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THE SECOND CIRCUIT'S "NEW ASYLUM SEEKERS": RESPONSES TO AN EXPANDED IMMIGRATION DOCKET

*John R.B. Palmer**

INTRODUCTION

The year 2002 saw a dramatic shift in the dynamics of immigration litigation in the United States. Triggered by a "streamlining" of the Department of Justice (DOJ)'s administrative review of expulsion orders,¹ immigration appeals have been pouring into the federal courts in record numbers. Not only is DOJ ordering more people expelled, but a significantly higher proportion of these people are now seeking judicial review.² For the first time ever, the courts of appeals have become major focal points for immigration litigation—not just in exceptionally compelling or strategic cases, but in ordinary, run-of-the-mill cases as well. Judicial review has become a regular component of the expulsion process.³

The consequences of this new phenomenon are multiple, and will likely reverberate throughout the entire system of immigration law. Among other things, DOJ's streamlined review has meant that the courts of appeals are increasingly reviewing oral immigration judge (IJ) opinions directly, without the Board of Immigration Appeals (BIA) first smoothing over rough edges.⁴ This has brought the federal courts face to face with a system of administrative adjudication straining under a

* At the time of writing, the author was an associate supervisory staff attorney for the U.S. Court of Appeals for the Second Circuit. The author is grateful to Professor Gerald L. Neuman for his valuable comments on an earlier draft, and to the editors of the *Catholic University Law Review* for all their work in organizing the symposium and improving this article. The views expressed herein are those of the author and do not necessarily represent the views or policies of the Second Circuit or any other person or entity.

1. "Expulsion" is a generic term used here to refer to removal, deportation, and exclusion.

2. See John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3-4 (2005).

3. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 8.

4. See *id.* at 28.

massive caseload that often seems to dwarf the resources allocated to it.⁵ Moreover, huge numbers of immigration cases have added to the federal courts' already-crowded dockets, and there is no sign of the flow subsiding.⁶ Nowhere has this result been more pronounced than in the Second and Ninth Circuits.⁷

This article focuses on the situation in the U.S. Court of Appeals for the Second Circuit. The immigration appeals coming into that court (and this is probably true in the other courts of appeals as well) are largely related to asylum applications.⁸ In other words, most of the appeals are being brought by people who claim to be refugees and who seek to avoid being expelled on that basis. High-volume asylum applications have been a significant feature of the systems of immigration adjudication in North America and Western Europe since the 1980s.⁹ Whereas asylum-seekers previously tended to concentrate in the countries directly bordering those from which they fled, moving farther afield only as part of organized refugee resettlement programs, the 1980s marked the beginning of a new pattern of "intercontinental jet-age asylum-seekers" arriving spontaneously "by sea and by air in increasingly large numbers in countries far away from their homelands."¹⁰ At least in the United States, however, these "new asylum seekers"¹¹ mostly limited their litigation to the agency level, and ventured into the judicial branch only in exceptional cases.¹² The increase in appeals that began in 2002, therefore, marks the federal courts' first real encounter with this type of high-volume asylum adjudication.

The Second Circuit has responded with a number of procedural measures aimed at improving its ability to keep up with the added

5. See Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 701-02 (1996).

6. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 3, 43-49.

7. See Lenni B. Benson, *Making Paper Dolls: In Which the Author Explains How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. (forthcoming 2006); Palmer, Yale-Loehr & Cronin, *supra* note 2, at 44-45.

8. Benson, *supra* note 7; see also Palmer, Yale-Loehr & Cronin, *supra* note 2, at 71-72.

9. See Matthew J. Gibney, *The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy*, in *THE REFUGEES CONVENTION 50 YEARS ON: GLOBALISATION AND INTERNATIONAL LAW* 19, 22-23 (Susan Kneebone ed., 2003); David A. Martin, *The New Asylum Seekers*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S* 1, 4-5 (David A. Martin ed., 1988).

10. Martin, *supra* note 9, at 1 (quoting *Report of the Executive Comm. of the High Commissioner's Programme* (35th Sess.) ¶ 76, U.N. DOC. A/AC.96/651 (1984)).

11. See generally *id.*

12. See David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1325 (1990).

caseload. These have included an initial effort to resolve large numbers of cases through compulsory mediation, a tightening of the time in which records and briefs are filed, the implementation of a process through which asylum appeals may be adjudicated without oral argument, and the creation of a specialized “immigration unit” within the court’s central Staff Attorneys Office.¹³ As a result, the court is now adjudicating immigration appeals at a higher rate than it is receiving them, and it has made significant progress toward reducing its existing backlog. In addition, the court is publishing a large number of precedential opinions in immigration cases, resolving a wide range of issues and adding to the development of the law.

One of the most striking aspects about this new caselaw is the degree to which it is focused on questions of evidence and credibility. Whereas the comparative trickle of immigration appeals before 2002 appear to have been largely self-selected to pose discrete questions of law, the recent shift in litigation tactics has flooded the court with cases that turn on adverse credibility determinations. Such fact-specific cases might seem well-suited for disposition through nonprecedential orders, yet the court has chosen to set precedent in a relatively large number of them. Between the start of 2002 and July 14, 2006 (the time of writing), the court had already issued forty-one precedential opinions on adverse credibility determinations, addressing the bases on which such determinations may or may not rest, the level of deference they are accorded, and the proper remedy when they turn out to be flawed.¹⁴

The immersion in credibility issues is probably the result of the court’s confrontation with the paradigm of the new asylum seeker, whose intercontinental travel often complicates the fact-finding process and generates skepticism among receiving countries’ authorities.¹⁵ This skepticism can become especially pronounced when large numbers of asylum claims are fed through the standardizing machinery of the high-volume law office or “travel agency” and rapidly spit out in cookie-cutter form.¹⁶ While the skepticism may be warranted in many cases, it places genuine refugees in an extremely precarious situation, and it often leads to a tension between first-instance administrative adjudicators and reviewing courts—a tension that appears to be reflected in many of the Second Circuit’s recent opinions.

Part I of this article provides an overview of the Second Circuit’s caseload and explains why the increase in immigration appeals has been

13. See *infra* Part II.A-D.

14. See *infra* note 74 and accompanying text; text accompanying notes 123–47.

15. See *infra* notes 87–94 and accompanying text.

16. See Palmer, *supra* note 2.

so significant for the court. Part II discusses the court's procedural responses to this increase, and the degree to which they have enabled it to keep up with the increased work. Part III then examines the court's focus on evidence and credibility and proposes the new asylum seeker paradigm as one possible explanation. The article presents a parallel between the current tension over credibility findings and a very similar situation that transpired some 100 years ago, during the country's first experiment with restrictive immigration policies. Although the Article does not attempt to quantify the extent to which today's administrative decisions are flawed, it explains how the flaws that do exist seem to stem from a tendency of many administrative adjudicators to be swayed by generalized skepticism about the "new asylum seekers" and to view their claims in the aggregate instead of tying findings to the evidence presented in each individual case. Now that the increased litigation has immersed the court in credibility issues, this administrative tendency is butting up against the judiciary's case-by-case, record-oriented approach to individualized justice.

I. CASELOAD

A. *Quantity*

The recent increase in the federal courts' immigration appeals is a phenomenon that has received significant attention from journalists, scholars, and legal practitioners.¹⁷ Beginning in April 2002, the number of challenges to BIA decisions lodged in the U.S. courts of appeals began to rise dramatically, climbing from an average of about 150 petitions for review per month to an average of about 770 per month.¹⁸ The bulk of

17. See, e.g., ABA COMM'N ON IMMIGR. POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 1-4 (2003), available at <http://www.abanet.org/immigration/bia.pdf> [hereinafter ABA REPORT]; COMM. ON FED. COURTS, ASS'N OF THE BAR OF THE CITY OF N.Y., THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS 1-2 (2004), available at <http://www.abcnyc.org/pdf/report/AppealSurgeReport.pdf> [hereinafter ABCNY REPORT]; DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE ABA COMM'N ON IMMIGR. POLICY, PRACTICE & PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 39-41 (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf; STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 729-31 (4th ed. 2005); Benson, *supra* note 7; Palmer, *supra* note 2; Palmer, Yale-Loehr & Cronin, *supra* note 2, at 3-8. For media accounts of this increase, see Palmer, Yale-Loehr & Cronin, *supra* note 2, at 8 n.17.

18. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 44. The direct causes of this phenomenon are a rise in both (1) the volume of BIA decisions being issued each month, and (2) the rate at which those decisions are appealed. See *id.* at 4. The causes of the increase in appeal rate are more difficult to pin down, but have been hypothesized as (1)

these challenges have been lodged in the Second and Ninth Circuits.¹⁹ In the Second Circuit alone, there has been an average of 171 petitions for review per month since April 2002—more than the average number of petitions filed each month *nationwide* before 2002.²⁰ In total, the Second Circuit received 7,723 petitions for review between April 1, 2002 and October 1, 2005.²¹

These numbers may look impossibly large to anyone contemplating the amount of work required for adjudication, but their actual impact obviously depends on such things as staffing and resources, as well as simply the volume and mix of cases to which courts have become accustomed. In the Second Circuit, the post-2002 petitions for review have been significant because they so greatly outnumber the pre-2002 filings, and because they make up such a large percentage of the court's overall docket.²² Moreover, this major increase in caseload has not been accompanied by any increase in the number of judgeships, which has remained at thirteen since 1984.²³

Since 2002, the Second Circuit has been receiving significantly more immigration appeals every month than it used to receive in an entire year.²⁴ In total, it has now received more than three times as many immigration appeals since 2002 as it received in the previous thirty years combined.²⁵ This has had a significant effect on the court's overall docket, which increased by 56% between fiscal year 2001 and fiscal year 2005.²⁶ Petitions for review drove most of this increase, which would

an increase in the proportion of BIA decisions constituting final expulsion orders, (2) an increase in the proportion of final orders of removal involving non-detained aliens, and (3) a shift in litigation behavior among immigration lawyers and their clients based on the high volume of BIA decisions and dissatisfaction with the BIA's procedures. *See id.* at 6-7.

19. *See id.* at 44-45.

20. *See id.*

21. *See* Palmer, *supra* note 2.

22. *See* Palmer, Yale-Loehr & Cronin, *supra* note 2, at 44-45, 48-49.

23. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 201, 98 Stat. 333, 346-47 (codified at 28 U.S.C. § 44 (2000)) (providing for the most recent increase in Second Circuit judgeships, from eleven to thirteen); *see also* Chronological History of Authorized Judgeships in U.S. Courts of Appeals, http://www.uscourts.gov/history/chronological_appeals.pdf (last visited June 27, 2006). In addition to the thirteen active judges on the Second Circuit, the court also has a fluctuating number of judges on senior status. *See* 28 U.S.C. § 371(b)(1) (2000). That number currently stands at ten. *See* U.S. Court of Appeals for the Second Circuit, List of Second Circuit Judges, <http://www.ca2.uscourts.gov/JudgesMain.htm> (last visited June 27, 2006).

24. *See* Palmer, *supra* note 2.

