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Margaret H. Taylor

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# **Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication**

**By Margaret H. Taylor\***

## **I. INTRODUCTION**

In *Refugee Roulette: Disparities in Asylum Adjudication* (the Asylum Study), Professors Ramji-Nogales, Schoenholtz, and Schrag provide a comprehensive analysis of new data to document decisional disparities that undermine the fairness of asylum adjudication. The Asylum Study is an empirical project of remarkable scope. It examines patterns of asylum decisions at four different adjudication levels: at the asylum office interview, in immigration court, on administrative appeal to the Board of Immigration Appeals (BIA), and on petition for review to the federal courts of appeals. At each level, the Asylum Study generates empirical findings to support what we knew mostly by anecdote - that there are eye-popping disparities in the grant rates of asylum adjudicators that cannot be explained by the underlying merits of the cases.<sup>1</sup>

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\* Professor of Law, Wake Forest University School of Law. I am grateful to Chris Coughlin, Jeff Lubbers, David Martin, Hiroshi Motomura, Sid Shapiro, and Ron Wright for their very helpful comments. I am especially indebted to my former student Christina L. Boyd, now a Ph.D. candidate in political science and a graduate student associate in the Center for Empirical Research in the Law at Washington University St. Louis, for offering her perspective on the design, methodology, and underlying theories of empirical studies of judicial behavior. While I have learned from the insights of these colleagues, any mistakes are my own.

What are we to make of these findings? One could derive an answer from a variety of perspectives; my response to the Asylum Study will employ two. First, I will situate the study within a territory that is noted but not explored by its authors: the work of political scientists who conduct empirical studies of judicial decision making. Second, I will examine the Asylum Study through the lens of administrative law, where we find a *deja vu* component to its findings. This essay has a dual purpose: to open a multidisciplinary window onto the Asylum Study, and to delve into the broader administrative law context of the intractable problem of decisional disparities in agency adjudication.

## II. OPENING A WINDOW TO POLITICAL SCIENCE

Political scientists have published scores of empirical studies to explore the impact of extraneous factors, including judge ideology and gender, on judicial decision making.<sup>2</sup> Most of these studies focus

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1. A snapshot of the "disconcerting variability" of administrative justice in the asylum adjudication system is captured in the Asylum Study's findings regarding applications from China. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 303 (2007) [hereinafter Asylum Study]. In one regional asylum office, the grant rates for applications from China varied from zero to sixty-eight percent. Sixty percent of the officers in that regional office deviated from their office's mean for granting applications from China by more than fifty percent. *Id.* at 321. A Chinese asylum seeker who appears in immigration court in Atlanta has a seven percent chance of success on her claim. Nationwide, immigration judges grant Chinese applications in forty-seven percent of cases. In Orlando, that figure is seventy-six percent. *Id.* at 330. When an applicant from China loses at the Board of Immigration Appeals and seeks a petition for review in the U.S. courts of appeals, her chance of success varies greatly depending on the circuit where the petition is heard. From 2003 to 2005, the Fourth Circuit did not remand a single case from China (i.e., the court never decided in favor of the applicant), while the Ninth Circuit remanded in thirty-seven percent of cases. *Id.* at 362.

2. The law review literature is cited in the Asylum Study, *supra* note 1, at 300-01 nn.2-7, 303 n.12. The inconsistent findings of twenty-eight empirical studies assessing whether male and female judges decide cases differently are summarized in Christina L. Boyd, Lee Epstein & Andrew D. Martin, UNTANGLING THE CAUSAL EFFECTS OF SEX ON JUDGING app. a (April 24, 2007) (unpublished manuscript), available at <http://epstein.law.northwestern.edu/research/genderjudging.pdf>.

on Article III courts (most often the Supreme Court), and consider decisional patterns at a single level of adjudication. These empiricists have honed the methodology used to study judicial decision making, and have developed a theoretical framework to explain judicial behavior. Their work provides a useful perspective to examine the findings of the Asylum Study.

As an empirical study of judicial behavior, the Asylum Study breaks no new ground methodologically, and it might be criticized by empiricists who generally apply more refined multivariate statistical models to much smaller datasets. The Asylum Study's conclusion that "the gender of the [immigration] judge had a significant impact on the likelihood that asylum would be granted,"<sup>3</sup> for example, would be viewed by a dedicated empiricist as problematic because the authors do not isolate the effect of judge gender.<sup>4</sup> The Asylum Study recognizes this limitation - noting, for example, that "some of the 'gender effect' on asylum decision making may be related to the different prior work experience of male and female judges"<sup>5</sup> - but does not employ the statistical tools to measure this effect. For this reason, while the Asylum Study convincingly documents decisional disparities in asylum adjudication, its analysis of whether judge ideology and gender are explanatory factors should be considered preliminary.

This criticism should not, however, obscure the significant contributions of the Asylum Study. The authors venture into new territory when they analyze the judicial behavior of adjudicators within an administrative agency, and when they undertake this

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Several of these studies, and their conflicting outcomes, are also noted in the Asylum Study, *supra* note 1, at 343-44.

3. Asylum Study, *supra* note 1, at 342.

4. This criticism is explained in Boyd et al., *supra* note 2, which posits that empirical studies of the role of sex in judging reach inconsistent results because the predominant statistical models - variants of regression analysis - are ill-suited to establish causal inferences in this context. *Id.* at 2, 9-12. The authors explain that because female judges are, on average, more liberal than their male colleagues, the data are imbalanced. This means that using regression analysis to assess the impact of sex on voting patterns could lead to misleading results. *Id.* at 10-12. The authors instead apply non-parametric matching methodology to test these effects, using a dataset of sex discrimination suits in the federal circuits, and observe substantial individual and panel effects. *Id.* at 14-28.

5. Asylum Study, *supra* note 1, at 344.

analysis at four levels of adjudication.<sup>6</sup> We might wish for more complete data, and wonder whether the explanations typically offered to explain the voting behavior of Article III judges hold true in the decidedly different political context of agency adjudication. Nevertheless, we now have a well-developed picture of the scope and patterns of decisional disparities in asylum adjudication. The Asylum Study prompts us, moreover, to consider whether differently designed adjudication systems might increase or reduce decisional disparities.<sup>7</sup>

The Asylum Study also demonstrates how important it is for empiricists to understand the legal and procedural context of their dataset. The substantive expertise of Professors Ramji-Nogales, Schoenholtz, and Schrag, which has been honed through years of experience representing asylum seekers (and supervising students who do the same), is critical to the successful design and implementation of this study.<sup>8</sup> It brought us, for example, useful ways to control for the variable of nationality differences in caseload while comparing asylum grant rates across individual adjudicators and regions.<sup>9</sup> I doubt that anyone who lacked the authors' intimate

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6. Each level of the study draws asylum claims from a different source and adjudicates them under different procedures. For this reason, the authors appropriately do not attempt any cross-level statistical comparisons. We cannot assess, for example, whether asylum officers who decide cases after an informal interview on the whole are more generous than immigration judges who preside over adversarial removal hearings because the pool of claims being adjudicated is quite different at those two levels. For criticism of a study that attempts this comparison, see *infra* note 10.

7. I elaborate on how the structure of agency adjudication might impact decisional uniformity *infra* Part II.A. See also Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 457-62 (2007).

8. This point is difficult to make without getting mired in the technical details of Appendix I, which explains the methodology the authors employed for selecting cases at each level of the study. One can note, for example, that all data excludes Mexican asylum applicants, and that detained asylum applicants are removed, as much as possible, from the immigration court analysis. Asylum Study, *supra* note 1, at 312, 395. These exclusions make sense to those well versed in asylum law and procedure, and they enhance the study's design. But they might not occur to someone lacking the substantive expertise of the study authors.

9. To control for the variable of nationality differences in caseload, the authors narrow their dataset by comparing grant rates only for cases of nationals from Asylee Producing Countries (APCs). These are countries with a significant number

knowledge of the asylum process could deliver such a detailed and convincing analysis.<sup>10</sup>

Although it is an impressive study, the Asylum Study does illustrate a boundary that persists between law professors and political scientists. Scholars from both disciplines have become accustomed to sharing the territory of empirical analysis, as demonstrated by a recent spate of law review articles distilling the best practices for designing studies and communicating results.<sup>11</sup> Nevertheless, most of us - legal scholars and political scientists alike - still do not routinely read each others' work (which is, for the most part, published in entirely different arenas), and thus miss certain insights that might be brought to bear when our fields of study overlap.<sup>12</sup>

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of applicants (over 500) and a national grant rate of at least thirty percent before the asylum office or immigration court in fiscal year 2004. *Id.* at 311.

