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Rethinking Review Standards in Asylum

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RETHINKING REVIEW STANDARDS IN ASYLUM

ANDREW TAE-HYUN KIM*

ABSTRACT

Factual findings drive asylum adjudication. If immigration judges get them wrong, they risk sending refugees back to persecution. Recent studies have exposed an immigration agency that is prone to inaccurate and ill-considered fact-finding due to its structural problems. Without the political will or the financial capital necessary to fix what many acknowledge as a compromised system of adjudication, the agency may continue to render decisions that cast doubt on its capability and expertise. With an agency either unable or unwilling to ensure an accurate and fair fact-finding process, the first meaningful review of an asylum applicant's claim happens at the federal courts of appeals, where judges continue to affirm the agency's decisions under a most deferential understanding of the substantial evidence standard of review. This Article exposes that anomaly and articulates an understanding of the substantial evidence standard that allows reviewing judges more latitude to consider the capabilities and credibility of the agency when they assess agency findings of fact. It argues that, in light of the agency's severe under-resourcing problems, judges should review the agency's factual findings less deferentially and exercise their discretion to remand decisions back to the agency if they lack confidence in the accuracy and fairness of the fact-finding process. The price to pay for not doing so is the risk of sending an individual to persecution.

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“[E]ach time we wrongly deny a meritorious asylum application, concluding that an immigrant’s story is fabricated when, in fact, it is real, we risk condemning an individual to persecution.... [W]e must always remember the toll that is paid if and when we err.” Judge Calabresi¹

INTRODUCTION

Judicial review over agency action has received both extensive judicial analysis and scholarly attention.² The scope of that review over agency factual determinations remains, however, comparatively neglected. In asylum³ adjudication, an agency’s factual determinations can wholly drive the outcome of the case. Asylum decisions are not only fact intensive, but the question of whether a noncitizen meets the statutory definition of a refugee—in reality, a mixed question of law and fact—is treated in the asylum context only as a question of fact.⁴ This distinction is critical because the scope of appellate review over factual determinations occurs under the more deferential substantial evidence standard,⁵ whereas courts

1. *Ming Shi Xue v. BIA*, 439 F.3d 111, 114 (2d Cir. 2006).

2. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) [hereinafter *Judges*]; Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) [hereinafter *Arbitrariness Review*]; Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77 (2011); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010).

3. The United States offers asylum to foreign nationals who can show that they meet the definition of a refugee—someone who has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A) (2006).

4. *Kaczmarczyk v. INS*, 933 F.2d 588, 593 (7th Cir. 1991).

5. 8 U.S.C. § 1252(b)(4)(B) (“[F]indings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (“Substantial evidence is more than a scintilla and

can review mixed questions of law and fact less deferentially.⁶ The scope of review over immigration agency factual determinations has become even more deferential with the passage of the REAL ID Act,⁷ which further curbed the already limited scope of judicial review of an immigration judge's credibility determination. Credibility determinations, in connection with the related factual findings, play a decisive role in many asylum cases.⁸

This trend towards more circumscribed appellate review has occurred despite recent studies that have cast doubt on the agency's competence and expertise, including the shortage of resources and time for immigration judges to adequately consider each case,⁹ significant grant rate disparities among immigration courts,¹⁰ political biases of some immigration judges and Board of Immigration members,¹¹ and the lack of meaningful review of immigration judges at the agency level.¹² This has prompted scathing critiques from many federal circuit court judges, including one declaration from Judge Richard Posner that the immigration adjudication at the agency level has fallen below the minimum standard of justice.¹³

In this Article, I argue for an interpretation of the substantial evidence standard of review that gives reviewing appellate judges the latitude to more strictly scrutinize an agency's factual determi-

must do more than create a suspicion of the existence of the fact to be established.”).

6. See *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 591 (2d Cir. 1961) (concluding that an agency's conclusions on mixed questions of law and fact arguably get less deference than an agency's conclusions on pure questions of fact).

7. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 and 49 U.S.C.).

8. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006) (describing credibility assessments as the “most crucial aspect of any asylum case”); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003) (depicting credibility as “the single biggest substantive hurdle” for an asylum applicant); Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 187 (2008).

9. Sydenham B. Alexander, III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 19-21 (2006).

10. See generally JAYARAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009).

11. Alexander, *supra* note 9, at 30-36.

12. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1657-65 (2010).

13. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

nations and to remand for further factual development if the procedures employed at the agency level do not give that judge confidence in the accuracy of the fact-finding process. In Part I, I analyze an important debate in the U.S. Court of Appeals for the Second Circuit over the meaning of the substantial evidence standard in asylum cases. I show that the Second Circuit sometimes applies a stricter standard in asylum cases that gives less deference to an agency fact-finder than to a district court judge under the clear error standard of review, which is seemingly contrary to a general understanding of substantial evidence review. In Part II, I articulate why this stricter standard makes sense as a matter of policy given the immigration agency's structural incapacities, including its serious under-resourcing problem, threats to decisional independence, and barriers to agency-level review of immigration judge decisions. In Part III, I claim that the traditional reasons for deferring to agency fact-finding—comparative advantage, agency expertise, political accountability, and finality—do not apply with as much force in this context.¹⁴ In Part IV, I provide the legal basis for stricter review of immigration agency fact-finding under the substantial evidence standard.

I. SCOPE OF ASYLUM REVIEW UNDER THE SUBSTANTIAL EVIDENCE STANDARD: THE CURRENT DEBATE IN THE SECOND CIRCUIT

A. *Asylum Procedure*

One method for claiming asylum is to file an application with the immigration court after the Department of Homeland Security (DHS) has initiated removal proceedings.¹⁵ If the DHS has not instituted removal proceedings, however, the noncitizen can file an affirmative application with the U.S. Citizenship and Immigration

14. In this Article, I focus on review of fact-finding in asylum cases, in part, because the argument for stricter review there is the most compelling, as an erroneous decision can mean sending the person back to persecution. But the rationales for less deferential review may also apply to fact-finding in immigration cases generally. See Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 106-07 (2012) (arguing for less deference in immigration fact-finding generally and advocating for a balancing test akin to procedural due process instead of categories of deference).

15. 8 C.F.R. § 208.4(b)(3) (2012).

Service (USCIS),¹⁶ where asylum officers with specialized training to adjudicate claims conduct interviews and either grant the application or refer the matter to an immigration judge for removal proceedings.¹⁷ In the latter case, the applicant can renew the application de novo before the immigration judge.¹⁸ Asylum officers refer approximately 65 percent of affirmative applications to the immigration courts;¹⁹ thus, immigration courts adjudicate most claims for asylum. Both the noncitizen and the government can appeal the immigration judge's decision to the Board of Immigration Appeals (BIA), the agency's appellate body.²⁰ After exhausting all administrative remedies,²¹ an asylum applicant can file a petition for review of the agency's removal order to the United States Court of Appeals.²²

B. Source of the Substantial Evidence Standard

When presented with an asylum appeal, the court of appeals examines agency fact-finding under the substantial evidence standard of review. That review standard appears in a number of enabling acts and as one of the standards enumerated in the Administrative Procedure Act (APA).²³ Both section 706 of the APA and the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*²⁴ specify that the standard applies only to formal agency action.²⁵ The standard even predates the APA, going as far back as the Supreme Court's articulation of the substantial evidence standard in the pre-World War II case *Consolidated Edison Co. v. NLRB*.²⁶

16. *Id.* § 208.4(b)(1).

17. *Id.* § 208.14(b), (c).

18. *Id.* § 208.4(a). The immigration judge may rely on the asylum officer's findings of fact, *id.* § 1240.7(a), but the immigration judge ultimately exercises de novo review of the asylum application, *id.* § 1003.42(d).

19. RAMJI-NOGALES ET AL., *supra* note 10, at 33.

20. 8 C.F.R. § 1003.1(b).

21. 8 U.S.C. § 1252(d)(1) (2006).

22. *Id.* § 1252(b)(2).

23. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (2006).

24. 401 U.S. 402 (1971).

25. *See* 5 U.S.C. §§ 556, 557.

26. 305 U.S. 197 (1938).

There, the Court defined substantial evidence as “more than a mere scintilla.... [and] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁷ A few decades later, the Court decided *Universal Camera Corp. v. NLRB*, where it clarified the meaning of the substantial evidence standard in the APA and the Taft-Hartley Act.²⁸ Going against the findings of the NLRB, the Second Circuit directed the Board to reinstate with back pay an employee found to have been discharged for giving testimony under the Wagner Act and ordered the Board not to discriminate against an employee who files charges or gives testimony under the Act.²⁹ In striking down the Second Circuit’s decision, the Court harmonized the meaning of the standard in the APA and the Taft-Hartley Act with the earlier usage of the term in *Consolidated Edison*.³⁰ The Court in *Universal Camera Corp.* instructed reviewing courts to consider the record as a whole before concluding that some evidence, or more than a “scintilla,” supported the agency’s decision.³¹ Despite this requirement to review and consider the whole record, the substantial evidence standard remains deferential and has been characterized as being even more deferential than the standard circuit courts use in reviewing district courts’ findings of fact.³²

C. The Varied Application of the Substantial Evidence Standard in Asylum Cases

Though removal proceedings constitute formal agency action, the procedures specified in the APA do not apply to them under the Immigration and Nationality Act (INA).³³ Congress has determined that the procedures designated under the INA shall be the “sole and

27. *Id.* at 229.

28. 340 U.S. 474, 476, 496-97 (1951).

29. *Id.* at 476.

30. *See id.* at 477.

31. *Id.*

32. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999); Verkuil, *supra* note 2, at 687-88 (listing the following standards of review in “telescopic order” from “narrow to wide scope or breadth” of review: (1) arbitrary and capricious, (2) substantial evidence, (3) clearly erroneous, and (4) de novo).

33. *Kaczmarczyk v. INS*, 933 F.2d 588, 595 (7th Cir. 1991).

exclusive” procedures³⁴ governing removal proceedings.³⁵ The Supreme Court imported the substantial evidence standard into the immigration context in *INS v. Elias-Zacarias*,³⁶ and the standard governs appellate review of factual determinations made by immigration judges and Board members.

But the application of that standard has not been even. In addition to the Second Circuit’s “stricter” formulation, courts have characterized the substantial evidence standard in asylum cases as follows: “[F]indings of fact are conclusive unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary;”³⁷ the “standard ‘requires a certain

34. 8 U.S.C. § 1252(a)(5) (2006); *see also* *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (“[W]e cannot ignore ... the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.”). *But see* *McLeod v. INS*, 802 F.2d 89, 94 (3d Cir. 1986) (applying § 556(e) of the APA to asylum proceedings).

35. Additional evidence suggests that the procedures defined in the INA have become unhinged from the APA. Previously, the INA provision governing the standard review of asylum claims specified that asylum claims shall be reviewed under the substantial evidence standard, which tracked the language of the APA. Congress has amended the statute to remove reference to the substantial evidence standard and to replace it with the “compelling reversal” language from *Elias-Zacarias*. *See* 8 U.S.C. § 1252(b)(4)(B); *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992).

36. 502 U.S. at 481 (holding that BIA determinations of asylum and withholding of removal are conclusive “if supported by reasonable, substantial, and probative evidence on the record as a whole”). In that same case, however, Justice Scalia stated in dicta that “[t]o reverse the BIA finding [of fact] we must find that the evidence not only *supports* that conclusion, but *compels* it.” *Id.* at 481 n.1. The plain language of this statement could restrict the substantial evidence standard. Congress codified Justice Scalia’s language. *See* 8 U.S.C. § 1252(b)(4)(B) (“[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”). However, it is unclear whether the application of the standard has actually changed. Some circuits have been using Justice Scalia’s language, while others have not. *See* Stephen M. Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133, 147-50 (2005). Still some cite both Justice Scalia’s “compel” standard while also referencing the “more than mere scintilla” language of *Universal Camera Corp.* *See, e.g.,* *Abdille v. Ashcroft*, 242 F.3d 477, 483-84 (3d Cir. 2001) (“Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Under the substantial evidence standard, the BIA’s finding must be upheld unless the evidence not only supports a contrary conclusion, but compels it.” (internal citations and quotations omitted)).

37. *Rivera Barrientos v. Holder*, 685 F.3d 1222, 1226 (10th Cir. 2011) (quoting *Hang Kannha Yuk v. Ashcroft*, 355 F.3d 1222, 1223 (10th Cir. 2004)).

minimum level of analysis from the immigration judge (IJ) and BIA,' as well as 'some indication that the IJ considered material evidence supporting a petitioner's claim;'"³⁸ "we must affirm the [IJ's] decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole;"³⁹ "the substantial evidence standard is demanding;"⁴⁰ "[t]he substantial evidence standard ... is more deferential than the 'clearly erroneous' standard used in reviewing findings of fact by a district judge;"⁴¹ and "[w]hile this is a highly deferential standard, the [c]ourt will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently flawed."⁴²

D. Jin Shui Qiu v. Ashcroft: Stricter Review in Immigration?

The meaning of the substantial evidence standard has been expressly debated in recent years in the U.S. Court of Appeals for the Second Circuit.⁴³ In *Jin Shui Qiu v. Ashcroft*, the panel opinion authored by Judge Calabresi provocatively stated that "[s]ubstantial evidence review in the immigration context is 'slightly stricter' than the clear-error standard that the circuit courts typically apply in reviewing a district court's factual findings."⁴⁴ Under this formulation of the review standard, the court overturned the immigration agency's factual determinations.⁴⁵ The case involved a Chinese man named Qiu who sought asylum and withholding of removal on the ground that he and his family faced persecution by Chinese authorities who forced his wife to undergo sterilization under China's population control policies.⁴⁶ The immigration judge

38. *Delgado v. Mukasey*, 508 F.3d 702, 705 (2d Cir. 2007) (quoting *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005)).

39. *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1254-55 (11th Cir. 2006).

40. *Wang v. Gonzales*, No. 05-3594, 2006 WL 225279, at *3 (6th Cir. Aug. 4, 2006).

41. *Ji Ying Chen v. Mukasey*, 510 F.3d 797, 801 (8th Cir. 2007).

42. *Jin Yi Liao v. Holder*, 558 F.3d 152, 156 (2d Cir. 2009).

43. Susan Green, *Substantial Evidence Versus Clear Error Review: Which Is More Deferential, and Why? The Debate in the Second Circuit*, IMMIGR. LITIG. BULL., Dec. 2008, at 3, 3 (concluding that substantial evidence review requires a more deferential review than clear error review).

44. 329 F.3d 140, 149 (2d Cir. 2003), *overruled on other grounds by Shi Wang Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007).

45. *Id.* at 156.

46. *Id.* at 143-44.

concluded that Qiu's story was incredible, unacceptably vague, and lacked corroboration.⁴⁷ The BIA affirmed the IJ's decision.⁴⁸ While it disagreed with the IJ's adverse credibility finding, the BIA nonetheless held that substantial evidence supported the IJ's conclusion.⁴⁹ It affirmed the IJ's conclusion that the applicant's testimony lacked the requisite specificity and that his corroborating evidence was not enough to remedy his "general" and "vague" testimony.⁵⁰

The Second Circuit disagreed. In overturning the BIA and IJ's decisions, the court concluded that the BIA erroneously relied on factual determinations that were not supported by substantial evidence.⁵¹ It identified two fact-finding errors upon which the BIA based its decision. The first was the IJ's conclusion that the fine receipt Qiu presented was not credible because its denomination was in dollars, not in yuan.⁵² According to the court, the agency ignored Qiu's testimony that he was fined 1000 yuan and that a "patently obvious explanation" for the dollar notation on the receipt was due to translator oversight.⁵³ The second fact-finding error was the IJ's conclusion that the Chinese government did not believe that Qiu had two children at the time that he and his wife fled.⁵⁴ From this, the IJ inferred that the threat of forced abortion and sterilization was not genuine.⁵⁵ The IJ determined that Qiu's family registry did not include one of his sons, despite Qiu's testimony that he had listed his son on his brother's registry.⁵⁶ Therefore, Qiu did not have reason to fear the Chinese government, for the government would have been aware of only one other child prior to the pregnancy and birth of the third child.⁵⁷ The IJ reasoned that the government was only aware of two children, both of whom had been registered with the

47. *Id.* at 145-46.

48. *Id.* at 146.

49. *Id.* at 147.

50. *Id.*

51. *Id.* at 154-55.

52. *Id.* at 155.

53. *Id.*

54. *Id.*

55. *Id.* at 146 (stating that according to the U.S. State Department, the Chinese government allows up to two children before it imposes penalties in rural areas).

56. *Id.* at 155.