25. *See id.* (reporting 2,360 petitions for review filed between April 1, 1972 and April 1, 2002, and 7,723 petitions filed between April 1, 2002 and October 1, 2005).

26. *See* Federal Court Management Statistics 2005, Courts of Appeals, <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (last visited Aug. 16, 2006) [hereinafter

have been only 3% had the number of petitions for review remained steady.²⁷ In terms of the composition of the docket, petitions for review accounted for around 4% of all of the court's filings before 2002.²⁸ They now make up about 36%, which makes them the court's largest single category of cases.²⁹ The Second Circuit now receives more petitions for review than civil appeals between private parties.³⁰ In fact, it receives more petitions for review than private civil appeals and criminal appeals combined.³¹

B. Quality

Petitions for review, by definition, challenge administrative expulsion orders.³² In other words, all of these cases coming into the courts of appeals are being brought by people whom DOJ has ordered expelled from the United States. The petitions are usually the first opportunities these people have for judicial review of their expulsion orders.³³ Although the Second Circuit does not systematically track the precise issues raised in these petitions, it is clear that the majority of them hinge on asylum claims. These are people who generally conceded that they

Federal Court Management Statistics] (reporting 7,035 cases filed in the Second Circuit during fiscal year 2005, as compared to 4,519 during fiscal year 2001).

27. This figure is calculated using the number of petitions for review filed in the Second Circuit during fiscal years 2005 (2,550) and 2001 (173) reported in the data sets assembled by the Administrative Office of the U.S. Courts (AO) and the Federal Judicial Center (FJC) and disseminated by the Inter-university Consortium for Political and Social Research (ICPSR). See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 33-34; see also Federal Court Management Statistics, *supra* note 26 (noting the numbers for overall Second Circuit filings during those fiscal years—7,035 for 2005 and 4,519 for 2001).

28. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 48.

29. The percentage is calculated from the number of petitions for review filed in the Second Circuit in fiscal year 2005 (2,550)—obtained from the ICPSR data sets—and the total number of Second Circuit filings in 2005 (7,035)—obtained from the AO's 2005 Federal Court Management Statistics. See *supra* note 27. That this is the largest single category of cases can be seen by comparing it with the categories listed in *Judicial Business of the U.S. Courts 2005*, excluding, of course, the "administrative appeals" category into which petitions for review themselves fall. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2005, at 134 tbl.B-6 (2005), available at <http://www.uscourts.gov/judbus2005/contents.html> [hereinafter JUDICIAL BUSINESS OF THE U.S. COURTS 2005].

30. In fiscal year 2005, the court received 1,511 civil appeals between private parties, see JUDICIAL BUSINESS OF THE U.S. COURTS 2005, *supra* note 29, at 134 tbl.B-6, as compared to 2,550 petitions for review, see *supra* note 27.

31. In fiscal year 2005, the court received 995 criminal appeals and 1,511 civil appeals between private parties. See JUDICIAL BUSINESS OF THE U.S. COURTS 2005, *supra* note 29, at 134 tbl.B-6. The total appeals received in these categories combined is 2,506, as compared, again, with 2,550 petitions for review, see *supra* note 27.

32. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 19.

33. See *id.*

were inadmissible or deportable, and then sought relief from expulsion based on fear of persecution in their countries of origin.³⁴ DOJ ultimately denied relief, and most (or, at least, a plurality) of the denials under review appear to be based on findings that the asylum-seekers were not being truthful.³⁵ Again, however, hard numbers on specific issues are difficult to come by.

II. PROCEDURAL RESPONSE: KEEPING UP WITH THE NUMBERS

The increase in immigration appeals has caused serious concerns in the Second Circuit about delays in adjudication and the accumulation of a backlog. To address these concerns, the court has taken a number of steps aimed at improving its ability to keep up with the pace at which appeals are being filed. These include: (1) modifying its mediation program, (2) cutting down on delays associated with the filing of records and briefs, (3) establishing a non-argument calendar for asylum-related appeals, and (4) relying more on central staff attorneys, including specialized attorneys focused solely on immigration, in the preparation of bench memoranda and proposed orders.

A. Mediation

The Second Circuit's mediation program, launched in 1974, is the oldest of the alternative dispute resolution programs in the federal courts of appeals.³⁶ Until recently, it was the only such program that regularly included immigration appeals.³⁷ One might assume that mediation would

34. See 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1) (2000).

35. See, e.g., cases cited *supra* note 74.

36. See Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 756-57 (1986). See generally JERRY GOLDMAN, AN EVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN: AN EXPERIMENT IN JUDICIAL ADMINISTRATION (1977), reprinted, in part, in MANAGING APPEALS IN FEDERAL COURTS 21 (Fed. Judicial Ctr. 1988); ANTHONY PARTRIDGE & ALAN LIND, A REEVALUATION OF THE CIVIL APPEALS MANAGEMENT PLAN (1983), reprinted, in part, in MANAGING APPEALS IN FEDERAL COURTS 89, *supra*; Jerry Goldman, *The Civil Appeals Management Plan: An Experiment in Appellate Procedural Reform*, 78 COLUM. L. REV. 1209 (1978).

37. See JUDITH A. MCKENNA, LAURAL L. HOOPER & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 26-32 (Fed. Judicial Ctr. 2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CaseMan1.pdf/\\$File/CaseMan1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CaseMan1.pdf/$File/CaseMan1.pdf); Lisa Evans, *Mediation in the Ninth Circuit Court of Appeals*, 26 JUST. SYS. J. 351, 351-52 (2005) (noting that the Ninth Circuit launched a pilot program in 2004 to identify groups of immigration cases that might be amenable to settlement); E-mail from Robert Rack, Med., U.S. Court of Appeals for the Sixth Circuit, to John Palmer, Assoc. Supervisory Staff Att'y, U.S. Court of Appeals for the Second Circuit (July 25, 2006, 17:33 EST) (on file with author) (explaining that while immigration cases are not ineligible for mediation in the Sixth Circuit based on any rule or written policy, in practice, immigration cases are generally mediated only at the request of a party

have little value in an immigration appeal, given that the government has already invested significant resources in obtaining a final expulsion order, the alien is facing expulsion, and there are often few terms over which the parties can bargain. In fact, this has not been the experience in the Second Circuit, which has seen settlement rates as high as 64% in immigration appeals during some years.³⁸ Because the lawyers for the government and the alien on appeal are often not the same lawyers who represented these parties during the administrative proceedings, simply forcing these appellate lawyers to review the record and confront the weaknesses of their cases before they become invested in brief-writing often proves fruitful. Sometimes the government will agree to a stipulated vacature of the expulsion order, and a remand to the agency; sometimes the alien will agree to withdraw the petition, and save the costs of briefing a losing case.³⁹ Even when this does not occur, mediation often proves useful in identifying issues already pending before the court, allowing cases to be heard in tandem or to be postponed until issues are decided and then ultimately settled.⁴⁰

When the increase in immigration appeals began in 2002, all counseled immigration appeals were generally scheduled for mediation as soon as administrative records were filed and before being briefed and sent on to panels of judges.⁴¹ The bulge in appeals did not affect the mediation program at first because there were generally long delays in the filing of the records. By 2004, however, enough records had been filed that the mediation program began to be overwhelmed with immigration appeals.

or the court); E-mail from David Lombardi, Chief Circuit Med., U.S. Court of Appeals for the Ninth Circuit, to John Palmer, Assoc. Supervisory Staff Att’y, U.S. Court of Appeals for the Second Circuit (July 25, 2006, 17:33 EST) (on file with author) (explaining that immigration cases were excluded from Ninth Circuit mediation until 2004, and that they are currently mediated only when requested by a party or referred to mediation by judges or motions attorneys). See generally ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* (Fed. Judicial Ctr. 1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/\\$File/mediconf.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mediconf.pdf/$File/mediconf.pdf). As discussed below, the Second Circuit has now cut back on its immigration mediation. See *infra* notes 44-47.

38. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 79 tbl.7.

39. See ABCNY REPORT, *supra* note 17, at 11-12.

40. See, e.g., PARTRIDGE & LIND, *supra* note 36, at 91, 99. For example, in the late 1990s, dozens of petitions for review involving jurisdictional issues created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were put on hold pending resolution of these issues in *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998). Palmer, Yale-Loehr & Cronin, *supra* note 2, at 47. Once *Henderson* was decided, these cases were mostly remanded to the BIA based on settlement agreements between the parties. See *id.* at 47 n.232.

41. See MCKENNA, HOOPER & CLARK, *supra* note 37, at 70.

As a result, in the summer of 2004, the court hired an additional mediator on a part-time basis,⁴² and it began relying on volunteer mediators from the private bar. These new mediators handled immigration appeals almost exclusively. In addition, the court adopted a policy whereby immigration appeals would be sent forward for briefing and adjudication without mediation if it appeared that they would otherwise be delayed by the mediation process.⁴³ This arrangement continued until the summer of 2005.

In August 2005, in anticipation of the rapid filing of thousands of administrative records (discussed below), the court abandoned regular mediation in asylum-related appeals altogether.⁴⁴ Mediation now occurs in asylum appeals only when requested by one of the parties⁴⁵ or by the court in specific cases.⁴⁶ In immigration appeals that do not involve an asylum claim, mandatory mediation continues as before.⁴⁷

B. Records and Briefing Deadlines

As already noted, the major cause of delay when the increase in appeals first started was the time it took for administrative records to be filed. This began to be alleviated in the fall of 2005, when DOJ came up with a new arrangement by which it could produce records within weeks and deliver them to the court on CD-ROMs.⁴⁸ This has had a huge effect on the court's case-processing time; whereas petitions would regularly sit on the docket with no action for over a year due to record delays, they can now be briefed and sent to judges within only a few months of being filed.

Another cause of delay during the first few years after the increase began was petitioners requesting multiple extensions of time to file briefs, or simply missing briefing deadlines altogether. Recognizing how much is at stake in expulsion cases, the court had been relatively permissive in granting extension requests, and it had been very hesitant to dismiss cases based on briefing defaults. As the backlog of immigration cases built up, however, this approach began to change. In

42. Full disclosure: The author was this mediator.

43. See Notice to Second Circuit Litigants, http://www.ca2.uscourts.gov/Docs/CAMP/Notice_to_Litigants.pdf (effective July 6, 2004).

44. See 2D CIR. R. 0.29(a), (c), available at <http://www.ca2.uscourts.gov/Docs/Rules/LR.pdf>; Memorandum from John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit (Sept. 13, 2005) (on file with author).