10. Another study purporting to explain disparities in asylum adjudication, published in a public policy journal, is premised on a misunderstanding of asylum procedures. Ming H. Chen, *Explaining Disparities in Asylum Claims*, 12 GEO. PUB. POL'Y REV. 29 (2007). The author of this study apparently did not know that asylum officers have legal authority to "deny" only those cases where the applicant is in authorized immigration status. See Asylum Study, *supra* note 1, at 306 n.22. Because asylum officers denied, on average, nine percent of cases during her study period, the study author calculated an average ninety-one percent "grant rate" in asylum offices. Chen, *supra*, at 34 figs.2 & 36; cf. Asylum Study, *supra* note 1, at 314 (finding that most asylum officers grant asylum to nationals of APCs at a rate between thirty and forty-five percent). Further extrapolating from this incorrect figure, she then concluded that "asylum officers refer less than 10% of the cases they adjudicate" to immigration court. Chen, *supra*, at 41. These startlingly inaccurate figures prompted the author to examine a mistaken hypothesis: that asylum officers are far more generous than immigration judges in granting asylum. *Id.* at 36. The Asylum Study found no such disparity in the grant rates of asylum officers and immigration judges.

11. See Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811 (2006); Lee Epstein et al., *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. (forthcoming 2007), available at <http://epstein.law.northwestern.edu/research/communicating.html>; Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 95 CAL. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=913336>.

12. This point is especially well made in R. Shep Melnick's essay, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245 (1992). See also Keith Whittington, *Crossing Over: Citation of Public Law Faculty in Law Reviews*, Law & Courts, Spring 2004, at 5.

Missing from the Asylum Study, although quite on point to the authors' analysis, are the theoretical models political scientists have developed to explain judicial behavior.<sup>13</sup> The Asylum Study posits that at each level of asylum adjudication, "the outcome of a case appears to be strongly influenced by the identity or attitude of the officer or judge to whom it is assigned."<sup>14</sup> This conclusion mirrors the attitudinal model of judging, originally developed to explain Supreme Court voting patterns but more recently expanded to other realms. The attitudinal model states that judges decide cases (and especially the close cases) based on their ideologies or attitudes toward a particular claim - or, stated more simply, that judges vote their values.<sup>15</sup> This claim is fully theorized and tested by empirical analysis; it also is challenged to a degree by an alternate theory known as the strategic model of judging. The strategic model accepts that judges are inclined to vote consistent with their ideological preferences, but stresses that they are also subject to compromises imposed by collegial decision making and a number of political constraints.<sup>16</sup> This theory also seems reflected in the Asylum Study - most notably in the section that correlates certain interventions from the Attorney General with a steep drop in BIA decisions favorable to asylum applicants.<sup>17</sup> More generally, the strategic model, with its emphasis on the political context of judging, seems an especially apt

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13. These models are generally missing from legal scholarship, which labors to "build a wall of separation between law and politics." Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 267 (2005). Professor Friedman's article is an important effort to dismantle this wall.

14. Asylum Study, *supra* note 1, at 302.

15. The classic work on the attitudinal model is Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002). See also Virginia Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. POL. SCI. 123 (2004); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

16. Lee Epstein & Jack Knight, *The Choices Justices Make* (1998); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583 (2001). For a critique of political science's positive approach to judicial behavior, see Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 385 (2007) ("The law has independent normative force that cannot be reduced to purely strategic explanations.").

17. Asylum Study, *supra* note 1, at 355-61.

theory to employ in a study of agency adjudicators who decide cases subject to political and policy controls.

A full elaboration and application of these theories is beyond the scope of this response (and, to be fair, can also be seen as beyond the scope of the Asylum Study). Nevertheless, I hope that by noting the relevance of these models I might prompt legal scholars and social scientists to be more attentive to the overlap of our fields, and perhaps entice those who routinely study judicial behavior to help us assess the broader implications of the Asylum Study.

### III. THROUGH THE LENS OF ADMINISTRATIVE LAW

As someone whose teaching and research covers immigration law and administrative law, I believe that the Asylum Study should be required reading for scholars, practitioners, and policymakers in both fields. Those who study agency adjudication often limit their focus to a single administrative context; they are overlooking some of the most important and challenging administrative law questions if they do not expand their field of vision to consider immigration adjudication. On the flip side, immigration law specialists may be surprised to discover a *deja vu* component to the Asylum Study. In fact, the problem of decisional disparities in agency adjudication is a landmine of administrative law, which has already exploded on those who suggest that increased managerial control over agency adjudicators is a possible route to reform.

#### *A. A Primer on the Structure of Agency Adjudication*

The authors of the Asylum Study conclude that "the structure of the immigration courts and the Board [of Immigration Appeals] should be improved along with their decisional processes."<sup>18</sup> They recommend increased independence for immigration judges (IJs) and members of the Board through the creation of an Article I court for immigration adjudication.<sup>19</sup> This recommendation falls at one end of the spectrum of models of decisional independence for agency adjudicators. To understand its implications, we must identify the full

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18. *Id.* at 386 (citation omitted).

19. *Id.*



range of choices and consider the conflicting goals inherent in structuring administrative adjudication.

Adjudication of cases within an executive branch agency rests on a premise that is inconsistent with the norm of judicial independence embodied in our Article III courts. In most administrative contexts, the adjudicators - those individuals who decide whether to grant or deny a benefit, or to impose a civil penalty under a particular statute - are employees of the very agency whose caseload they adjudicate. They are, in other words, potentially subject to the supervision and control of one of the interested parties.<sup>20</sup> This is because administrative adjudication, traditionally conceived, is not simply about deciding individual cases; it is a means to effectuate the statutes enacted by Congress in accordance with the priorities of the executive branch. Agencies develop and implement policy when they adjudicate.<sup>21</sup> In order to promote policy consistency and ensure accurate outcomes, agency heads may exercise supervisory oversight over agency adjudicators, and usually have some degree of control over their decisions as well.<sup>22</sup>

A second divergence from Article III norms also comes into play when agencies, not courts, adjudicate. One rationale for lodging policymaking authority in an administrative agency is the expertise that can develop within the agency staff. While our legislators and our Article III judges are generalists, our bureaucrats are often specialists, with technical knowledge and experience that can usefully be employed to further the agency's mission. We expect

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20. See generally 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.9 (4th ed. 2002); Michael Asimow, *When the Curtain Falls: Separation of Functions in Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 759-65 (1981); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1219-36 (2006).

21. Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 978-80 (1991); Moliterno, *supra* note 20, at 1126. The Supreme Court has affirmed broad agency discretion to choose rulemaking or adjudication as the vehicle for policymaking. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). See generally Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005); M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383 (2004).

22. Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1, 10-14 (1986).

scientists to have a hand in developing food-safety standards, and physicians and pharmacologists to determine whether a new drug application should be approved. In some administrative contexts, agency adjudicators are specialists as well, selected because their background and expertise suits them to hear a particular type of case.<sup>23</sup> Moreover, in the federal system all agency adjudicators specialize to some degree after they are hired, because they by and large decide the cases of one particular agency.

There is an obvious tension between the oversight that promotes consistency and accuracy and the decisional independence of agency adjudicators. This tension has bedeviled administrative law from its inception.<sup>24</sup> The founding document of the modern administrative state - the federal Administrative Procedure Act (APA) - offers one model for resolving this tension, which centers on the particulars of employing and supervising administrative law judges. Since the APA was enacted in 1946, a number of additional models have sprung up, reflecting a sliding scale of decisional independence for agency adjudicators.<sup>25</sup> These models reflect different choices that can be made on two critical issues: the degree of managerial control over adjudicators, and the degree of control over their decisions.

One option is reflected in the solution proposed in the Asylum Study: to jettison the idea of policy control by executive branch officials through complete separation of adjudicators from the administrative agency whose cases they decide. The authors recommend that immigration judges and the BIA be lodged in an independent agency or court, and that these adjudicators serve for a fixed term with protection from removal except for "good cause."<sup>26</sup>

23. Asylum officers are one example. See *infra* note 31.

24. See Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1 (1997); Antonin Scalia, *The ALJ Fiasco - A Reprise*, 47 U. CHI. L. REV. 57 (1979); Jeffrey A. Wertkin, *A Return to First Principles: Rethinking ALJ Compromises*, 22 J. NAT'L ASS'N. ADMIN. L. JUDGES 365, 389-91 (2002) ("The APA's conception of the ALJ's role ... involves a curious mixture of autonomy and subservience.").

25. Gifford, *supra* note 21; Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65 (1996).

26. Asylum Study, *supra* note 1, at 386-87. The Asylum Study recommends a "statutory Article I court," but also argues for an "independent federal agency" for immigration adjudication. *Id.* These are in fact two distinct variations of the complete separation model. See *infra* notes 27-28.

Complete separation could be accomplished by creating a statutory Article I court for immigration adjudication.<sup>27</sup> It also could be achieved by what is known in administrative law as the "split-enforcement" model, where adjudicators remain lodged in an executive branch agency but that agency is formally separate from the entity that administers or enforces the law.<sup>28</sup>

The hallmark of complete separation is that adjudicators are emancipated from the policy control that comes from vesting a presidential appointee who also oversees enforcement with the authority to review their decisions. According to proponents, this leaves adjudicators "free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives."<sup>29</sup> The complete separation model is a perennial favorite reform proposal among those who value expert adjudicators with decisional independence; it has been proposed time and again as an appropriate model for immigration judges and the BIA.<sup>30</sup>

At the opposite end of the spectrum are agency decision makers who decide cases under a strong system of managerial control of individual adjudicators and their decisions. Asylum officers who decide affirmative claims provide an example of how this system can be coupled with the idea of an adjudicator with substantive expertise. The asylum officer corps was created in 1990 to replace Immigration and Naturalization Service (INS) examiners, who decided affirmative asylum applications along with a variety of other benefits petitions. The central premise of reform was that asylum cases should first be adjudicated in a nonadversarial environment by a cadre of

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27. See generally Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377.

