

Random Refuge

The U.S. asylum system, pervaded by chance, demands reform.

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Arbitrary government action is antithetical to the rule of law. It is most abhorrent when it can result in imprisonment, torture, or death, as can occur when a refugee's petition for asylum is denied.

In many ways, the United States has quite a good system for adjudicating applications for asylum from political or religious persecution. The overall approval rates are significant, reflecting the fact that refugees often seek freedom in America after being jailed or beaten for their beliefs or to avoid becoming the victims of regimes that commit human rights abuses.

Unfortunately, pure chance plays too large a role in whether any particular asylum applicant is awarded refuge or is deported to a country where he fears serious harm, such as torture. There are huge disparities in the rates of decisions favorable to asylum seekers at all levels of the process: decisions by asylum officers, by immigration judges, and by federal appellate judges. The most critical moment in a case may therefore be its random assignment to a particular adjudicator.

BIG DIFFERENCES

A person who has fled to our shores may win asylum by proving a well-founded fear of being persecuted in her home country on account of race, religion, nationality, political opinion, or membership in a particular social group. The first step for most applicants is an interview by one of several hundred asylum officers in one of the eight regional offices of the Department of Homeland Security.

For "Refugee Roulette," our study of disparities in asylum adjudication that will appear in the *Stanford Law Review* in November, we looked at how the officers in each DHS region

resolved similar cases from 1999 through 2005. (Search online for "refugee roulette" to see a draft of our study.)

We limited our study to applicants from 11 countries that have large numbers of successful asylum applicants. We used a very forgiving standard for measuring deviation, treating an officer as an outlier only if that officer's grant rate deviated from the local office average by more than 50 percent.

We found that in three regions, fewer than 10 percent of the officers had grant rates that diverged from the regional norm by more than 50 percent, but that in three other regions, more than 20 percent of the officers' rates diverged by more than 50 percent. In one region, *most* officers diverged to that substantial degree from the regional mean.

To address the concern that these differences might result from different populations of asylum seekers in different regions, we focused our analysis on applicants from a single country, China—yet the disparity persisted. In one region, for example, two of the officers granted asylum to none of the Chinese applicants they interviewed, while two others granted asylum to more than two-thirds of the Chinese applicants who came before them.

Imagine that you were a Chinese asylum applicant who had fled to avoid retribution for having given birth to a second child. You walk into an asylum office for your interview. The clerk tells your lawyer that your file has just been assigned, randomly, to Officer Jones.

Your lawyer's face falls, and she tells you, "I'm so sorry. Jones has never granted asylum to a Chinese applicant. If only you'd gotten Smith, in the office next to Jones, who grants asylum to two-thirds of the Chinese applicants! Then we could be pretty confident that you wouldn't be sent back to be persecuted in China." What would you think of the American system of justice?

IMMIGRATION COURTS

In most cases, when Homeland Security rules against an applicant, it issues a summons initiating a deportation hearing

in a Department of Justice immigration court. A DHS lawyer represents the government in this adversarial hearing. The applicant gets one last chance to prove that she meets the statutory standard for asylum. If she does not, she may be deported from the United States to the country she fled. Asylum seekers, many of whom are unable to afford or find a pro bono legal representative, are not entitled to a court-appointed lawyer.

We found that at least in the four largest immigration courts (in New York, San Francisco, Los Angeles, and Miami), the judges had widely disparate rates of granting asylum in similar cases during a 4½-year period. (This part of our study was reported in *The New York Times* on May 31.)

Looking only at cases from a group of the 15 countries that produced the largest number of successful asylum applicants, we found that nine of 31 judges in New York deviated by more than 50 percent from that court's average grant rate for such cases. Though clerks assign cases randomly, six judges had rates below 25 percent, while three judges had rates of 80 percent or more.

These discrepancies again held even for asylum claims from one country. For example, of 22 Los Angeles immigration judges deciding large numbers of Chinese cases, half deviated from the average by more than 50 percent—five granted asylum at a rate below 28 percent, while five others granted asylum at a rate above 54 percent.

We also discovered interesting correlations between the characteristics of the judges and their grant rates. For example, female judges granted asylum in 54 percent of their asylum cases, while male judges granted in only 37 percent. Judges who worked for Homeland Security before being appointed to the bench had lower grant rates than those who did not. The longer that such judges had worked for the department, the lower their grant rates.

BEFORE THE BIA

After a loss in immigration court, an applicant may appeal to the Board of Immigration Appeals, where a single member decides most cases. The board does not keep statistics on decisions by individual members. We did learn, however, that although the board decided 37 percent of its asylum cases favorably to applicants (through reversals or remands) in fiscal year 2001, that rate fell to 13 percent in fiscal year 2002 and has since declined to 11 percent.

This dramatic drop appears to be connected with then-Attorney General John Ashcroft's decisions, early in 2002, to remove from the board five members who had been appointed during the Clinton administration, to require board members to decide asylum cases individually rather than in panels, and to direct the board to stop writing opinions, or to write only short opinions, when it affirmed most deportation orders.

When the board's rate of decisions favorable to asylum seekers dropped precipitously, many more losing applicants began to appeal to the U.S. Courts of Appeals, essentially the last stop. Our study found that at this level, the most important determinant is where the applicant lives. Although on average, the federal courts decide 15 percent of their cases in favor of the asylum seeker, the percentage is 36

percent in the 7th Circuit but less than 5 percent in all three Southern circuits. In addition, in some circuits the party of the president who appointed the judges is dramatically correlated with outcomes. In the 6th Circuit, for example, Democratic appointees voted to remand asylum denials at a rate 57 percent higher than Republican appointees.

REFORMS NEEDED

To reduce disparities, asylum officers, immigration judges, and federal judges with particularly high and low rates of decisions favorable to asylum applicants should confer with each other and decide some cases together to try to reduce the degree to which chance assignments determine case outcomes.

More substantial changes are also necessary. The single most important factor affecting outcomes in immigration court was whether applicants were represented. Our study confirmed earlier analyses showing that represented applicants win at three times the rate of unrepresented applicants. Because the consequences of erroneous deportation are so serious, Congress should provide legal services without charge to indigent asylum applicants in immigration court.

In addition, the entire process should be professionalized and depoliticized. Despite disparities in some regions that Homeland Security is now working to correct, the corps of asylum officers is a model of professionalism. But the Justice Department's processes are subject to political manipulation. At present, Justice has only the most minimal standards for hiring immigration judges. In addition, the attorney general has removed BIA members based on political considerations. He also can and sometimes does overrule the board's decisions personally.

Rigorous hiring standards, significant training programs, and resources such as law clerks will help professionalize the immigration courts. To improve review, the Board of Immigration Appeals should return to its pre-2002 practice of deciding asylum cases in three-member panels and should no longer allow single judges to decide the cases of individuals who may face persecution.

Our most important recommendation is that the immigration courts and the board should be removed from the Department of Justice and placed in an independent agency. Board members and a director of the Office of Immigration Judges, who would select judges, should serve for fixed terms without fear of arbitrary removal.

Protecting those fleeing persecution because of their beliefs is the most American of traditions. The asylum process must be professionalized to ensure that we remain a beacon of hope to the victims of human rights abuses.

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