For example, these judges have often noted that an immigration judge's behavior forms part of a pattern, for example, or that features of the strapped adjudication system create persistent errors.[181] While these forms of oversight may not be as effective as direct changes within the agency, Gelbach and Marcus point to several tools that courts have at their disposal: courts may threaten sanctions, or write opinions that may result in the DOJ pressuring the EOIR to correct a problem so they do not to face reputational consequences in court.[182] As this analysis has revealed, some courts have also used the doctrinal tools at their disposal in order to spur agency action, and this has been enabled by the elastic nature of the appellate review system. This may be seen, for example, in the variety of additional rules of interpretation that the Ninth and Seventh Circuits have developed in assessing credibility determinations, as discussed *supra*.

While courts may already engage in this type of oversight as a descriptive matter, the notion of problem-oriented oversight also has critical implications for the theoretical underpinnings of the deference doctrine in asylum law. As I explore below, scholars like Adam Cox have observed the decreased deference that some courts accord the immigration agency.[183] Cox has argued that one problem with this approach is that it departs from the *Chevron* doctrine in an important way, as courts appear to be assessing the competence of the immigration agency. As he contends, there is no doctrinal basis for this sort of assessment. Cox questions whether judges are in the best position to make such judgments, though he notes that these courts now review more than ten thousand immigration court decisions each year.[184] Gelbach and Marcus provide evidence that courts are capable of recognizing patterns of errors in immigration judge decision-making, for example, and this is in fact one of the primary *benefits* of judicial review in the context of high volume adjudication.[185] As I argue, this suggests that courts could make these broader assessments, and this type of

179. To be sure, Gelbach and Marcus acknowledge that this is a highly stylized example, and that no courts are yet engaging in the precise, more technical method that they set forth. Gelbach & Marcus, *supra* note 2, at 1144–46.

180. *Id.* at 1129; *see also* Legomsky, *supra* note 30, at 1645.

181. Gelbach & Marcus, *supra* note2, at 1129; *Shrestha*, 590 F.3d at 1044; *Terezov*, 480 F.3d at 565.

182. Gelbach & Marcus, *supra* note 2, at 1146.

183. Adam Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007).

184. *Id.* at 1683 (as discussed *supra,* these numbers have only increased over time).

185. Gelbach & Marcus, *supra* note 2, at 1129–30.

oversight provides a basis for justifying resource-intensive judicial review. One way of viewing the phenomenon that Cox observes is that courts are engaged in precisely the sort of problem-oriented oversight that Gelbach and Marcus envision. However, just as with the other core functions of judicial review, this analysis reveals that courts are engaging in this form of oversight very unevenly across circuits. As I argue below, the case for this oversight is particularly critical in the context of asylum adjudication, as the need for judicial review to "legitimize" the actions of the agency is at its most compelling.

B. Deference and Immigration Exceptionalism

Immigration law has long been considered a "maverick"[186] or a "constitutional oddity"[187] within American public law. As Peter Schuck writes, "No other area of American law has been so radically insulated and divergent from those fundamental norms of a constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[188] Hiroshi Motomura refers to immigration law as "an aberrational form of the typical relationship between statutory interpretation and constitutional law."[189] One of its defining features, as Adam Cox has recognized, is that its jurisprudence reflects an obsession with judicial deference.[190] The "plenary power" doctrine, which established the relationship between the three branches in immigration law, first allowed Congress to exclude nearly all Chinese immigrants in a decision where the Court declined to review the actions of the political branches.[191] In *Ekiu v. United States,* the Supreme Court expanded this doctrine in 1892, when it declared, "as to [aliens], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[192]

Courts continue to invoke this doctrine in present-day decisions of admission and exclusion, and it has arguably influenced every aspect of the level of scrutiny accorded to the immigration agency. As this Article's analysis reflects, deference to the agency remains an important component of asylum law, and the circuits appear to engage in very different levels of scrutiny when reviewing asylum adjudication. Following the streamlining measures and the subsequent surge of federal appeals, Judge Posner emerged as a particularly vocal critic of the

186. Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

187. Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

188. Schuck, *supra* note 186, at 1.

189. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

190. Cox, *supra* note 183, at 1671.

191. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).