28. See generally Gifford, *supra* note 21; Paul R. Verkuil & Jeffery S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Cases*, 55 ADMIN. L. REV. 731, 773-77 (2003) (discussing the split-enforcement model and various proposals for an Article I court within the context of Social Security disability cases).

29. Nat'l Ass'n of Immigration Judges, *An Independent Immigration Court: An Idea Whose Time Has Come* 13 (2002).

30. See *id.*; U.S. Comm'n on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* 175-83 (1997); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980).

professionals whose background, experience, and ongoing training especially suited them to hear these sensitive claims.<sup>31</sup>

Asylum officers are not exempt from the supervision experienced by other government employees; they must meet strict timetables for deciding cases and undergo regular performance evaluations.<sup>32</sup> They also are subject to a high degree of decisional control. Asylum officers must secure their supervisor's assent in every case before a decision issues. There also are procedures in place for advance clearance from headquarters for especially controversial or difficult decisions.<sup>33</sup> These features illustrate the tradeoff inherent in adjudication systems that stress managerial control: decisional independence is greatly reduced, but the system is thought to promote policy consistency and greater uniformity of decisions.

Between the poles of complete separation and strong managerial control are a wide variety of administrative adjudication systems that balance these competing factors in different ways. Those not governed by the formal adjudication provisions of the APA may provide de facto independence that to some degree insulates agency adjudicators from managerial control, but authorizes post-adjudication review of their decisions by the agency.

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31. See generally Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253 (1992); Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455 (1992); Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. J. INT'L L. & POL'Y 43 (1994); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 728-31 (1995).

32. See Walter A. Ewing & Benjamin Johnson, Am. Immigration Law Found., *Asylum Essentials: The U.S. Asylum Program Needs More Resources, Not Restrictions* (2005), available at [http://www.aifl.org/ipc/policy\\_reports\\_2005\\_asylumessentials.asp](http://www.aifl.org/ipc/policy_reports_2005_asylumessentials.asp) (stating that case completion guidelines require asylum officers to conduct eighteen asylum interviews each two-week pay period); Memorandum from Joseph E. Langlois, Chief, Asylum Div., U.S. Citizenship and Immigration Servs., to All Asylum Office Personnel (Oct. 10, 2006) (on file with author) (detailing asylum office's success in meeting case processing goals).

33. Asylum Study, *supra* note 1, at 308. AILA's quality assurance referral sheet details those categories of cases that must be referred to headquarters for review prior to issuance of a decision. U.S. Citizenship and Immigration Servs., *Quality Assurance Referral Sheet* (Nov. 6, 2001) (on file with author).

Immigration judges and members of the BIA operate in such an environment. They are employed by the Executive Office for Immigration Review (EOIR), lodged within the Department of Justice, rather than by the Department of Homeland Security (DHS), whose enforcement cases they adjudicate.<sup>34</sup> This structure looks something like the split-enforcement model, except that the Attorney General and the Secretary of DHS (along with the Chairman or a majority of the BIA) can refer Board decisions to the Attorney General for review.<sup>35</sup> IJ decisions, in contrast, are not subject to any oversight within the agency, either before or after they are issued. The only review of an IJ's work product happens via party-initiated appeals to the BIA. EOIR issues case completion guidelines for immigration judges and Board members, and is in the process of establishing a formal system of performance evaluation as well.<sup>36</sup>

The features of de facto independence vary from agency to agency and - unless incorporated in an agency's governing statute - can be revised by executive branch officials. In contrast, administrative law judges (ALJs)<sup>37</sup> employed in a number of federal

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34. When Congress created DHS, responsibility for immigration enforcement was moved from the former INS to DHS. The INS was, like EOIR, lodged within the Department of Justice, giving the Attorney General authority over both the enforcers and the adjudicators of immigration law. See Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 288-95 (2002). When Congress abolished the INS and created DHS, but left EOIR within the Department of Justice, it created an unusual agency structure: one presidential appointee (the Attorney General) exercises policy control over EOIR adjudicators, but a second (the Secretary of DHS) presides over a separate agency with authority over immigration enforcement. See David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, Insight (Migration Policy Inst., Washington, D.C.), Apr. 2003, at 1, 18-19.

35. 8 C.F.R. § 1003.1(h) (2007). The regulation does not specify any substantive criteria for referral. Rather, it delineates those who have authority to invoke this mechanism of policy control. Referrals of BIA decisions to the Attorney General are rare, but this option does give the Department of Justice final say in adjudicated matters of immigration policy. For an explanation of how referral operated before the creation of DHS, see Taylor, *supra* note 34.

36. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673 (Sept. 20, 2007) (to be codified at 8 C.F.R. pts. 1003, 1240).

37. The phrase "administrative law judge" is a term of art; it is not (as many law students mistakenly assume) a generic phrase that can be used to describe any

agencies experience a particular form of independence established by the APA. ALJ independence includes a number of features that insulate ALJs from the managerial control of their employing agencies. An agency that employs ALJs cannot seek out candidates with relevant expertise and hire them directly; instead, ALJ candidates must be screened through procedures established by the Office of Personnel Management and selected according to rigid statutory criteria.<sup>38</sup> Once hired, ALJs cannot be supervised by anyone who performs investigative or prosecuting functions within the agency.<sup>39</sup> They also are exempt by statute from the annual performance appraisals conducted for virtually all other federal

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agency adjudicator. Instead, administrative law judges decide claims under the APA's provisions for formal adjudication. See 5 U.S.C. § 556(b)(3) (2000) ("There shall preside at the taking of evidence [in a formal adjudication] ... one or more administrative law judges as appointed under section 3105 of this title."). The vast majority of agency adjudications are not formal adjudications under the APA; procedures for these so-called informal adjudications are established by the agency's governing statute and regulations. The term "informal" is not meant to describe the actual formality of a hearing. Removal proceedings conducted by an immigration judge are a good example of administrative adjudications that look quite formal but are not governed by the APA. See generally Lubbers, *supra* note 25.

38. See generally Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112-20 (1981). An oft-criticized feature of the statutory selection criteria for ALJs is the veteran's preference, which adds points to the eligibility score of veterans and restricts an agency's ability to pass over a qualified veteran to choose an applicant without veteran status. 5 U.S.C. §§ 2108, 3309 (2000). Women are significantly underrepresented in the ALJ corps by operation of the veteran's preference. See Elaine Golin, *Note, Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1549-50 (1995). The statutory selection criteria for ALJs also reflect an overemphasis on litigation experience, and an underemphasis on judicial temperament and substantive expertise. See Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 292-95 (1994). The Administrative Conference of the United States (ACUS) has criticized the criteria and procedures used to select ALJs and recommended various changes. See Paul R. Verkuil et al., *Report for Recommendation 92-7: The Federal Administrative Judiciary*, in 2 Administrative Conference of the United States, *Recommendations and Reports* 777, 954-67 (1992).

39. 5 U.S.C. § 554(d) (2000).

employees.<sup>40</sup> Finally, ALJs can be removed only for "good cause" after a hearing before the Merit Systems Protection Board.<sup>41</sup> While ALJs are personally insulated from agency control by these provisions, their decisions are subject to reconsideration within the agency.<sup>42</sup> Thus, ALJ independence all but extinguishes an agency's authority over hiring, firing, and supervision of its ALJs, but gives an agency control - according to whatever administrative appeal or quality assurance procedures the agency might establish - over ALJ decisions.

A system of administrative adjudication can incorporate different models of decisional independence at different levels. This is true, as I have noted, for the asylum process. In addition, multi-tiered systems use different procedures for moving cases up to the next adjudication level, and can adopt different decisional standards - such as de novo consideration or a particular standard of review - at each level.

### *B. Comparing Asylum and Disability Adjudication*

Armed with this understanding of the structure of agency adjudication, we now turn to consider the *deja vu* aspect of the Asylum Study. For administrative law scholars, the Asylum Study's findings immediately call to mind the long history of attempts to redress decisional disparities in disability determinations made by the Social Security Administration (SSA).

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40. 5 U.S.C. § 4301(2)(D) (2000). See generally Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589 (1993); L. Hope O'Keeffe, *Note, Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986).

41. 5 U.S.C. § 7521(a) (2000).

42. 5 U.S.C. § 557(b) (2000). The APA specifies that "on appeal from or review of the initial decision [of an ALJ], the agency has all the powers which it would have in making the initial decision." *Id.* Reviewing courts have limited an agency's ability to overturn ALJ decisions that are based on witness credibility or demeanor. See *Loomis Courier Serv., Inc. v. NLRB*, 595 F.2d 491 (9th Cir. 1979); *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977).

