Prosecutors and Bureaucrats in Robes: Asylum Adjudication in France and the U.S.

Introduction

To be an asylum seeker is to be a liminal subject before the law. Asylum seekers are not like any other excludable foreigner, as international law imposes an obligation on all countries to refrain from deporting persons to places where they will face persecution.[1] At the same time, asylum seekers do not yet possess refugee status—that is, their requests for asylum must pass through an adjudication process before they can be recognized as *bona fide* refugees and benefit from the attendant rights, including the right to reside on the territory of the host country until they are no longer in danger of persecution back home.

Asylum seekers embody this precarious status when they appear before the institutions of a host State—in particular, the institutions tasked with adjudicating their asylum claims. In the vast majority of countries,[2] asylum adjudication unfolds within the State's administrative apparatus and comprises three parties: the asylum applicant who seeks admission into the country as a refugee, the government defending its sovereignty interests, and the adjudicator who makes a decision about the parties' rights and duties under the law. Besides sharing this basic setup, asylum

[1] This principle is known as the duty of *nonrefoulement*, enshrined in Article 33 of the 1951 Refugee Convention ("*la Convention de Genève*"), and now recognized as a rule of customary international law, which is binding on all States. The Convention states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of [being a member of a protected class]." National systems, including those of France and the U.S., have assimilated this duty through the adoption of domestic legislation. In the U.S., the relevant domestic law is the Refugee Act of 1980, which amended the Immigration and Nationality Act (INA) and the 1962 Migration and Refugee Assistance Act to provide a systematic procedure for the admission of refugees. In France, the 1951 Convention was assimilated through the "Loi n° 52-893 du 25 juillet 1952 portant création d'un Office français de protection des réfugiés et apatrides," subject to a number of subsequent amendments—the latest being in 2015. As such, asylum adjudication has both international and domestic legal implications in both countries. In addition, both the U.S. and France are party to the 1967 Protocol Relating to the Status of Refugees, which incorporates the definition of a "refugee" contained in the 1951 Convention and sets forth specific rights guaranteed to persons recognized as such.

[2] In Italy, the only exception in the developed world, asylum claims are first examined by "territorial commissions for the recognition of international protection," composed of a member of the prefecture, a member of the national police, an elected local representative and a representative of the UNHCR, which make their decisions under the control of the civilian judicial system. See, *1952-2012: le juge français de l'asile. Un colloque organisé par la Cour nationale du droit d'asile et le Conseil d'Etat le 29 octobre 2012 au Palais du Luxembourg*. Conseil d'Etat, Droits et Débats (2014), p. 28 (remarks by Odile Piérart, conseiller d'Etat, France).

adjudication around the world takes vastly different forms—with differences ranging from the background and configuration of the adjudicators, to the number and timing of steps involved in reaching a final decision, to the type and extent of assistance afforded to asylum seekers as they navigate the process. Indeed, despite some efforts to develop common standards at the regional and global levels, asylum adjudication systems remain largely country-specific in their operation.

This paper brings such sharp differences into focus by juxtaposing two particularly contrasting systems: the American and the French. That a contrast exists should hardly come as a surprise. The two countries have vastly dissimilar legal structures (and cultures), which affect the character and arrangement of their administrative institutions. In the U.S., the administrative system is part of the executive branch and, as such, exists under the authority of the President of the United States. In France, the administrative order enjoys constitutionally recognized independence from the executive power at the same time that its supreme council, the Conseil d'État, acts as an advisor to the government. The two countries' administrative systems also markedly differ in how they interact with the "ordinary" judiciary. In France, there is a clear-cut separation between administrative courts, on the one hand, and civil and criminal jurisdictions, on the other. The *ordre administratif* and the *ordre judiciaire,* as they are called, constitute parallel judiciaries with entirely separate functions.[3] In the U.S., the administrative system is also clearly distinguishable from the judiciary, but the relationship between the two branches is more complex. In general, administrative decisions, which are the province of the executive branch, are subject to review by the judiciary ("Article III courts"), which includes federal district courts, federal circuit courts of appeal and the Supreme Court of the United States. However, there is a judicial doctrine according to which Article III courts owe deference to the administration's interpretation of its