57. *Id.*

Chinese government, and that Qiu faced no problem from the government.⁵⁸ The court held that the agency's conclusion that Qiu's son was not registered was speculative and unsupported by substantial evidence.⁵⁹ It concluded that speculating from Qiu's statement that he listed his eldest child on his brother's registry to conclude that government officials did not know of Qiu's two children "dangles from a chain of flimsy speculations."⁶⁰

Though the court's application of the substantial evidence standard to these facts may not be particularly controversial,⁶¹ its characterization of the substantial evidence standard is. The panel's formulation of the standard provides an appellate court a larger lens through which it can do a more searching inquiry of an agency's factual finding, which seems incongruous with the Supreme Court's conclusion in *Dickinson v. Zurko* that the substantial evidence standard is more deferential to the fact-finder than the clear error standard applied to district-court-level factual finding by judges or juries.⁶²

Despite *Zurko*, as well as the generally accepted view of administrative law scholars that reviewing judges should be more deferential to an administrative trier of fact than to a trial judge,⁶³ several Second Circuit decisions after *Qiu* have not only repeated the dicta that the substantial evidence standard is "'slightly' stricter than the clear-error standard that the circuit courts typically apply in reviewing a district court's factual findings," but have followed *Qiu* in reversing the IJ's factual determinations.⁶⁴

E. Cases Citing Qiu: A Review

Since *Qiu*, eight Second Circuit cases have repeated Judge Calabresi's strict formulation of the substantial evidence standard.⁶⁵

58. *Id.*

59. *Id.*

60. *Id.*

61. *But see* *Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007) (clarifying that speculations and conjectures are permissible as long as there is at least one probative fact to support the conclusion reached).

62. 527 U.S. 150, 153, 165 (1999); *see also* *Verkuil*, *supra* note 2, at 687-88.

63. *See* *Verkuil*, *supra* note 2, at 688.

64. *See* *Qiu*, 329 F.3d at 149.

65. The slightly stricter language is not limited to cases in the Second Circuit. The

In six of the eight cases,⁶⁶ the court reversed the IJ's factual findings. This reversal rate of 75% is remarkably high.⁶⁷ According to other scholars' empirical studies of review standards, the expected reversal rates for cases reviewed under the substantial evidence standard is anywhere from 15%⁶⁸ to 33%.⁶⁹ Though these rates are from broader studies not limited to immigration cases, one available study found similar results when analyzing immigration cases at the courts of appeal in 2006. Of the nearly 5,400 immigration appeals decided that year, the courts reversed and remanded 17.5% of the time.⁷⁰ The reversal rates varied among circuits, with a low of 5% in the Fourth Circuit to a high of 25% in the Seventh Circuit.⁷¹ The Second Circuit reversed about 22% of immigration cases.⁷² The study does not distinguish among the different types of immigration cases. For the subset of cases decided under the substantial evidence standard, one would hypothesize that the reversal rates would be even lower than the 17.5% because the sample contains the non-deferential de novo review of questions of

language originated in the Ninth Circuit in the 1980s, *see Diaz-Escobar v. INS*, 782 F.2d 1488 (9th Cir. 1986), and has been cited in its opinions into the 1990s, no less than ten times. *See Lall v. INS*, No. 96-70363, 1997 U.S. App. LEXIS 17193, at *2 (9th Cir. July 7, 1997); *Padilla-Rocha v. INS*, 97 F.3d 1460, at *1 (9th Cir. 1996) (unpublished table decision); *Aruta v. INS*, 80 F.3d 1389, 1393 (9th Cir. 1996); *Delfin v. INS*, 83 F.3d 426, at *3 (9th Cir. 1996) (unpublished table decision); *Castillo-Ponce v. INS*, 69 F.3d 543, at *2 (9th Cir. 1995) (unpublished table decision); *Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995); *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1179 (9th Cir. 1991), *rev'd on other grounds*, 937 F.2d 411 (9th Cir. 1991); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1001 (9th Cir. 1988). But unlike the Second Circuit, the Ninth Circuit denied the petition in all but two cases. After stating a less deferential review standard, one would expect a more favorable outcome for the petitioners. That has not been the case in the Ninth Circuit, however, where the standard originated, suggesting that Ninth Circuit judges are not applying a stricter—i.e. less deferential—standard. The Sixth Circuit has also applied the slightly stricter language. *See Wang v. Gonzales*, No. 05-3594, 2006 WL 2252579, at *3 (6th Cir. Aug. 4, 2006). Like the majority of Ninth Circuit cases, the Sixth Circuit, applying the standard, denied the petition.

66. The two cases the court did not reverse are *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 181 (2d Cir. 2006) and *Islami v. Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005).

67. Though the sample size may be too small to permit broad inferences, the high reversal rate is nonetheless significant.

68. Verkuil, *supra* note 2, at 689.

69. Zaring, *supra* note 2, at 137.

70. John Guendelsberger, *Circuit Court Decisions Year 2006*, IMMIG. L. ADVISOR, Jan. 2007, at 5, available at <http://eoirweb/library/lib-index.htm>.

71. *Id.*

72. *See id.*

law. This makes the 75% reversal rate of the agency for the eight cases citing the stricter formulation of the standard all the more remarkable. While it is unclear whether the application of the more deferential understanding of the substantial evidence standard would have made a difference in the outcome of these cases, such a high reversal rate at least suggests that the application of the stricter standard may matter.⁷³

The six cases that reversed the immigration judges' factual findings under the stricter standard are varied in terms of subject matter of claims, country of origin, panel composition, and the like. Two out of the six cases involve claims of persecution on account of political opinion.

In *Secaida-Rosales v. INS*, the Second Circuit revived the slightly stricter language for the first time since *Qiu*.⁷⁴ The petitioner there sought asylum and withholding of removal based on alleged persecution from government officials and extra-governmental forces that threatened him and his family on account of their membership in an organization that sought to protect citizens' property from improper government seizure.⁷⁵ The Second Circuit concluded that the IJ relied on a number of erroneous legal standards as well as inappropriate speculation and conjecture in assessing the evidence, which formed the basis for her adverse credibility finding. The court held that the adverse credibility

73. A more thorough empirical analysis of these decisions, accounting for panel composition; political affiliations of judges; and other factors that may have caused such high reversal rates, would have to be performed to assess whether the standard of review is outcome determinative. *See, e.g.,* Verkuil, *supra* note 2, at 689. But this remarkable result implies that standards of review may be outcome determinative. *But see* Zaring, *supra* note 2, at 169-70, 190-97 (showing empirically that different standards of review may not matter and advocating for one reasonability standard).

74. 331 F.3d 297, 307 (2d Cir. 2003).

75. *Id.* at 302-05. The IJ dismissed his petition largely because she found Secaida-Rosales to be incredible. *Id.* at 305. She noted the omission of two facts on his asylum application that he later included at the hearing; the implausibility of his safe, continued employment while subject to persecution; his failure to produce additional corroborating evidence; and the lack of coherent responses during cross-examination. *Id.* at 308.

finding was neither based on valid, cogent reasons,⁷⁶ nor supported by substantial evidence.⁷⁷

In *Lin Zhong v. U.S. Department of Justice*, petitioner Lin sought review of the IJ and BIA's denial of his application for asylum and withholding of removal on the basis that he and his family suffered under China's one-child policy.⁷⁸ He claimed that when his wife became pregnant with their third child, Chinese family planning officials forced her to abort the child and ordered him to undergo sterilization.⁷⁹ The IJ found him incredible due to significant discrepancies between the two testimonies he gave and found his documentary evidence non-corroborative.⁸⁰ The IJ also found that Lin's pending divorce from his wife removed any threat of sterilization.⁸¹ The Second Circuit concluded that two key rulings by the IJ, which were central to Lin's claims, lacked substantial evidence.⁸² The court found that the IJ's conclusion that his pending divorce removed the threat of sterilization was unsupported by substantial

76. *Id.* at 313. The court's requirement that an adverse credibility finding be based on inconsistencies that go to the heart of the claim has been superseded by the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231, 309 (2005), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006). See *Xiu Xia Lin v. Mukasey*, 534 F.3d 162, 163 (2d Cir. 2008) (per curiam) (recognizing that the REAL ID Act allows an IJ to base an adverse credibility finding on "any inaccuracies or falsehoods ... without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim") (emphasis omitted). Nevertheless, the court's analysis as to the substantial evidence standard remains good law.

77. 331 F.3d at 313. For example, the court reasoned that the purported implausibilities concerning Secaida-Rosales's continued employment and receipt of a government identification card were not supported by substantial evidence because the country conditions report stated that rogue groups like the death squads whom Secaida-Rosales says threatened him operate independently of and hidden from the government.

78. 480 F.3d 104, 109 (2d Cir. 2007).

79. *Id.* at 109-10. Lin fled his home and discovered that family planning officials destroyed his home after unsuccessfully searching for him there. When his wife became pregnant for the fourth time, family planning officials subjected her to another forcible abortion and pursued and threatened Lin for sterilization.

80. *Id.* at 113.

81. *Id.*

82. *Id.* at 130-31. The first ruling concerned the IJ's determination that Lin's wife's abortions in 1990 and 1991 were not forced but voluntary because Lin's wife was issued abortion certificates for them. The IJ presumably based this conclusion on a State Department country report. However, the court found no mention of such fact in the 1999 U.S. State Department report, the only one included in the administrative record. It further reasoned that even if such evidence were in the report, it would be unreasonable to draw inferences regarding circumstances of abortions performed in 1990 and 1991 from a report prepared a decade later.

evidence because the IJ had heard of the pending divorce only minutes before rendering the oral decision and had not inquired into the matter.⁸³

Three cases involved claims of persecution based on religion. In *Poradisova v. Gonzales*, a husband, wife, and their son sought asylum from religious persecution in Belarus on account of their Jewish ethnicity and religion.⁸⁴ The IJ found numerous facts leading to her conclusion that the Poradisovs failed to meet their burden of proof of persecution.⁸⁵ The court concluded that the IJ erred not only by applying the wrong legal standards, but also by ignoring relevant evidence.⁸⁶ Characterizing the IJ opinion and BIA's summary affirmance as a mere "search for a justification to deport," the court granted the petition.⁸⁷

In *Ivanishvili v. U.S. Department of Justice*, the Second Circuit considered a petition for review from a woman from the Republic of Georgia, who sought asylum and withholding of removal for alleged persecution on account of her status as a member of an ethnic and religious minority group.⁸⁸ The IJ rejected Ivanishvili's asylum claim as untimely because she failed to apply within one year of her last arrival in the United States.⁸⁹ Regarding her withholding of removal claim, the IJ did not believe Ivanishvili's testimony that she had been persecuted because of her ethnic status and as a Jehovah's Witness in the Republic of Georgia and deemed unpersuasive her evidentiary support.⁹⁰ The court affirmed the IJ's conclusion on the asylum claim but reversed for lack of substantial evidence

83. *Id.* at 131.

84. 420 F.3d 70, 74 (2d Cir. 2005).

85. *Id.* at 78-79.

86. *Id.* at 79. For example, the IJ's conclusion that the Poradisovs' claims were uncorroborated was belied by State Department reports that confirmed the Poradisovs' account of the general societal and political anti-Semitism in Belarus. Further, the IJ's conclusion—that the incidents the Poradisovs recounted did not amount to persecution—failed to consider the cumulative significance of each incident. Moreover, the IJ significantly weighed the fact that the Poradisovs did not file police reports after each incident. The court discounted this finding because record evidence established that the police themselves are anti-Semitic in Belarus. *Id.* at 80.

87. *Id.* at 82. The court instructed the agency on remand to conduct a "good-faith inquiry into whether an applicant is entitled to this country's protection." *Id.*

88. 433 F.3d 332, 335-36 (2d Cir. 2006).

89. *Id.* at 339.

90. *Id.* at 340.

the IJ's factual finding that the harassment Ivanishvili suffered did not amount to persecution.⁹¹ According to the court, the IJ relied on a country conditions report and "other background evidence" to reach this conclusion but ignored the petitioner's own testimony, even though the IJ did not explicitly discredit such testimony as incredible.⁹²

In *Jin Teng Lin v. Gonzales*, the court overturned several of the IJ's factual findings under the substantial evidence standard.⁹³ Lin claimed to be Episcopalian but was unable to explain the difference between that denomination and others, which formed a basis for the IJ's adverse credibility finding.⁹⁴ The court concluded that Lin's inability to compare his stated religious group to other denominations does not necessarily indicate lack of knowledge of his group.⁹⁵

Finally, one case concerned a claim of persecution based on social group. In *Hong Ying Gao v. Gonzales*, the court reviewed a claim by a nineteen-year-old woman whose parents sold her into marriage.⁹⁶ She claimed that when she broke off the engagement, her former fiancé beat her and threatened that his uncle, a powerful local official, would arrest her.⁹⁷ Out of fear that she would be forced to marry him, Gao fled China for the United States.⁹⁸ The IJ concluded that Gao was not persecuted on account of a particular social group because her situation involved a mere dispute between two families, that Gao failed to meet her burden of establishing that the Chinese government would not protect her, and that she could have relocated within China to avoid persecution.⁹⁹ The Second Circuit overturned these conclusions under the substantial evidence standard because the IJ failed to consider plausible alternative explanations.¹⁰⁰

91. *Id.* at 340-41.

92. *Id.* at 341.

93. No. 05-4699-ag, 2006 WL 2195795, at *2-3 (2d Cir. July 28, 2006).

94. *Id.*

95. *Id.*

96. 440 F.3d 62 (2d Cir. 2006), *vacated on other grounds*, *Keisler v. Hong Ying Gao*, 552 U.S. 801 (2007).

97. *Id.* at 64.

98. *Id.*

99. *Id.* at 70-71.

100. *Id.* at 65-66, 70-71. First, the court held that Gao belonged to a particular social group of "women who have been sold into marriage (whether or not that marriage has yet taken

In addition to the variation in subject matter, the post-*Qiu* cases also varied as to the basis for reversal, applicant's country of origin, and panel composition.¹⁰¹ The common thread among the cases is the stricter formulation of the standard of review.¹⁰²

place) and who live in a part of China where forced marriages are considered valid and enforceable." *Id.* at 70. Second, the court overturned the IJ's two factual findings under the substantial evidence standard. *Id.* at 63-66, 71. Concerning the IJ's first conclusion that Gao failed to meet her burden of establishing that the Chinese government would not protect her, the court stated that such finding of fact lacked substantial basis because the State Department report stated that trafficking in women for marriage or prostitution is widespread in China and that official efforts to combat this problem have been hampered by corruption and resistance by village leaders. *Id.* at 71. Moreover, Gao's testimony that her fiancé threatened to have his uncle, a powerful government official, arrest her corroborated such evidence. *Id.* Concerning the IJ's second conclusion that Gao could find safe haven within China, the court pointed to Gao's relocation attempt to a place an hour away from her home, which was met with further harassment of her and her family and ultimately proved unsuccessful. *Id.*

101. In three of the six cases, the court overturned the IJ's adverse credibility determination. *See* *Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 132 (2d Cir. 2007); *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 342-43 (2d Cir. 2006); *Secaida-Rosales v. INS*, 331 F.3d 297, 301 (2d Cir. 2003). Most of the claims involved applicants from China. *See* *Lin Zhong*, 480 F.3d at 108; *Hong Ying Gao*, 440 F.3d at 64; *Jin Teng Lin v. Gonzales*, No. 05-4699ag, 2006 WL 2195795, at *4 (2d Cir. July 28, 2006). The countries of origin of the applicants in the other cases were Guatemala, Belarus, and the Republic of Georgia. *Poradisova v. Gonzales*, 420 F.3d 70, 74 (2d Cir. 2005); *Ivanishvili*, 433 F.3d at 335; *Secaida-Rosales*, 331 F.3d at 301. The panel composition in each of these six cases was equally varied. Four different judges authored the majority opinions, two of whom were Democratic appointees and two of whom were Republican appointees. *Lin Zhong*, 480 F.3d at 107; *Ivanishvili*, 433 F.3d at 335; *Hong Ying Gao*, 440 F.3d at 64; *Poradisova*, 420 F.3d at 73; *Secaida-Rosales*, 331 F.3d at 301. Judges Calabresi and Straub were Democratic appointees, whereas Judges Cardamone and Oakes were Republican appointees. *See* *Biographical Directory of Federal Judges, 1789-present*, FED. JUD. CTR., <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Oct. 17, 2013). One case, *Jin Teng Lin v. Gonzales*, was disposed of by summary order and thus did not identify the opinion's author. 2006 WL 2195795, at *1. The panel there consisted of Judges Newman, Straub, and Katzmman. *Id.*