45. See 2D CIR. R. 0.29(a), (c).

46. See *id.* R. 0.29(b).

47. See *id.* R. 0.29(a), (c).

48. See Memorandum from John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit, *supra* note 44.

July 2004, the court adopted a policy of granting initial thirty-day extensions as a matter of course, but granting additional requests only in exceptional circumstances.⁴⁹ It also became more strict about dismissing cases due to briefing defaults. Its current practice is to dismiss petitions when the petitioner's brief is not filed within fifteen days of the deadline.⁵⁰ In addition, the court will hear cases without the benefit of the respondent's brief if that brief is not filed within fifteen days of the respondent's deadline.⁵¹

C. Non-Argument Calendar

The most significant change adopted by the Second Circuit has been the establishment of a "non-argument calendar" whereby appeals relating to asylum claims can be decided without oral argument.⁵² Until 2005, the court was unique among the federal courts of appeals in its reliance on oral argument in almost all types of cases.⁵³ Whereas all of the other circuits employed some form of screening program to channel certain cases down a non-argument track, the only cases in which the Second Circuit regularly denied oral argument were those in which the appellant was both pro se and incarcerated.⁵⁴ All other appeals were generally scheduled for oral argument unless waived by the parties.⁵⁵ In practice, many people ended up waiving oral argument, but the Second Circuit nonetheless heard oral argument in a higher proportion of cases than any of the other courts of appeals.⁵⁶ In fiscal year 1998, for instance, 85% of the Second Circuit's decisions on the merits of counseled appeals were reached after oral argument, as compared to 54% in the Ninth Circuit.⁵⁷ Looking specifically at appeals from administrative agencies (such as the BIA), those numbers were again 85% for the Second Circuit, but only 29% for the Ninth.⁵⁸

49. See Notice to Second Circuit Litigants, *supra* note 43.

50. See 2D CIR. R. 0.29(d).

51. *Id.*

52. See Memorandum from John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit, *supra* note 44.

53. See MCKENNA, HOOPER & CLARK, *supra* note 37, at 8-9, 10 tbl.5 (summarizing the courts' non-argument practices as of 2000); 2D CIR. R. 0.29 (instituting the Second Circuit's first non-argument calendar); Pamela A. MacLean, *Judges Blast Immigration Rulings*, NAT'L L.J., Oct. 24, 2005, at S1 (noting that the Second Circuit's creation of the non-argument calendar was "a first for a circuit that prides itself on giving all litigants an opportunity for oral argument").

54. See MCKENNA, HOOPER & CLARK, *supra* note 37, at 70, 72.

55. See *id.* at 70.

56. See, e.g., *id.* at 11 tbl.6.

57. See *id.*

58. See *id.* at 11 tbl.7.

The Second Circuit initiated its non-argument calendar in October 2005,⁵⁹ and the process works as follows: “Any appeal . . . in which a party seeks review of a denial of a claim for asylum” is initially sent to a panel of three judges on the non-argument calendar.⁶⁰ The judges consider the appeal sequentially, and any one of them has authority to transfer the case to the regular argument calendar. The non-argument panel may dispose of the case in any way it sees fit; it is not limited in terms of outcome or form of decision. The non-argument panel is also authorized to hear oral argument itself, rather than transferring the case to a new panel of the regular argument calendar. If the case is transferred to the regular argument calendar, it is scheduled for oral argument before a new panel of judges.

Four non-argument panels convene every week (generally), and each panel is given twelve cases.⁶¹ Thus, a total of forty-eight cases are submitted to the non-argument calendar every week.⁶² The panels attempt to dispose of all their cases within three weeks of submission.⁶³

D. Reliance on Staff Attorneys

The final change adopted in response to the increase in immigration appeals has been greater reliance on the court’s central staff attorneys. Like all of the federal appeals courts, the Second Circuit already had a large central staff responsible for the preparation of bench memoranda in certain cases.⁶⁴ In the Second Circuit, before the establishment of the non-argument calendar, staff attorneys were responsible for the bench memoranda in all pro se appeals, as well as in all counseled and pro se motions.⁶⁵ The court’s staff attorneys have now been given the added responsibility of preparing bench memoranda and proposed orders in all of the appeals on the non-argument calendar. Although all of the staff attorneys work on these appeals to some extent, the court hired an additional eight attorneys to form an “immigration unit” that focuses entirely on the non-argument calendar.⁶⁶ The idea is that these specialized attorneys can most efficiently analyze the recurring legal and

59. See Memorandum from John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit, *supra* note 44.

60. 2D CIR. R. 0.29.

61. See Memorandum from John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit, *supra* note 44.

62. *Id.*

63. See *id.*

64. See MCKENNA, HOOPER & CLARK, *supra* note 37, at 6–7, 6 tbl.4, 68.

65. See *id.* at 68.

66. Full disclosure: The author helped to create this unit, and he supervised it from August 2005 to August 2006.

factual issues presented in the court's asylum cases, and that they can serve as resources for the rest of the staff on the complexities of immigration law.

E. Quantitative Results

One result of all these changes has been a huge increase in the Second Circuit's output of decisions. The court is now not only adjudicating enough immigration appeals to prevent the accumulation of a backlog, it has already shrunk the existing immigration backlog from 5,164 petitions for review pending on October 1, 2005,⁶⁷ to 3,242 pending on May 31, 2006⁶⁸—a 37% decrease in just eight months. The court disposed of approximately 1,200 of these appeals through nonprecedential summary orders,⁶⁹ and 74 through published opinions.⁷⁰ The remaining cases were terminated based on settlements, procedural defaults, or summary dismissals.⁷¹ These figures reflect action taken on the non-argument calendar, as well as action taken after regular arguments (and action taken administratively, in the case of settlements and procedural defaults). Up-to-date information is not yet available on the non-argument calendar in particular, but as of February 17, 2006, the Staff Attorneys Office had submitted 927 appeals to panels on this calendar, and these panels had decided 598 of them—588 through non-precedential summary orders, and ten through published opinions. The panels had transferred another forty-eight to the regular argument calendar to be decided after oral argument, and the remaining 271 were still under review by non-argument panels as of that date.⁷²

III. SUBSTANTIVE RESPONSE: JUDGING CREDIBILITY

The seventy-four immigration-related opinions that the Second Circuit published between October 1, 2005 and May 31, 2006 represent, by far, the most immigration opinions that the court has ever published in any prior year, let alone any prior eight-month period.⁷³ This indicates that

67. This figure comes from the ICPSR data described *supra* note 27.

68. This figure was obtained from the court's internal docket database.

69. This figure was estimated based on a search of Westlaw's database of unreported Second Circuit decisions (CTA2U) for the phrase "Board of Immigration Appeals" with dates before June 1, 2006, and after September 30, 2005. That search, conducted on July 25, 2006, yielded 1,235 cases, but it is assumed that not all of these are petitions for review.

70. The complete list of cases is on file with the author.

71. A breakdown on these terminations is not available at this time.

72. These figures were obtained from the court's internal docket database.

73. This can be easily confirmed by a Westlaw search for the phrase "Board of Immigration Appeals" within the database of reported Second Circuit decisions (CTA2R).

there have been substantive, as well as procedural, consequences of the increase in immigration appeals. At the very least, the sheer volume of these opinions means that immigration law is evolving at the circuit level faster than ever before. A wide range of open legal issues are being resolved, and gaps in the precedent quickly filled. The published opinions have touched on numerous areas of the law, but one of the most striking is the issue of credibility determinations—how they are made and how they are reviewed. While most of the court's asylum cases turn on the applicants' credibility, it is nonetheless significant that the court has chosen to address this issue so frequently in published opinions rather than nonprecedential summary orders.

One might think that there is little room for new legal precedent on the credibility of witnesses; surely courts long ago worked out the standards by which fact-finders may reject testimony as not credible and by which appellate courts review such decisions. In addition, to the extent that cases turn on credibility, one might expect them to be well-suited for nonprecedential decisions because they are fact-specific. Yet, since 2002, the Second Circuit has published a growing number of opinions in which it has reviewed adverse credibility determinations in the asylum context; as of July 14, 2006 (the time of writing), this number had reached forty-one.⁷⁴ Moreover, these are the court's first-ever

74. Yuanliang Liu v. U.S. Dep't of Justice, 455 F.3d 106, 111 (2d Cir. 2006); Liang Chen v. U.S. Att'y Gen., 454 F.3d 103, 105-08 (2d Cir. 2006) (per curiam); Guo-Le Huang v. Gonzales, 453 F.3d 142, 146-48 (2d Cir. 2006); Li Zu Guan v. INS, 453 F.3d 129, 138-40 (2d Cir. 2006); Li Hua Lin v. U.S. Dep't of Justice, 453 F.3d 99, 109-11 (2d Cir. 2006); Cheng Tong Wang v. Gonzales, 449 F.3d 451, 453-54 (2d Cir. 2006) (per curiam); Kanacevic v. INS, 448 F.3d 129, 136-38 (2d Cir. 2006); Zhi Wei Pang v. Bureau of Citizenship & Immigration Servs., 448 F.3d 102, 112 (2d Cir. 2006); Tu Lin v. Gonzales, 446 F.3d 395, 403 (2d Cir. 2006); Xian Tuan Ye v. Dep't of Homeland Sec., 446 F.3d 289, 297 (2d Cir. 2006) (per curiam); Diallo v. Gonzales, 445 F.3d 624, 629-34 (2d Cir. 2006); Rui Ying Lin v. Gonzales, 445 F.3d 127, 132 (2d Cir. 2006); Rizal v. Gonzales, 442 F.3d 84, 89-91 (2d Cir. 2006); Pavlova v. INS, 441 F.3d 82, 91-92 (2d Cir. 2006); Chung Sai Zheng v. Gonzales, 440 F.3d 76, 79-81 (2d Cir. 2006) (per curiam); You Hao Yang v. BIA, 440 F.3d 72, 76 (2d Cir. 2006) (per curiam); Ming Shi Xue v. BIA, 439 F.3d 111, 113-14 (2d Cir. 2006); Singh v. BIA, 438 F.3d 145, 147 (2d Cir. 2006); Tandia v. Gonzales, 437 F.3d 245 (2d Cir. 2006); Sall v. Gonzales, 437 F.3d 229, 235-36 (2d Cir. 2006); Qyteza v. Gonzales, 437 F.3d 224, 226 (2d Cir. 2006); Borovikova v. U.S. Dep't of Justice, 435 F.3d 151, 154 (2d Cir. 2006); Ming Xia Chen v. BIA, 435 F.3d 141, 143 (2d Cir. 2006); Xiao Ji Chen v. U.S. Dep't of Justice, 434 F.3d 144, 157-60 (2d Cir. 2006); Yu Yin Yang v. Gonzales, 431 F.3d 84, 85-86 (2d Cir. 2005); Latifi v. Gonzales, 430 F.3d 103, 104-05 (2d Cir. 2005); Majidi v. Gonzales, 430 F.3d 77, 80 (2d Cir. 2005); Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 400-02 (2d Cir. 2005); Jin Chen v. U.S. Dep't of Justice, 426 F.3d 104, 113-14 (2d Cir. 2005); Chun Gao v. Gonzales, 424 F.3d 122, 131 (2d Cir. 2005); Yun-Zui Guan v. Gonzales, 432 F.3d 391, 398-99 (2d Cir. 2005); Xue Hong Yang v. U.S. Dep't of Justice, 426 F.3d 520, 522 (2d Cir. 2005); Zhou Yi Ni v. U.S. Dep't of Justice, 424 F.3d 172, 174 (2d Cir. 2005); Jin Yu Lin v. U.S. Dep't of Justice, 413 F.3d 188, 189-90 (2d Cir. 2005); Xu Duan Dong v. Ashcroft, 406 F.3d 110, 111-12 (2d Cir. 2005); Jin Hui Gao v. U.S. Att'y

published opinions squarely reviewing adverse credibility determinations in asylum cases, a class of cases that has been in existence (essentially) since 1980;⁷⁵ indeed, they are almost the court's only published opinions involving credibility review in immigration cases of any time, going back as far as the 1952 enactment of the Immigration and Nationality Act.⁷⁶

In fact, the current focus on credibility is reminiscent of a much earlier wave of federal court litigation, one that occurred some 100 years ago during the implementation of the Chinese exclusion laws. That episode is distinguishable in a number of ways from the present situation, but it also bears remarkable similarities, offering clues as to why credibility is currently receiving so much attention from the Second Circuit. Specifically, both the Chinese exclusion litigation and the present asylum litigation appear to involve clashes between, on the one hand, the skepticism and fact-finding shortcuts of harried front-line adjudicators who view masses of cases in the aggregate, and on the other hand, the case-by-case, record-oriented approach of more removed reviewing courts. Whereas the skepticism implicated in the Chinese exclusion litigation was colored by overtly racist attitudes,⁷⁷ the current skepticism appears to stem instead from a variety of factors. I propose that one of these factors is the paradigm of the "new asylum seeker" that emerged in the 1980s.