Social security disability adjudication has spawned the classic book on agency adjudication - Jerry Mashaw's *Bureaucratic Justice*,<sup>43</sup> written in 1983 - along with a dizzying array of scholarly studies<sup>44</sup> and reports issued by government agencies<sup>45</sup> and outside

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43. Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983) [hereinafter Mashaw, *Bureaucratic Justice*]. Professor Mashaw was also the project director for an earlier study sponsored by the National Center for Administrative Justice, then an entity of the American Bar Association. Jerry Mashaw et al., *Social Security Hearings and Appeals* (1978) [hereinafter Mashaw et al., *Social Security Hearings and Appeals*]. A third oft-cited book is a study by a political scientist: Donna Price Cofer, *Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process* (1985).

44. See, e.g., Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 229 (1990); Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461; Verkuil & Lubbers, *supra* note 28; Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203 (2002).

45. Congress's "watchdog agency," the U.S. General Accounting Office (now known as the U.S. Government Accountability Office), has issued numerous reports on disability adjudication. The general tenor of these reports is captured in the following titles: Jane L. Ross, U.S. Gen. Accounting Office, *SSA Actions to Reduce Backlogs and Achieve More Consistent Decisions Deserve High Priority* (1997), available at <http://www.gao.gov/archive/1997/he97118t.pdf> [hereinafter U.S. Gen. Accounting Office, *SSA Actions to Reduce Backlogs*]; U.S. Gen. Accounting Office, *Disappointing Results from SSA's Efforts to Improve the Disability Claims Process Warrant Immediate Attention* (2002), available at <http://www.gao.gov/new.items/d02322.pdf>; U.S. Gen. Accounting Office, *More Effort Needed to Assess Consistency of Disability Decisions* (2002), available at <http://www.gao.gov/new.items/d04656.pdf> [hereinafter U.S. Gen. Accounting Office, *Consistency of Disability Decisions*]. For a succinct summary of the claims adjudication process and the most recent proposed reforms, see Scott Szymendera, Cong. Research Serv., *Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI): Proposed Changes to the Disability Determination and Appeals Process* (Apr. 24, 2006), available at [http://www.opencrs.com/rpts/RL33179\\_20060424.pdf](http://www.opencrs.com/rpts/RL33179_20060424.pdf). The independent, bipartisan Social Security Advisory Board has also issued reports on SSA adjudication. See Soc. Sec. Advisory Bd., *Disability Decision Making: Data and Materials* (May 2006), available at <http://www.ssab.gov/documents/chartbook.pdf> [hereinafter Soc. Sec. Advisory Bd., *Disability Decision making*]; Soc. Sec. Advisory Bd., *Improving the Social Security Administration's Hearing Process* (Sept. 2006),



consultants.<sup>46</sup> The process of resolving disability claims is "the largest system of administrative adjudication in the Western world."<sup>47</sup> SSA receives some five million disability applications each year,<sup>48</sup> and its ALJs resolve almost 500,000 contested cases.<sup>49</sup> A just and efficient resolution of these claims is vitally important to deserving beneficiaries, for whom "disability benefits often provide the barest cushion against destitution,"<sup>50</sup> and to the integrity of America's promise to provide a means of support for those who are unable to work because of serious disabling conditions.<sup>51</sup> Building an adjudication system to deliver on this promise has been extraordinarily difficult, however. Among the most visible and intractable problems - indeed, a central theme of multiple studies and several attempted reforms of disability adjudication - is a concern

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available at <http://www.ssab.gov/documents/HearingProcess.pdf> [hereinafter Soc. Sec. Advisory Bd., Hearing Process Report].

46. The Lewin Group et al., Evaluation of SSA's Disability Quality Assurance (QA) Processes and Development of QA Options that Will Support the Long-Term Management of the Disability Program (2001), available at <http://www.disabilitydoc.com/ssa-disability-quality-assuran>.

47. Mashaw, *Bureaucratic Justice*, *supra* note 43, at 18.

48. Soc. Sec. Admin., SSA Publ'n No. 13-11700, Annual Statistical Supplement to the Social Security Bulletin tbls.2.F5 & 2.F6 (2007), available at <http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2006/2f4-2f6.pdf> (displaying combined totals of Disability Insurance and Social Security Insurance claims received in fiscal year 2005).

49. Szymendera, *supra* note 45, at 1 (noting that in fiscal year 2004, ALJs issued rulings in 495,029 appeals of initial disability denials).

50. Koch & Koplow, *supra* note 44, at 229.

51. The disability adjudications discussed in this essay encompass two programs administered by the Social Security Administration. The first, Social Security Disability Insurance, provides cash benefits and medical coverage to persons under sixty-five who meet the statutory definition of disability and have worked a requisite number of qualifying quarters. The second, Supplemental Security Income, is a means-tested welfare program for persons of limited income who are disabled. Under both programs, "disability" is defined as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§423(d)(1)(A), 1382(c)(a)(3)(A) (2000). *See generally* Szymendera, *supra* note 45, at 1-3; Koch & Koplow, *supra* note 44, at 204-25.

that "the outcome of cases depends more on who decides the case" than on the underlying facts or applicable legal standards.<sup>52</sup>

Disability adjudication therefore provides a portal to the administrative law context of the Asylum Study because the SSA system is plagued with decisional disparities quite similar to those documented in the Asylum Study.<sup>53</sup> Asylum and disability cases also share two features that contribute to the problem of inconsistent decisions: a multi-tiered adjudication system, which provides multiple opportunities to present a claim under different procedures, and an underlying claim that is both legally complex and fact-specific.

While the particulars vary in several respects, applicants for asylum and SSA disability claimants move through adjudication systems with some structural features in common. Both systems start with an application filed in a nonadversarial setting, which is adjudicated by an officer who decides applications within a system of managerial control. Disability applications are decided in the first instance by examiners in state Disability Determination Service agencies, who review the paper record.<sup>54</sup> Asylum applicants are interviewed in person by an asylum officer.<sup>55</sup> In both systems, disappointed claimants get another "bite at the apple" when their claim is heard *de novo* at the next level. In the asylum context, this

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52. Mashaw et al., *Social Security Hearings and Appeals*, *supra* note 43, at xxi.

53. Some courts have noted similarities between the asylum and disability adjudication systems. *See Banks v. Gonzales*, 453 F.3d 449, 453-54 (7th Cir. 2006) (suggesting that the SSA model of using vocational experts in disability cases should be adapted to the asylum context, to provide immigration judges with "concrete, case-specific" evidence on country conditions); *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000) ("Both administrative settings have the common feature of determining the applicant's eligibility for certain benefits... . Both social security and deportation hearings are likely to be unfamiliar settings for the applicant."); *Fisher v. INS*, 79 F.3d 955, 972 (9th Cir. 1996) (Noonan, J., dissenting) (arguing that an immigration judge has a duty to develop the record similar to that of an ALJ in social security disability cases).

54. *Levy*, *supra* note 44, at 467-71; *see also Bloch et al.*, *supra* note 44, at 22-26. Disappointed claimants must file a petition for reconsideration with the state agency before they move to the ALJ hearing stage. *Id.* New regulations will change this, and instead impose review by a federal reviewing official. *See Administrative Review Process for Adjudicating Initial Disability Claims*, 71 Fed. Reg. 16,424, 16,432-34 (Mar. 31, 2006).

55. *Asylum Study*, *supra* note 1, at 306.

happens automatically because applicants who do not convince the asylum officer are referred to removal proceedings before an immigration judge.<sup>56</sup> Disability applicants who lose at the state level may choose to present their case anew to an administrative law judge employed by the Social Security Administration.<sup>57</sup>

Both systems currently provide for administrative appeals from the ALJ or IJ decision, but here procedures in the two agencies diverge significantly. In the asylum context, the party that loses before an IJ - either a disappointed applicant or the government - can appeal to the BIA. The Board uses a "clearly erroneous" standard to review IJs' findings of facts, and a *de novo* standard for questions of law, discretion, and judgment.<sup>58</sup> Asylum applicants who lose before the BIA can petition for review in the circuit courts of appeals.<sup>59</sup>

In the social security context, a disappointed claimant (but not the government) can request a review of an ALJ decision before the administrative appeals unit, currently known as the Appeals Council. There is no right to administrative appeal, however, and the Appeals Council may decline review.<sup>60</sup> The Appeals Council also decides a number of cases on its own motion, as part of quality assurance review. Under this procedure (which has varied over time, as discussed below), ALJ decisions can be selected for review before they take effect, and will be modified or reversed if the Appeals Council finds error.<sup>61</sup>

The administrative appeals body has recently become a flashpoint in the SSA and asylum adjudication systems. In both contexts, a crushing caseload has prompted procedural reforms and a

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56. *Id.* at 306-07.

57. This constitutes their first chance to appear in person at a hearing; claimants may be represented but no government attorney opposes the application. See Bloch et al., *supra* note 44, at 26; Levy, *supra* note 44, at 471-72.

58. 8 C.F.R. § 1003.1(d)(3) (2007).

59. The Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 242(a)(1)-(b)(2), 66 Stat. 163 (1952) (exempting asylum from the bar on judicial review of discretionary decisions). The INA is codified as amended at 8 U.S.C.A. §§1-1178 (West 2007).