102. *See* *Lin Zhong*, 480 F.3d at 109; *Ivanishvili*, 433 F.3d at 337; *Hong Ying Gao*, 440 F.3d at 64; *Jin Teng Lin*, 2006 WL 2195795, at *4; *Poradisova*, 420 F.3d at 77. The two cases that affirmed the agency's decision under the "stricter" formulation of the substantial evidence standard are not particularly distinguishable from the six cases that reversed under the standard. In *Joaquin-Porras v. Gonzales*, the court denied the petition of a Costa Rican man claiming persecution based on his sexual orientation. 435 F.3d 172 (2d Cir. 2006). There, the IJ concluded that Joaquin-Porras's sexual assault was an isolated incident and that his brief detention and verbal abuse did not amount to persecution. *Id.* at 177. The court agreed and affirmed the IJ's factual findings under the substantial evidence standard. *Id.* at 181-82. In *Islami v. Gonzales*, Judge Calabresi affirmed the IJ's denial of Islami's claim of persecution based on his refusal to join the Albanian national army, though he disagreed with the IJ's factual findings. 412 F.3d 391, 396 (2d Cir. 2005). The IJ found that Islami's refusal to participate in the military, which was known to perpetrate crimes against humanity against

F. Siewe v. Gonzales: Challenging the Stricter Formulation

In *Siewe v. Gonzales*, Chief Judge Jacobs challenged the *Qiu* formulation of the substantial evidence standard.¹⁰³ *Siewe* involved a native and citizen of the Republic of Cameroon seeking review of the BIA's summary affirmance of the IJ's denial of his claims for asylum, withholding of removal, and relief under the Convention Against Torture.¹⁰⁴ *Siewe* claimed that he was persecuted on account of his political opinion due to his affiliation with the Social Democratic Front, Cameroon's largest opposition party.¹⁰⁵ The IJ found *Siewe's* testimony and evidence incredible because they contained internal inconsistencies.¹⁰⁶ She doubted the authenticity of a number of documents *Siewe* submitted as evidence, such as a photocopied arrest warrant, a medical report, and a letter purporting to appoint *Siewe* as a campaign manager, and she rejected his explanations for omitting various incidents from his asylum application and asylum interview, such as his participation in a violent incident that gave rise to his arrest.¹⁰⁷ These doubts led to an adverse credibility finding, which inevitably led to a denial of his claims for asylum, withholding of removal, and relief under the Convention Against Torture.¹⁰⁸

The Second Circuit agreed and rejected *Siewe's* challenge that the IJ's adverse credibility finding was based on impermissible speculation.¹⁰⁹ The court concluded that the record evidence supported the IJ's inference that *Siewe's* arrest warrant was not authentic.¹¹⁰ The IJ doubted the authenticity of the arrest warrant because *Siewe* testified that the one he acquired was only a copy because the original had been creased, and the IJ noted the copy

Muslims and ethnic Albanians, did not amount to past persecution. *Id.* at 396-97. Judge Calabresi found that this conclusion was not supported by substantial evidence. *Id.* at 397. But because the government met its burden to show changed country conditions, Judge Calabresi affirmed the IJ and denied the petition. *Id.* at 398.

103. 480 F.3d 160, 162 (2d Cir. 2007).

104. *Id.*

105. *Id.*

106. *Id.* at 165-66.

107. *Id.* at 165.

108. *Id.* at 162, 170-71.

109. *Id.* at 162, 171.

110. *Id.* at 162, 169.

showed no evidence of having been creased.¹¹¹ The court concluded that the absence of a streak mark on the copy supported the IJ's inference that the original must have been undamaged.¹¹² The IJ also found it significant that Siewe could not explain why the arrest warrant stated that he had five children, when he testified he had two.¹¹³ The court concluded that this error supported the IJ's conclusion regarding the inauthenticity of the document.¹¹⁴ The court also accepted the IJ's disbelief that an arrest warrant would have the term "political police" on it.¹¹⁵ Although Siewe explained that the warrant's use of the term was a result of careless language and that Cameroonian authorities were not overly concerned with how the term would look to foreigners, the court noted that the IJ's conclusion was plausible and that the court cannot reverse a finding of fact even if another conclusion is more reasonable.¹¹⁶ The court also found plausible the IJ's disbelief of Siewe's testimony that he left Cameroon by traveling in his own name and carrying his own arrest warrant.¹¹⁷ The court briefly addressed a number of other findings concerning his corroborating evidence that led to the adverse credibility finding¹¹⁸ but noted that, because corroborating evidence is often limited in the immigration context, a single false document or a single instance of false testimony can "infect the balance of the alien's uncorroborated or unauthenticated evidence" and found permissible the IJ's application of the maxim "false in one thing, false in everything."¹¹⁹

Courts routinely affirm agencies' adverse credibility findings under the substantial evidence standard;¹²⁰ what is remarkable about *Siewe*, therefore, is not the result but the way it was reached. In authoring the opinion, Chief Judge Jacobs carefully explicated the parameters of the substantial evidence standard.¹²¹ He began by

111. *Id.* at 169.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 166, 170.

119. *Id.* at 170.

120. *See, e.g., Zhou Yun Zhang v. INS*, 386 F.3d 66, 74 (2d Cir. 2004).

121. *Siewe*, 480 F.3d at 166-67.

stating that, when reviewing credibility decisions in an immigration context, the scope of review is “exceedingly narrow”¹²² because “the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant.”¹²³ Concerning *Siewe*’s argument that the IJ’s findings were speculative, he distinguished between fair inference and bald speculation, only the latter of which would warrant reversal under the substantial evidence standard.¹²⁴ Because the “very essence of [the fact-finder’s] function is to select from among conflicting inferences and conclusions that which it considers most reasonable,”¹²⁵ “[d]ecisions as to ... which of competing inferences to draw are entirely within the province of the trier of fact.”¹²⁶ According to the court, speculation is permissible, indeed required, because that is what fact-finders do when they choose what seems to them to be the most reasonable inference when facts are in dispute.¹²⁷ Speculation is impermissible only when there is a “complete absence of probative facts to support the conclusion reached.”¹²⁸

To support this view, the decision relied on cases involving speculation challenges to fact-finding at the district court level.¹²⁹ Just as a reviewing court would not overturn a fact-finder’s choice under the clear error standard when there are two permissible views of the evidence, a reviewing court should not overturn a fact-finder’s conclusions under a similar circumstance in the administrative context.¹³⁰ In direct response to the Judge Calabresi-authored *Qiu* decision, the panel opinion in *Siewe* asserted that the substantial evidence standard in the administrative context “bespeaks no lesser deference to an IJ than to a district judge when each draws inferences from the evidence as a finder of fact.”¹³¹ It then went on to show why it finds no support in the law for a stricter formulation

122. *Id.* at 166 (quoting *Melgar de Torres v. Reno*, 191 F.3d 307, 313 (2d Cir. 1999)).

123. *Id.* (quoting *Zhou Yun Zhang*, 386 F.3d at 73).

124. *Id.* at 167-69.

125. *Id.* at 167 (quoting *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)).

126. *Id.* (quoting *Palazzo ex rel. Delmage v. Como*, 232 F.3d 38, 44 (2d Cir. 2000)).

127. *Id.*

128. *Id.* (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)).

129. *Id.* at 167-68.

130. *Id.* at 168.

131. *Id.*

of the substantial evidence standard.¹³² The Ninth Circuit case from which Judge Calabresi borrowed the slightly stricter language, *Aruta v. INS*, drew its formulation from a series of four other cases,¹³³ and the fourth one, which began the chain, actually yielded no support for the view that substantial evidence review is stricter than clear error review because the context of the case was inapposite.¹³⁴ That case, *Bolanos-Hernandez v. INS*,¹³⁵ was decided after the passage of the Refugee Act of 1980, which made withholding of removal no longer discretionary.¹³⁶ Therefore, to clarify the correct standard for reviewing withholding of removal claims, the court in *Bolanos-Hernandez* stated that abuse of discretion review had been replaced by “a heightened, substantial evidence standard of review.”¹³⁷ As such, the *Siewe* panel explained that a conclusion that the substantial evidence standard is stricter than the highly deferential abuse of discretion standard does not necessarily yield Judge Calabresi’s conclusion that the substantial evidence standard is stricter than clear error review.¹³⁸

The *Siewe* analysis actually finds analogous support in a Supreme Court decision, although it is not cited. In *Dickinson v. Zurko*, the Supreme Court decided a case that turned on the difference in standards of review.¹³⁹ There, the Court reviewed an en banc decision by the Court of Appeals for the Federal Circuit that reviewed a Patent and Trademark Office (PTO) decision to deny the respondents’ patent application.¹⁴⁰ The Federal Circuit reviewed the PTO’s factual findings under the clearly erroneous standard of review,¹⁴¹ which governs a district court’s factual findings,¹⁴² rather than using the framework set forth in the APA,¹⁴³ which specifies

132. *Id.* at 168 n.1.

133. *See id.*; 80 F.3d 1389, 1393 (9th Cir. 1996).

134. *See Siewe*, 488 F.3d at 168 n.1 (discussing the chain of cases from which the stricter language arose).

135. 767 F.2d 1277 (9th Cir. 1984).

136. *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

137. *See Siewe*, 480 F.3d at 168 n.1 (quoting *Bolanos-Hernandez*, 767 F.2d at 1282 n.8).

138. *Id.* at 168.

139. 527 U.S. 150, 153-54 (1999).

140. *Id.* at 150.

141. *Id.* at 153.

142. *Id.* (citing FED. R. CIV. P. 52(a)).

143. *Id.*

the proper scope of judicial review as either the “arbitrary, capricious, [or] an abuse of discretion” standard or the “substantial evidence” standard.¹⁴⁴ The Federal Circuit concluded that an exception to section 706 of the APA applied under section 559,¹⁴⁵ which states that the APA does “not limit or repeal additional requirements ... recognized by law.”¹⁴⁶ According to the Federal Circuit, prior to the adoption of the APA, its predecessor court, the Court of Customs and Patent Appeals, applied the clearly erroneous standard to review factual findings by the agency,¹⁴⁷ which was a stricter standard than the “arbitrary or capricious” or the “substantial evidence” standard articulated in the APA.¹⁴⁸

The Supreme Court disagreed with the Federal Circuit and refused to recognize the exception.¹⁴⁹ In so concluding, the Court clarified that an important purpose of the APA was to “bring uniformity to a field full of variation and diversity.”¹⁵⁰ The Court recognized the inconsistency in the century-long precedent in the Supreme Court and the various appellate courts throughout the nation. The phrase “clearly erroneous” has been used to review agency decisions under a more deferential standard in a number of cases,¹⁵¹ and at least on one occasion, the Court has used the words “substantial evidence” to review a trial court’s factual findings.¹⁵² Nevertheless, the Court agreed with the Commissioner of Patents on several grounds. The Court presumed that the PTO, as the “expert body,” is better able to “deal with the technically complex subject matter” in its conclusions of fact than an appellate court.¹⁵³ Moreover, the PTO’s findings are entitled to more deference than findings by a trial judge precisely because of the agency’s

144. *Id.* at 152 (citing Administrative Procedure Act, 5 U.S.C. § 706 (1994)).

145. *Id.* at 154.

146. *Id.* (quoting 5 U.S.C. § 559).

147. *Id.*

148. *See id.* at 154, 158.

149. *Id.* at 165.

150. *Id.* at 155. Justice Breyer also cited the Court’s decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951), a case that helped clarify the substantial evidence standard and that “recogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.” *Zurko*, 527 U.S. at 154.

151. *Id.* at 156.

152. *Id.* at 156-57.

153. *Id.* at 160-61.

expertise.¹⁵⁴ In so concluding, the Court clarified that the substantial evidence standard is more deferential to the trier of fact in the administrative context, making review under the clear error standard less deferential than review under the substantial evidence standard.¹⁵⁵ A significant assumption underlying this rule is that, unlike a trial court—whose comparative advantage lies only in direct evaluation of a witness, for example—an administrative agency has expertise in that particular area of the law.¹⁵⁶ The Court noted that the Federal Circuit's predecessor court frequently referred to technical complexity and agency expertise as reasons that counsel significant deference in the PTO context.¹⁵⁷

Though not explicitly stated, the importance of the finality of an agency decision is another assumption underlying the Court's adoption of a standard stricter than clear error. A law review article cited by Justice Breyer in *Zurko* provides a historical basis for the substantial evidence standard.¹⁵⁸ It explains that when Congress considered the Logan-Walter bill—the APA's predecessor bill that passed both houses of Congress but which President Roosevelt vetoed¹⁵⁹—it debated the propriety of adopting the clear error standard over the substantial evidence standard when reviewing administrative findings of facts.¹⁶⁰ The legislative debate revealed that some members of Congress favored the substantial evidence standard over the clear error standard because it would give administrative findings more finality.¹⁶¹ According to the article's author, Robert Stern, a greater degree of finality should be given to findings by an administrative agency than to findings by the trial court.¹⁶² Indeed, Stern goes as far as to equate the level of deference under the substantial evidence rule to that under jury verdicts, claiming that the deference owed under it is "identical" to the

154. *Id.*

155. *See id.* at 159-61.

156. *See id.* at 160-61.

157. *Id.* at 160.

158. Robert L. Stern, *Review of Findings of Administrators, Judges, and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 84-88 (1944).

159. S. Rep. No. 752, at 189-90 (1945) (Comm. Report).

160. Stern, *supra* note 158, at 88.

161. *See id.*

162. *See id.* at 88-89.

substantial evidence standard in administrative law.¹⁶³ Stern notes that the Supreme Court has defined substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁶⁴ This indicates that, though one may draw a different conclusion from the evidence, the finding or verdict should stand. A reviewing court cannot set aside the finding or verdict because it would have reached a different conclusion.¹⁶⁵

According to Stern, though the level of deference accorded to a jury and to an administrator may be “identical,” the reasons for according that deference are different.¹⁶⁶ The purpose of deferring to a jury is to leave decision making to “persons embodying the underlying sense of fairness of the community, rather than a single man, no matter how expert, who might have arbitrary notions of his own.”¹⁶⁷ Deference is accorded to administrative findings for exactly the opposite reason—to secure the advantage of expertise and specialization, *not* broad community senses of fairness.¹⁶⁸ Indeed, in his invocation of *Lavender v. Kurn*, a case involving a speculation challenge to a jury’s finding, Chief Judge Jacobs in *Siewe* implicitly equates findings of fact by administrative judges to findings of fact by juries.¹⁶⁹ According to him, because the Supreme Court announced the principle of deference in *Lavender* categorically, it is not limited to a jury context and should also apply to a review of administrative findings of fact.¹⁷⁰

G. Mei Chai Ye v. U.S. Department of Justice: *A Response to Siewe*

Since the rebuke in *Siewe*, neither Judge Calabresi nor any other Second Circuit judge has made statements about the comparative strictness of the substantial evidence standard to the clear error

163. *Id.* at 74.

164. *Id.* at 73 (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

165. *Id.* at 89.

166. *Id.* at 81-82.

167. *Id.* at 81.

168. *Id.* at 81-82.

169. *See Siewe v. Gonzales*, 480 F.3d 160, 167 (2d Cir. 2007) (citing *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)).

170. *Id.*

standard. However, a Second Circuit panel, which included Judge Calabresi, offered a rejoinder in *Mei Chai Ye v. U.S. Department of Justice*, a forced abortion case.¹⁷¹ Mei Chai Ye, a native and citizen of China, claimed that Chinese authorities subjected her to two forced abortions and that she feared they would subject her to involuntary sterilization if she returned to China.¹⁷² During the hearing, the IJ suspected that Ye's asylum application resembled another application filed by a different asylum applicant.¹⁷³ Further, the same attorney represented both applicants.¹⁷⁴ Because of the "striking similarity" between Ye's affidavit and that submitted by another petitioner in an unrelated case and Ye's inability to provide any convincing response as to the similarity, the IJ found that Ye had submitted a fabricated application for asylum.¹⁷⁵ In concluding that an inter-proceeding similarity can support an adverse credibility finding, the panel decision relied on the court's case law holding that an intra-proceeding similarity can indicate that the statements are "canned."¹⁷⁶ Thus, the panel concluded, an IJ's drawing an inference of falsity from an inter-proceeding similarity was reasonable and provided substantial evidence for the IJ's conclusion.¹⁷⁷

What is conspicuously absent in *Mei Chai Ye* is a stricter formulation of the substantial evidence standard. In a footnote, the panel opinion acknowledges that the Second Circuit has been inconsistent in its recitation of the substantial evidence standard.¹⁷⁸ That footnote characterizes the position in *Qiu*—that in the immigration context, substantial evidence review is slightly stricter than clear-error review—as dicta.¹⁷⁹ But it also describes as dicta the *Siewe* position that the two standards may be identical.¹⁸⁰

171. 489 F.3d 517, 520 (2d Cir. 2007).