A. *The "New Asylum Seekers"*

In the 1960s and 1970s, the governments of North America and Western Europe came to view refugee movements as distant, controllable phenomena that were more issues of foreign policy than domestic affairs.⁷⁸ Refugees fled from their homes in Asia, Africa, and

Gen., 400 F.3d 963, 963-64 (2d Cir. 2005); Zhou Yun Zhang v. INS, 386 F.3d 66, 74, 79 (2d Cir. 2004); Xusheng Shi v. BIA, 374 F.3d 64, 65-66 (2d Cir. 2004); Ramsameachire v. Ashcroft, 357 F.3d 169, 174-75 (2d Cir. 2004); Wu Biao Chen v. INS, 344 F.3d 272, 273, 275 (2d Cir. 2003); Secaida-Rosales v. INS, 331 F.3d 297, 301, 312 (2d Cir. 2003).

75. See THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 831-33 (5th ed. 2003) (discussing the 1980 Refugee Act and earlier forms of persecution-based relief).

76. The limited number of other opinions in which the court actually reviewed adverse credibility determinations in the immigration context include: *Kokkinis v. Dir. of INS*, 429 F.2d 938, 939-40, 942 (2d Cir. 1970) (deferring to special inquiry officer's decision to credit a witness over the petitioner, leading to a finding of deportability based on marriage fraud); *United States ex rel. Exarchou v. Murff*, 265 F.2d 504, 505, 507 (2d Cir. 1959) (reversing special inquiry officer's adverse credibility finding, which had led to a denial of voluntary departure).

77. See, e.g., Kitty Calavita, *The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910*, 25 *LAW & SOC. INQUIRY* 1, 26-27, 30-31, 34-35 (2000).

78. See Gibney, *supra* note 9, at 26.

Latin America into neighboring countries within those regions, and remained there unless invited to resettle in third countries through organized programs.⁷⁹ Refugees were easy to identify because they tended to move in masses and live in refugee camps, and the world's wealthier states could specially screen and select refugees from the countries of first asylum before inviting them to enter.⁸⁰ Moreover, the decision to take in refugees was often grounded in cold war geopolitics, and the opposition of xenophobic electorates in the West could be overcome by portraying refugee admissions as central to the struggle against communism.⁸¹

While this view of orderly, controlled refugee admissions linked to foreign policy or national security goals was necessarily an incomplete generalization,⁸² it nonetheless crystallized into an image of "traditional" asylum seekers. That image then stood in contrast to the "new asylum

79. See Martin, *supra* note 9, at 2-4, 9-10.

80. See *id.* at 9-10; Doris Meissner, *Reflections on the U.S. Refugee Act of 1980, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S*, *supra* note 9, at 60. As former INS Commissioner Doris Meissner put it: "Our historical understanding and policy conception of refugees and refugee situations was that of an overseas phenomenon. As a nation, we saw ourselves responding to events that occurred far away, and we saw refugees as persons whom we screened and chose before they could come to the United States." *Id.*

81. See Gibney, *supra* note 9, at 26-27. On the politicized nature of U.S. refugee admissions during this period, see generally GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 25-48 (1986); Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865 (1982). Writing in 1982, Professor Ira Kurzban concluded that "[s]ince 1948, our government has used the refugee admissions process for political purposes. The result is a selection and admission process that is promoted and ultimately molded by the unique value of refugees as political metaphors of alleged communist oppression." *Id.* at 866-67 (footnote omitted).

82. See Martin, *supra* note 9, at 2, 8 (acknowledging that the placement of the "new asylum seeker" in historical context leaves out "certain exceptions and qualifications" from earlier periods). Important exceptions to the image of "traditional" asylum seekers gathering in a neighboring country of first asylum, and remaining there unless invited to resettle farther afield, are the massive and scattered refugee movements from the Ottoman and Russian Empires, and the European dictatorships of the first half of the twentieth century. See Gilbert Jaeger, *Irregular Movements: The Concept and Possible Solutions*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S*, *supra* note 9, at 28-29. Ironically, it was those movements that had spawned the modern system of international refugee protection to begin with. See, e.g., Jean-Yves Carlier, *The Geneva Refugee Definition and the 'Theory of the Three Scales'*, in *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* 37, 38 (Frances Nicholson & Patrick Twomey eds., 1999); Danièle Joly, *A New Asylum Regime in Europe*, in *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES*, *supra*, at 336-37; Jerzy Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete*, in *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES*, *supra*, at 55-56.

seekers” who emerged in the 1980s. Unlike “traditional” asylum seekers, “new asylum seekers” did not wait in refugee camps for organized resettlement programs, but arrived directly in North America, Western Europe, and elsewhere.⁸³ They came by sea and by air in increasingly large numbers, often making use of smugglers and false documents.⁸⁴ This may seem today like an obvious byproduct of globalization, but governments at that time were startled by the emergence of these “intercontinental jet-age asylum-seekers.”⁸⁵ More importantly, the loss of control over arrivals, the economic pressures driving migrants from poor states to wealthy ones, and the subsequent end of the cold war all contributed to bringing asylum policy down from the “high politics” of foreign affairs and national security to the “day to day electoral politics” of such issues as unemployment, national identity, and the welfare state.⁸⁶

The result has been an increasingly skeptical reaction toward asylum claims in North America and Western Europe.⁸⁷ This skepticism is exacerbated by the inherent difficulties of corroborating an asylum claim and the added difficulties of corroborating such a claim after the asylum seeker has crossed not just a land border, but whole continents and oceans.⁸⁸ It is further exacerbated when high-volume law offices and “travel agencies” end up standardizing peoples’ stories so that they can churn out large quantities of cookie-cutter filings.⁸⁹ The skepticism has manifested itself, in part, in a series of restrictive measures aimed at

83. Martin, *supra* note 9, at 4.

84. *See id.* at 1, 5.

85. *See id.* at 1 (quoting *Report of the Executive Comm. of the High Commissioner's Programme (35th Sess.)* ¶ 76, U.N. DOC. A/AC.96/651 (1984)).

86. Gibney, *supra* note 9, at 28 (emphasis omitted). In addition, the fact “that the overwhelming majority of [these] asylum seekers [were] of non-European origin” fueled xenophobic reactions. Jaeger, *supra* note 82, at 36–37 (quoting the statement of a government representative at the consultations on the arrivals of asylum-seekers and refugees in Europe, held in Geneva in 1985).

87. *See* T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”: A Response to David Martin*, 44 U. PIT. L. REV. 237, 253–56 (1983) [hereinafter Aleinikoff, *A Response to David Martin*]; T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REFORM 183, 185 & n.14, 191, 199–200, 223–25, 231 (1984) [hereinafter Aleinikoff, *Political Asylum*] (discussing skeptical official reactions in the United States and West Germany, and noting growing pressure for restrictive immigration measures in France); Gibney, *supra* note 9, at 26–33; Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1208–09 (1989); Martin, *supra* note 9, at 8–11.

88. *See* Stephen Yale-Loehr & John R.B. Palmer, *Evidentiary Issues in Asylum Cases*, 6 BENDER'S IMMIGR. BULL. 595, 595 (2001).

89. *See* Palmer, *supra* note 2.

controlling and deterring the arrival of asylum seekers.⁹⁰ In addition, it has manifested itself more generally in the tendency of adjudicators to reject asylum claims based on adverse credibility determinations.⁹¹

In the United States, the “new asylum seekers” started arriving, unexpectedly, almost immediately after the enactment in 1980 of the country’s first statutory provision for asylum.⁹² At the time of its enactment, the Immigration and Naturalization Service (INS) anticipated that the provision would be used by only a very small number of people.⁹³ The legislation authorized 5,000 successful asylum applicants to adjust their status annually to that of lawful permanent resident,⁹⁴ and even this number “was seen as most generous and highly unlikely to be needed.”⁹⁵ Within six months, however, more than 100,000 asylum claims had been lodged under the new legislation, largely by Cubans, Iranians, and Nicaraguans.⁹⁶ While claims dropped off for a number of years after that, they rose to even higher levels at the end of the 1980s and throughout the first half of the 1990s.⁹⁷

90. See Aleinikoff, *Political Asylum*, *supra* note 87, at 188–95, 199–211; Gibney, *supra* note 9, at 28; Joly, *supra* note 82, at 341–55.

91. See Deborah E. Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 INT’L J. REFUGEE L. 252, 256–59 (1990); Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 RUTGERS L. REV. 127, 137–45, 160–74 (2000); Elwin Griffith, *Asylum and Withholding of Deportation—Challenges to the Alien After the Refugee Act of 1980*, 12 LOY. L.A. INT’L & COMP. L. REV. 515, 529–34 (1990).

92. Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (codified as amended at 8 U.S.C. § 1158 (2000)); see Aleinikoff, *Political Asylum*, *supra* note 87, at 184; Meissner, *supra* note 80, at 60.

93. See Aleinikoff, *Political Asylum*, *supra* note 87, at 184; CHARLES B. KEELY, U.S. COMM’N ON IMMIGRATION REFORM, THE CHALLENGE OF MASS ASYLUM 3–4 (1994), available at <http://www.utexas.edu/lbj/uscir/respapers/tco-jan94.pdf>; Meissner, *supra* note 80, at 60.

94. Refugee Act of 1980 § 209(b), 94 Stat. at 106.

95. Meissner, *supra* note 80, at 60; see also KEELY, *supra* note 93, at 3–4 (noting that the number had “no particular basis” and “seemed more than sufficient for the trickle of persons who sought asylum”).

96. See Meissner, *supra* note 80, at 60–61. This figure is only a rough estimate, as there are no reliable data from this period on the precise number of asylum applications filed. See Aleinikoff, *Political Asylum*, *supra* note 87, at 184 n.12, 186–88, 186 n.16.