192. *Ekiu*, 142 U.S. 651, 660 (1892). There, an arriving citizen of Japan had been excluded on the basis that she was likely to become a public charge and was not given the opportunity to demonstrate otherwise.

agency's decision-making, and his criticism has captured the attention of legal scholars and the media alike.[193] In examining the jurisprudence of Judge Posner, Cox argues that he may have afforded less deference to the agency because he judged it to be incompetent. As Cox explains, and I explore in more detail *infra*, *Chevron* deference has been defended upon the principle that administrative agencies have greater expertise and more political accountability than courts. However, as he points out, "Administrative law jurisprudence has generally made these judgments of institutional competence wholesale rather than retail."[194] In other words, the *Chevron* doctrine arguably did not envision a world in which courts decide whether deference is warranted by directly evaluating the competence of an individual agency's decision-making. And yet, as Cox suggests, this appears to be precisely what is happening in immigration cases. Scholars frequently invoke the term "immigration exceptionalism" to explain that immigration law is "littered with special immigration doctrines that depart from mainstream constitutional norms."[195] Looking solely at Judge Posner's opinions in the Seventh Circuit, Cox considers the possibility that courts have created an area of immigration exceptionalism within the deference doctrine.[196] Judge Posner famously stated:

> In recent years an avalanche of asylum claims has placed unbearable pressures on the grossly understaffed Immigration Court, and we and other courts have frequently reversed the credibility determinations made by immigration judges and affirmed by the also sorely overworked Board of Immigration Appeals. Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate."[197]

As Cox argues, Judge Posner "decided that deference is not due because the immigration agencies are failing to discharge this duty [to implement a statute over which they have primary responsibility] when they decide immigration cases."[198] This skepticism extends to the agency's handling of both factual and legal questions, and Judge Posner variously referred to its adjudication as "arbitrary, unreasoned, irrational, inconsistent, uninformed," and falling "below

193. Cox, *supra* note 183; Marek, supra note 163.

194. Cox, *supra* note 183, at 1682.

195. David Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. L. REV. 583, 584 (2017).

196. Cox, *supra* note 183, at 1684.

197. *Kadia*, 501 F.3d at 820–21.

198. Cox, *supra* note 183, at 1679. Cox also suggests an alternative explanation: that Judge Posner could be applying a variant of the nondelegation norm in immigration cases, which might reflect his belief that Congress ought to be forced to make certain choices themselves, rather than delegating them to an administrative agency. *Id.* at 1674–75.

the minimum standards of justice."[199] While Cox's analysis is limited only to Judge Posner, he notes that "a number of federal appellate judges have suggested that the immigration courts are fundamentally incompetent, biased, or both[,]" and that this "chorus has grown louder in recent years[.]"[200]

Both the data considered here and subsequent work by Anna Law indicate that this view may be more widespread than Judge Posner's jurisprudence, as it encompasses the Seventh Circuit more broadly, as well as the Ninth.[201] In Anna Law's interviews with Ninth Circuit judges, one judge stated anonymously that they would have no problem with according deference to the immigration agency, "if the IJs were well trained" and "not erratic."[202] The foregoing analysis also reveals that this is not merely limited to the application of *Chevron* deference. As this project has demonstrated, a perception of the agency's incompetence has arguably seeped into every aspect of how certain circuits interpret the standards in asylum law, not merely those governed by *Chevron*. These courts' mistrust of the agency has led them to read additional requirements into every component of the substantial evidence standard. In at least the Seventh and Ninth Circuits, this distrust of the agency's competence has arguably resulted in a much closer scrutiny of its adjudication.