60. Koch & Koplow, *supra* note 44, at 243; Soc. Sec. Admin., Social Security's Appeals Council Review Process, [http://www.ssa.gov/appeals/appeals\\_process.html](http://www.ssa.gov/appeals/appeals_process.html); see also 20 C.F.R. § 404.970(a) (2007) (specifying four grounds on which the Council will grant review).

61. Koch & Koplow, *supra* note 44, at 245-49.

concomitant shift in the role of the appeals unit.<sup>62</sup> As described in the Asylum Study, the BIA now decides administrative appeals under streamlined procedures that promote single-member decisions.<sup>63</sup> This has greatly reduced its role of promoting uniformity and policy consistency through precedent decisions. The Social Security Administration has recently promulgated regulations to create a new body, the Decision Review Board, to perform the quality assurance function of Appeals Council own-motion review.<sup>64</sup> Under the new regulation, the Appeals Council is being phased out; once it is eliminated disappointed claimants will no longer be able to seek administrative review of an ALJ decision.<sup>65</sup> Their only recourse after an ALJ denial will be a petition for judicial review in federal district court.<sup>66</sup>

In addition to moving through multi-tiered adjudication systems with some structural similarities, disability and asylum cases are specialized, highly complex, and require adjudicators to make a binary yes-or-no decision on a claim that could fall anywhere along a continuum.<sup>67</sup> In both contexts, decision makers must navigate a

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62. Professors Koch and Koplow describe the Appeals Council circa 1990 in language that also seems apt for the BIA today: "Members of the Appeals Council are snowed under with files ...," Koch & Koplow, *supra* note 44, at 258 n.312, "[and] now function almost exclusively as case handlers, not as policymakers, ... [in an] operation that resembles a factory assembly line," *id.* at 266-67.

63. Asylum Study, *supra* note 1, at 350-53, 356-57, 385.

64. Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,437 (Mar. 31, 2006).

65. *Id.* at 16,437-38, 16,441.

66. *Id.* at 16,438.

67. Stephen Legomsky identifies this last factor as the "spectrum of choice" of a decision. He explains that "some subjects provide more than the usual leeway to adjudicators" and posits that for asylum adjudication the spectrum of choice is "exceptionally broad." Legomsky, *supra* note 7, at 443. David Martin has also developed this point in a discussion of why the factual issues in asylum cases are so difficult to resolve, which is highly relevant to the Asylum Study. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1270-87 (1990). Professor Martin observes that "asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face. Adjudication must draw a line at some point on that spectrum." *Id.* at 1278 (footnote omitted). Richard Pierce notes the same phenomenon in disability determinations. He explains that cases disputed up to the ALJ level often involve claims of pain or mental illness, which require ALJs to make subjective "yes-or-no

"dense thicket" of statutes, regulations, and case law, but at the same time the ultimate decision turns on "fine-grained attention to the intimate facts on the record"<sup>68</sup> and an assessment of whether the applicant is telling the truth. Because credibility looms so large in asylum claims,<sup>69</sup> and in many contested disability cases,<sup>70</sup> the accuracy of any given decision may be unknowable.<sup>71</sup> As Stephen Legomsky notes in his response to the Asylum Study, these factors all promote a high degree of variance among agency adjudicators.<sup>72</sup>

*C. The Unhappy History of Attempted Reform in the  
Disability Adjudication Context*

The earliest studies of the adjudication system for disability claims found "that a claimant's success ... is substantially affected by the identity of the presiding ALJ."<sup>73</sup> Since then, the oft-repeated wisdom is that decisional disparities in disability adjudication are "patent"<sup>74</sup> - or even "manifest and alarming."<sup>75</sup> Some studies assess "horizontal inconsistency,"<sup>76</sup> documenting differences in allowance rates among different hearing offices or different decision makers at

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decisions on disability when the applicant's ability to work and the severity of the underlying illness could fall anywhere along a vast spectrum." Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 511 (1990); see also Levy, *supra* note 44, at 467 (disability determinations are "highly technical and complex" and require evaluation of evidence that is "inherently subjective") (footnotes omitted).

68. Koch & Koplow, *supra* note 44, at 228.

69. Legomsky, *supra* note 7, at 443; Martin, *supra* note 67, at 1281-82.

70. Koch & Koplow, *supra* note 44 at 229; Levy, *supra* note 44, at 467; Pierce, *supra* note 67, at 502 & n.85.

71. Koch & Koplow, *supra* note 44, at 270 ("Accuracy in a disability case is extremely difficult to define, let alone measure or achieve. No one we spoke with was able to articulate a workable definition of 'accuracy.'"); Legomsky, *supra* note 7, at 425.

72. Legomsky, *supra* note 7, at Part 439-44.

73. Mashaw et al., *Social Security Hearings and Appeals*, *supra* note 43, at 21.

74. *Id.* at xxi.

75. Koch & Koplow, *supra* note 44, at 283.

76. The term is borrowed from Professors Koch and Koplow, who define "horizontal consistency" as "the similarity of decisions in different venues" at the same adjudication level. *Id.*

the same adjudication level.<sup>77</sup> (This is similar to the analysis in the Asylum Study, which analyzes horizontal consistency at four levels of asylum adjudication.) But the key concern in the social security context has been "vertical inconsistency"<sup>78</sup> between state disability examiners and federal ALJs.<sup>79</sup>

State disability examiners allow roughly forty percent of initial claims.<sup>80</sup> Allowance rates for federal ALJs, whose caseload consists of claimants who were denied benefits at the state level, have fluctuated between fifty-eight percent and seventy-two percent since 1985.<sup>81</sup> Although there are a number of factors that might feed into this apparent generosity,<sup>82</sup> policymakers have long been concerned with the seeming anomaly of a relatively high allowance rate in a pool of cases that initially were rejected.

Reflecting this concern, efforts to reform disability adjudication have sometimes been coupled with a desire to reduce the overall

77. See Soc. Sec. Advisory Bd., Disability Decision Making, *supra* note 45, at 29 chart 13 (comparing average allowance rate in each state, at the state Disability Determination Services level and at the federal ALJ level); Szymendera, *supra* note 45, at 13 tbl.4 (showing high, low, and average grant rates for state Disability Determination Services offices).

78. Koch & Koplow, *supra* note 44, at 283 ("'Vertical consistency' is achieved when decisionmakers evaluate a case according to the same procedures and legal standards at each tier of the appellate review ladder. It requires harmony among all the adjudicatory levels regarding standards for case handling, definitions of eligibility, and interpretations of policy.").

79. See Soc. Sec. Advisory Bd., Disability Decision Making, *supra* note 45, at 29 chart 13 (comparing initial decision and ALJ allowance rate in each state); U.S. Gen. Accounting Office, Consistency of Disability Decisions, *supra* note 45, at 1, 7, 10-12 (giving figures and assessing causes of vertical inconsistency); U.S. Gen. Accounting Office, SSA Actions to Reduce Backlogs, *supra* note 45; see also Daniel J. Gifford, *Need Like Cases Be Decided Alike? Mashaw's Bureaucratic Justice*, 1983 AM. B. FOUND. RES. J. 985, 987 (asserting that SSA efforts to achieve more consistent determinations are undermined by the "excessive independence of ALJs").

80. Szymendera, *supra* note 45, at 7.

81. U.S. Gen. Accounting Office, Consistency of Disability Decisions, *supra* note 45, at 1.

82. ALJs may grant applications at a higher level than state offices because they are the only adjudicators who meet the applicant face-to-face, have more opportunity to develop a record, and historically were governed by different rules and guidelines than the state offices. See Bloch et al., *supra* note 44, at 26, 33-34; Levy, *supra* note 44, at 498.

allowance rates of ALJs.<sup>83</sup> And that helps to explain why reform efforts created such controversy, resulting in "an agency at war with itself."<sup>84</sup> I will relate the story of two skirmishes in this war: programs that targeted individual ALJs or their decisions for special review, and a proposal to subject all ALJs to greater oversight through performance evaluations.

Social security ALJs with high grant rates or low productivity have, at various times, had their decisions subject to special scrutiny or (for a handful of low-producing judges) been subject to "for cause" removal actions. This targeting began in the 1970s, when the director of SSA's hearing office, Robert Trachtenberg, established a Quality Assurance Review program with several components. Director Trachtenberg issued productivity memos to ALJs stating quotas for decisions per month; he then revised personnel policies to create incentives to reach the productivity goals.<sup>85</sup> Trachtenberg also instituted a program of post-adjudicatory review of ALJ decisions. The most controversial part of this program would have singled out the decisions of low-producing ALJs for Regional Chief Review.<sup>86</sup> Several ALJs sued, contending the Trachtenberg policies unlawfully intruded on various aspects of ALJ independence. The lawsuit was settled when SSA agreed to modify these programs significantly to meet ALJ objections.<sup>87</sup>

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83. *Ass'n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1137 ("Evidence ... strongly suggested that [the Office of Hearing Administration] had an ulterior goal to reduce ALJ allowance rates."); Mashaw, *Bureaucratic Justice*, *supra* note 43, at 174-78. But see *Nash v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989) ("The agency maintained then, and maintains now, that reducing [allowance] rates was not the intent of the policy.").

84. *Koch & Koplow*, *supra* note 44, at 231.