97. See OFFICE OF IMMIGR. STATS., U.S. DEP’T OF HOMELAND SEC. (DHS), 2002 YEARBOOK OF IMMIGRATION STATISTICS 65 tbl.18 (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/Yearbook2002.pdf>. The DHS statistics show only those asylum applications filed with the INS and DHS, not applications filed, defensively, in immigration courts only after the commencement of removal proceedings. *Id.* at 57–58. The total number of asylum applications filed each year is therefore greater than that reported by DHS. See *id.* at 58.

During all of this time, however, only a handful of asylum claims worked their way into the federal courts.⁹⁸ For a number of reasons, asylum litigation was focused at the administrative level, and lawyers tended to seek judicial review in only exceptional circumstances.⁹⁹ Adverse credibility determinations often did not present such circumstances and appear to have been infrequently challenged in the Second Circuit.¹⁰⁰ Credibility was at issue in other circuits' asylum opinions in the 1980s and 1990s,¹⁰¹ but the Second Circuit's decisions during this period tended to hinge on the elements of the statutory asylum standard itself, such as the protected grounds on which persecution must be based¹⁰² and the various bars to relief.¹⁰³

B. *The "New Asylum Seekers" in the Second Circuit*

This began to change at the end of the 1990s. At this time, people were increasingly turning to the federal courts for judicial review of expulsion orders in general, and asylum claims were a prominent feature of this expanded litigation.¹⁰⁴ Although this initial bulge in appeals was small in comparison to the massive increase that followed in mid-2002,¹⁰⁵ it nonetheless brought questions of proof before the Second Circuit, leading the court to issue a series of precedential opinions on the evidence that may be required of asylum seekers.

98. See Martin, *supra* note 12, at 1325; see also Palmer, Yale-Loehr & Cronin, *supra* note 2, at 43-44, 46 fig.1 (showing the low number of immigration appeals overall during this period).

99. See Martin, *supra* note 12, at 1325.

100. This assertion is based on the fact that there are few Second Circuit opinions reviewing adverse credibility determinations during this period. See *supra* note 76.

101. See, e.g., Hartooni v. INS, 21 F.3d 336, 342 (9th Cir. 1994); Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986); Canjura-Flores v. INS, 784 F.2d 885, 889 (9th Cir. 1985).

102. See, e.g., Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994) (holding that "the plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion"); Sotelo-Aquije v. Slattery, 17 F.3d 33, 35, 37 (2d Cir. 1994) (holding that evidence compelled conclusion that a Peruvian man had a "well-founded fear of persecution" on account of political opinion where he was targeted by the Peruvian Shining Path guerillas for actively opposing that group); Gomez v. INS, 947 F.2d 660, 663-64 (2d Cir. 1991) (holding that being beaten and raped by Salvadoran guerillas did not make a woman a member of a "particular social group" for purposes of asylum eligibility).

103. See, e.g., Ofosu v. McElroy, 98 F.3d 694, 701 (2d Cir. 1996).

104. See Benson, *supra* note 7. The courts probably began to see more asylum cases at this time because there had been a huge bulge of asylum applications at the agency level in the mid-1990s, and these were probably just beginning to work their way through the BIA. See OFFICE OF IMMIGR. STATS., *supra* note 97, at 65 tbl.18.

105. See Palmer, Yale-Loehr & Cronin, *supra* note 2, at 43-44, 46 fig.1.

The first of these was *Abankwah v. INS*,¹⁰⁶ issued in July 1999, in which the court touched on the extent to which an asylum claim may be denied based on insufficient documentary corroboration.¹⁰⁷ The court held that the BIA had been “too exacting both in the quantity and quality of evidence that it required.”¹⁰⁸ Noting that DOJ regulations do not require that an asylum applicant’s credible testimony be corroborated, the court stressed that “a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.”¹⁰⁹ The court returned to the corroboration issue the following year in *Diallo v. INS*,¹¹⁰ holding that before denying an asylum claim solely for lack of corroborating evidence, an IJ must first explain “why it is reasonable . . . to expect such corroboration,” and why the applicant’s “proffered explanations for the lack of such corroboration are insufficient.”¹¹¹ It applied this principle again in 2001 in *Alvarado-Carillo v. INS*,¹¹² and in 2003 in *Jin Shui Qiu v. Ashcroft*.¹¹³

In *Jin Shui Qiu*, the court also concluded that the BIA had been too exacting in its demands for testimonial specificity in the absence of an adverse credibility finding.¹¹⁴ Noting that vague testimony might well generate suspicion and lead a fact-finder to “probe for incidental details, seeking to draw out inconsistencies that would support a finding of lack of credibility,”¹¹⁵ the court held that *credible* testimony is “too vague” only if it does not identify the facts necessary to make out a *prima facie* case.¹¹⁶ The court explained that

since the list of circumstantial details can be expanded indefinitely, a legal standard that empowers an [IJ] or the BIA to rule against a petitioner who fails to anticipate the particular set of details that the fact-finder desires (but does not request, through questions directed to the applicant) is no standard at all. It would enable the administrative decisionmaker to reject whichever applicants that fact-finder happens to disfavor.¹¹⁷

106. 185 F.3d 18 (2d Cir. 1999).

107. *Id.* at 21, 24.

108. *Id.* at 24.

109. *Id.* at 24, 26.

110. 232 F.3d 279 (2d Cir. 2000).

111. *Id.* at 290.

112. 251 F.3d 44, 54–55 (2d Cir. 2001).

113. 329 F.3d 140, 153–54 (2d Cir. 2003).

114. *See id.* at 150–52.

115. *Id.* at 152.

116. *Id.* at 151.

117. *Id.* at 151–52.

While *Abankwah*, *Diallo*, *Alvarado-Carillo*, and *Jin Shui Qiu* did not deal squarely with adverse credibility findings, they set the stage for much of the credibility review that followed. All of them took issue with what appeared to be overly skeptical adjudicators making evidentiary demands that failed to take into account the difficulties genuine refugees face in presenting and documenting asylum claims.¹¹⁸ *Diallo*, *Alvarado-Carillo*, and *Jin Shui Qiu* established the principle that the agency must make its adverse credibility findings explicit, and must distinguish between decisions based on a lack of credibility and those based on a lack of corroborating evidence.¹¹⁹ In the absence of an adverse credibility finding, lack of corroborating evidence might be an independent basis for denying an asylum claim only if the IJ has identified the missing corroboration, explained why it could be reasonably expected, and explained why any reasons proffered by the applicant for its absence are insufficient.¹²⁰ The cases also indirectly implicated the standards governing adverse credibility determinations. In *Diallo*, for instance, the court noted that minor, isolated inconsistencies need not be fatal to an asylum applicant's credibility.¹²¹ In *Jin Shui Qiu*, the court noted that before relying on vague testimony for an adverse credibility finding, an IJ would be wise to first "probe for incidental details" so as to generate the record needed to support such a finding.¹²²

The first precedential opinion in which the court squarely reviewed an adverse credibility determination in the asylum context was *Secaída-Rosales v. INS*, issued in 2003.¹²³ Secaída was a Guatemalan asylum seeker who claimed to have been threatened in the early 1990s by police and paramilitary death squads for supporting a neighborhood committee

118. See *id.* at 150-53; *Alvarado-Carillo v. INS*, 251 F.3d 44, 54-55 (2d Cir. 2001); *Diallo v. INS*, 232 F.3d 279, 289 (2d Cir. 2000); *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999).

119. See, e.g., *Diallo*, 232 F.3d at 287.

120. See *id.* at 290. The *Diallo* opinion expressly rejected the Ninth Circuit's rule that corroboration may never be the sole basis for denying an asylum claim. See *id.* at 286 (rejecting the standard laid out in *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000)). As the court later recognized in *Jin Shui Qiu*, however, this statement is not necessarily part of the holding in *Diallo*, since it was not strictly necessary to the result. *Jin Shui Qiu*, 329 F.3d at 154 n.11. Although the court has not returned to this issue, Congress has. In the REAL ID Act of 2005, Congress provided (with respect to asylum applications filed on or after May 11, 2005), "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." Pub. L. No. 109-13, § 101(a)(3), (h)(2), 119 Stat. 231, 303, 305 (codified at 8 U.S.C.A. § 1158(b)(1)(B)(ii) (West Supp. 2006)).

121. *Diallo*, 232 F.3d at 288.

122. See *Jin Shui Qiu*, 329 F.3d at 152.

123. 331 F.3d 297, 301 (2d Cir. 2003).

involved in a land dispute with the government.¹²⁴ An IJ denied his claim on adverse credibility grounds, primarily because Secaida had omitted from his written asylum application two facts to which he later testified: that his uncle's assassin had shot at Secaida after killing the uncle, and that a friend had been killed during a student strike.¹²⁵ In addition, the IJ "pointed to the implausibility of Secaida's safely continuing employment and procuring a new national identity card while subject to [government] persecution."¹²⁶ The IJ also found that Secaida had failed to produce sufficient corroborating evidence, and had given confused answers in response to several questions on cross-examination.¹²⁷

The Second Circuit reversed, holding that the IJ was overly stringent in her demands.¹²⁸ In doing so, the court laid out a basic framework for credibility review. While recognizing the deference required under the substantial evidence standard, the court held that adverse credibility determinations must nonetheless be grounded in the record and supported by adequate reasoning.¹²⁹ The court explained that an IJ must provide "specific, cogent" reasons that "bear a legitimate nexus" to the credibility determination, and must not base the determination on "speculation and conjecture."¹³⁰ While inconsistent testimony and other discrepancies may support an adverse credibility determination, they must be material to the asylum claim and "substantial" when measured against the record as a whole.¹³¹ Finally, the IJ's application of an "inappropriately stringent standard" in judging credibility is reviewed *de novo* as legal, rather than factual, error.¹³²

The court held that the omissions from Secaida's asylum application could not support the adverse credibility determination because one (the allegation that Secaida had been shot at) was insubstantial when measured against the rest of the evidence, and the other (the allegation that his friend had been killed) was collateral to Secaida's asylum claim.¹³³ The court also held that the purported implausibility was based on flawed reasoning, and that the IJ had been too exacting in her

124. *Id.* at 301–04.

125. *Id.* at 308–09.

126. *Id.* at 308.

127. *Id.*

128. *See id.* at 312.

129. *See id.* at 307, 312.

130. *See id.* at 307 (citing and quoting *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2003); *Ahmad v. INS*, 163 F.3d 457, 461 (7th Cir. 1999); *Senathirajah v. INS*, 157 F.3d 210, 216 (3d Cir. 1998); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1381 (9th Cir. 1990)).

131. *See id.* at 308.

132. *See id.* at 307 (citing *Aguilera-Cota*, 914 F.2d at 1380).