Mila Sohoni provides an additional, compelling basis on which courts may be according less deference to agency decision-making in asylum cases. She suggests that some appellate courts perceive asylum as more akin to a private right than a public one.[203] Sohoni argues that Article III demands that the doctrine of deference be calibrated to the nature of the right involved, and that the courts' decreased deference to the agency likely reflects a judicial perception that asylum is something like a quasi-private right.[204] James Pfander and Theresa Wardon provide support for this, as they demonstrate that immigration did not historically fall squarely within the "public rights" category.[205] Bolstered by their historical

199. *Id.* at 1679–80.

200. *Id.* at 1682.

201. The higher remand rate of the Second Circuit suggests that it may also be among these courts, though the present study does not include the Second Circuit. See RAMJI-NOGALES ET AL., *supra* note 1, at 78.

202. ANNA LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 130 n.72 (2010) (anonymously citing an interview with a Ninth Circuit judge on July 26, 2007).

203. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. L. REV. 1569, 1623 (2013).

204. Traditionally, Article III review is viewed as necessary in cases involving private rights, or rights stemming from an individual's status as a person, such as his common law rights in property and bodily integrity. *Id.* at 1594. While the standards of review for agency action do not turn on whether the right at issue is public or private, Sohoni argues that courts ought to be guided by Article III jurisprudence when determining the extent of their deference in reviewing agency adjudication.

205. James Pfander and Theresa Wardon provide support for this by demonstrating that immigration did not historically fall squarely within the "public rights" category. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 433–40 (2010).

findings, Sohoni argues that the courts' refusal to accord the expected level of deference in asylum cases simply reflects their recognition of this quasi-private right, and they are thus "performing the robust review that Article III demands."[206]

Whatever the reason for this decreased level of deference, one thing is clear: the data in this Article illustrate the appellate review model's elasticity very starkly. In an area in which courts are applying the identical standard of review to decisions issued by the Board, some courts are consistently four times more likely to remand than others.[207] Thomas Merrill has pointed to the elasticity of the current model of judicial review as one reason for its endurance.[208] In an article exploring the origins of the appellate review model, Merrill explains that it was much less intentional than one might expect.[209] Rather, the appellate review model was improvised by the Supreme Court in response to a political crisis brought on by very searching judicial review of the Interstate Commerce Commission's decisions. As Merrill argues, this "jerry-built" system became entrenched by the 1920s and eventually spread to all of administrative law, even though the Court has never grappled with the Article III problems created by the use of administrative agencies to adjudicate cases.[210] However, one reason that the appellate review model has remained in place, he argues, is because of its elasticity, or "its flexibility at both the micro and macro levels."[211] At the micro, or individual case level, he argues that a court "can usually find a way to" overturn an agency's decision on an issue within the agency's competence that "suggests it is exercising its own competence."[212] For example, it may overturn a fact-based decision by framing the decision as "contrary to law."[213]

As the data here have demonstrated, this elasticity permits a wide range of approaches to reviewing the agency's adjudication of asylum cases. This variation

206. Sohoni, *supra* note 203, at 1623.

207. While *Refugee Roulette* laments this level of inconsistency, Legomsky reminds us that consistency can sometimes come at the expense of judicial independence. Stephen Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 474 (2007).

208. Thomas Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 997 (2011).

209. *Id.* at 963.

210. *Id.* at 939.

211. *Id.* at 997.

212. *Id.* at 998. Merrill also argues that the model has proven flexible at the macro levels, citing the creation of "hard look review" by the courts in response to concerns of agency capture. *Id.* Studies that have attempted to examine whether the standard of review makes a meaningful difference in the likelihood of remand, for example, have largely concluded that it does not, a point which further supports Merrill's argument that the review model is quite elastic. *See, e.g.*, Richard Pierce, *What Do the Studies of Judicial Review of Agency Action Mean?,* 63 ADMIN. L. REV. 77 (2011); Paul Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002).

213. Merrill, *supra* note 208, at 998.

in these approaches begs the question: which approach is normatively most beneficial, when federal courts are faced with the task of reviewing an agency in a state of crisis? Turning from the descriptive to the normative, I argue that the more expansive review employed by the Seventh and Ninth Circuits is the most sensible in this context. In addition to the core functions of judicial review discussed *supra*, I suggest, judicial review should also enable courts to be responsive to signs that the decision-making within an agency is compromised. This is particularly true in the asylum context, when there is good reason to depart from the traditional deference that courts afford administrative decision-making.