[3] Bell, John. *Judiciaries within Europe: A Comparative Review*. Cambridge University Press: 2006, p. 50.

own mandates and procedures as long as those interpretations are "permissible."[4] This means that courts will uphold certain administrative actions and decisions as valid as long as they are found to be within the bounds of the reasonable—a rather low bar to meet—even if those actions contradict or reverse longstanding precedent.[5]

These observations do not begin to exhaust the many possible points of comparison between the American and French administrative systems. But they do provide a suitable starting point for a more in-depth look at the world of asylum adjudication. For the purposes of this paper, three implications of the foregoing comparison are of particular relevance. The first concerns the figure of the adjudicator: Who are the decision-makers charged with determining non-citizens' right to asylum, what is their professional background, and how are they recruited for this task? In France, a judge (*magistrat*) is someone who has undergone a specific training and enjoys a distinct status in society. In the U.S., by contrast, judges differ widely in their career backgrounds and prospects. A judge in the U.S. can be a lawyer who has been elected (most state court judges), appointed by the legislature (Article I judges and some state court judges), or appointed by executive officials, with or without approval from the legislative branch (most federal judges). Immigration judges, on the other hand, are appointed by the Attorney General in coordination with the White House but without input from the legislative branch.[6]

A second implication concerns the type of vertical or hierarchical checks on asylum adjudicators' decision-making.[7] Immigration judges in the U.S. are executive officials subservient

[4] This doctrine is commonly known as "*Chevron* deference," as it originates from the case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837. See, *infra*, p. 11.
[5] See, *e.g.*, Kozel, Randy J. and Jeffrey A. Pojanowski. "Administrative Change," *UCLA Law Review*, Vol. 59, No. 1 (2011), pp. 118-20; Givati, Yehonatan and Matthew C. Stephenson. "Judicial Deference to Inconsistent Agency Statutory Interpretations," *The Journal of Legal Studies*, Vol. 40, No. 1 (January 2011), pp. 85-113.
[6] Laacher, Smaïn, *Croire à l'incroyable. Un sociologue à la Cour nationale du droit d'asile*. Galimard: 2018. p. 31-34.
[7] The counterpoint alluded to here might call to mind Mirjan Damaška's "hierarchical and coordinate ideals" in his conceptual framework for differentiating models of authority. See Damaška, Mirjan R. (1986). *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press, p. 19-26.

to the Attorney General. In France, the strong culture of judicial independence, especially prevalent in the administrative order, rules out a strongly managerial form of control.[8] Instead, asylum adjudicators are subject to various layers of "soft" supervision.[9] In counterpoint to vertical checks are the horizontal dynamics of influence. Whereas immigration judges in the U.S. are dispersed throughout the country and operate largely in isolation from one another, asylum judges in France are concentrated in a single building where they engage in frequent discussions and open exchanges. Crucially, they are accustomed to adjudicating cases in three-judge panels and with the presence of an impartial *rapporteur*.

Finally, French and American adjudicators operate under different conceptions and sources of "legal authority." Whereas immigration judges in the U.S. are strongly constrained by precedent according to the principle of *stare decisis*, (Latin for "to stand by things decided") asylum adjudicators in France operate under a framework of jurisprudence that leaves more room for decisional independence. The Conseil d'État, which sits at the helm of the administrative legal system, may quash a particular decision of the CNDA, forcing it to re-adjudicate the matter. However, the Conseil d'État's rulings on asylum, which are very limited in number, do not constitute *stare decisis* for the CNDA.[10] Furthermore, even though the French legal system is embedded within two regional frameworks—the European Union and the Council of Europe—

Whereas the common law system may generally be characterized as horizontal or "coordinate" in orientation, in contrast to the Continental or civil law system's predominantly "hierarchical vision of authority," these generalities fail to accurately characterize the asylum adjudication processes in the U.S. and France, respectively, given the features elaborated on below.