133. *See id.* at 309.

demands for additional corroboration.¹³⁴ Finally, the court held that Secaída's confusion demonstrated difficulty with the language rather than a lack of credibility.¹³⁵

Secaída-Rosales was the first of what has proven to be a long (and growing) line of Second Circuit opinions on credibility. In many of these opinions, the court has upheld IJ decisions, emphasizing the deference owed to administrative findings of fact. In *Wu Biao Chen v. INS*,¹³⁶ for instance, the court held that the petitioner could not overcome an adverse credibility determination merely by offering "*ex post* justifications" for the discrepancies in his case.¹³⁷ The substantial evidence standard, the court held, "requires Chen to do more than simply offer a 'plausible' alternative theory; instead, to warrant reversal of the BIA's decision, he must demonstrate that a reasonable fact-finder would be compelled to credit his testimony."¹³⁸ The court reiterated this deference in *Zhou Yun Zhang v. INS*,¹³⁹ explaining that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant."¹⁴⁰

In other opinions, however, this deference has been overcome by flaws in the administrative findings, or in the process by which those findings were reached. For instance, the court has vacated adverse credibility determinations where it has found purported discrepancies to be insignificant or non-existent.¹⁴¹ It has also done so where the IJ has relied

134. *See id.* at 310–12.

135. *See id.* at 312.

136. 344 F.3d 272 (2d Cir. 2003) (per curiam).

137. *Id.* at 275.

138. *Id.* at 275–76 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992)).

139. 386 F.3d 66 (2d Cir. 2004).

140. *Id.* at 73.

141. *See, e.g.*, *Pavlova v. INS*, 441 F.3d 82, 90 (2d Cir. 2006) (holding that an applicant's "minor fault" in the medical terminology used to describe the condition of her ovaries was, "at most, the sort of *de minimis*, nonmaterial inconsistency that we have often stated may not form the basis for an adverse credibility determination"); *Chung Sai Zheng v. Gonzales*, 440 F.3d 76, 80 (2d Cir. 2006) (per curiam) (holding that an applicant's medically erroneous description of his vasectomy as involving an operation on his "muscles," and a discrepancy on the applicant's child's birth certificate regarding the location of the birth, were "patently insufficient to support an adverse credibility finding"); *Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005) (holding that a determination could not be supported by "insignificant and trivial" discrepancies); *Jin Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 114–15 (2d Cir. 2005); *Chun Gao v. Gonzales*, 424 F.3d 122, 131–32 (2d Cir. 2005); *Secaída-Rosales v. INS*, 331 F.3d 297, 308–09 (2d Cir. 2003).

on mere speculation unsupported by the record.¹⁴² Similarly, it has vacated where the applicant has offered a significant explanation for a discrepancy and the IJ has failed to address this explanation.¹⁴³ In all, as of July 14, 2006, the court has pointed out flaws in the agency's adverse credibility findings in twenty-one of its post-2002 published opinions.¹⁴⁴ Of these, remand has been required in seventeen,¹⁴⁵ while four others have been upheld in spite of the flaws, based on the conclusion that remand would be futile.¹⁴⁶ Finally, the court has published opinions upholding credibility findings as free of flaws in twenty cases.¹⁴⁷ The

142. See, e.g., *Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 110-11 (2d Cir. 2006); *Pavlova*, 441 F.3d at 88-89; *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 159 (2d Cir. 2006); *Secaida-Rosales*, 331 F.3d at 309-10.

143. See, e.g., *Latifi*, 430 F.3d at 105-06; *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 391, 403 (2d Cir. 2005).

144. See *Yuanliang Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 111 (2d Cir. 2006); *Guo-Le Huang v. Gonzales*, 453 F.3d 142, 146-48 (2d Cir. 2006); *Li Zu Guan v. INS*, 453 F.3d 129, 138-40 (2d Cir. 2006); *Li Hua Lin*, 453 F.3d at 109-11; *Zhi Wei Pang v. Bureau of Citizenship & Immigration Servs.*, 448 F.3d 102, 112 (2d Cir. 2006); *Tu Lin v. Gonzales*, 446 F.3d 395, 403 (2d Cir. 2006); *Rui Ying Lin v. Gonzales*, 445 F.3d 127, 132 (2d Cir. 2006); *Rizal v. Gonzales*, 442 F.3d 84, 89-91 (2d Cir. 2006); *Pavlova v. INS*, 441 F.3d 82, 91-92 (2d Cir. 2006); *Chung Sai Zheng v. Gonzales*, 440 F.3d 76, 80 (2d Cir. 2006) (per curiam); *You Hao Yang v. BIA*, 440 F.3d 72, 76 (2d Cir. 2006) (per curiam); *Ming Shi Xue v. BIA*, 439 F.3d 111, 113-14 (2d Cir. 2006); *Singh v. BIA*, 438 F.3d 145, 147 (2d Cir. 2006); *Tandia v. Gonzales*, 437 F.3d 245, 249-50 (2d Cir. 2006); *Sall v. Gonzales*, 437 F.3d 229, 235-36 (2d Cir. 2006); *Qyteza v. Gonzales*, 437 F.3d 224, 226-28 (2d Cir. 2006); *Xiao Ji Chen*, 434 F.3d at 158-60; *Latifi*, 430 F.3d at 105-06; *Cao He Lin*, 428 F.3d at 402-03; *Jin Chen*, 426 F.3d at 114-15; *Chun Gao*, 424 F.3d at 131; *Secaida-Rosales*, 331 F.3d at 312.

145. See *Guo-Le Huang*, 453 F.3d at 151; *Li Zu Guan*, 453 F.3d at 142; *Li Hua Lin*, 453 F.3d at 112; *Zhi Wei Pang*, 448 F.3d at 112; *Rui Ying Lin*, 445 F.3d at 136; *Rizal*, 442 F.3d at 93; *Pavlova*, 441 F.3d at 92; *You Hao Yang*, 440 F.3d at 76; *Chung Sai Zheng*, 440 F.3d at 81; *Ming Shi Xue*, 439 F.3d at 128; *Singh*, 438 F.3d at 150; *Tandia*, 437 F.3d at 251; *Sall*, 437 F.3d at 236; *Latifi*, 430 F.3d at 105-06; *Cao He Lin*, 428 F.3d at 395; *Jin Chen*, 426 F.3d at 107; *Chun Gao*, 424 F.3d at 132; *Secaida-Rosales*, 331 F.3d at 313.

146. See *Yuanliang Liu*, 455 F.3d at 118 (remanding on the issue of the frivolousness finding, but not on the adverse credibility finding); *Qyteza*, 437 F.3d at 228; *Tu Lin*, 446 F.3d at 403; *Xiao Ji Chen*, 434 F.3d at 149.

147. See *Liang Chen v. U.S. Att'y Gen.*, 454 F.3d 103, 105-08 (2d Cir. 2006) (per curiam); *Cheng Tong Wang v. Gonzales*, 449 F.3d 451, 453-54 (2d Cir. 2006) (per curiam); *Kanacevic v. INS*, 448 F.3d 129, 136-38 (2d Cir. 2006); *Xian Tuan Ye v. Dep't of Homeland Sec.*, 446 F.3d 289, 297 (2d Cir. 2006); *Diallo v. Gonzales*, 445 F.3d 624, 629-34 (2d Cir. 2006); *Singh*, 438 F.3d at 149-50; *Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 161-62 (2d Cir. 2006); *Ming Xia Chen v. BIA*, 435 F.3d 141, 144-46 (2d Cir. 2006); *Yun-Zui Guan v. Gonzales*, 432 F.3d 391, 400 (2d Cir. 2005) (per curiam); *Yu Yin Yang v. Gonzales*, 431 F.3d 84, 85-86 (2d Cir. 2005); *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005); *Xue Hong Yang v. U.S. Dep't of Justice*, 426 F.3d 520, 522-23 (2d Cir. 2005); *Zhou Yi Ni v. U.S. Dep't of Justice*, 424 F.3d 172, 174 (2d Cir. 2005) (per curiam); *Jin Yu Lin v. U.S. Dep't of Justice*, 413 F.3d 188, 191-92 (2d Cir. 2005); *Xu Duan Dong v. Ashcroft*, 406 F.3d 110, 111-12 (2d Cir. 2005) (per curiam); *Jin Hui Gao v. U.S. Att'y Gen.*, 400 F.3d 963, 964 (2d Cir. 2005) (per curiam); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 66 (2d Cir. 2004); *Xusheng Shi v. BIA*, 374 F.3d 64, 65-66 (2d Cir. 2004) (per curiam); *Ramsameachire v.*

standards laid out in all of these published opinions have then guided the court's adjudication of the hundreds of petitions for review that have been decided by nonprecedential summary order.

The substance of the court's opinions, together with the fact that the court has felt the need to publish so much on credibility in general, suggests an underlying tension between the court and the administrative adjudicators whose decisions are under review. Interestingly, it is a tension that also surfaced during the wave of litigation over the country's exclusion of Chinese laborers some 100 years ago.¹⁴⁸

C. Chinese Exclusion Litigation

The Chinese exclusion laws are most widely remembered for their overt racism,¹⁴⁹ and for the Supreme Court's deference to congressional and executive authority over immigration.¹⁵⁰ However, a lesser known aspect of the episode is the degree to which federal courts became involved in reviewing factual findings about who fell within the exclusion laws' purview.¹⁵¹ Such decisions often hinged on credibility, with the excluded Chinese claiming non-laborer status or U.S. citizenship, and administrative decision-makers disbelieving them.¹⁵² As Professor Gerald L. Neuman describes it,

[t]he officials saw themselves as confronting a mass of fraudulent claims backed by perjured witnesses suborned by unscrupulous attorneys in the pay of a Chinese conspiracy. The bureaucracy believed itself powerless to catch all the frauds, but openly announced a strategy of detecting deceit by isolating arriving Chinese in holding centers and then trapping them in minor testimonial inconsistencies.¹⁵³

Ashcroft, 357 F.3d 169, 175 (2d Cir. 2004); *Wu Biao Chen v. INS*, 344 F.3d 272, 275-76 (2d Cir. 2003) (per curiam).

148. This comparison was first suggested to me by Professor Gerald L. Neuman.

149. See, e.g., *ALEINIKOFF, MARTIN & MOTOMURA*, *supra* note 75, at 146; *Kitty Calavita*, *supra* note 77, at 34.

150. See, e.g., *United States v. Ju Toy*, 198 U.S. 253, 261-63 (1905); *Lem Moon Sing v. United States*, 158 U.S. 538, 547-50 (1895); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 595-96, 603-04, 606 (1889). See generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854-63 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-54).

151. See generally LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

152. See *id.* at 43, 58-65.

153. Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 638-39 (1988) (footnote omitted).