85. *Levy*, *supra* note 44, at 478; *see also Cofer*, *supra* note 43, at 93-96.

86. *Cofer*, *supra* note 43, at 87.

87. *Id.* at 111-12 (describing the June 7, 1979 settlement in *Bono v. Social Security Administration*). The Trachtenberg initiatives are also described in two reported cases arising from a decade-long lawsuit brought by an ALJ challenging various aspects of the program. *See Bowen*, 869 F.2d at 675 (holding that individual ALJ did not have standing to challenge SSA's nonacquiescence policy and that other challenged practices did not unlawfully intrude onto ALJ independence); *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (holding that individual ALJ had standing to challenge allegedly unlawful intrusions onto ALJ independence).

Congress then entered the fray. A 1980 amendment to the Social Security Act, known as the "Bellmon Amendment," directed the SSA Appeals Council to create a significant program of own-motion review of ALJ decisions.<sup>88</sup> The legislative history indicated that Congress was concerned with the high allowance rate of ALJs after state disability denials, and with the considerable disparity in the allowance rates among individual ALJs.<sup>89</sup> The resulting Bellmon Review Program had several phases; most controversial was the initial decision to target those ALJs with high allowance rates for more extensive review. ALJs who allowed more than seventy percent of claims, for example, would have all of their decisions screened for review under the Appeals Council own-motion procedures.<sup>90</sup>

A number of lawsuits were filed to challenge the Bellmon Review Program, including one by the Association of Administrative Law Judges, which contended that targeting the decisions of ALJs with high allowance rates created considerable pressure for them to deny benefits in violation of ALJ independence guarantees.<sup>91</sup> While that case was pending, the Bellmon Review Program was modified considerably, so that the individual targeting components of own-motion review were removed before the district court ruled in 1984.<sup>92</sup>

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88. Own-motion review by the Appeals Council had been dormant for several years prior to the Bellmon Amendment. *Ass'n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1135 n.6 (1984). The Association of Administrative Law Judges decision contains a detailed description of the various phases of the Bellmon Review Program created under this statute. *Id.* at 1135 & nn.7-8, 1136; see also Cofer, *supra* note 43, at 117-22; U.S. Gen. Accounting Office, *Social Security: Results of Required Reviews of Administrative Law Judge Decisions* (1989), available at <http://archive.gao.gov/d25t7/139091.pdf>; Levy, *supra* note 44, at 497-500.

89. *Ass'n of Admin. Law Judges*, 594 F. Supp. at 1134.

90. *Id.* at 1134-36; U.S. Gen. Accounting Office, *supra* note 88, at 8. Only ALJ grants, not denials, were originally included in Appeals Council own-motion review. This disparity was justified, according to SSA, by studies that suggested that a high rate of allowance indicated a high rate of ALJ error, and also by the fact that the Appeals Council already reviewed a significant number of ALJ denials via claimant petitions for review. *Ass'n of Admin. Law Judges*, 594 F. Supp. at 1134.

91. *Ass'n of Admin. Law Judges*, 594 F. Supp. at 1136.

92. In 1982, SSA discontinued its use of ALJ allowance rates as the selection criteria, and instead targeted individual ALJs according to their "own-motion rates" - the frequency with which the Appeals Council took corrective actions on their decisions. *Id.* at 1134-35. In 1984, the SSA eliminated the individual ALJ portion



Finding that these changes were "significantly for the better," the court declined to enjoin operation of the program.<sup>93</sup> Nevertheless, the court concluded that the SSA's "unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof."<sup>94</sup>

Both the Trachtenberg initiatives and the Bellmon Review Program targeted the decisions of ALJs with high grant rates or low productivity for special review. While SSA ALJs perceived that they could be subject to adverse personnel actions if their productivity or the outcome of their decisions did not eventually fall in line with agency expectations, no such actions were taken under the Bellmon program.<sup>95</sup> In the mid-1980s, however, the SSA brought "for cause" removal actions before the Merit Systems Protections Board (MSPB) against three low-producing ALJs.<sup>96</sup> The Board held that low productivity could in principle form the basis for removing an ALJ. It also concluded, however, that the SSA's evidence that an ALJ's case disposition rate was one-half the national average was not sufficient to establish "good cause" "in the absence of evidence demonstrating

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of Bellmon Review, and increased the number of cases reviewed from a random national sample. *Id.* at 1135-36.

93. *Id.* at 1141, 1143.

94. *Id.* at 1143; see also *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (holding that, while coercion of ALJs to lower allowance rates would infringe decisional independence, "the efforts complained of in this case for promoting quality and efficiency do not"). In a separate lawsuit challenging the procedures used to promulgate the Bellmon Review program, the Ninth Circuit ruled that the Bellmon Review program was a substantive rule that was improperly established without notice-and-comment procedures, and ordered that ALJ decisions that had been set aside by Appeals Council own-motion review should be reinstated. *W.C. v. Bowen*, 807 F.2d 1502, 1505-06 (9th Cir. 1987).

95. *Ass'n of Admin. Law Judges*, 594 F. Supp. at 1135, 1142.

96. *Soc. Sec. Admin. v. Balaban*, 20 M.S.P.R. 675 (1984); *Soc. Sec. Admin. v. Goodman*, 19 M.S.P.R. 321 (1984); *Soc. Sec. Admin. v. Brennan*, 19 M.S.P.R. 335 (1984), opinion clarified, 20 M.S.P.R. 35 (1984). These cases, and the broader issue of establishing production standards for ALJs, are discussed in Lubbers, *supra* note 40, at 599-600; Pierce, *supra* note 67, at 504-07; James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 642-44 (1993); and O'Keeffe, *supra* note 40, at 614-24.

the validity of using its statistics to measure comparative productivity."<sup>97</sup>

As Jeffrey Lubbers, former Research Director of the Administrative Conference of the United States (ACUS), describes it, the Social Security Administration's attempts throughout the 1970s and 1980s to assert managerial control over its ALJs resulted in a set of "mixed signals" about the legal contours of ALJ independence and the limits of agency management prerogatives.<sup>98</sup> Courts affirmed the agency's authority to set "reasonable production goals, as opposed to fixed quotas."<sup>99</sup> Meanwhile, the MSPB recognized that an ALJ's failure to meet production goals could be grounds for removal, but set a "virtually insurmountable burden of proof" in such cases.<sup>100</sup> Finally, quality assurance through own-motion review by the Appeals Council was upheld, but only after the SSA abandoned a system that targeted ALJs with high allowance rates for this procedure. Perhaps the most significant legacy of this era, however, is not found in the annals of reported cases. The APA's uneasy compromise establishing ALJ independence was severely tested during this period, resulting in a "legacy of tension" between social security ALJs and their employing agency.<sup>101</sup>

It was against this backdrop that ACUS, at the request of the Office of Personnel Management (OPM), undertook a study of the federal administrative judiciary in the early 1990s.<sup>102</sup> ACUS was an advisory agency whose mission was to study and improve the functioning of federal bureaucracy. It had funded a number of significant research studies on social security disability adjudication.<sup>103</sup> The authors of this broader study on the administrative judiciary - all preeminent scholars of administrative law - were well-attuned to the details of SSA's efforts to assert greater managerial control over its ALJs. Thus, they waded carefully

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97. Goodman, 19 M.S.P.R. at 331.

98. Lubbers, *supra* note 40, at 595-96.

99. Bowen, 869 F.2d at 680.

100. Lubbers, *supra* note 40, at 599-600.

101. Levy, *supra* note 44, at 502.

102. See Verkuil et al., *supra* note 38.

103. Verkuil & Lubbers, *supra* note 28, at 737 n.16 (listing ACUS recommendations emerging from numerous ACUS-funded studies of disability adjudication).

into the debate, seeking to find some middle ground to balance adequate protection of ALJ decisional independence against an employing agency's need to ensure a reasonable degree of uniformity, productivity, and adherence to law and agency policy in administrative adjudication.

The study authors concluded that the "good cause" standard for removal of ALJs was an important component of decisional independence, and that removal actions should be considered a "last resort" for extreme instances of misconduct, insubordination, or low productivity.<sup>104</sup> At the same time, they stressed that agencies needed "other approaches for assessing and dealing with apparent or alleged instances of misbehavior, bias, or unacceptably low productivity on the part of their ALJs."<sup>105</sup> Among the recommendations to emerge from the ACUS study was that Congress should authorize a system whereby the Chief ALJ in an agency that employed more than one ALJ would, in consultation with other agency ALJs and with oversight from OPM, "conduct regular ALJ performance reviews, based on relevant factors, including case processing guidelines, judicial comportment and demeanor, and the existence, if any, of a clear disregard of or pattern of nonadherence to properly articulated and disseminated rules, procedures, precedent, and other agency policy."<sup>106</sup>

The political fallout was swift and fierce. The ACUS proposal met "indignant opposition" from a well-organized ALJ lobby,<sup>107</sup> which decried the notion that agency managers - who "look too much at computer printouts, read too little history, and fail to provide for the individual nature of each case"<sup>108</sup> - should exercise greater oversight over their productivity and their adherence to precedent and agency policy. The fact that the ACUS proposal would lodge this function in the Chief ALJ (which the study authors described as a

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104. Lubbers, *supra* note 40, at 600.