C. Justifications for Judicial Deference

Two primary theories are commonly invoked to justify judicial deference to agency action: political accountability and expertise. As Anne Joseph O'Connell explains, neither theory is sufficient on its own because agency decision-making can be based on both political and internal factors that rely upon the agency's expertise.[214] Courts have traditionally employed both theories in justifying deference, and this study provides an opportunity to assess the strength of each in justifying judicial deference to asylum adjudication. This Article builds upon the important work of Michael Kagan and Maureen Sweeney, both of whom have suggested that *Chevron* deference is not appropriate when reviewing asylum cases.[215] It also relies upon O'Connell's suggestion that courts ought to take factors such as the political responsiveness and the agency's track record into account in determining the appropriate level of deference to accord an agency.[216] As I argue below, a more responsive approach to deference law would permit federal courts to calibrate their scrutiny to signals of declining quality within agency adjudication, which would be normatively desirable.

1. Political Accountability

Under the political accountability theory of judicial review, courts defer to agency action because agencies are more accountable to the national electorate (through the President) than Article III courts.[217] The immigration context raises unique concerns, however, as many noncitizens are not part of the electorate, and there is no evidence that the immigration agency is responsive to those over whom it exercises power. Several prominent immigration scholars, including Stephen Legomsky, have emphasized that asylum applicants are politically powerless, and are particularly dependent upon the federal courts for the protection of their

214. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 980 (2008) (noting that courts cascade between the expertise and political accountability theories of judicial review).

215. Sweeney, *supra* note 67; Kagan, *supra* note 3, at 44.

216. O'Connell, *supra* note 214, at 979.

217. *See Chevron*, 467 U.S. at 865–66; O'Connell, *supra* note 214, at 980.

rights.[218] The system of asylum adjudication arguably reflects their vulnerability, as it has been marred by a history of politicization and attempts to politically insulate its decision-making from judicial review.[219] Moreover, the agency has consistently underfunded immigration adjudication, resulting in immigration judges shouldering an enormous caseload that makes high quality adjudication nearly impossible. As discussed supra, recent scholarship concluded that the agency has displayed a "near-total disregard for quality assurance initiatives.[220] Although the EOIR had one early evaluation program effort that involved peer evaluation, this ended in 2008.[221] Since then, the EOIR has focused on case completion goals as the primary metric by which immigration judges are assessed, and placed no emphasis on decisional accuracy.[222] As David Ames and his colleagues argue, this focus may reflect the political weakness of the litigants before the agency.[223] Thus far, theories of judicial review and deference have not adequately considered the political powerlessness of noncitizens. This vulnerability makes the "legitimizing" function developed by Mashaw all the more critical. Indeed, there is no evidence that the agency is in any way responsive to the asylum seekers over whom it exercises power. Rather, it suggests that the political powerlessness of noncitizens has led to the agency's history of politicization and its disregard for quality assurance initiatives.

This lack of political power arguably renders the agency's decision-making even more vulnerable to political pressures. In fact, recent scholarship has pointed to the structural design of the agency in order to call for less deference in asylum cases. In a trenchant analysis, Maureen Sweeney argues that the institutional location of asylum decision-making within the Department of Justice, a law enforcement agency deeply invested in enforcing border patrol, warrants a reconsideration of *Chevron* deference in asylum cases.[224] As she observes, the Supreme Court has never (outside of dictum in *Cardoza-Fonseca*) engaged in any robust analysis to justify the application of the *Chevron* doctrine in interpreting the Refugee Act.[225] Moreover, she contends that the Court's doctrine has arguably evolved in the three decades since this decision, and displayed an increasing willingness to scrutinize whether Congress intended for courts to exercise deference.[226]

218. Legomsky, *supra* note 44, at 1208.

219. *Id.* (demonstrating that attempts to insulate the agency from judicial review have been ongoing since at least the 1980s); Legomsky, *supra* note 29, at 1676.