When the Chinese challenged their expulsion orders in habeas corpus petitions before the federal district courts, they had a relatively high rate of success.¹⁵⁴ In fact, it is through these challenges that the courts first established what became known as the “some evidence” requirement of due process.¹⁵⁵ In *United States v. Chin Len*,¹⁵⁶ for instance, the Second Circuit overturned an administrative decision denying admission, based on an adverse credibility determination, to a Chinese man who claimed U.S. citizenship.¹⁵⁷

The agency¹⁵⁸ had found Chin Len’s citizenship claim not credible based on (1) discrepancies in his testimony and that of one of his witnesses, and (2) a finding that Chin Len had submitted a fraudulent document—a certificate showing that the U.S. Commissioner for the Northern District of New York had previously adjudged him to be a U.S. citizen.¹⁵⁹ It is not entirely clear what the purported discrepancies consisted of, but both the district court and the Second Circuit found them to be insufficiently significant to support the agency’s determination.¹⁶⁰ The district court concluded that “[o]n the whole, the stories agree[d] better than the average of honest witnesses testifying to transactions that occurred nine or ten years ago.”¹⁶¹ The Second Circuit characterized the discrepancies as “slight and . . . wholly inconsequential.”¹⁶² Although the date and seal on the certificate did appear to be altered, the court concluded that was not, on its own, an indication of fraud.¹⁶³ Further, while Chin Len had apparently testified that he had obtained the certificate in Hong Kong, the court concluded that this was an honest mistake, as he had clearly been confusing the certificate with another document.¹⁶⁴

154. See SALYER, *supra* note 151, at 80 tbl.3, 81.

155. See Neuman, *supra* note 153, at 637–41. For a recent application of the standard in the Second Circuit, see *Ortiz v. McBride*, 380 F.3d 649, 655 (2d Cir. 2004) (“For a prison disciplinary proceeding to provide due process there must be, among other things, ‘some evidence’ to support the sanction imposed.” (quoting *Gaston v. Coughlin*, 249 F.3d 156, 163 (2d Cir. 2001))), *cert. denied*, 543 U.S. 1187 (2005).

156. 187 F. 544 (2d Cir. 1911).

157. *Id.* at 550.

158. At this time, it was the Department of Commerce and Labor that was responsible for implementing the Chinese exclusion laws.

159. *Chin Len*, 187 F. at 545.

160. *Id.* at 546, 549.

161. *Id.* at 546.

162. *Id.* at 548.

163. *Id.* at 549–50.

164. *Id.* at 549.

Chin Len was decided in 1911,¹⁶⁵ when judicial deference to the administrative decisions in Chinese exclusion cases was at its maximum. The Supreme Court had already ruled that administrative decisions denying admission were final, and could not be overturned absent a showing that the hearing was unfair.¹⁶⁶ Although it would later rule that the denial of a non-frivolous citizenship claim in deportation proceedings required a judicial determination de novo, that was not until 1922.¹⁶⁷ Consequently, the question before the Second Circuit in *Chin Len* was whether the administrative proceedings had been so deficient as to deprive the petitioner of a fair hearing.¹⁶⁸ The court held that they had.¹⁶⁹

The fact that *Chin Len* was claiming citizenship as opposed to some other exemption from Chinese exclusion probably made the courts more sympathetic to his case.¹⁷⁰ However, the “some evidence” test was applied to overturn denials of claims for relief other than citizenship as well.¹⁷¹ Moreover, the courts’ reliance on the deferential “some evidence” test was only a result of Congress’ attempts to cut off judicial review of the administrative decisions in these cases.¹⁷² Before this occurred, the courts were reviewing expulsion decisions de novo, and the clash between judicial and administrative methods was even more pronounced.¹⁷³

This was not, as one might guess, a simple matter of the courts overturning decisions infected with racial bias. As Professor Lucy E. Salyer explains in her comprehensive history of the episode, many of the district court and court of appeals judges held anti-immigrant sentiments that were at least as strong as those of the administrative decision-makers.¹⁷⁴ Indeed, some of the federal judges had been directly involved in pushing through anti-Chinese legislation before joining the courts.¹⁷⁵

Instead, it appears that the success of the Chinese in federal court was based on a tension between the “different institutional orientation and practices” of the courts and the administrative agency.¹⁷⁶ Salyer concludes that a key difference was the evidentiary standard employed

165. *Id.* at 544.

166. *See Chin Yow v. United States*, 208 U.S. 8, 12 (1908); *United States v. Ju Toy*, 198 U.S. 253, 261-62 (1905).

167. *See Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922).

168. *See Chin Len*, 187 F. at 550.

169. *Id.*

170. *See SALYER, supra* note 151, at 207-12.

171. *See Neuman, supra* note 153, at 640.

172. *See SALYER, supra* note 151, at 194-207.

173. *See id.* at 69-93.

174. *See id.* at 72.

175. *See id.*

176. *Id.* at 81-82.

by each: "Unlike the [court], the [administrative adjudicator] did not feel bound to land a Chinese person when there were no discrepancies in his story. If the [adjudicator] felt the story was fraudulent or if he could find minor discrepancies, he would deny the Chinese entry."¹⁷⁷

The federal judges, on the other hand, "were less willing to deviate from legal tradition" even though they "strongly supported exclusion and believed that the Chinese coming before them were making fraudulent claims to evade that policy."¹⁷⁸ They decided cases "on the evidence presented, not on intuition or personal belief."¹⁷⁹ The judges thus "clearly felt torn between their personal beliefs and judicial evidentiary standards. They all believed that Chinese lied in the proceedings, but judicial norms did not allow them to take that belief into consideration unless there was proof of perjury."¹⁸⁰

D. Tension Over Credibility Determinations

Clearly there are important differences between the Chinese exclusion litigation and the current situation faced by the courts. Among other things, the IJs and BIA members of today are far more professional, better trained, and better equipped to adjudicate cases fairly and accurately than the administrative adjudicators charged with implementing the Chinese exclusion laws.¹⁸¹ Moreover, in drawing a comparison between the two groups, I do not mean to suggest that today's administrative adjudicators are infected with the same racism and nativist biases as the adjudicators of the past.

Differences aside, however, it is hard not to be struck by the similarities between the two periods. Then, as now, we see a confrontation between administrators and courts over how to judge credibility. The courts' opinions in both periods take issue with the administrative adjudicators' tendencies to focus on minor discrepancies, to rely on speculation, and to generally express a skepticism that they are unable to ground in the record of each individual case. Indeed, the IJ and BIA opinions under review in the Second Circuit suggest that many of today's administrative adjudicators, just like those of the Chinese exclusion period, see themselves as "confronting a mass of fraudulent

177. *Id.* at 82.

178. *Id.* at 91-92.

179. *Id.* at 92.

180. *Id.*

181. On the efforts to increase the professionalism and independence of today's IJs, see ALENIKOFF, MARTIN & MOTOMURA, *supra* note 75, at 249-50; Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 457-69 (1988).

claims backed by perjured witnesses suborned by unscrupulous attorneys.”¹⁸²

While there are likely multiple causes of the current tension over credibility findings, the “new asylum seeker” paradigm is probably an important one.¹⁸³ First, the “new asylum seekers” often rely on smugglers and false documents, they chose their destination countries rather than simply seeking asylum directly on the other side of their countries’ borders, and they are no longer viewed through the prism of cold war geopolitics. All of this has the tendency to encourage skepticism. Second, the “new asylum seekers” come in high volume, which seems to far outpace the resources allocated to adjudicating their claims. This means that the administrators not only see large numbers of very repetitive claims, but they are also under huge pressure to adjudicate these claims quickly, with little support. Third, the “new asylum seekers” come from far away, making it hard for them, and even harder for the government, to gather specific evidence on their claims. This means that there is often very little solid evidence in the record on which to base findings. There is almost never, for instance, the option of simply choosing between the conflicting stories given by the witnesses called by each party.

It is not that the administrators have no grounds to be skeptical. Many of today’s asylum seekers do present fraudulent claims¹⁸⁴ (as, too, did many of the people who sought to bypass the Chinese exclusion laws 100 years ago¹⁸⁵). Nor is it that the courts are unaware of all this fraud. The Second Circuit has not only seen a prominent New York immigration lawyer plead guilty to submitting hundreds of fraudulent asylum applications,¹⁸⁶ it has also seen the claim at issue in its well-known *Abankwah* decision turn out to be a fake.¹⁸⁷

182. Neuman, *supra* note 153, at 638-39 (describing the Chinese Exclusion period).

183. Another may simply be that accurately judging a witness’ truthfulness is an extremely difficult task, and people are bound to disagree over both the process and the outcome. As the Second Circuit has remarked, “these cases, simply put, are hard.” *Li Hua Lin v. U.S. Dep’t of Justice*, 453 F.3d 99, 112 (2d Cir. 2006).

184. See generally KO-LIN CHIN, *SMUGGLED CHINESE: CLANDESTINE IMMIGRATION TO THE UNITED STATES* (1999); PETER KWONG, *FORBIDDEN WORKERS: ILLEGAL CHINESE IMMIGRANTS AND AMERICAN LABOR* (1997).

185. See SALYER, *supra* note 151, at 44, 61-62.

186. See *United States v. Porges*, 80 F. App’x 130, 131 (2d Cir. 2003); Brief for the United States of America at 5, *Porges*, 80 F. App’x 130 (2d Cir. 2003) (Nos. 02-1520(L), 02-1522, 02-1549).

187. For a fascinating account of the case (and the subsequent prosecution for perjury, false statements, and passport fraud), see David A. Martin, *Adelaide Abankwah, Fauziya Kasinga, and the Dilemmas of Political Asylum*, in *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck eds., 2005).

The tension arises, however, when “different institutional orientation and practices”¹⁸⁸ are brought to bear on the “new asylum seekers” claims. Many of the administrators, already skeptical, confronted with masses of similar cases, under intense pressures from both outside the agency and within, and less bound by rules of evidence, seem to view claims in the aggregate and base findings on generalized skepticism. The courts, confronted with a smaller and more varied pool of cases, having the benefits of greater resources and the independence that comes with life tenure, and grounded in the notion of individualized justice, insist instead that findings be tied to the specific evidence in each applicant’s record.

A striking example of this can be gleaned from the Second Circuit’s opinion in *Guo-Le Huang v. Gonzales*.¹⁸⁹ In that case, a Chinese man had claimed asylum based on allegations that government officials in his village had forcibly aborted his wife’s pregnancy, and threatened him and his wife with sterilization after he had confronted the officials about their human rights abuses.¹⁹⁰ The IJ found him not to be credible based, according to his oral ruling, on four reasons: first, Guo-Le Huang had introduced a document, purportedly issued by the village officials, confirming that his wife had been forced to have an abortion.¹⁹¹ The IJ concluded that this document was “clearly . . . fraudulent” because he saw no reason why the village officials would admit to carrying out persecution that the Chinese national government regularly denies, and because Guo-Le Huang could not “give any possible reason why such a document would be needed by anybody in China.”¹⁹² Second, the IJ did not believe Guo-Le Huang’s account of his confrontation with the village officials because, “[a]n uneducated villager, such as [Huang], really would not be making human rights arguments.”¹⁹³ Third, the IJ faulted Guo-Le Huang for failing to offer medical documents to explain why his wife had not been sterilized immediately after her abortion.¹⁹⁴ Finally, the IJ faulted Guo-Le Huang for having given up his first child for adoption because she was a girl, explaining that this was “a very sexist act,” and that “in America, parents generally believe in sacrificing for their children.”¹⁹⁵

188. SALYER, *supra* note 151, at 82 (discussing the Chinese exclusion period).

189. 453 F.3d 142 (2d Cir. 2006).