105. *Id.*

106. Recommendations and Statements of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 61,759, 61,764 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310).

107. Lloyd Musolf, *Performance Evaluation of Federal Administrative Law Judges: Challenge for Public Administration?*, 28 AM. REV. PUB. ADMIN. 390, 394 (1998).

108. Timony, *supra* note 96, at 653.

form of peer review)<sup>109</sup> and would impose various safeguards on the exercise of this authority did little to blunt the opposition. Ultimately, the issue became linked to larger political agendas, including a promise by Republicans who had just gained control of the House of Representatives to shrink the federal government.<sup>110</sup> ACUS was a "low-profile" agency without a natural constituency, virtually unknown outside circles of administrative law.<sup>111</sup> Despite the fact that its budget was "minuscule" and its mission was to foster government reform,<sup>112</sup> it became a tempting target for a Congress looking to "show the taxpayers that once an agency is created, it does not have eternal life."<sup>113</sup> And so in 1995 the Administrative Conference of the United States lost its congressional funding. A thorough study of the legislative history of its demise concludes that vocal opposition from some ALJs who were outraged at the ACUS proposal to subject them to greater oversight played a significant role.<sup>114</sup>

#### IV. POLICY CHOICES IN CONTEXT

Our case study of attempted reform of disability adjudication shows that efforts to promote uniformity and policy consistency through increased managerial control over agency adjudicators and their decisions have generated significant controversy with limited results. One might therefore conclude that it is a good idea to steer well clear of this approach. This is the route taken by the authors of the Asylum Study. After proposing enhanced resources, better training, and more rigorous hiring standards for immigration judges and the BIA (all important and necessary reforms), the study authors

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109. Lubbers, *supra* note 40, at 604.

110. Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 91-92 (1998).

111. *Id.* at 93.

112. *Id.* at 66.

113. *Id.* at 78.

114. *Id.* at 59-61, 95-97. Professor Fine concludes that the Republican Party's desire to eliminate an agency was the "greatest contributing factor" to the defunding of ACUS demise, but that the process "was set in motion by a small but outspoken group of disaffected administrative law judges" unhappy with ACUS's recommendations. *Id.* at 113-14. Congress has recently shown interest in reviving ACUS. See Regulatory Improvement Act of 2007, H.R. 3564, 110th Cong. (2007) (authorizing appropriations for ACUS through fiscal year 2011).

call for complete separation of EOIR adjudicators from the Department of Justice.

In the meantime, the DOJ and EOIR, through a number of management directives, seem to be moving in the opposite direction. Responding to harsh criticism of the BIA and immigration judges, former Attorney General Gonzales announced in January of 2006 that DOJ would conduct an internal review of EOIR. In August of that year, he released a memorandum outlining initiatives that DOJ and EOIR would undertake to improve the operation of immigration courts and the BIA. First on the list was establishing a system of "performance evaluations to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals."<sup>115</sup> In September of 2007, DOJ published a final rule to make explicit the legal authority to establish a system of performance appraisals for immigration judges and Board members.<sup>116</sup> Implementation is "targeted for the July 2007-June 2008 rating period."<sup>117</sup> This program has been developed internally, without input from stakeholders outside EOIR and without public disclosure of the procedures or criteria for evaluating IJs and Board Members.

With this recent action, we see two policy options on the table. As scholars call for greater independence for EOIR adjudicators, the executive branch moves toward exercising greater managerial control. In my mind, neither option can be fully embraced until we know important details: how an independent agency for immigration adjudication would be structured, for example, or what criteria will be used and what possible sanctions lurk in IJ performance review. We can, however, identify some potential problems that might be overlooked by those who consider EOIR reform in isolation, apart

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115. Press Release, U.S. Dep't. of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html).

116. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,675 (Sept. 20, 2007) (to be codified at 8 C.F.R. pts. 1003, 1240).

117. Memorandum from Kevin D. Rooney, Dir., Executive Office for Immigration Review, U.S. Dep't of Justice, to All Executive Office for Immigration Review Employees (undated) (on file with author) [hereinafter Rooney Memo].

from its administrative law context, and we can consider how these options ought to be implemented if pursued.<sup>118</sup>

Turning first to EOIR's performance evaluation proposal, the agency is moving toward the landmine that exploded on SSA and ACUS. That is not to say that a similar blowback is inevitable. The legal context is different for ALJs and EOIR adjudicators, because ALJ protection from managerial control is enshrined in the APA. The political context is different as well. Efforts to reign in agency adjudicators might be greeted with opposition, support, or indifference, depending on the extent of publicity, the degree of sympathy for beneficiaries of the program, the particulars of how control is exercised, and the political clout of the judges' union. Recent assaults on the decisional independence of immigration adjudicators, however, have created a climate of mistrust within EOIR and among its stakeholders that may fuel opposition to EOIR's performance evaluation system.

The agency's new regulation promises to "provide for performance appraisals for immigration judges and Board members while fully respecting their roles as adjudicators."<sup>119</sup> But this promise to protect decisional independence is accompanied by statements that EOIR adjudicators "do not serve in a purely judicial capacity" and "are subject to the Attorney General's direction and control"<sup>120</sup> - assertions echoed in other regulations that have undermined decisional independence within EOIR over the past few

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118. Professor Legomsky suggests, for example, that immigration judges could be made into ALJs. Legomsky, *supra* note 7, at 471. This proposal cuts against the quite sensible idea that immigration judges should be selected with an eye toward the challenges of their specific docket, and that "it would be desirable for the judges to have some degree of knowledge or experience with immigration law." Asylum Study, *supra* note 1, at 380. Even if one embraces the structural features of ALJ independence as appropriate in this context, the rigid statutory criteria and the procedures for selecting ALJs are fraught with problems that I would not impose on the immigration courts. See *supra* note 38.

119. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. at 53,676-77.

120. *Id.* at 53,673. The preamble to the new regulation authorizing the Director of EOIR to create a system of performance evaluation also quotes the Second Circuit decision upholding SSA efforts to improve the quality and timeliness of ALJ disability decisions. *Id.* at 53,674 (quoting *Nash v. Bowen*, 869 F.2d 675, 681 (2d Cir. 1989)).

years.<sup>121</sup> Against the backdrop of a recent "war on independence" against EOIR adjudicators, which Professor Legomsky has detailed elsewhere,<sup>122</sup> these qualifiers come across as saber rattling and create suspicion that "subject to the Attorney General's ... control" will be the operative principle in any system of performance evaluation.<sup>123</sup>

A lack of transparency may also generate opposition to EOIR's new performance evaluation system. In liaison meetings with the American Immigration Lawyers Association (AILA), the agency has deflected questions about what criteria will be used to evaluate judges and how evaluations will be conducted. EOIR has also rebuffed requests to provide AILA and other stakeholders with an opportunity to review and comment on the program.<sup>124</sup> Although an agency's management directives and procedural rules are exempt from notice and comment procedures, EOIR has waived this exemption in the past.<sup>125</sup> And EOIR could solicit public input on the

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121. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 374, 379 (2006).

122. *Id.* at 371-85.

123. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. at 53,673.

124. Executive Office for Immigration Review, AILA-EOIR Agenda Questions and Answers (2006), available at <http://www.usdoj.gov/eoir/statspub/eoiraila101806.pdf>. Only the slimmest of details have emerged about the performance evaluation initiative. Former EOIR Director Rooney has stated that EOIR adjudicator performance will be rated as "Satisfactory, Improvement Needed, and Unsatisfactory," and that implementation of the program is subject to statutory bargaining obligations with the IJ union. Rooney Memo, *supra* note 117. EOIR's General Counsel has been detailed to a newly created position of Assistant Chief Immigration Judge for Conduct and Professionalism, serving in an "acting" capacity. Executive Office for Immigration Review, AILA-EOIR Liaison Meeting Agenda Questions 2-3 (2007), available at <http://www.usdoj.gov/eoir/statspub/eoiraila041107.pdf>. The BIA now reports to the Office of Chief Immigration Judge instances where IJs have failed to display the appropriate level of professionalism. DOJ's Office of Immigration Litigation makes a similar report to EOIR's Office of General Counsel when a case pending in federal court reflects temperament, conduct, or quality problems on the part of an IJ or BIA member. Rooney Memo, *supra* note 117.

125. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7309-10 (Feb. 19, 2002) (codified at 8 C.F.R. pts. 3, 280) (soliciting public comment on a proposed rule to "revise the structure and procedures of the Board of Immigration Appeals, provide for an enhanced case

design and implementation of performance reviews outside of the rulemaking process. In light of the significant negative publicity that has surrounded EOIR adjudication over the past year, it is a poor tactical choice for the agency to be so close-lipped about its plans (although it is possible that - despite public statements to the contrary - this silence might simply reflect a lack of progress on this initiative due to the current vacuum of leadership at DOJ).<sup>126</sup>

The opportunity for public input is particularly important given that EOIR's new regulation promises an evaluation system that will include a "process for reporting adjudications that reflect temperament problems or poor decisional quality."<sup>127</sup> There is a reservoir of potential support for a system that deals appropriately with misconduct by a minority of immigration judges, conduct that includes (in the words of the Third Circuit Court of Appeals) "bullying ... brow-beating ... hostility ... abusive treatment," "bias-laden remarks," and "crude (and cruel)" behavior.<sup>128</sup> Immigration attorneys have long perceived unfairness in the fact that EOIR routinely sanctions private attorneys for misconduct, but does nothing to address serious misbehavior by its own immigration judges or government attorneys. They might welcome managerial intervention to deal with the few bad actors but - given the accompanying risk to decisional independence - must be assured that the system is operating fairly. Although EOIR cannot discuss

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management procedure, and expand the number of cases referred to a single Board member for disposition").