172. *Id.*

173. *Id.*

174. *Id.* at 520-21.

175. *Id.* at 522-23.

176. *Id.* at 524 (citing *Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006)).

177. *Id.*

178. *Id.* at 523-24 n.4.

179. *Id.* at 523 n.4.

180. *Id.* Judge Jacobs's actual articulation of the substantial evidence standard as compared to the clear error standard in *Siewe* was as follows: "These standards of review bespeak no lesser deference to an IJ than to a district judge when each draws inferences from the evidence as a finder of fact." *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007).

Though the debate remains unresolved, the footnote attempts to minimize the utility of standards of review:

[W]hile the various statements made in the course of upholding or rejecting the adequacy of a particular finding are often helpful, they cannot become rigid rules of law that dictate the outcome in every case.... In practice, panels will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our precedents, to the administrative decision and the record assembled to support it. And sound judgment of this sort cannot be channeled into rigid formulae.¹⁸¹

H. The Importance of the Debate

Mere “disagreement over formal labels,”¹⁸² in the words of Judge Calabresi, can in fact have significant legal consequences. Congress has carefully calibrated the appropriate standards of judicial review over fact-finding by administrative agencies, the purpose of which is to allocate the decision-making responsibilities between the executive and judicial branches of government.¹⁸³ In so doing, Congress has made a choice to weigh the desire for efficient and timely agency action against the need for consistent and just decision making.¹⁸⁴ In more practical terms, identifying and arguing under the correct standard of review matters for attorneys, as judges should and generally do pay particular attention to stay within the bounds of each review standard. Judges faithfully recite the appropriate review standard and explain the scope of that review in each opinion they author. Scholars have given much attention to standards of review as well. Entire treatises have been written to explain the meaning of various standards of review, parsing how much deference must be accorded under each.¹⁸⁵ In the

181. *Mei Chai Ye*, 489 F.3d at 523 n.4 (quoting *Ming Xia Chen v. BIA*, 435 F.3d 141 (2d Cir. 2006) (internal quotation marks omitted)).

182. *Id.*

183. Verkuil, *supra* note 2, at 681.

184. *Id.*

185. See, e.g., HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS: STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS* (2007).

administrative law scholarship over the past decade, scholars have spilled much ink explicating the difference between arbitrary and capricious review, the substantial evidence standard, clear error review, and de novo review;¹⁸⁶ standards of review do matter.¹⁸⁷

The issue is not merely academic. For persons seeking asylum, it could mean the difference between risk of persecution and safety.¹⁸⁸ Though Judge Calabresi does not support his reasoning for his stricter review standard with a legal argument, his position is defensible as a matter of both policy and law. The stricter review standard makes sense, especially in light of the recent studies that have cast doubt on the immigration agency's institutional competence and expertise, including the shortage of resources and time for immigration judges to adequately consider each case, significant grant rate disparities among immigration courts, political biases of some BIA members, and the lack of meaningful review of immigration judge decisions at the agency level.¹⁸⁹ Part II outlines the reasons that not only suggest, but indeed compel stricter review of immigration agency decisions.

II. REASONS FOR STRICTER REVIEW: DEFICIENCIES WITHIN IMMIGRATION ADJUDICATION

In 2005, Judge Richard Posner of the Seventh Circuit declared “that the adjudication of [asylum] cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁹⁰ As a prelude to this remarkable statement, Judge Posner stated that over the prior year, the Seventh Circuit had reversed immigration cases in whole or in part 40 percent of the time,¹⁹¹ a “staggering”¹⁹²

186. *See, e.g.*, Verkuil, *supra* note 2, at 688.

187. *But see* Zaring, *supra* note 2, at 135.

188. *See* Ming Shi Xue v. BIA, 439 F.3d 111, 113-14 (2d Cir. 2006) (“[E]ach time we wrongly deny a meritorious asylum application, concluding that an immigrant’s story is fabricated when, in fact, it is real, we risk condemning an individual to persecution.... [W]e must always remember the toll that is paid if and when we err.”).

189. *See generally* RAMJI-NOGALES ET AL., *supra* note 10.

190. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

191. *Id.* at 829.

192. *Id.*

percentage given the highly deferential standard of review usually accorded to the agency's findings.¹⁹³

Judge Posner is not alone in his criticism of immigration judges and the BIA. Decisions in at least six circuits have voiced similar disapproval of the agency's performance. While reversing the agency in *Ssali v. Gonzales*, Judge Ripple, writing for the Seventh Circuit, commented that "[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case."¹⁹⁴ Another Seventh Circuit panel, in *Dawoud v. Gonzales*, stated that "[t]he IJ's opinion is riddled with inappropriate and extraneous comments, such as reference to the IJ's personal experiences with alcohol in Egypt, commentary on the state of the tourism industry there, and speculation about the attractiveness of the United States to asylum-seekers in general."¹⁹⁵ The Third Circuit, in *Qun Wang v. Attorney General*, commented that "[t]he tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."¹⁹⁶ In *Jin Chen v. U.S. Department of Justice*, the Second Circuit stated that the IJ's findings were "grounded solely on speculation and conjecture."¹⁹⁷ The Ninth Circuit, in *Lopez-Umanzor v. Gonzales*, observed that "the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudice, personal speculation, bias, and conjecture."¹⁹⁸ The Fourth Circuit, in *Camara v. Ashcroft*, criticized the IJ for "completely ignor[ing]"¹⁹⁹ independent evidence and for "fail[ing] to follow the [agency's] own regulations."²⁰⁰ Numerous other circuit judges have voiced similar comments.²⁰¹ What is also striking about this

193. Guendelsberger, *supra* note 70, at 3.

194. 424 F.3d 556, 563 (7th Cir. 2005).

195. 424 F.3d 608, 610 (7th Cir. 2005).

196. 423 F.3d 260, 269 (3d Cir. 2005).

197. 426 F.3d 104, 115 (2d Cir. 2005).

198. 405 F.3d 1049, 1054 (9th Cir. 2005).

199. 378 F.3d 361, 370 (4th Cir. 2004).

200. *Id.* at 372.

201. See *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (citing at least seven other cases containing similar critiques of IJs and the BIA); see also *Zuh v. Mukasey*, 547 F.3d 504, 513-14 (4th Cir. 2008) (citing two more recent cases in the Fourth Circuit and other academic commentary critical of the performance of the IJ and the BIA).

list is that the criticisms are coming from judges appointed by both Republican and Democratic presidents.²⁰²

These significant errors arise from serious structural problems at the agency. Judge Posner's critique has appropriately spawned various studies and proposals for reform.²⁰³ I analyze some of those findings below.

*A. Lack of Institutional Capacity: Under-Resourcing Problems at the Executive Office for Immigration Review (EOIR)*²⁰⁴

Removal hearings are adversarial proceedings. Both the noncitizen and the government provide testimony, can call available witnesses, introduce documentary evidence—which is subject to objections—and make closing statements. How these hearings differ from other proceedings is the massive caseload relative to the number of judges capable of handling it. During the 2012 fiscal year, immigration judges received a total of 296,173 immigration matters²⁰⁵ and completed a total of 206,225 cases.²⁰⁶ That same year began with 266 total immigration judges,²⁰⁷ but hiring freezes and retirement eligibility decreased that number to 258 immigration judges by the end of fiscal year 2012's third quarter.²⁰⁸ Assuming that the cases are divided evenly among the 266 judges, and that each case takes the same amount of time to complete, each immigration judge would have had to complete approximately 1,001 cases a

202. Judges Posner, Ripple, and Neimeyer, who authored these opinions, are Reagan appointees, whereas Judges Wood, Graber, Fuentes, and Pooler, who also authored opinions, are Clinton appointees. See *Biographical Directory of Federal Judges*, *supra* note 101.

203. See, e.g., RAMJI-NOGALES ET AL., *supra* note 10, at 1-6, 61-76; Legomsky, *supra* note 12, at 1644-51.

204. The EOIR is a part of the Department of Justice and was created by the Attorney General in 1983. See 8 C.F.R. §§ 1003.0, 1003.9, 1003.10 (2012); 48 Fed. Reg. 8038-39 (Feb. 25, 1983).

205. *Immigration Court Backlog Tool*, TRACIMMIGRATION (Aug. 2013), http://trac.syr.edu/phptools/immigration/court_backlog/.

206. *Immigration Court Processing Time by Outcome*, TRACIMMIGRATION (Aug. 2013), http://trac.syr.edu/phptools/immigration/court_backlog/court_pocetime_outcome.php.

207. U.S. DEP'T OF JUSTICE, FISCAL YEAR 2013 CONGRESSIONAL BUDGET SUBMISSION, ADMINISTRATIVE REVIEW AND APPEALS (2012), available at http://www.justice.gov/jmd/2013_justification/pdf/fy13-ara-justification.pdf.

208. U.S. DEP'T OF JUSTICE, FISCAL YEAR 2014 CONGRESSIONAL BUDGET SUBMISSION, ADMINISTRATIVE REVIEW AND APPEALS (2013), available at http://www.justice.gov/jmd/2014_justification/pdf/ara-justification.pdf.

year.²⁰⁹ According to one study, such numbers mean that an average immigration judge was required to complete 4.3 removal cases each day,²¹⁰ which leaves an average immigration judge with only about seventy-three minutes to consider each case.²¹¹ In those minutes, the judge must review the evidence, hear testimony, and render a decision over matters that are often highly fact intensive and that may require consideration of numerous documents. Though an immigration judge can issue a written decision that is served on the parties at a later date, most often the decision is rendered orally due to time constraints.²¹²

To make matters worse, immigration judges lack the necessary support staff.²¹³ As of August 20, 2009, 232 immigration judges shared only 56 law clerks. This equals to about one law clerk for four judges. They also lack necessary administrative support.²¹⁴ Such shortages are more acutely felt in the immigration context because of challenges that are particular and unique to an immigration hearing. For example, a third of asylum seekers are unrepresented.²¹⁵ This means that immigration judges must take additional time to advise the noncitizen of basic legal concepts and procedures, work usually done by the representing attorney. Moreover, in addition to functioning as a neutral, impartial arbiter in the case,²¹⁶ an immigration judge has a duty to establish and

209. This figure is a rough estimate and does not take into account a range of other factors, such as the number of cases that are on backlog.

210. Legomsky, *supra* note 12, at 1652. Legomsky notes that others have estimated the average case load at four per day, COMM'N ON IMMIGRATION, ABA, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY 43-48 (2010), five per day, *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5, 7 (2006), and even six per day, Alexander, *supra* note 9, at 19.

211. *Maximum Average Minutes Available per Matter Received*, TRACIMMIGRATION (2009), <http://trac.syr.edu/immigration/reports/208/include/minutes.html>.

212. See 8 C.F.R. §§ 1003.37(a), 1240.13 (2012) (authorizing oral decisions).

213. LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 24, 31, 36 (2012) (characterizing insufficient support staff, along with the EOIR's underfunding, as the "basic problem" and recommending proposals for change, including increasing resources and redirecting work to other agencies); COMM'N ON IMMIGRATION, ABA, *supra* note 210, at 2-16.

214. Legomsky, *supra* note 12, at 1652-53 (citing *Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow*, TRACIMMIGRATION (June 18, 2009), <http://trac.syr.edu/immigration/reports/208/>).

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

216. *Islami v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006).

develop the factual record.²¹⁷ To compound the problem, many noncitizens appearing in court do not speak English, thus needing translation services.²¹⁸ This not only requires additional care, but also takes up more time, as each question and each statement must be repeated once in English and again in translation, and vice versa.²¹⁹ Finally, certain administrative tasks, like arranging for audio recordings of hearings or keeping track of documents, also fall on the shoulders of the immigration judge.²²⁰

The administrative record that reviewing circuit judges see on appeal often reflects these challenges at the agency. These problems prompted a 2006 Senate Judiciary Committee hearing. In his testimony to the Committee, Chief Judge Walker of the Second Circuit recapped the unique problems of immigration adjudication and urged the doubling of the number of immigration judges.²²¹ He testified:

I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien's testimony.²²²

217. *Qun Yang v. McElroy*, 277 F.3d 158, 162 (2d Cir. 2002).

218. EOIR provides interpreters, who are either EOIR employees or contractors, if the noncitizen lacks English proficiency. See *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 745 (9th Cir. 1991); William R. Robie, *The Purpose and Effect of the Proposed Rules of Procedure for Proceedings Before Immigration Judges*, 1 GEO. IMMIGR. L.J. 269, 279 (1986).

219. Legomsky, *supra* note 12, at 1653.

220. 8 C.F.R. §§ 1003.28, 1003.36, 1240.9 (2012).

221. See *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5, 7 (2006) (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf>.

222. *Id.*

In 2007, Ninth Circuit Court of Appeals Judge Carlos Bea echoed a similar sentiment:

Last year, [Immigration Judges] decided over 350,000 matters, or roughly 1,520 matters per judge.... Of course the[ir] opinions are not as detailed as we appellate court judges would like, how could they be? Of course they don't have time to review all the documents in the record.... I think we would see fewer appeals if Immigration Judges were given the resources necessary to do a detailed, thorough, thoughtful job in the first place.²²³

In the wake of these reports, the U.S. Department of Justice in 2006 conducted a comprehensive review of the immigration courts and proposed twenty-two specific steps “to improve the performance and the quality of the Immigration Courts.”²²⁴ One key proposal was hiring more immigration judges and support staff.²²⁵ According to one study, some temporary positions were funded in 2006 and were subsequently made permanent.²²⁶ In addition to hiring more judges, another proposal suggested hiring more law clerks through the Attorney General’s Honors Program.²²⁷ In 2006, the number of clerks was thirty-five. In 2008, that number had jumped to fifty.²²⁸ During the 2010 to 2011 fiscal year, the agency hired forty-four new immigration judges.²²⁹ But according to one study, “[t]he number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 275,316 by the beginning of May 2011,” and the case backlog swelled to levels “48 percent higher than levels at the end of” the 2008 fiscal year.²³⁰ This happened despite a record-setting pace of new hires of immigration judges.²³¹ Unless more is done to curb the rising immigration case backlog, the problem will

223. *Improving the Immigration Courts: Effort to Hire More Judges Falls Short*, TRACIMMIGRATION (July 28, 2008), <http://trac.syr.edu/immigration/reports/189> [hereinafter *Improving the Immigration Courts*].

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *New Judge Hiring Fails to Stem Rising Immigration Case Backlog*, TRACIMMIGRATION (June 7, 2011), <http://trac.syr.edu/immigration/reports/250>.

229. *Id.*

230. *Id.*

231. *Id.*

persist since the hiring initiative appears to be at an end.²³² The new EOIR Director, Juan P. Osunda, testified before the Senate Judiciary Committee on May 18, 2011 that recruitment efforts of immigration judges have been “cut short due to budgetary restrictions on hiring.”²³³ Further, Osunda anticipated the loss of about ten immigration judges throughout each year due to “normal attrition.”²³⁴

This means that immigration judges must continue to render quick decisions over matters that are potentially life and death for the noncitizen without the adequate time or support to thoroughly develop facts and review documents. If the noncitizen’s claims are true, he risks persecution upon removal. As a result of the immense time pressure that immigration judges face, they can render only quick, oral decisions²³⁵ that often lack analysis and that often do not articulate the factual predicate for the decision.²³⁶ As Judge Bea noted in his 2007 testimony, many immigration judges’ decisions reflect the fact that they do not even have the time to review the entire record before rendering a decision.²³⁷ Without time to review the entire record, judges do not have the additional time required to research the law or current country conditions and to probe for more factual development, which poses thorny problems in asylum cases.²³⁸

232. *See id.*

233. *Id.*

234. *Id.*

235. Immigration judges can render either an oral decision announced in front of the parties or a written decision served on the parties at a later date. *See supra* note 212.

236. Legomsky, *supra* note 12, at 1655.

237. *Improving the Immigration Courts*, *supra* note 223.