190. *Id.* at 144.

191. *Id.* at 145.

192. *Id.* at 145-46 (quoting IJ’s oral decision) (internal quotations omitted).

193. *Id.* at 145 (quoting IJ’s oral decision) (internal quotations omitted).

194. *Id.*

195. *Id.* (quoting IJ’s oral decision) (internal quotations omitted).

The Second Circuit rejected each of these reasons (as well as three additional reasons given by the BIA).¹⁹⁶ The court found the first reason problematic because, contrary to the IJ's characterization of the record, Guo-Le Huang had, in fact, offered a reason for why the abortion document was needed.¹⁹⁷ The court found the IJ's second reason speculative, his third reason unsupported by the record, and his last reason simply unrelated to credibility.¹⁹⁸ The last reason, however, provided a hint as to the real reasons behind the IJ's decision, which became much clearer from the hearing transcripts themselves.¹⁹⁹

The transcripts revealed that the IJ had expressed skepticism about Guo-Le Huang's truthfulness from the very start, before the merits of his claim were even discussed.²⁰⁰ At an initial hearing, the IJ had found it "ridiculous" that Guo-Le Huang, who lacked work authorization, claimed to be complying with the law and not working.²⁰¹ The IJ had remarked that "[e]verybody else has no papers and they are working in restaurants all over the country."²⁰² At the second hearing, the IJ had found it hard to believe that Guo-Le Huang was living in a Hispanic neighborhood on 105th Street in New York City, remarking that "most of the people are living in Chinatown."²⁰³ Finally, at the merits hearing itself, the IJ had "launched into a diatribe against Chinese immigrants lying on the witness stand, spanning 12 pages of the transcript."²⁰⁴ Among other things, the IJ had complained that "Chinese applicants would say one thing to each other 'in a restaurant in Chinatown,' but when they sat in the 'magic chair' in the witness box, they would say that they were persecuted under the family planning policy."²⁰⁵ The IJ had also berated Guo-Le Huang for giving up his daughter for adoption, telling him that his "culture is prejudice[d] against females."²⁰⁶

This may be an unusual case because the IJ's remarks indicate such blatant skepticism, much of which seems to have been based solely on the fact that Guo-Le Huang was a Chinese asylum-seeker. Indeed, the Second Circuit, while assuming that this was an atypical departure from

196. *Id.* at 146-47.

197. *Id.* at 146.

198. *Id.* at 146-47.

199. *Id.* at 147 (noting that the IJ's speculation "appears to have been influenced by his evidence bias against Huang").

200. *Id.* at 148-50 (discussing and quoting the hearing transcript).

201. *Id.* at 148 (quoting the hearing transcript) (internal quotations omitted).

202. *Id.* at 149 (quoting hearing transcript) (internal quotations omitted).

203. *Id.* (quoting hearing transcript) (internal quotations omitted).

204. *Id.*

205. *Id.* (quoting hearing transcript).

206. *Id.* (quoting hearing transcript) (internal quotations omitted) (alteration in original).

this particular IJ's normal conduct, was so troubled by the apparent bias here that it actually directed the agency to assign the case to a different IJ in the event that further consideration was needed on remand.²⁰⁷ At the same time, however, this generalized skepticism and tendency to view asylum claims in the aggregate is clear in other cases as well, even if more subtly expressed.

An example that may seem less shocking is the tendency of many IJs to focus on generalized State Department reports of document fraud in China when judging the credibility of Chinese asylum applicants.²⁰⁸ To the extent that these reports are accurate, it would not be illogical to conclude that any given group of Chinese asylum seekers may be carrying a higher than average proportion of fraudulent documents. Faced with the pressure of adjudicating thousands of Chinese asylum claims, there is clearly a temptation to translate the assumed proportion of fraudulent documents within the group as a whole into a probability that each individual applicant's documents are fraudulent. But while this might be a statistically sound way to achieve a measure of accuracy in the aggregate, it clashes with the notion of individualized justice. As the Second Circuit held in *Rui Ying Lin v. Gonzales*,²⁰⁹ "it is not reasonable . . . to conclude . . . that every document from China is presumptively a forgery" based solely on the fraud reports.²¹⁰ Instead, an adjudicator must evaluate the documentary evidence in each case on its own merits.²¹¹

207. *Id.* at 151.

208. See, e.g., *Xiu Ling Zhang v. Gonzales*, 405 F.3d 150, 157 (3d Cir. 2005) (noting that the IJ may have relied on a 1998 State Department Report's finding that documentation from certain parts of China "is subject to widespread fabrication and fraud") (internal quotations omitted); *Xing Chan Yang v. Ashcroft*, 104 F. App'x 254, 257 (3d Cir. 2004) (unpublished decision) (noting IJ's reliance on a State Department report to find that "the Court must be on guard . . . with regard to any and all documentation coming from China, especially Fujian province which apparently is replete with fraud") (omission in original); *Jiamu Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (noting IJ's reliance on a 1995 State Department report entitled *China—Country Conditions and Comments on Asylum Applications* to find that documentation from China is "marked by widespread fabrication and fraud") (internal quotations omitted); see also IRENA OMELANIUK, COOP. EFFORTS TO MANAGE EMIGRATION, BEST PRACTICES TO MANAGE MIGRATION: CHINA (2004), available at http://migration.ucdavis.edu/ceme/more.php?id=149_0_6_0 (discussing document fraud in China).

209. 445 F.3d 127 (2d Cir. 2006).

210. *Id.* at 134.

211. See *id.* at 134-35. The Ninth Circuit expressed this same point in a 1950s Chinese citizenship case, in which it overturned a district court's adverse credibility finding because the finding was predicated on the similarity between the applicant's claim and other Chinese citizenship claims that the trial judge had adjudicated. *Mar Gong v. Brownell*, 209 F.2d 448, 450-53 (9th Cir. 1954). The Ninth Circuit held that the trial court "should not have given weight to its experiences, unfortunate as they may have been, in other

Even in cases in which generalized skepticism or aggregate approaches to credibility are not explicitly stated, these tendencies often appear to be lurking in the background. For instance, the Second Circuit has frequently criticized IJs for basing adverse credibility findings on minor discrepancies in applicants' evidence²¹² or on speculation that is not tied to the record.²¹³ Although some of these errors may simply reflect close judgment calls over which people are bound to disagree,²¹⁴ the propensity to make adverse credibility findings with little support also suggests that the same underlying skepticism or aggregate approach explicitly stated in *Guo-Le Huang* and *Rui Ying Lin* may be the unstated driving force behind many of these decisions.

To be sure, one gets a skewed picture of the IJs and BIA by looking solely at cases that have been challenged in the federal courts,²¹⁵ and this

cases, in arriving at its findings with respect to this appellant." *Id.* at 453. Instead, "[e]ach case should be allowed to stand upon its own bottom." *Id.*

212. *See, e.g., Pavlova v. INS*, 441 F.3d 82, 90 (2d Cir. 2006) (holding that an applicant's "minor fault" in the medical terminology used to describe the condition of her ovaries was, "at most, the sort of *de minimis*, nonmaterial inconsistency that we have often stated may not form the basis for an adverse credibility determination"); *Chung Sai Zheng v. Gonzales*, 440 F.3d 76, 80 (2d Cir. 2006) (*per curiam*) (holding that an applicant's medically erroneous description of his vasectomy as involving an operation on his "muscles," and a discrepancy on the applicant's child's birth certificate regarding the location of the birth, were "patently insufficient to support an adverse credibility finding"); *Latifi v. Gonzales*, 430 F.3d 103, 105 (2d Cir. 2005) (holding that a determination could not be supported by "insignificant and trivial" discrepancies); *Secaida-Rosales v. INS*, 331 F.3d 297, 308-09 (2d Cir. 2003).

213. *See, e.g., Li Hua Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 110-11 (2d Cir. 2006); *Pavlova*, 441 F.3d at 88; *Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 159 (2d Cir. 2006); *Secaida-Rosales*, 331 F.3d at 309-10.

214. *See Ming Xia Chen v. BIA*, 435 F.3d 141, 145 (2d Cir. 2006) (noting that "it is inevitable that some findings of lack of credibility will be deemed supportable by one panel that would not pass muster in the view of another panel").

215. One reason for this skewed picture is that the government cannot seek judicial review of BIA decisions. Consequently, the courts do not see the thousands of cases in which asylum applicants are found credible and granted relief. In fiscal year 2005, for example, the immigration courts nationwide granted 11,737 asylum claims, and denied 19,166. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK K2 (2006), available at <http://www.usdoj.gov/eoir/statsub/fy05syb.pdf>. Leaving aside claims that were withdrawn, abandoned, or otherwise disposed of, this translates into a grant rate of 38%. For the New York immigration court, which is the source of most of the asylum decisions under review in the Second Circuit, the grant rate was 62%, or 2,760 grants and 3,285 denials. *Id.* at K6 tbl.8. In addition, these numbers do not take into account all of the asylum claims granted at the asylum officer level before applicants are even placed in expulsion proceedings. *See KELLY JEFFERYS, U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2005*, at 5 tbl.9 (2006), available at http://www.uscis.gov/graphics/shared/statistics/publications/Refugee_Asylee_5.pdf (reporting 13,520 grants in fiscal year 2005).

The New York immigration court's 62% grant rate may well suggest that the tension visible in Second Circuit published opinions is based only on aberrational errors. On the

Article does not attempt to quantify the extent to which generalized skepticism exists among the administrative adjudicators or the rate at which it manifests itself in their decisions. However, a qualitative analysis of the Second Circuit's opinions suggests that the flaws that do exist stem from a tendency of many administrative adjudicators to be swayed by generalized skepticism over the "new asylum seekers," and to view their claims in the aggregate instead of tying findings to the evidence presented in each individual case. Now that the increased litigation has immersed the court in credibility issues, this administrative tendency is clashing with the judiciary's case-by-case, record-oriented approach to individualized justice.

CONCLUSIONS

The recent increase in immigration litigation has presented major challenges for the Second Circuit. It has significantly transformed the court's docket, and led to procedural changes designed to help the court keep up with all the extra work. It has also brought the court face-to-face with the "new asylum seeker," leading to an explosion of precedential opinions addressing issues of credibility. These opinions appear to reflect a tension between, on the one hand, the tendency of many administrative adjudicators to view cases in the aggregate and rely on generalized skepticism, and on the other hand, the court's focus on the evidence in each individual record. The sheer volume of these cases and the immersion in factual disputes have been burdensome, to say the least. The court's response, however, has been "to do what judges do best—to decide one case at a time."²¹⁶

other hand, 62% may be a low grant rate when one considers that this is a class of cases in which the government rarely introduces any evidence directly bearing on the events in dispute, relying instead mostly on the evidence introduced by the applicants themselves. An added complication is that behind the overall immigration court grant rates, there is wide variation between the grant rates of individual IJs. See Transactional Records Access Clearinghouse (TRAC), Immigration Judge Reports -- Asylum, at <http://trac.syr.edu/immigration/reports/judgereports/>.

216. *Li Hua Lin*, 453 F.3d at 112.