220. Ames et al.,, supra note 165, at 41.

221. *Id.*

222. *Id.* at 42.

223. *Id.* at 40.

224. Sweeney, *supra* note 67, at 134.

225. *Id.* at 133.

226. *Id.* at 150.

A well-developed body of scholarship has emphasized the lack of decisional independence within immigration courts and the related politicization of adjudication. These structural features are likely partially due to the lack of political power of immigrants. There have been egregious accounts of the system's politicization, such as Legomsky's recounting of a government prosecutor contacting the chief immigration judge ex parte to protest a ruling of an immigration judge, which caused the chief judge to instruct the immigration judge to reverse his ruling.[227] After Ashcroft reduced the size of the Board in 2002, Levinson demonstrated that the "re-assigned" Board members were those with decision rates most favorable to noncitizens.[228] Legomsky also showed that the percentage of favorable decisions for noncitizens by immigration judges and Board members negatively correlated with their job security.[229] In 2008, a former Justice Department official, under a grant of immunity before the U.S. House Judiciary Committee, testified that between 2004 and 2006, the White House and the Justice Department had bypassed the usual application procedures in order to appoint immigration judges based on either their Republican Party affiliations or their conservative ideological views.[230] The official's testimony revealed that more than half of them had no prior immigration experience.[231] In 2016, former Board Chair and immigration judge Paul Schmidt described the politicized environment of the agency, explaining, "You exist to implement the power of the Attorney General, you aren't 'real' independent Federal Judges."[232] Recent work by Catherine Kim supports this, as she demonstrates that, under the Trump Administration, immigration judges are more likely to order removal.[233] In short, as Shruti Rana argues, the "problems at the immigration agency read like a laundry list of all of the reasons a court should not defer to an agency[.]"[234] In many decisions, courts of appeals have called the independence of agency adjudicators into question, finding that the immigration judge showed "bias" and

227. Legomsky, *supra* note 29, at 1668.

228. Levinson, *supra* note 38, at 1155–56 .

229. Legomsky, *supra* note 29, at 1668; Kim, *supra* note 30, at 619; Levinson, *supra* note 38, at 1156–60.

230. U.S. DEP'T OF JUST., OFF. OF PRO. RESP. & OFF. OF INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 81–93 (2008).

231. *Id.*

232. Jason Dzubow, *Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge (Part I)*, ASYLUMIST (Sept. 28, 2016), https://www.asylumist.com/2016/09/28/former-bia-chairman-paul-w-schmidt-on-his-career-the-board-and-the-purge-part-1/.

233. Kim, *supra* note 30.. In addition, Daniel Chand and William Schreckhise find that immigration judges give significantly greater deference to the positions of the public, their agency and President, and Congress in responding to a survey. Daniel E. Chand & William Dean Schreckhise, *Independence in Administrative Adjudications: When and Why Agency Judges Are Subject to Deference and Influence*, 52 ADMIN. & SOC'Y 171 (2018).

234. Shruti Rana, *Chevron Without the Courts? The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L J. 313, 325 (2012).

"prejudgment" against the noncitizen.[235] Thus, when an agency is particularly vulnerable to political manipulation and its litigants are politically powerless, a more searching level of review is warranted.