126. See Pamela A. MacLean, *No Sign of Immigration Judge Code of Conduct*, NAT'L L.J., Feb. 26, 2007, at 6; Philip Shenon, *Interim Heads Increasingly Run Federal Agencies*, N.Y. Times, Oct. 15, 2007, at A1 (reporting that the top three posts at the Department of Justice are filled by interim officials in an "acting" capacity).

127. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg., 53,673, 53,677 (Sept. 20, 2007) (to be codified at 8 C.F.R. pts. 1003, 1240).

128. *Cham v. Attorney Gen.*, 445 F.3d 683, 686 (3d Cir. 2006). For additional examples of the "prolific and scathing" criticism of immigration judges coming from the courts of appeals, see Legomsky, *supra* note 7, at 420 n.44. These concerns about the temperament of immigration judges and the quality of their decisions were widely reported in the press. See, e.g., Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, Dec. 26, 2005, at A1; Pamela A. MacLean, *Immigration Bench Plagued by Flaws; Due Process Abuse, Bad Records Alleged*, NAT'L L.J., Feb. 6, 2006, at 1.



disciplinary action taken against an individual judge, it should be more forthcoming about the substantive criteria and the procedures it will use in the new system of performance evaluation.

In sum, I do not believe, as Professor Legomsky seems to suggest in his response to the Asylum Study, that any system of performance evaluation is an "especially bad idea."<sup>129</sup> It is true, however, that "in the wrong hands, with the wrong attitude, and without constant vigilance," increased managerial control of EOIR adjudicators "could cause a serious setback to the system of administrative justice."<sup>130</sup> The ACUS study identified several criteria for a system of performance evaluation that appropriately protects decisional independence. They include peer review and oversight of the program from the Office of Personnel Management.<sup>131</sup> EOIR would do well to implement these recommendations and - by opening up its proposal for public input - to allow others to assess whether the program is in fact being designed to "fully respect[]"<sup>132</sup> the role of the adjudicator.

Administrative law also provides a perspective to evaluate the more conceptual reform proposals of the Asylum Study. Our primer on the structure of agency adjudication discloses a fundamental disconnect between the problem of decisional disparities documented in the Asylum Study and the solution proposed by the study authors. Creating an independent agency to insulate immigration judges, members of the BIA, and their decisions from oversight would

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129. Legomsky, *supra* note 7, at 468-72. Professor Legomsky articulates his criticism as directed toward "performance reviews that take approval rates into account and serve as a criterion for retention or promotion." *Id.* at 469. He later includes efforts to increase adjudicator productivity within the scope of his analysis and suggests that any system of evaluation that comes with consequences significant enough to alter adjudicator behavior will threaten decisional independence. *Id.* He does not discuss in this section whether "punishing wayward adjudicators," which receives his strong disapproval, includes actions against intemperate and abusive IJs, or how such misconduct can be identified and redressed in the absence of performance reviews.

130. *Nash v. Califano*, 613 F.2d 10, 15-16 (2d Cir. 1980) (quoting memorandum from Robert Trachtenberg, the SSA official who promoted the controversial targeting of ALJs for quality assurance review, to the Regional Chief ALJs, setting forth a Regional Office Peer Review Program).

131. Lubbers, *supra* note 40, at 605.

132. Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. at 53,676-77.

jettison the tools traditionally available to achieve policy control and greater uniformity of decisions. Simply put, there is no reason to think that asylum decisions will become more consistent if EOIR adjudicators become more independent, and some reason to suspect the opposite would be true.

The authors of the Asylum Study nevertheless recommend emancipating EOIR from DOJ control to promote other important values, notably "imbu[ing] [agency adjudicators] with a culture of professionalism and with the independence necessary to perform [their] duties impartially."<sup>133</sup> A culture of professionalism springs from a number of sources, however, and it is perhaps more closely related to the training, expertise, and sense of mission shared by adjudicators than it is to their place in the administrative bureaucracy. The successful creation of the asylum officer corps within the former Immigration and Naturalization Service aptly illustrates this point.<sup>134</sup> EOIR adjudicators may gain a measure of prestige if they are moved to an independent agency. But structural reform by itself will not necessarily improve the judicial demeanor of the intemperate, or make the slipshod judge more careful. It will do nothing to change the fact that there are "too many people who should not be in a position of judging others, especially those with no power" serving as immigration judges.<sup>135</sup>

This problem of intemperate and abusive IJs should not be overlooked as we evaluate reform proposals. The concern could perhaps be addressed with a somewhat counterintuitive idea: the Attorney General's directive to establish more managerial control over EOIR adjudicators by instituting performance reviews could be combined with the Asylum Study's proposal to liberate them from policy control. Stated differently, EOIR adjudicators could be separated from DOJ, as the Asylum Study authors recommend, and at the same time could be subject to greater supervisory oversight from the head of a newly-independent agency.<sup>136</sup> The Department of

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133. Asylum Study, *supra* note 1, at 386.

134. See *supra* note 31 and accompanying text.

135. This statement was made with reference to ALJs in Koch, *supra* note 38, at 275.

136. Although the Asylum Study authors do not address the issue of performance evaluations and strongly favor reforms that move in the direction of decisional independence, they make passing reference this idea. Asylum Study,

Justice has so thoroughly undermined the integrity of EOIR adjudication in recent years that a "divorce" between the two agencies is perhaps the only route to a healthy bureaucratic culture of professional adjudication. It is this concern, rather than the problem of decisional disparities so thoroughly documented in the Asylum Study, that seems to animate the authors' policy proposals. Moreover, it is only within such culture, in the absence of mistrust and lingering tension between agency managers and adjudicators, that management initiatives to promote consistency and evaluate judicial temperament and performance can be implemented successfully.

In a perfect world, we might work our way through these vexing choices in a careful study of the sort that, ironically, used to be funded by ACUS. (An excellent example is an ACUS-funded study conducted by David Martin in the late 1980s, which successfully launched the asylum officer corps.)<sup>137</sup> It seems more likely that Congress or the executive branch will instead lob in a quick "fix" of the asylum system with potentially disastrous consequences.<sup>138</sup>

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*supra* note 1, at 333 n.65 (suggesting that data about discrepant grant rates "may be a jumping off point for a more thorough examination of performance and professionalism in the courtroom").

137. See Martin, *supra* note 67. Professor Martin later served as a consultant to the INS; his work as a consultant forged the compromise that created our current asylum procedures. See Martin, *supra* note 31. ACUS also funded earlier studies in the immigration law arena. See Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227 (1988); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of Immigration Process*, 71 IOWA L. REV. 1297 (1986).

138. Attorney General Ashcroft's "streamlining" of BIA adjudication provides one example. These procedures had a number of negative spillover effects, including a dramatic rise in the caseload of the courts of appeals. See Legomsky, *supra* note 121, at 375-77; John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 56 (2005). A recent near miss was a proposal from the ombudsman of the U.S. Citizenship and Immigration Services to eliminate asylum officer jurisdiction over any individual who is not in valid immigration status. This proposal, which would have gutted the current system of affirmative asylum adjudication, paid absolutely no heed to the years of study that went into crafting the current procedures. Memorandum from Prakash Khatri, Ombudsman, Citizenship and Immigration Servs., to Emilio Gonzalez, Dir., U.S. Citizenship and Immigration Servs. (March 20, 2006), available at

Effective reform is not possible, however, unless we understand the broader administrative law context and talk frankly about the tradeoffs inherent in structuring agency adjudication.

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[http://www.dhs.gov/xlibrary/assets/CISombudsman\\_RR\\_24\\_Asyllum\\_Status\\_03-20-06.pdf](http://www.dhs.gov/xlibrary/assets/CISombudsman_RR_24_Asyllum_Status_03-20-06.pdf). It was promptly rejected by the USCIS Director, who noted that the recommendation was based on a novel legal interpretation and would, if implemented, "eliminate a valuable, time-tested process for the vast majority of asylum applicants." Memorandum from Emilio Gonzalez, Dir., U.S. Citizenship and Immigration Servs., to Prakash Khatri, Ombudsman, Citizenship and Immigration Servs. (June 20, 2006), available at [http://www.dhs.gov/xlibrary/assets/CISombudsman\\_RR\\_24\\_Asyllum\\_Status\\_USCIS\\_Response-06-20-06.pdf](http://www.dhs.gov/xlibrary/assets/CISombudsman_RR_24_Asyllum_Status_USCIS_Response-06-20-06.pdf).