238. Legomsky, *supra* note 12, at 1655. The same holds true at the Board Level. In 2006, the BIA decided more than 43,000 cases with only eleven members. *Immigration Litigation Reduction*, *supra* note 210, at 187. This meant that each appeals member decided nearly 4,000 cases per year, which works out to around 80 cases per week. *Id.* Judge Walker recommended that the number of BIA members be increased to thirty. *Id.* at 188. In addition, the ABA in its report recommended hiring forty additional staff attorneys to assist the BIA. ABA HOUSE OF DELEGATES RESOLUTION 114C, at 4 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/114C.authcheckdam.pdf. While the BIA’s overwhelming caseload has also come under strong criticism, I focus mostly at the EOIR level for purposes of this Article because factual determinations are made by immigration judges.

B. Lack of Quality Representation for Noncitizens

In early 2011, Second Circuit Court of Appeals Judge Robert A. Katzmann organized about 200 leaders from government and private practice to discuss the barriers that deny many noncitizens proper legal counsel.²³⁹ Judge Katzmann described the general lack of representation for noncitizens in removal proceedings as a “substantial threat to the fair and effective administration of justice.”²⁴⁰ Indeed, noncitizens’ fate largely rests on whether they can afford or find access to a lawyer.²⁴¹ According to one study, noncitizens with legal representation were five times more likely to win their cases than those without.²⁴² In New York, which contains one of the busiest immigration dockets in the country, 60 percent of detained noncitizens proceed pro se.²⁴³ According to the New York Immigrant Representation Study, a two-year joint project of the Vera Institute of Justice and the study group spearheaded by Judge Katzmann,²⁴⁴ having legal representation was one of the two most important variables in obtaining a successful outcome in a case, with detention status being the other variable.²⁴⁵ Represented noncitizens who are not detained have a 74 percent rate of success.²⁴⁶ But unrepresented noncitizens who are also not detained had a low success rate of only 13 percent.²⁴⁷ According to Judge Katzmann, “[o]ften times, the reviewing appellate judge, who is constrained at the time the case comes before her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different.”²⁴⁸

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

240. *Id.*

241. *See id.*

242. *Id.*

243. *See id.* But see Schoenholtz & Jacobs, *supra* note 215, at 742 (stating that among asylum seekers, one-third are unrepresented).

244. NEW YORK IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011) [hereinafter NYIRS], available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

245. *Id.* at 3. The other variable was being free from detention. *Id.*

246. *Id.* If the represented noncitizen is detained, the success rate drops drastically to 18 percent. *See id.*

247. *Id.* If the unrepresented noncitizen is detained, the success rate drops to 3 percent. *Id.*

248. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant*

One barrier to securing representation is that nearly two-thirds of noncitizens taken into custody in a city like New York are sent to distant detention centers in places like Texas, Louisiana, or Pennsylvania, where representation is even more difficult to secure.²⁴⁹ These detention centers are located far away from metropolitan cities and are physically difficult to reach.²⁵⁰ Kenneth Mayeaux, director of the LSU Immigration Law Clinic, states that it takes half a day just to drive to a detention center in Louisiana from a metropolitan city like Baton Rouge.²⁵¹ This fact alone would deter many attorneys from taking on an immigration client.²⁵² In such distant locations, nearly 80 percent of noncitizens go unrepresented.²⁵³

The lack of representation is just one problem; the quality of representation is another. According to one study, federal judges “agreed that immigration was the area in which the quality of representation was lowest.”²⁵⁴ One immigration judge stated, “I’ve grown concerned that many [immigration] attorneys are just not very interested in their work and therefore bring little professional vigor or focus to it.”²⁵⁵ According to the New York Immigration Representation Study, about fifty-two New York immigration attorneys have been expelled or suspended by the EOIR from the practice of law.²⁵⁶ According to an official in the state attorney general’s office, “Across New York, fraudulent legal service providers are making huge profits by defrauding immigrant communities.”²⁵⁷

Poor, 11 GEO. J. LEGAL ETHICS 3, 9 (2008).

249. See Schoenholtz & Jacobs, *supra* note 215, at 748.

250. *Id.*

251. Interview with Kenneth A. Mayeaux, Professor of Prof'l Practice, LSU Law Ctr. and Dir., LSU Immigration Law Clinic, in Baton Rouge, La. (Aug. 2, 2011).

252. *Id.*

253. Dolnick, *supra* note 239, at A24; NYIRS, *supra* note 244, at 3.

254. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 330 (2011).

255. Noel Brennan, *A View From the Immigration Bench*, 78 FORDHAM L. REV. 623, 626 (2009); see also Dolnick, *supra* note 239, at A24 (quoting Judge Katzmman, who said that “[t]he too-often-poor quality of representation continues to undermine the effective administration of justice”).

256. *Preliminary Findings*, NEW YORK IMMIGRANT REPRESENTATION STUDY (May 3, 2011), <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf>.

257. Dolnick, *supra* note 239, at A24. In addition to the poor quality of lawyers, noncitizens are vulnerable to the predatory practices of immigration consultants, who often describe themselves as “notarios.” See Andrew F. Moore, *Fraud, the Unauthorized Practice of Law and*

Such issues have prompted immigrant groups to lobby for more funding for programs to train lawyers and advise noncitizens of their rights. For example, within the past year, a U.S. Department of Justice-sponsored project called the Legal Orientation Program opened a New York City branch to educate noncitizens of their rights, and Justice Department authorities have stepped up efforts to prosecute fraudulent lawyers.²⁵⁸ According to Fatima A. Shama, the city's immigrant affairs commissioner, advocates are urging Mayor Bloomberg "to fulfill his 2009 campaign promise to spend \$2 million to train lawyers."²⁵⁹ But such measures appear to have stalled due to the budgetary cuts happening at both federal and state governments nationwide.²⁶⁰

An asylum applicant's chances of a favorable outcome increase with the presence and quality of representation because an attorney is better able to elicit, develop, and frame the relevant facts to support the petitioner's claim for asylum.²⁶¹ If outcomes hinge largely on representation, and immigration judges are either unable or unwilling to make thorough findings of facts, a reviewing judge would—and should—have less confidence in both the accuracy and fairness of the agency proceeding.

C. Bias and Threat to Agency's Decisional Independence

Not all criticisms of the agency stem from its under-resourcing problem. Some raise deep concerns about the impartiality of the fact-finder.²⁶² For example, *Lopez-Umanzor* noted the immigration judge showed "bias" and "prejudgment" against the noncitizen.²⁶³ Likewise, in *Wang v. Attorney General*, the panel disapproved of the

Unmet Needs: A Look at State Laws Regulating Immigration Assistants, 19 GEO. IMMIGR. L.J. 1, 5 (2004). These "notarios" target noncitizens from Latin American countries, where a notario is a type of lawyer, a civil law notary. *Id.*

258. Dolnick, *supra* note 239, at A24.

259. *See id.*

260. *See New Judge Hiring*, *supra* note 228 (stating that DOJ cannot hire more judges because of federal budget cuts); Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET & POL'Y PRIORITIES (2012), available at www.cbpp.org/files/2-8-08sfp.pdf.

261. *See supra* notes 241-47 and accompanying text.

262. *Islami v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) (articulating an immigration judge's responsibility to act "as a neutral, impartial arbiter" and cautioning against assuming an advocate's role).

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

“disparagement” and “sarcasm” of the immigration judge.²⁶⁴ Arguably, such criticism is more serious than that concerning the carelessness or the lack of knowledge of the pertinent law because it calls into question the decisional independence of immigration judges. One scholar believes that the problem is widespread.²⁶⁵ Another has described the problem as having reached “crisis proportions” and urges a public campaign against the offending immigration judges.²⁶⁶

While the causes of such bias may ultimately remain unknown, some evidence suggests that structural issues within the agency beyond the individual judges themselves may be contributing to the problem.

A recent empirical study of immigration judges shows that immigration judges face burnout and stress levels that are higher than those experienced by prison wardens and emergency room physicians.²⁶⁷ Immigration judges face extraordinary time pressures and lack the essential resources to do their job properly.²⁶⁸ Another important contributing factor for the high stress levels relates to the nature of cases immigration judges decide.²⁶⁹ On a daily basis, immigration judges hear distressing stories of persecution and see noncitizens facing removal. If the judges are wrong, they risk sending an asylum applicant back to persecution. Hearing repeated accounts of persecution may desensitize even the most impartial judge and over time may increase a judge’s perception of fraud.²⁷⁰ As Stephen Legomsky notes, the net effect may be a vicious cycle that contributes to even more burnout: rushed decisions reduce accuracy, which leads to more petitions for review, which compounds the under-resourcing problem, which over time raises more suspicion

264. 423 F.3d 260, 267-69 (3d Cir. 2005).

265. ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS 12 (2009), available at <http://www.appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf> (“A shocking number of examples of a lack of professionalism ... infects Immigration Court proceedings.”).

266. Alexander, *supra* note 9, at 45-46.

267. Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 59-60 (2008).

268. *See id.* at 64-69.

269. *Id.* at 74-75.

270. *Id.* at 76.

that any particular appeal is frivolous and aimed only at prolonging the noncitizen's stay in the United States.²⁷¹

Some scholars have attributed the hostility and bias some immigration judges have shown to the agency's institutional structure.²⁷² Historically, immigration judges answered to the INS, which had significant law enforcement responsibility.²⁷³ To separate its adjudicatory function from its enforcement one, the Justice Department in 1983 created EOIR, now the "umbrella agency that houses both the immigration judges and the BIA."²⁷⁴ The agency also enacted regulations that require immigration judges and the BIA to exercise "independent judgment and discretion" from the Attorney General.²⁷⁵ While these two changes have ameliorated some concerns about whether immigration judges can truly make independent judgments and not be influenced by the agency's enforcement obligations, concerns still arise. For example, Legomsky describes a high-profile case of a government prosecutor contacting the chief immigration judge *ex parte* to complain about a ruling of an immigration judge.²⁷⁶ The chief judge, instead of informing him to appeal to the BIA, told the immigration judge to change his ruling.²⁷⁷ Such action reflects the threat to the decisional independence of immigration judges and BIA officials, who have a duty to impartially decide each case.

Other scholars have shown a positive correlation between decisions made by immigration judges and BIA members and their job security.²⁷⁸ In 2002, then Attorney General Ashcroft announced that he would be cutting the number of BIA members from twenty-three to eleven.²⁷⁹ This proposal surprised many because it was preceded by a plan to introduce procedural shortcuts for the

271. Legomsky, *supra* note 12, at 1656-57.

272. See Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 471 (2008) (criticizing the funding and structure of the immigration court and recommending creation of an ethics review board); Legomsky, *supra* note 12, at 1667 (describing the historic "unhealthy marriage of law enforcement and adjudicatory responsibilities" within the agency).

273. Legomsky, *supra* note 12, at 1667.

274. *Id.*

275. 8 C.F.R. §§ 1003.1(d)(1), 1003.10(b) (2012).

276. Legomsky, *supra* note 12, at 1668.

277. *Id.*

278. See, e.g., *id.*

279. See *id.*

purported reason of reducing backlog of BIA appeals.²⁸⁰ A year later, Attorney General Ashcroft announced the names of five BIA members whom he had “reassigned” to lower positions at the EOIR.²⁸¹ This was the first such reassignment of Board members in the BIA’s then sixty-three-year history.²⁸² According to a study by Peter Levinson, the “reassigned” names coincided with Board members who had the highest percentage of rulings that favored noncitizens.²⁸³ Levinson’s study showed that the reassigned members included two former immigration law professors and very senior BIA members with substantial immigration experience and expertise.²⁸⁴ Moreover, the reassigned members did not necessarily fit into the Attorney General’s stated criteria for reassignment. Attorney General Ashcroft set specific guidelines for gauging which judges should retain their post: those qualities were “integrity,” “professional competence,” “adjudicatorial temperament,” indicators of “experience,” and the like.²⁸⁵ These qualities appear not to have played a role in many cases.

Equally significant is the impact that such reassignment had on BIA decision making. When Levinson compared the decisions of Board members before and after the reassignment, several Board members who were more inclined to rule in favor of noncitizens suddenly issued fewer rulings favoring noncitizens.²⁸⁶ Similarly, another study that compared Board decisions before and after the reassignment revealed an increase in affirmance rates of adverse rulings against noncitizens.²⁸⁷ Although these studies do not conclu-

280. *See id.*

281. *Id.* at 1668-69.

282. *Id.* at 1669.

283. *See* Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1155-56 (2004); Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave*, L.A. TIMES, Mar. 12, 2003, at A16.

284. Levinson, *supra* note 283, at 1155.

285. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified as amended at 8 C.F.R. § 1003 (2012)).

286. *See* Levinson, *supra* note 283, at 1156-60.

287. *See* DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 27-28, available at www.dorsey.com/files/upload/DorseyStudyABA.pdf; Alexander, *supra* note 9, at 12 (showing that board decisions in favor of noncitizens fell 15 percent); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 358-59

sively prove a causal relationship between the increase in adverse rulings against noncitizens and Attorney General Ashcroft's decision to reassign BIA members, the studies provide compelling circumstantial evidence of the threats to decisional independence posed by executive control of agencies and indicate that factors beyond the merits of each case may considerably influence agency members' decisions.

D. Procedural Shortcuts at the BIA

In addition to reassigning BIA members, Attorney General Ashcroft instituted a procedure to streamline appeals at the BIA level for the purported reason of reducing backlog. He implemented the streamlining measures in 2002.²⁸⁸ One measure that has received the most vocal criticism allowed the BIA to affirm the rulings of immigration judges without opinion.²⁸⁹ Under this plan, the BIA could not issue any reasoning or opinion for its ruling.²⁹⁰ Attorney General Ashcroft made this plan the "primacy of the streamlining system for the majority of the cases," as this system became the norm rather than the exception.²⁹¹ Although only 5 percent of all cases are now decided under this plan, it does not mean the BIA issues detailed reasoning for its other opinions.²⁹² Indeed, as Judge Walker testified, "short opinions by single members are now the dominant form of decision making.... [T]hey can be as short as two or three sentences, even when the issues would appear to merit a longer discussion."²⁹³

The other major structural change Attorney General Ashcroft initiated was to move to a single-judge appellate review instead of a decision by a three-member panel.²⁹⁴ Regulations limit three-

(2005) (showing decrease in favorable remands in asylum decisions between 2000 and 2003).

288. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002) (codified as amended at 8 C.F.R. § 1003).

289. See 8 C.F.R. § 1003.1(e)(4) (authorizing affirmance without opinion).

290. See *id.*

291. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878.

292. See Legomsky, *supra* note 12, at 1657.

293. See *id.* at 1657 (quoting COMM'N ON IMMIGRATION, ABA, *supra* note 210, at ES-32).

294. See COMM'N ON IMMIGRATION, ABA, *supra* note 210, at 3-26.

member review to only a few circumstances.²⁹⁵ This shift to a single-member review may result in a less thorough review. Given the time pressures under which immigration judges issue their rulings, a less thorough review at the BIA level means a greater likelihood that errors will escape the review process. Moreover, a single-judge model of review leaves less room for legal debate and disagreement among judges that would enhance legal reasoning and could lead to more accurate decision making. Indeed, some studies have documented that a greater likelihood of less favorable rulings for noncitizens exists when review occurs under a single-member review as opposed to a panel review.²⁹⁶ According to a 2008 GAO Report, only 7 percent of single-member judgments favored noncitizens, whereas 52 percent of panel decisions favored noncitizens.²⁹⁷

These procedural shortcuts raise serious questions about the accuracy of the agency's factual determinations and whether noncitizens get a fair shake at the agency level. If immigration judges do not have the necessary time and resources to do a thorough job in the first place, and the BIA institutes procedures to short-circuit the intra-agency review process, then there is a greater likelihood of errors at the agency level. To make matters worse, the Board in 2002 changed not only the means by which immigration judge decisions are reviewed but also the nature of that review when it curbed its scope of review from *de novo* review to clearly erroneous.²⁹⁸ The clearly erroneous standard is the same standard that appellate courts employ to evaluate factual findings by district courts.²⁹⁹ Thus, it is a highly deferential standard of

295. The six circumstances are:

(1) the need to settle inconsistencies among the rulings of different immigration judges; (2) the need to establish a precedent construing the meaning of laws, regulations, or procedures; (3) the need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents; (4) the need to resolve a case or controversy of major national import; (5) the need to review a clearly erroneous factual determination by an immigration judge; or (6) the need to reserve the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

8 C.F.R. § 1003.1(e)(6)(i)-(vi) (2010).

296. *See id.*

297. *See id.*

298. *See id.*

299. *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard

review. But an appellate court defers to the district court, in part, because of assurance that the procedures employed there and the judicial process provided to the parties satisfy the standard of justice.