2. Expertise

The expertise theory is the second fundamental basis for judicial deference. According to this rationale, courts ought to defer to agency interpretations because they have more expertise in their areas of specialization than do courts. Several scholars have suggested that the traditional reasons for deferring to agency fact-finding do not apply as forcefully in the context of immigration, and that less deference is due as a result.[236] No scholar has more extensively developed the critique of the expertise rationale in this context than Michael Kagan. In Kagan's recent work, he relies upon the limitations of the expertise rationale to argue that *Chevron* deference is inappropriate in the context of asylum law.[237] As he argues, immigration cases rarely raise issues requiring scientific expertise, and instead raise "classic problems of fact and law, which would seem to dilute any claims that an executive body has a relative advantage compared to courts."[238] In his prior work, he has also shown that immigration judges enjoy very little advantage in assessing the credibility of asylum seekers, a factor on which many cases hinge. Deference to the fact-finder is traditionally justified on the basis of the relative advantage in making an accurate evaluation of the evidence, as the trial court has a unique opportunity to judge a witness's credibility. As Kagan demonstrates, social science research has soundly undermined the notion that truthfulness can be assessed from one's demeanor, and this criticism is particularly forceful in the asylum context.[239] At least one court has recognized this: the Seventh Circuit has voiced concern about immigration judges' insensitivity to the difficulty of judging a witness's demeanor when the witness is from a country that may have different cultural norms and may be testifying about very sensitive events.[240] It has further noted that the refusal of DHS and DOJ to provide proper training on making credibility determinations in the face of these challenges leaves immigration judges to "grasp[] at straws" and focus on "minor contradictions."[241] A second rationale, efficiency, is often used to justify deference to the fact-finder, as it

235. Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005).

236. *See, e.g.*, Kim, *supra* note 30, at 586.

237. Kagan, *supra* note 3, at 30.

238. *Id.*

239. Kagan, *supra* note 35, at 127.

240. *Kadia*, 501 F.3d at 819 (noting that "immigration judges often lack the 'cultural competence' to base credibility determinations on an immigrant's demeanor.").

241. Djouma v. Gonzalez, 429 F.3d 685, 688 (7th Cir. 2005) ("The departments [DOJ and DHS] seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility").

would be inefficient to have the reviewer reach these same findings anew. As Kagan argues, efficiency alone is a difficult rationale when it comes at the expense of the correct substantive outcome, particularly when the stakes are as high as in an asylum claim.[242] While there is no doubt that the immigration judge is still in a relatively better position than an appellate court to be able to assess things like a witness's demeanor, there is reason to be skeptical of whether it justifies the extreme deference to the immigration judge in asylum adjudication.

An issue closely related to expertise concerns the conditions under which agencies adjudicate cases. Immigration judges operate in a climate where any relative expertise is nearly moot, as judges report not having time to do basic research on the relevant case law.[243] As Stephen Legomsky has demonstrated, the agency suffers from severe underfunding that has affected its reputation and the courts' perception of its decision-making.[244] In 2009, for example, the average immigration judge was required to complete 4.3 removal cases per day; this left each judge with approximately 72 minutes to consider each case, which would include hearing testimony, reviewing evidence, and rendering a decision.[245] As the Seventh Circuit noted in 2007, one Board member decided more than 50 cases a day, requiring a decision nearly every ten minutes if he were assumed to work a nine-hour day without a break.[246] The GAO's 2017 analysis showed that the EOIR's case backlog, or the cases pending from previous years that remain open at the start of a new fiscal year, more than doubled from 2006 through 2015.[247] As its analysis demonstrated, the median pending time for a case went from 198 days in 2006 to 404 days in 2015.[248] Many immigrants today routinely wait more than 1000 days for a hearing,[249] and it would take the immigration courts 3.6 years to clear their backlog if they were given no new cases.[250]

Given that immigration judges operate with inadequate resources and a crushing caseload, erroneous decisions are simply inevitable. Moreover, as Gelbach and Marcus point out, federal judges are able to spend much more time on each case.[251] Federal courts also confer the advantage of being generalists, which plays a particularly important role in this context. As Legomsky has argued,

242. Kagan, *supra* note 35, at 117.

243. In 2017, immigration judges reported to the GAO that they do not have sufficient time to conduct essential tasks such as "case-related legal research or staying updated on changes to immigration law." GAO-17-438, *supra* note 28, at 31.

244. Legomsky, *supra* note 29, at 1639.

245. *Maximum Average Minutes Available Per Matter Reviewed*, TRAC: IMMIGR. http://trac.syr.edu/immigration/reports/208/include/minutes.html; *see also* Kim, *supra* note 30, at 610–11.