[8] See, e.g., Massot, Jean. "The Powers and Duties of the French Administrative Judge," April 1, 2016, Yale Law School, p. 2. Adapted from "Les pouvoirs et les devoirs du juge administratif dans l'examen des requêtes," lecture delivered in Split, Croatia, at the *Troisièmes journées juridiques et administratives franco-croates*, October 26-27, 2009, organized by the universities of Split, Paris-II, and the French Conseil d'État. Available at: https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_massot_powers.pdf

[9] Here, the term "soft supervision" echoes the concept of "soft law," which refers to less-than-binding legal authority.

[10] See Troper, M. and Grzegorczyk, C. (1997). "Precedent in France" in D. MacCormick and R. Summers (eds.) *Interpreting precedents: A comparative study*. Dartmouth, MA: Dartmouth Publishing Co. See also, "The Layout of the French Legal System," Georgetown Law Library Guide, available at: https://guides.ll.georgetown.edu/c.php?g=362135&p=2446075

both of which incorporate judicial institutions that issue decisions obligatory on France as a whole, the decisions tend to leave a significant "margin of appreciation" for national authorities, including judicial bodies, to interpret European norms in future cases.[11]

These differences have significant implications for the quality of justice rendered by the administrative institutions of each State with respect to asylum seekers. Judicial and administrative institutions, like all State institutions, are susceptible to some degree of politicization. Administrative institutions set up to adjudicate asylum claims are no exception. However, in the latter case, the risks of unchecked and unbalanced political influence may be particularly acute, not least because asylum seekers are an electorally unrepresented and therefore relatively powerless constituency. Through the adoption of certain institutional safeguards, domestic legal systems can, to a greater or lesser extent, insulate adjudicators and their decision-making processes from such incursions. This paper uses the contrasting examples of France and the U.S. to illustrate how basic institutional choices can have systemic implications and a significant downstream impact on the integrity and legitimacy of an adjudication system.

The next section outlines the institutional framework of asylum adjudication in each country, focusing on the features introduced above. Following this descriptive account, a comparative section extrapolates relevant aspects of the two systems and evaluates their impact on the accuracy, consistency and fairness of asylum outcomes. A concluding section notes the advantages of certain features of the French model and argues that an appreciation of its comparative benefits should guide the development of asylum policy in both countries.

Before delving in, a brief methodological note is in order. The starting point for this paper was the writer's background in the U.S. immigration system, including her experience doing *pro*

[11] The term "margin of appreciation" refers to the space that the regional human rights court leaves to domestic authorities and institutions to apply their obligations under the European Convention on Human Rights in conformity with domestic exigencies, traditions or legal cultures. https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

bono work for asylum seekers facing deportation proceedings. Lacking comparable familiarity with the French system, the writer embarked on a literature review of legal and historical materials relevant to immigration in France, followed by an intensive period of interviews at the French court of asylum, where she also attended a number of hearings. This field-research component was necessary for capturing the perspective of practitioners in France, which was helpful to understanding the actual workings of the country's asylum adjudication system. As such, the paper includes references to interviews with French judges and other staff at the court of asylum, whereas comparative material is drawn from the writer's own experience and studies in the U.S.

Two Worlds of Adjudication

To speak of "asylum adjudication" is in some sense inaccurate; it may be more appropriate to refer to "asylum adjudications" (in plural). The road to receiving refugee status is almost invariably a long and winding one, involving an array of actors who make consequential decisions on the fate of asylum seekers at every turn. A paper on comparative asylum adjudication(s) could therefore take a number of different decision-making "moments" as its focus.[12]

This paper is concerned with adjudication performed by "judges." Both the U.S. and France have dedicated corps of judges tasked with adjudicating the rights of asylum seekers as provided by international law.[13] In the U.S., such judges are employees of the Executive Office for

[12] For example, one could study the decision-making power exercised by administrative officers at the border, which pertains to whether or not a foreigner without a prior permission to enter is admitted into the territory; in practical, if not legal, terms this encounter is the first instance in which a State actor makes a determination as to an asylum seeker's prospects of obtaining refuge. A relevant comparison in this regard would involve juxtaposing the decision-making authority exercised by U.S. Border and Customs Patrol (BCP) agents and that exercised by OFPRA personnel operating in holding areas (*zones d'attente*) at border entry-points in France. Alternatively, one could look to the nature of adjudication at the last instance. In France, the institution of last resort for asylum seekers is the Conseil d'Etat (the supreme administrative tribunal), whereas in the U.S. it is the Supreme Court, both of which exercise discretion in certifying cases. One could also choose to compare the types and number of adjudications at any point in between these two "instances."