Given the crushing caseloads and extreme time pressures under which immigration judges operate, the same logic does not apply to the immigration agency. The clear error standard shields the Board from exercising much-needed oversight to ensure that through its review an individual would not be harmed by an immigration judge's mistakes. And coupled with the switch to single-member review and the lack of meaningful analysis by the BIA, a reasonable perception is that the BIA is merely "rubber stamping" the decisions of immigration judges, however flawed some of them may be.³⁰⁰ The effect of these changes is to cast doubt on whether any meaningful review happens at the agency. Arguably, the first meaningful review of an immigration judge's decision happens at the federal courts of appeals. Though the ideal solution would put more meaningful review at the agency level where it belongs, the agency's unwillingness or incapacity to do so means circuit judges must have the necessary latitude to review agency decisions more searchingly to catch errors and remand for more accurate fact-finding.

III. INAPPLICABLE ASSUMPTIONS UNDER THE SUBSTANTIAL EVIDENCE STANDARD

My argument for less deferential appellate review of agency fact-finding in asylum cases does not rest only on the agency's current capabilities. If it did, more searching review might be only temporarily required—until Congress properly supported the agency with resources that could "cure" its current problems. Unfortunately, however, additional resources would not wholly allay many concerns related to appellate review. Many of the traditional assumptions that counsel deference to agencies simply do not apply with much force to immigration agencies.

to the trial court's opportunity to judge the witnesses' credibility.").

300. See *supra* notes 189-201 and accompanying text.

A. Comparative Advantage

1. Live Testimony Advantage

One reason why appellate judges defer to trial judges on findings of fact is because the trial judge is in a better position than the appellate judge to come to a conclusion about factual questions. The trial judge sees the presentation of the evidence live. Therefore, he or she has access to a defendant's or witness's demeanor—whether the person appears nervous or makes eye contact, as well as other nonverbal cues that an appellate judge cannot discern from reading a transcript of the proceeding.³⁰¹ Such nonverbal cues are critical in a trial judge's determination of whether a particular defendant or witness was or was not credible. This relationship of direct interaction to credibility—and thus generally more accurate fact-finding—explains why appellate judges review a trial judge's findings of fact under the clear error standard, under which a trial judge's findings of fact must stand unless clearly erroneous.³⁰² This means that if there are two reasonable inferences that can be drawn from a particular fact, and the trial judge draws one such inference and the reviewing judge would draw the other inference, then the trial judge's inference cannot be clearly wrong and the reviewing judge cannot override it.³⁰³

The same rationale undergirds deference to an administrative finding of fact. An administrative fact-finder, like a trial judge, is theoretically in a better position to judge the credibility of a live witness and make assessments as to the related facts. According to Justice Breyer, reviewing judges should give even more deference to an administrative fact-finder than to a trial judge.³⁰⁴ But it is not clear why the review should be more deferential under the substan-

301. See Green, *supra* note 43, at 4.

302. FED. R. CIV. P. 52(a)(6); *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007).

303. *Cf. Menendez-Donis v. Ashcroft*, 360 F.3d 915, 918 (8th Cir. 2004) (“Under [the clear error] standard, we can overturn factual findings that we conclude are clearly wrong even though they are not unreasonable.”).

304. See *Dickinson v. Zurko*, 527 U.S. 150, 156 (1999) (concluding that the clear error standard is stricter than the substantial evidence standard of review, which “signal[s] less strict court/agency review”); see also *Menendez-Donis*, 360 F.3d at 918 (“[U]nder the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong.”).

tial evidence standard than under the clear error standard. On this factor alone, the deference accorded an administrative fact-finder should be equal to and no more deferential than the deference reviewing judges accord an Article III trial judge. An administrative fact-finder is in no better position to know that someone is lying than a trial judge: in both cases deference relates to the direct observation of the witness's demeanor and other nonverbal cues.³⁰⁵ This appears to be the position that Chief Judge Jacob endorsed in *Siewe* when he concluded that, under the substantial evidence standard, a reviewing court must accord “no lesser deference to an [immigration judge] than to a district judge when each draws inferences from the evidence as a finder of fact.”³⁰⁶

Moreover, empirical evidence suggests that, in some respects, an immigration judge may enjoy little comparative advantage over an appellate judge, and reliance on nonverbal cues may actually undermine accurate fact-finding. Concerning credibility determinations, which are “the most crucial aspect”³⁰⁷ of an asylum case and “the single biggest substantive hurdle’ facing asylum applicants,”³⁰⁸ Chief Judge Frank H. Easterbrook of the Seventh Circuit made the following observation:

Asylum cases pose thorny challenges in evaluating testimony. Applicants regularly tell horrific stories that, if true, show past persecution and a risk of worse to come.... Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms. Yet many aliens, who want to remain in the United States for economic or social reasons unrelated to persecution, try to deceive immigration officials. Often they are coached by friends or organizations that disapprove of this nation's restrictions on immigration and do what they can to help others remain here. Occasionally, the coaches (like smug-

305. An administrative fact-finder may theoretically have greater expertise over the facts he or she may be considering. Therefore, administrative fact-finding may deserve greater deference. I address this argument in Part III.B.

306. *Siewe*, 480 F.3d at 168.

307. Rempell, *supra* note 8, at 186-87 (quoting Cianciarulo, *supra* note 8, at 126).

308. *Id.* at 187 (quoting Kagan, *supra* note 8, at 368).

glers who provide transportation and bogus credentials) do this for pay rather than out of friendship or commitment. How is an immigration judge to sift honest, persecuted aliens from those who are feigning?³⁰⁹

Empirical evidence in psychology supports Judge Easterbrook's view that in matters of credibility, certainty is not possible.³¹⁰ Contrary to popular belief, attention to a witness's demeanor is not a reliable method for spotting a liar.³¹¹ Such unreliability would be magnified in the immigration context due to the role of cultural differences. Immigration judges see noncitizens from a variety of cultures, thus it may be difficult to draw a general conclusion about whether a particular mannerism or demeanor signifies lying. For example, avoiding eye contact when speaking, which indicates dishonesty in some cultures, would not necessarily imply that the person is being untruthful in others. Avoidance of eye contact might indicate deference to authority or be another relatively meaningless non-verbal cue or trait. Instead, research shows that what someone says, instead of how it is said, is a more reliable indicator of dishonesty.³¹² Thus, factual inconsistencies and the amount of detail provided in a story are what more accurately distinguish a truth-teller from a fibber.³¹³ But even then, the error rate is significant.³¹⁴ If factual inconsistencies and the amount of detail in a story are more reliable indicators of the truth than one's demeanor, then reviewing judges are equally positioned to discern fact from fiction from a hearing transcript. Arguably, they may be in a *better* position to accurately

309. *Mitondo v. Mukasey*, 523 F.3d 784, 788 (2008); see also Suketu Mehta, *The Asylum Seeker*, THE NEW YORKER, Aug. 1, 2011, at 32, 36-37 (documenting incentives for asylum applicants to augment their claims of persecution).

310. Kagan, *supra* note 14, at 129-36 (examining evidence in psychology and other social science research that cast serious doubt about the utility of demeanor in assessing truth from fiction).

311. See RICHARD WISEMAN, QUIRKOLOGY: HOW WE DISCOVER THE BIG TRUTHS IN SMALL THINGS 54-56 (2007).

312. Stephen Porter & John C. Yuille, *The Language of Deceit: An Investigation of the Verbal Cues to Deception in the Interrogation Context*, 20 LAW & HUM. BEHAV. 443 (1996); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS. 243, 263-64 (1988).

313. See WISEMAN, *supra* note 311, at 58-59.

314. See *id.* at 58.

assess truth from fiction because they are not influenced by potentially misleading nonverbal cues.³¹⁵

2. *Procedures Employed at Article III Courts Versus at Agencies*

The INA does not specify the procedure for adjudicating claims for asylum. Instead, statutory provisions and agency regulations fill that gap. Compared to district court hearings, the procedures in removal hearings that assist in an accurate development of the facts are scant. Unlike at the district court level, there are no Federal Rules of Civil Procedure or Federal Rules of Evidence to guide and safeguard the integrity of the fact-finding process.³¹⁶ There is often no formal discovery process to develop and test facts.³¹⁷ The INA merely specifies that the immigration judge shall “interrogate, examine, and cross-examine the alien and any witnesses.”³¹⁸ But as argued above, developing the necessary facts through testimony and cross-examination of witnesses can be challenging for the significant portion of asylum-seekers who proceed without representation.³¹⁹ In such an environment, a reviewing judge would have greater confidence in the accuracy of the facts found by the Article III judge versus an immigration judge.

315. *See Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1084-85 (9th Cir. 1997) (Duniway, J., dissenting) (“Every trial lawyer knows, and most trial judges will admit, that it is not unusual for an accomplished liar to fool a jury (or, even, heaven forbid, a trial judge) into believing him because his demeanor is so convincing. The expression of his countenance may be open and frank; he may sit squarely in the chair, with no squirming; he may show no nervousness; his answers to questions may be clear, concise, and audible, and given without hesitation; his coloration may be normal—neither pale nor flushed. In short, he may appear to be the trial lawyer’s ideal witness. He may also be a consummate liar.”).

316. The Federal Rules of Civil Procedure “govern ... civil actions and proceedings in the United States District Courts.” FED. R. CIV. P. 1. Likewise, the Federal Rules of Evidence govern proceedings in United States District Courts, as well as other federal courts. FED. R. EVID. 101.

317. Limited discovery is possible. In particular, regulations authorize depositions and Freedom of Information Act (FOIA) requests. *See* FOIA, 6 C.F.R. §§ 5.1-5.12 (2012); FOIA, 8 C.F.R. §§ 103.42, 1003.35 (depositions). The IJ has some discretion to hold a pre-hearing conference, during which parties can “exchange information voluntarily.” 8 C.F.R. § 1003.21(a).

318. 8 U.S.C. § 1229a(b)(1) (2006).

319. *See supra* Part II.B.

B. Agency Expertise

Another reason why reviewing courts accord deference to agency findings is the assumption that agencies possess expertise that judges do not.³²⁰ One of the earliest cases to articulate this principle was *Universal Camera Corp. v. National Labor Relations Board*.³²¹ There, the Supreme Court clarified the meaning of the substantial evidence standard in the Administrative Procedure Act and the Taft-Hartley Act.³²² Though the Court emphasized that the substantial evidence standard gives courts “more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past,”³²³ it also stated that courts cannot “displace the [agency]’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”³²⁴ The Court concluded that the reason for deference to an agency’s finding of fact is to respect an agency’s “specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect.”³²⁵

The same expertise rationale motivated Justice Breyer’s opinion in *Zurko*.³²⁶ Justice Breyer rejected the adoption of the less deferential clear error standard of review for administrative factual finding. He did not, however, focus on the comparative advantage rationale for deference³²⁷—for example, observation of witnesses. Rather, he asserted that the Patent and Trademark Office’s expertise comes from its ability to deal with technically complex matters.³²⁸ Justice Breyer stated that the Court first used the term “substantial evidence” in the agency context to review factual findings made by the Interstate Commerce Commission. Reviewing the Federal Circuit’s cases, he concluded that in more than half of the cases

320. See *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999).

321. 340 U.S. 474, 487 (1951).

322. See *id.*

323. *Id.* at 490.

324. *Id.* at 488.

325. *Id.*

326. *Dickinson v. Zurko*, 527 U.S. 150, 157 (1999).

327. See discussion *supra* Part III.A.

328. *Dickinson*, 527 U.S. at 160.

the Federal Circuit³²⁹ decided between 1937 and 1946, the court emphasized technical complexity as the primary reason for deference.³³⁰

Although not cited by Justice Breyer in *Chevron*,³³¹ which directs the level of deference applied to agency legal determinations, looms large over all appellate review of agency action.³³² The Supreme Court has reiterated in several cases that *Chevron* applies in immigration cases.³³³ Though in theory *Chevron* does not constrain a judge's review of the agency's findings of fact, in reality *Chevron* deference operates as a curb on judicial review over factual findings.³³⁴ Indeed, the technical expertise rationale Justice Breyer gave for why courts need to defer to an agency's fact-finding echoes *Chevron*.³³⁵

In *Chevron*, the Court articulated the expertise rationale for deference to agencies, a rationale often debated by judges and scholars alike.³³⁶ The case concerned a disputed interpretation of the phrase "stationary source" in the 1970 Clean Air Act Amendments.³³⁷ The Environmental Protection Agency (EPA), which administers the

329. The Court refers here to the Court of Customs and Patent Appeals (CCPA), which was the predecessor to the Court of Appeals for the Federal Circuit. *See id.* at 154.

330. *See id.* at 161.

331. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

332. John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 520 (2008) (describing *Chevron* as "the keystone in the Court's jurisprudence of appellate review of agency action"); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (characterizing *Chevron* as "the Court's most important decision about the most important issue in modern administrative law").

333. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (stating that *Chevron* applies to asylum and withholding cases); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987) (invoking *Chevron* to reverse the BIA's interpretation of the meaning of the asylum and withholding of deportation statute in the INA).

334. *See* Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 775, 786-88 (1992); Jonathan Robert Nelson, *Shaking the Pillars: An Asylum Applicant Shakes Loose Some Unusual Relief*, INTERPRETER RELEASES, Jan. 3, 2006, at 1-3 (explaining that in *Xiaodong Li v. Gonzales*, 420 F.3d 500, 503-04 (5th Cir. 2005), the Fifth Circuit reluctantly upheld the BIA's decision to deny Li asylum under *Chevron* deference, a case that generated so much political pressure that it led the Attorney General to take the unprecedented step to ask the court to vacate its initial ruling).

335. *Dickinson v. Zurko*, 527 U.S. 150, 160 (1999) (noting that the PTO, as an "expert body," can "better deal with the technically complex subject matter" than can a judge).

336. *See* Kane, *supra* note 332, at 520 (describing *Chevron* as "the most cited and discussed case in the history of administrative law").

337. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845-46 (1984).

statute, concluded that because the Clean Air Act did not define the statute it had authority under the Environmental Protection Act to promulgate a rule interpreting the phrase broadly.³³⁸ The D.C. Circuit disagreed and interpreted the phrase narrowly because of its view that the statute so mandated.³³⁹ The Supreme Court disagreed. It narrowed the judicial role to determining whether Congress expressed a clear intent concerning the meaning of the statutory term. If a court cannot determine a clear congressional intent, then its role is to defer to an agency's interpretation, as long as it is reasonable.³⁴⁰

The Court named several reasons to defer to agencies. One was political accountability.³⁴¹ Because the consequence of choosing between two interpretations of the statutory text boiled down to balancing the conflicting policy interests of environmental protection and economic growth, the Court stated that federal judges "who have no constituency [] have a duty to respect legitimate policy choices made by those who do."³⁴² Another reason was the Court's view that Congress delegated authority, albeit implicitly, to agencies to interpret the statutes they administer.³⁴³ Yet another reason was the expertise rationale. Because the regulatory scheme at issue in *Chevron* was both complex and technical, the Court deferred to the agency's "detailed and reasoned fashion," stating that "[j]udges are not experts in the field."³⁴⁴

Some scholars have argued against *Chevron's* expertise rationale. In *Chevron*, the Court deferred to the agency because the statute was "lengthy, detailed, technical, [and] complex."³⁴⁵ According to John Kane, this rationale obfuscates the role of courts; just because the subject matter a court is required to understand is technical

338. *Id.* at 840, 841; 40 C.F.R. §§ 51-52 (1981).

339. *Chevron*, 467 U.S. at 841-42.

340. *Id.* at 842-43.

341. *Id.* at 866.

342. *Id.*

343. *See id.* at 843-44; Eskridge & Baer, *supra* note 2, at 1085-89 (tracing the developments in *Chevron* deference).

344. *Chevron*, 467 U.S. at 863, 865; cf. Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 743 (2002) (discussing the Court's justification for its holding in *Chevron* on the expertise rationale, but concluding that the decision ultimately turned an implied congressional delegation).

345. *Chevron*, 467 U.S. at 848.

does not mean that the choice courts make is itself technical and outside of the province of judicial expertise.³⁴⁶ Both the *Chevron* and pre-*Chevron* frameworks require the agency to explain its decision in a way that a reviewing court can understand so that the court can determine whether the agency's decision was reasonable.³⁴⁷ Kane argues that courts are better able to come to an informed choice about an issue, however technical, once agencies satisfy their duty of explaining the issue for a reviewing court.³⁴⁸ "Exercising judgment is generally the area of judges'" expertise, not necessarily administrators' or technicians'.³⁴⁹ Even if Congress intended for courts to simply defer to an agency's judgment about matters that are technical, the expertise rationale applies with significantly less force in the immigration context. Understanding the statute in *Chevron* required expertise of a scientific nature.³⁵⁰ Though the kind of expertise required to understand the patent statute in *Zurko* was not scientific, it was complex in a technical sense.³⁵¹ The INA, while complicated in scope, is neither scientific nor technical.³⁵² It resembles any other complicated statute that Article III judges interpret on a daily basis.