246. *Kadia*, 501 F.3d at 820.

247. GAO-17-438, *supra* note 28, at 23.

248. *Id.* at 22.

249. TRAC, *supra* note 245.

250. *Id.*

251. Gelbach & Marcus, *supra* note2, at 1111.

asylum officers and immigration judges are bombarded every day with tales of unimaginable human tragedy and may begin to think in relative terms.[252] One advantage of a generalist federal appellate court is that judges may be less likely to develop a level of institutional callousness, or undue sympathy for agency officials.[253] With adequate scrutiny of the agency's decision-making, the appellate process permits some of the most egregious errors to be fixed.

The doctrines that the Seventh and Ninth Circuit have developed are most appropriately tailored to the limitations of the expertise rationale in the asylum context. These courts closely scrutinize the agency's factual findings to be certain that they are well-supported by the entire factual record, as well as to ensure that the agency has provided specific and reasonable support for any adverse determinations. While this inquiry has grown increasingly searching as the reputation of the agency has been called into question and the quality of its decision-making has arguably grown poorer, one could argue that this approach more fully permits courts to fulfill the aims of judicial review. In fact, the Ninth Circuit has argued that its searching review is entirely consistent with the legislative history of the REAL ID Act.[254] However, even if this scrutiny lies outside the bounds contemplated by *Chevron,* I argue that this more searching inquiry is normatively beneficial and is justified by the current state of immigration adjudication.

3. Judicial Deference as Responsive to Agency Crisis

A consideration of all of these factors warrants a reexamination of the deference doctrine in asylum law. Anne Joseph O'Connell has argued that judicial doctrine could be better attuned to the reality of agency decision-making, and that courts could assess several factors when deciding how much to defer to an agency's decision-making, such as the level of presidential and congressional control over the agency, the agency's track record, and the type of agency.[255] She suggests, for example, that if an agency receives substantial oversight from Congress and the White House, then perhaps courts should simply defer to their reasonable decisions.[256] Immigration cases are different from nearly every other type of agency action, however, as they are virtually non-responsive to the people upon whom they act. Thus, immigration cases might dictate precisely the opposite result: the more oversight the agency receives from Congress and the White House, the more closely courts should scrutinize their actions. As Maureen Sweeney argues, majoritarian political accountability is a "distinct *dis*advantage

252. Legomsky, *supra* note 43, at 1210.

253. *Id.*

254. *Shrestha*, 590 F.3d at 1043.

255. O'Connell, *supra* note214, at 980.

256. *Id.* at 981.

in any attempt to protect the fundamental rights of politically vulnerable minorities."[257]

To be sure, this theory of deference would require a revision to the theory encapsulated by *Chevron*.[258] Indeed, part of the point of *Chevron,* as Cox explains, was to create a "general, trans-substantive doctrine of administrative deference" to replace the prior, more "ad hoc" approach.[259] Accordingly, *Chevron* does not authorize courts to calibrate the level of deference to their assessment of an individual agency's competence.[260] Thus, it begs the question of how well-suited courts are to assess this competence.[261] As discussed *supra,* the recent work of Gelbach and Marcus suggests that courts can serve this role, at least in areas of the law in which they receive large numbers of appeals.[262] As they point out, the federal courts now feed on a sizable diet of immigration cases, and are accordingly well-situated to observe trends within the agency's decision-making.[263] In a crisis as severe as the immigration agency's, with performance measured by the number of cases completed and little time to decide each case, such shortcomings are nearly impossible to ignore. Facing this reality, some courts have arguably adjusted their scrutiny of the agency accordingly, which is normatively beneficial.