It may be that agencies possess expertise not only in the sense that they have the technical or scientific understanding over the material but also in the sense that they develop a specialty over the subject matter by the exclusive nature of their practice. The argument goes as follows: the EPA, as the administrator of the Clean Air Act, is in a better position to interpret the meaning of a particular term in a statute it administers than an Article III court

346. Kane, *supra* note 332, at 552.

347. *Id.* at 352 n.201. Kane also cites pre-*Chevron* law that requires an agency to explain in reasonable detail both the substance and method of the agency's decision. *See id.*; *see, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (concluding that an agency decision may be upheld for lacking clarity if the reasoning can be discerned by a reviewing court).

348. Kane, *supra* note 332, at 552.

349. *Id.* *Chevron* was also predicated on a political accountability rationale, which may counsel in favor of deferring to the policy choices made by an agency. *See infra* Part III.C.

350. *See Chevron*, 467 U.S. at 865 ("The Administrator's interpretation represents a reasonable accommodation of manifestly competitive interests and is entitled to deference: the regulatory scheme is technical and complex.").

351. *Dickinson v. Zurko*, 527 U.S. 150, 160 (1998) (describing the subject matter as "technically complex").

352. 8 U.S.C. §§ 1101-1524 (2006).

because the EPA has interpreted that term more often than a judge and can bring to bear its superior knowledge of the statute generally. Article III judges practice in courts of general jurisdiction and, by that very nature, are less likely to develop expertise in a particular area of the law.³⁵³ Likewise, the BIA may be more of an expert on the meaning of the term “persecution” in the INA because it deals with the term on a frequent basis in the course of administering the statute. An immigration judge may be in a better position to tell whether an asylum applicant is lying because the judge sees hundreds of such applicants and is better able to distinguish one who shows a genuine fear of persecution from another who may be lying. But as discussed in Part II.C, this frequency may not result in accuracy. It may actually undermine it.³⁵⁴ Immigration judges who absorb only a constant stream of stories of persecution are more likely to face post-traumatic stress disorder.³⁵⁵ Recurrent accounts of persecution may lead to unwarranted perception of fraud and, as various circuit judges have noted, a tendency for prejudgment, hostility towards noncitizens, and an inaccurate assessment of the facts.³⁵⁶

Further, circuit judges’ sharp critiques of the significant mistakes made by IJs and BIA members actually challenge the claim that the BIA and the IJs possess greater expertise than the circuit courts on immigration matters.³⁵⁷ During the last decade, the

353. Erwin Chemerinsky, *Decision-Making: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 114-15 (1997) (discussing the nature of Article III judges as generalists).

354. See *supra* Part II.C.

355. Lustig et al., *supra* note 267, at 73-75.

356. *Id.* at 76-77 (describing IJs’ perceptions of fraud in their courtrooms); see *Qun Wang v. Att’y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“[T]he tone, the tenor, and disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show.”); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (“[T]he IJ’s opinion is riddled with inappropriate and extraneous comments, such as reference to the IJ’s personal experiences with alcohol in Egypt.”); *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 154-55 (3d Cir. 2005) (finding that the IJ’s “hostile” and “extraordinarily abusive” conduct towards the petitioner “by itself would require a rejection of his credibility finding”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (“[T]he [immigration judge’s] assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture.”); *Korytynuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (“[I]t is the IJ’s conclusion, not [the petitioner’s] testimony, that ‘strains credulity.’”).

357. See, e.g., Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron*, 60 DUKE L.J. 1059, 1109-11 (2011) (discussing critiques often made about the decisions of IJs and the BIA).

number of immigration cases in the federal circuit courts has increased exponentially.³⁵⁸ In 2005, close to 40% of the Second Circuit's docket was immigration cases.³⁵⁹ The Ninth Circuit was not far behind. Between 35% and 40% of the two circuits' dockets have been immigration cases in recent years.³⁶⁰ These numbers alone would require circuit judges to become familiar with the INA and substantive immigration law. Moreover, the structural changes made at the BIA to streamline review have increased circuit judges' expertise in immigration law while decreasing the BIA's.³⁶¹ Even in non-streamlined cases, the BIA provides so little, if any, reasoning of its decisions that some have questioned whether an IJ decision affirmed without opinion by the BIA should be accorded *Chevron* deference at all by the circuit court.³⁶² In a similar vein, Judge Posner has commented that in many cases, the BIA "is not deploying any insights that it might have obtained from adjudicating immigration cases."³⁶³ Finally, the empirical evidence in psychology

358. See, e.g., Note, Recent Cases, *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts—Wang v. Attorney General*, 423 F.3d 260 (3d Cir. 2005), and *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596, 2596 (2006) (stating that immigration cases have "swollen in the past five years from three percent to eighteen percent of all federal appeals").

359. Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547, 551-52 (2007).

360. Rempell, *supra* note 8, at 187.

361. See, e.g., Cronin, *supra* note 359, at 552-53 (outlining the Second Circuit's steps to accommodate its increased caseload). As argued previously, the egregious errors committed by BIA members and IJs raise significant concerns about their expertise. See, e.g., *Ayala v. Att'y Gen.*, 605 F.3d 941, 943, 951 (11th Cir. 2010) (remanding to the BIA because "[t]he decision of the Board is riddled with error" and the BIA and IJ "fail[ed] to render a reasoned decision"); *Haile v. Holder*, 591 F.3d 572, 574 (7th Cir. 2010) (remanding to the BIA for a second time because "the Board's conclusion [that denationalization alone does not constitute persecution] doesn't follow from its premise, and unlike a jury an administrative agency has to provide a reasoned justification for its rulings"); *Parlak v. Holder*, 578 F.3d 457, 471, 480 (6th Cir. 2009) (Martin, J., dissenting) ("This record is replete with error."); *Bah v. Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) ("[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework.... The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due.").

362. Farbenblum, *supra* note 357, at 1112 n.295 (quoting *Smriko v. Ashcroft*, 387 F.3d 279, 289 (3d Cir. 2004) ("If ... an individual Board member arbitrarily ... streamlines a case where no Board or binding precedent accepts or rejects an alien's plausible interpretation of an ambiguous statute, we are then left to interpret the statute without the BIA having provided its *Chevron* deference-entitled 'concrete meaning' to an ambiguous statute.")).

363. *Wei Cong Mei v. Ashcroft*, 393 F.3d 737, 739 (7th Cir. 2004).

shows that accuracy and certainty may not even be possible in credibility determinations.³⁶⁴ Such findings cast further doubt on the possibility that the immigration agency can bring to bear or develop expertise in its immigration proceedings in the same way that the EPA can over scientific matters.³⁶⁵

Other measures show that an Article III judge may be more “expert” than an immigration judge at discerning truth from fiction. One way judges develop this skill is through their experience in hearing cases. Judges who are appointed to the federal bench undergo a rigorous selection and confirmation process that tests their professional background, legal experience, and judicial temperament.³⁶⁶ Judges appointed to the appellate bench usually have years of experience hearing cases that would engender confidence in their skill in exercising sound judgment. Comparatively, the hiring process for immigration judges is not as rigorous, and immigration judges generally possess less legal experience than Article III judges.³⁶⁷

Recent reports that have exposed the illegal hiring of immigration judges at the Department of Justice (DOJ) beginning in 2003 also undercut the credibility of some immigration judges and the integrity of their decisions.³⁶⁸ In his testimony to Congress, Kyle Sampson, who was then Chief of Staff in the DOJ Office of the Attorney General and in charge of hiring immigration judges, stated that until 2006, he believed that the appointment of immigration judges was not subject to the civil service laws that prohibited hiring based on political affiliation.³⁶⁹ Under Sampson, the EOIR did not post or fill vacancies for immigration judge positions without communicating those vacancies to Sampson and the Office of the

364. *See supra* notes 308-15 and accompanying text.

365. *See supra* Part III.A.1.

366. *See* Chemerinsky, *supra* note 353, at 115.

367. *See id.*

368. PENN STATE LAW, CTR. FOR IMMIGRATION RIGHTS, PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT’S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES 23 (2009); *see* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2195 (2011) (concluding that today—unlike during the New Deal when an agency’s expertise was more scientific—agency decisions reflect more political, not scientific considerations, and that agency decisions may reflect “‘tunnel vision,’ an agency’s supreme confidence in the importance of its own mission to the point where it leaves common sense aside”).

369. *Id.* at 17, 25.

Attorney General.³⁷⁰ Sampson himself asked for names of potential candidates from the White House and Republican members of Congress.³⁷¹ Even with those sources, he confirmed candidates' Republican Party affiliation by having them fill out a PPO Non-Career Appointment Form. That form required candidates to name their political party affiliation, voting address for the past two presidential elections, involvement in the Bush/Cheney campaigns of 2000 and 2004, and the contact information for someone who could verify the candidate's political involvement.³⁷²

Notwithstanding the illegality of taking political affiliation into account in civil service hiring, hiring judges on the basis of political affiliation—Democratic, Republican or third party—neglects the criteria necessary to do the job, chiefly, judicial experience and experience in immigration law.³⁷³ Although the EOIR has implemented changes to improve the process of hiring immigration judges,³⁷⁴ according to the ABA, there is still the lack of transparency and public input in the hiring of immigration judges that would ensure that applicants with inadequate backgrounds or inappropriate judicial temperament are not hired.³⁷⁵ Such realities show why the expertise rationale for deference is particularly unconvincing in the immigration context.

C. Political Accountability

The Supreme Court in *Chevron* articulated political accountability of agencies as a significant reason why courts need to defer to agency choices and their resolution of competing views involving matters of public interest.³⁷⁶ This was based on the view that

370. *Id.* at 28.

371. *Id.*

372. *Id.*

373. See COMM'N ON IMMIGRATION, ABA, *supra* note 210, at 2-10 (stating the importance of hiring immigration judges with adequate experience and appropriate judicial temperament).

374. *Id.*

375. *Id.* at 2-18 to 2-19.

376. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 867, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))).

Congress and the President, who create and appoint agency members, are democratically elected, while Article III judges are not.³⁷⁷ Congress created agencies to make tough policy choices that arise under a particular statute; therefore, we should respect agency choices.³⁷⁸ But this reason for deference was limited to policy choices made by agencies, not their factual determinations.³⁷⁹ Therefore, the political accountability rationale does not apply to fact-finding in individual asylum cases.

Even if fact-finding could be closely aligned with policy determinations, the political accountability rationale is itself unconvincing in the asylum context. Agency personnel are no more democratically elected than are Article III judges.³⁸⁰ One difference is that agency personnel are appointed by the President and the agency is created by Congress—both are publicly elected. Therefore, agency personnel are arguably more answerable to the political process than Article III judges.³⁸¹ But an agency member's connection to the political process is attenuated at best.³⁸² The EPA, according to the Court in *Chevron*, is not directly accountable to the public either, but it is theoretically accountable through the President.³⁸³ In practice, though, it would be rare for an agency adjudicator's decision in individual cases to result in political accountability, especially so in the immigration context.³⁸⁴ Even under the theoretical assumption that the public could somehow hold the Attorney General accountable for the decisions of the BIA and IJs, the reality is that decisions by the BIA and IJs—and the procedures employed to arrive at those decisions—are not publicly available.³⁸⁵ In fact, most of the decisions the BIA and IJs make are unpublished, further insulating them from public accountability.³⁸⁶

377. *Id.*

378. *Id.* at 865-66.

379. *See id.*

380. *But see* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 762 (“Scholars have widely endorsed *Chevron* and especially the principle of [agency] political accountability on which it rests.”).

381. Kane, *supra* note 332, at 563.

382. *Id.* (noting that the agency officials are “indirectly” answerable to elected officials).

383. *Chevron*, 467 U.S. at 865.

384. Kane, *supra* note 332, at 563 (wondering when the last time an agency adjudicator's decision resulted in political accountability).

385. Farbenblum, *supra* note 357, at 1108.

386. *Id.* at 1109.

D. Finality: Akin to Jury Verdicts?

Another argument for greater deference under the substantial evidence standard is the value of the finality of administrative decisions. Indeed, this argument motivated Justice Breyer's holding in *Zurko*. There, he described congressional debates concerning the meaning of the substantial evidence standard that reveal that Congress explicitly rejected the clear error standard for administrative fact-finding in order to give more finality to administrative fact-finders.³⁸⁷ To support his view, he cited Stern's law review article, which goes as far as to argue that the substantial evidence standard used to review an administrative fact-finding is "identical" to the standard appellate courts apply in reviewing jury verdicts.³⁸⁸ We accord deference to a jury verdict, in part, because it is intended to be final.

The contention that an administrative fact-finder's conclusions merit the same deference as that of a jury is unconvincing, however. In at least two respects, we accord more deference to a jury's verdict than an administrator's fact-finding. The Supreme Court has said that a reviewing court must take into account the administrative record as a whole and must consider evidence that detracts from the fact-finder's conclusion.³⁸⁹ In contrast, a court reviewing a jury verdict must draw every possible inference in favor of a jury verdict.³⁹⁰ Second, unlike a jury, an administrative fact-finder must provide reasons for her decision. Indeed, under *SEC v. Chenery Corp.*, an administrative fact-finder must explain her reasoning with "such clarity as to be understandable."³⁹¹ A jury has no obligation to explain the reasons for its decision. That difference is especially acute in the review of an adverse credibility determination. When an appellate court reviews a jury's credibility determination, it must disregard all evidence that is "favorable to the moving party that the jury is not required to believe."³⁹² This

387. *Dickinson v. Zurko*, 527 U.S. 150, 156 (1999).

388. Stern, *supra* note 158, at 74, 76.

389. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

390. FED. R. CIV. P. 50; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

391. 332 U.S. 194, 196 (1947).

392. *Reeves*, 530 U.S. at 151.

means that the reviewing court must defer almost entirely to a jury's factual determination. But the substantial evidence standard allows a reviewing court to review an administrative fact-finder's credibility determinations more strictly than the findings of a jury. While the finality of agency decisions is an important goal, it should not be the exclusive goal—particularly in light of evidence that casts serious doubt on the competence of the fact-finding process at the agency.

IV. THE WAY FORWARD: ANALYSIS AND RECOMMENDATIONS

The critiques by circuit judges have shed necessary light on the deficiencies of asylum adjudication and have renewed talks for agency reform. Scholars have recommended proposals ranging from incremental changes at the agency to a drastic overhaul of the entire asylum adjudication system.

An example of the former approach is Scott Rempell's recommendation to broaden the BIA's scope of review over immigration judge decisions.³⁹³ Before the 2002 reforms, the BIA had the authority to review IJ decisions *de novo*, including over factual findings.³⁹⁴ As explained in Part II.D, under the 2002 regulations, the BIA must review findings of fact under the highly deferential clearly erroneous standard of review.³⁹⁵ The effect of the change in the standard of review is that it gives the BIA much less discretion to overturn IJ factual findings. Though it is not particularly unusual to defer to a trier of fact, who has some comparative advantage over a reviewing court,³⁹⁶ a reviewing court could interpret greater deference as mandating an altogether less thorough review. As applied to the BIA, this is a plausible inference. The change in standard of review coincided with the BIA's institution of other procedural shortcuts, such as moving from a three-judge panel review to single-member review and streamlining decisions.

393. Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 321 (2011).

394. *Id.* at 285 (citing *In re S-H-*, 23 I. & N. Dec. 462, 463-64 (B.I.A. 2002)); see also *In re Vilanova-Gonzalez*, 13 I. & N. Dec. 399, 402 (B.I.A. 1969); *In re B-*, 7 I. & N. Dec. 1, 1 (B.I.A. 1956).

395. 8 C.F.R. § 1003.1(d)(3)(i) (2012).

396. See *supra* Part III.A.

The cumulative effect of these changes is a less thorough review of immigration judges' decisions. If less attention is paid to each case within the agency, then the court of appeals is the first level of meaningful review. Reinstating *de novo* review of immigration judges' decisions would be an incremental improvement leading to more meaningful review at the agency level. It would give reviewing judges confidence that the fact-finding process had been accurate at the agency level.³⁹⁷

An example of a more drastic approach is Stephen Legomsky's recommendation to overhaul the entire immigration adjudication system.³⁹⁸ Legomsky proposes giving more decisional independence to immigration judges by moving them from the Department of Justice into a new independent executive branch tribunal.³⁹⁹ He also advocates converting immigration judges to administrative law judges, which would give them more job security and give them the resources necessary to do their jobs more effectively.⁴⁰⁰ For the appellate phase, Legomsky recommends a single round of appeal outside of the agency done by Article III judges instead of BIA members.⁴⁰¹ But that appeal would be done in a new immigration court, with experienced Article III district and circuit judges serving two-year assignments.⁴⁰² By giving Article III judges more oversight over immigration judges, Legomsky argues that the new system would depoliticize asylum adjudication.⁴⁰³ Moreover, a new Article III court would preserve the specialized expertise of immigration law and also provide a generalist's perspective.⁴⁰⁴ Legomsky's proposal would provide more independent oversight during the appellate process. Removing immigration judges from the Justice Department would reduce the likelihood of political pressure on decision making and would more likely ensure fairer outcomes.

While Legomsky's solution is feasible, it may ultimately prove politically elusive, like many other proposals to reform the immigra-

397. Rempell also discusses other reasons why regulatory reform should reinstitute the *de novo* standard. See Rempell, *supra* note 393, at 319.

398. See generally Legomsky, *supra* note 12.

399. See *id.* at 1678.

400. See *id.* at 1681-82.

401. See *id.* at 1714.

402. See *id.* at 1715.

403. See *id.* at 1721.

404. See *id.* at 1680-81.

tion adjudication system. For years, many commentators and scholars have articulated proposals to reform the immigration system without any resulting action or even political or public consensus. With the current budget crisis⁴⁰⁵ and the partisan political climate, a drastic change in the administration of the immigration system is unlikely in the near future. If the agency cannot do more to ensure a more accurate fact-finding process by IJs and if the BIA does not institute procedures for more thorough review, errors will continue and will escape review by the BIA. Lack of proper oversight from reviewing court of appeals judges increases the risk of an asylum petitioner returning to a foreign country to face persecution.⁴⁰⁶ Until enough resources and political will exist to make the necessary changes to the agency below, court of appeals judges should embrace the latitude they have under the substantial evidence standard to inquire into the fact-finding process to ensure that mistakes are caught.

A. The Legal Basis for “Stricter” Review

Courts have iterated the substantial evidence standard in a variety of ways in a variety of contexts. Examples include: “more than a mere scintilla”⁴⁰⁷ (reviewing action of Social Security Administration); “more than a scintilla but less than a preponderance of the evidence, and must be based upon the record taken as a whole”⁴⁰⁸ (Department of Agriculture); “less than a preponderance, but rather such relevant evidence as a reasonable person would accept as adequate to support a conclusion”⁴⁰⁹ (Social Security); “such relevant evidence as a reasonable mind might accept as adequate to accept a conclusion”⁴¹⁰ (county planning commission and board); agency findings “may not be disregarded on the basis that

405. See *supra* note 233 and accompanying text.

406. See *Ming Shi Xue v. BIA*, 439 F.3d 111, 113-14 (2d Cir. 2006).

407. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

408. *Lacy v. U.S. Dep’t of Agric.*, No. 07-3961, 2008 WL 2178099, at *4 (6th Cir. May 22, 2008) (internal quotations omitted) (quoting *Bobo v. U.S. Dep’t of Agric.*, 52 F.3d 1406 (6th Cir. 1995)).

409. *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005).

410. *USCOC of Va. #3, Inc. v. Montgomery Cnty. Bd. of Supervisors*, 343 F.3d 262, 271 (4th Cir. 2003) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

other inferences might have been more reasonable”⁴¹¹ (Department of Labor Benefits Review Board); “not irrational [] and is in accordance with the law”⁴¹² (Benefits Review Board); “whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion”⁴¹³ (Patent and Trademark Office); and whether “a reasonable jury could have found” the facts the agency found⁴¹⁴ (NLRB). As noted earlier in Part I.C, even within the immigration context, the language used to explain the substantial evidence standard has ranged considerably.⁴¹⁵

Essentially, as one scholar has argued, substantial evidence has become a reasonability standard in application.⁴¹⁶ The standard encompasses a range of deference that gives judges latitude to factor in the capabilities and the credibility of the agency’s fact-finding process. After concluding that technical findings by the PTO deserve more deference than findings made by trial judges due to the PTO’s superior expertise, Justice Breyer and the majority in *Zurko* emphasized that ultimately, what appellate judges are trying to do when they review findings by an agency is to assess “intangible factors such as judicial confidence in the fairness of the fact-finding process.”⁴¹⁷ Indeed, even after Justice Breyer’s carefully calibrated analysis of the difference between the clear error standard of review and the substantial evidence standard of review, the Court admitted, “[C]ase-specific factors, such as a finding’s dependence upon agency expertise or the presence of internal agency review ... will often prove more influential in respect to outcome than will the applicable standard of review.”⁴¹⁸

This view of judicial review echoes what the Court stated almost half a century ago in *Universal Camera Corp.*, one of the earliest cases to analyze the substantial evidence standard of review.⁴¹⁹ The case involved review of factual findings made by the National Labor

411. *Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 240 (4th Cir. 2011).

412. *Pietrunti v. Office of Workers’ Comp. Programs*, 119 F.3d 1035, 1040 (2d Cir. 1997).

413. *Dickinson v. Zurko*, 527 U.S. 150, 162-63 (1998) (internal quotations omitted).

414. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 367 (1998).

415. See *supra* Part I.C.

416. See Zaring, *supra* note 2, at 148.

417. *Zurko*, 527 U.S. at 163 (citation omitted).

418. *Id.*

419. 340 U.S. 474, 489, 477 (1951).

Relations Board.⁴²⁰ There, the Court admitted to the difficulty of capturing in words what is entailed in the process of appellate review.⁴²¹ The Court did not assume that agencies possess expertise merely by virtue of being an agency. Instead, the Court urged deference for matters that are “within [the] special competence” of the agency and matters over which the agency “carr[ies] the authority of an expertness which courts do not possess.”⁴²² Moreover, the Court required reviewing judges to canvass the “whole record” to ascertain substantiality, and “not to abdicate[] the[ir] conventional judicial function.”⁴²³

Judge Calabresi articulated a similar view in *Mei Chai*, in his response to Judge Jacobs.⁴²⁴ He stated:

In the end, this disagreement over formal labels is not the real issue. As our court [has] so presciently stated ... while the various statements made in the course of upholding or rejecting the adequacy of a particular finding are often helpful, they cannot become rigid rules or law that dictate the outcome in every case [] because we know of no way to apply precise calipers to all such findings so that any particular finding would be viewed by any three of the 23 judges of this Court as either sustainable or not sustainable. In practice, panels will have to do what judges always do in similar circumstances: apply their best judgment, guided by the statutory standard governing review and the holdings of our previous precedents, to the administrative decision and the record assembled to support it. And sound judgment of this sort cannot be channeled into rigid formulae.⁴²⁵

420. *Id.*

421. *See id.* (“It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.”).

422. *Id.* at 488, 490.

423. *Id.* at 477, 490.

424. 489 F.3d 517, 523-24 n.4 (2d Cir. 2007).

425. *Id.* (citations and internal quotations omitted).

B. Akin to Hard Look Review

Such a standard is akin to “hard look” review. The hard look doctrine has its origin in *Greater Boston Television Corp. v. FCC*,⁴²⁶ where Judge Leventhal articulated the “supervisory function”⁴²⁷ of courts to police agencies and intervene “if the court becomes aware ... from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”⁴²⁸ Though Judge Leventhal used the words “hard look” to refer to the agency’s responsibilities, the words have evolved to describe a rigorous standard circuit judges apply to review agency decisions.⁴²⁹ In *Motor Vehicle Manufacturers Ass’n v. State Farm Auto Mutual Insurance Co.*, the Court established the doctrine and rooted its foundations in section 706 of the APA, which requires that courts reverse agency action if it is arbitrary and capricious.⁴³⁰ A court’s obligation to review the entire record under the substantial evidence standard is also a facet of the hard look requirement.

The hard look doctrine is not without its critics. Some have questioned its legal basis⁴³¹ and claimed that judges lack the technical knowledge to make sound judgments about agency decisions.⁴³² Others say the doctrine leads to an ossification of agency rule making because meeting a court’s demands is expensive, time consuming, and requires resources that the agency may not have.⁴³³ These concerns are diminished in the immigration

426. 444 F.2d 841, 851 (D.C. Cir. 1970).

427. *Id.*

428. *Id.* (citation omitted).

429. *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980).

430. *See* 5 U.S.C. § 706(2)(A) (2006) (“The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); Miles & Sunstein, *Arbitrariness Review*, *supra* note 2, at 763.

431. *See* Miles & Sunstein, *Arbitrariness Review*, *supra* note 2, at 762.

432. Breyer, *supra* note 2, at 388-90.

433. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13-15 (2009) (discussing undue ossification of rulemaking from analytical demands courts have made on agencies); Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928-29 (2007) (arguing that hard look review incentivizes agencies to hire consultants to do their work, which does not achieve the purpose of hard look, which is to make agency officials undergo their own intellectual exercise).

context because, as discussed in Part II, the kinds of facts immigration judges find do not necessarily involve technical or scientific expertise. Because striking down an agency decision under a hard look review in the immigration context would essentially mean requiring a more thorough fact-finding in individualized determinations, the concerns about freezing the status quo and discouraging efficient agency decision making would be significantly less.

Moreover, courts appear to be applying hard look review to other agencies, which provides precedent for the stricter review standard articulated in immigration. Thomas Miles and Cass Sunstein have argued that courts appear to be applying hard look review when applying the substantial evidence and arbitrary and capricious standards.⁴³⁴ In an empirical study of decisions rendered by the EPA and NLRB from 1996 to 2006, they found that courts reversed decisions at a 46 percent rate and attributed the high reversal rates to the impermissible role that political ideology plays in hard look review.⁴³⁵ That courts are reversing agencies that are, by most accounts, more credible, capable, and highly resourced than the immigration agency⁴³⁶ at a higher rate⁴³⁷ further supports adopting a stricter approach in immigration.⁴³⁸

C. A Continuum of Deference

Since *Mei Chai*, Judge Calabresi and other judges on the panel have decided and authored six opinions under the substantial evidence standard.⁴³⁹ In every one, the panel granted the petition

434. Miles & Sunstein, *Arbitrariness Review*, *supra* note 2, at 765.

435. *Id.* at 767.

436. *See supra* Part II.A.

437. In comparison, circuit courts reverse immigration agency decisions at rates approximately between 5 percent (Fourth Circuit) and 25 percent (Seventh Circuit). *See supra* notes 71-72 and accompanying text.

438. The high rate of reversal of the EPA and NLRB may also be explained by the kinds of claims being challenged—those that are more prone to differences in political ideology—and the quality of lawyers who challenge them—the kinds of large law firms bringing a challenge to a decision by the EPA would be more likely to win on appeal than the kinds of lawyers who appeal IJ and BIA appeals, *see supra* notes 254-61 and accompanying text.

439. *See* *Jin Yi Liao v. Holder*, 558 F.3d 152, 154, 156 (2d Cir. 2009); *Aliyev v. Mukasey*, 549 F.3d 111, 115 (2d Cir. 2008); *Diallo v. U.S. Dep't of Justice*, 548 F.3d 232, 234 (2d Cir. 2008); *Niang v. Mukasey*, 511 F.3d 138, 145 (2d Cir. 2007); *Delgado v. Mukasey*, 503 F.3d 702, 705 (2d Cir. 2007); *Vumi v. Gonzales*, 502 F.3d 150, 153 (2d Cir. 2007).

and remanded back to the agency.⁴⁴⁰ In none of them, however, has the panel resurrected the “stricter” formulation of the substantial evidence standard. But if standards of review are to mean anything—and if Judge Calabresi and his colleagues are indeed applying a stricter standard, as it appears from the outcome of the six cases—then he should clearly state as much. Doing so would put agencies on notice that their factual findings will receive careful scrutiny and could achieve *ex ante* what a remand does *ex post*: instructing the agency to develop the necessary facts and do a more careful job in the first instance.⁴⁴¹

Stricter review in immigration does not mean formulating a new standard in immigration cases only or applying different standards for different agencies. Rather, it means applying one standard but understanding that the substantial evidence standard permits a continuum of deference depending on the capabilities, expertise, and reliability of the agency. Until Congress amends the INA to give appellate courts more latitude to order more fact-finding,⁴⁴² reviewing courts should embrace the latitude they already have under the substantial evidence standard to remand decisions to ensure

440. See cases cited *supra* note 439.

441. Though there will be an initial added burden stemming from more remands, the precise effect of more remands on the agency’s ability to manage its caseload is beyond the scope of this article and a topic for future study.

442. Before the passage of the Immigration Reform and Illegal Immigration Responsibility Act of 1996 (IRIIRA), Pub. L. 101-108, 110 Stat. 3009 (1996), Congress explicitly gave, by statute, appellate courts discretionary authority to remand to the agency for more factual development. 28 U.S.C. § 2347(c) (2006). For example, courts have taken judicial notice of non-record evidence and remanded under § 2347(c) for further consideration by the agency. *See, e.g., Coriolan v. INS*, 559 F.2d 993, 1002-04 (5th Cir. 1977) (taking judicial notice of Amnesty International Report and remanding under § 2347(c)). The IRIIRA now generally precludes this option. In only a limited number of circumstances may an appellate court remand to the agency for additional fact-finding. One such circumstance is when the immigration judge does not make an explicit credibility finding, yet the BIA mistakenly relies on a presumed adverse determination to reach its conclusions. *Wan Chien Kho v. Keisler*, 505 F.3d 50, 56 (1st Cir. 2007) (“If, in the absence of a credibility finding by the IJ, a reviewing court determines that such a finding is necessary for effective review of the case, it may remand to the agency for further fact-finding.”). Another is when a reviewing appellate court determines that a credibility finding is necessary to review the case and the immigration judge has not made one. *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1059 (9th Cir. 2005); *Hartooni v. INS*, 21 F.3d 336, 343 (9th Cir. 1994) (remanding for credibility determination). The ability to remand for additional fact-finding appears to be limited to credibility determinations and compelling circumstances in which not doing so would result in manifest injustice. *Tian Ming Lin v. U.S. Dep’t of Justice*, 473 F.3d 48, 52 (2d Cir. 2007).

that the quality of procedures employed at the agency was adequate and that their decisions are considered and rest on accurate and developed facts.⁴⁴³

CONCLUSION

Asylum adjudications are prone to significant mistakes. Though the ideal solution would be to give the agency the resources necessary to do its job well the first time, both political will and capital are lacking. One consequence of this impasse is that some noncitizens are removed on an inaccurate assessment of the facts. With an agency either unable or unwilling to ensure an accurate and fair fact-finding process, the first meaningful review of an asylum applicant's petition happens at the court of appeals. This Article has articulated the bases for why reviewing courts need to embrace the latitude they have to remand for an accurate assessment of the facts and a legal basis to do so under the substantial evidence standard. Reviewing courts defer to reasonable decisions by agencies. But without the necessary factual predicate for such decisions—as is evident in many an immigration administrative record—there is very little to which courts can defer.

The substantial evidence standard is appropriately less deferential in many asylum cases because not all justifications for agency deference exist, nor are those that potentially exist very compelling. If some agencies like the EOIR are no better situated than district court judges to make findings of fact, then it is unclear why reviewing courts should accord them more deference than they do trial judges. Indeed, the strong evidence of under-resourcing at the agency level—which has manifested itself in egregious errors made by immigration judges and the lack of meaningful review at the BIA level—suggests that the agency is, in fact, in a worse position to make accurate findings of fact as compared to a district judge. The touchstone of any review standard, let alone the substantial

443. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (remanding agency decision under the arbitrary and capricious standard for development of the record that would give the reviewing court the “factors that were considered” by the agency, the agency’s “construction of the evidence,” and “some explanation in order to determine if the [agency] acted within the scope of [its] authority and if the [agency]’s action was justifiable under the applicable standard”).

evidence standard, is whether there can be “judicial confidence in the fairness of the fact-finding process.”⁴⁴⁴ Sadly, in our current system of asylum adjudication, such confidence may be misplaced. Without that confidence, reviewing judges should be able to reject findings when adequacy or accuracy is in doubt.

For decades, consensus in the immigration debate has been elusive. But if there is one area where all sides of the debate can find common ground, it is that removal decisions should be based on accurate factual information. That can only happen with an agency willing and able to employ a more accurate and adequate fact-finding process and a reviewing court willing to police it.

444. *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999).