As I argue here, it would not be desirable to have a theory of judicial review that is simply invariant to major crises within an agency. Certain circuits, such as the First, Tenth, and Eleventh in these data, have simply continued to employ the same approach to reviewing the agency's decision-making, even as the agency increasingly employed measures that incontrovertibly reduced the quality of its adjudication. Others, such as the Seventh and Ninth Circuits, have engaged in closer scrutiny in response to repeated signals that the quality of adjudication was compromised. This latter approach better fulfills the legitimizing function of judicial review, and this is particularly true in the context of an agency that is not politically responsive to its litigants. In this context, judicial review becomes all the more important, and an approach to deference that is calibrated to the quality of decision-making is both normatively justifiable and desirable. This is all the more compelling in a substantive area of law in which the stakes could not be

257. Sweeney, *supra* note 67, at 191 (emphasis in original).

258. *Cf. id.* While Sweeney argues that a removal of *Chevron* deference is wholly consistent with both congressional intent and more recent Supreme Court jurisprudence, I conclude that the more expansive approach to deference in the asylum context would likely require revisions to existing jurisprudence. As I argue *infra,* a theory of judicial review that permits a court to calibrate its deference to changing conditions within the agency that affect the quality of its adjudication is normatively beneficial.

259. Cox, *supra* note 183, at 1682.

260. *Id.* at 1682–83.

261. *Id.* at 1683.

262. Gelbach & Marcus, *supra* note 2, at 1129–30.

263. *Id.* at 1099-1100.

higher,[264] and the right at stake is arguably more akin to a private one that demands robust review by Article III judges.[265]

CONCLUSION

The most promising potential to meaningfully reform asylum adjudication likely lies in proposals to improve the quality of decision-making within the agency more directly. Thus, calls to separate the enforcement and adjudicative arms of the agency, for example, are critically important, as are those that would provide more resources and independence to immigration judges and the Board. However, while many of these proposals could bring substantial improvement to the quality of asylum adjudication, they are unlikely to manifest soon. Rather, recent changes move the agency in the opposite direction. The imposition of quotas will likely further compromise the immigration judges' independence and the quality of their decision-making, as job performance is now dependent upon how quickly they close cases.[266] As a result, federal courts may be the only institutions equipped to meaningfully address flaws in the immigration agency's system of adjudication.

A close review of five circuit courts has revealed important differences in how courts approach judicial review of asylum adjudication. Circuits like the First, Tenth, and Eleventh engage in very little scrutiny of asylum cases; instead they adhere to an approach grounded in extreme deference to the agency. Other circuits, like the Seventh and Ninth, have calibrated their approach in response to signals that the quality of agency adjudication is extremely compromised in asylum cases. Accordingly, they have used the elasticity of the appellate review model, and the flexibility in the substantial evidence standard, to develop rules of interpretation that expand the seemingly narrow standard of review in asylum cases.

As I outline here, this more expansive approach is normatively desirable. Federal courts ought to use the elasticity of the appellate review model in order to expand the scope of their review in the asylum context, as the Seventh and Ninth circuits have already done. While it is not necessarily the approach envisioned by *Chevron,* a theory of deference that permits courts to respond to signs of crisis within an agency more closely fulfills the purpose of judicial review. This is particularly true in the asylum context. In stark contrast to other agencies, the

264. Kim, *supra* note 30, at 615; *see also* Kagan, *supra* note 3, at 2 ("*Chevron* deference seems to be at the height of its powers in refugee and asylum cases, with the highest possible human consequences.").

265. Sohoni, *supra* note203.

266. EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES, SECTION 3: ACCOUNTABILITY FOR ORGANIZATIONAL RESULTS (Mar. 30, 2018). In order to achieve "satisfactory performance," each judge must complete 700 cases per year (more than two per working day) and must achieve a remand rate of less than 15% total from both the Board and Courts of Appeals.

immigration agency is not responsive to the people over whom it exercises power. Rather, it is structured in a way that permits adjudication to be directly influenced by the political whims of the executive, even though asylum arguably implicates a more quasi-private right.[267] Moreover, as a long line of scholarship has recognized, there are reasons to doubt the purported expertise advantage of the agency in this context. The more expansive standard adopted by at least two circuits is thus preferable and more closely fulfills the aims of judicial review, and more courts should follow suit.

267. Sohoni, *supra* note 203, at 1621.