[13] France and the U.S. have the same obligations vis-à-vis refugees under international law. The relevant legal instrument is the 1967 Protocol Relating to the Status of Refugees, which incorporates articles 2 to 34 inclusive of the 1951 Refugee Convention (or *Convention de Genève*) while removing its temporal and geographic limitations.

Immigration Review. In France, asylum judges sit at the *Cour nationale du droit d'asile* (National Court of Asylum). In both cases, the judges serve as adjudicators in the second instance—that is, they are tasked with examining the claims of asylum seekers who have already failed to secure grants of international protection from the administration and who risk expulsion from the territory.

Adjudication at the Executive Office for Immigration Review

The U.S. Executive Office for Immigration Review (EOIR), as its name suggests, is an executive agency. Before 1983, its functions belonged to the Immigration and Naturalization Service, which was tasked with enforcing the Immigration and Nationality Act (INA).[14] Due to concerns about law enforcement and adjudicatory powers comingling within a single governmental body, then-Attorney General William French Smith transferred immigration judges to the EOIR, a new sub-agency within the Department of Justice. Then, in 2002, the George W. Bush administration created the Department of Homeland Security (DHS), which absorbed the INS's enforcement functions and split them among three agencies within DHS: the U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). All three of these agencies play roles in the asylum process.[15] Through this reorganization, adjudicators of immigration law were to assume a proper degree of separation from enforcement personnel, now housed in DHS. Nevertheless,

[14] The INA of 1952 "collected and codified many existing provisions and reorganized the structure of immigration law. The Act has been amended many times over the years, but is still the basic body of immigration law." *Immigration and Nationality Act*, USCIS.
[15] USCIS, Aliens and Nationality; Homeland Security; Reorganization of Regulations; Final Rule [68 FR 9824] [FR 19-03], February 28, 2003, available at: https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-88492/0-0-0-91881/0-0-0-91963.html

immigration judges remained accountable to the head of the Department of Justice, the Attorney General, who is also the chief law enforcement officer of the U.S. and a political appointee.[16]

There are two types of immigration adjudicators within the EOIR. The first category, called Immigration Judges (IJs), sit in "immigration courts" where they try cases of non-citizens who have been deemed "deportable" by administrators working for the Department of Homeland Security. The second corps consists of members of the Board of Immigration Appeals (BIA), who adjudicate cases on appeal from the immigration courts. The BIA is a centralized tribunal sitting in Virginia. Both immigration courts and the BIA have jurisdiction over a wide array of "deportable" non-citizens, and not just asylum seekers.[17]

There are two main ways through which asylum seekers appear before IJs. The first is through a defensive procedure, whereby non-citizens who are already in removal proceedings apply for relief from deportation as asylum seekers before an IJ. This process applies to any non-citizen stopped by U.S. Customs and Border Protection (CBP) agents while crossing the border without a visa who does not otherwise get immediately deported through the application of "expedited removal." By law, non-citizens who present themselves at a port of entry or who are caught within 100 miles of the border without authorization can be deported without a hearing ("expedited removal").[18] However, if they express fear of returning to their home countries, they are to be referred to an interview with an Asylum Officer, in which they have an opportunity to

[16] See 8 C.F.R. §§ 1003.1(d)(2), 1003.10(b) (requiring the BIA and immigration judges, respectively, to exercise "independent judgment and discretion," subject to the orders of the Attorney General)
[17] Currently, there are 330 immigration judges located in more than 58 immigration courts spread throughout the U.S.
[18] Persons subject to "expedited removal" are denied an appearance before an IJ. While the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 authorizes the application of expedited removal to non-citizens who have been in the U.S. for less than two years, successive administrations have applied it only to non-citizens who had been in the U.S. for less than 14 days. In its policy memo from February 20, 2017, the Department of Homeland Security under President Trump announced its intention to implement expedited removal "to the greatest extent" authorized by statute.

demonstrate that they have a "credible fear" of persecution in their home country.[19] Only those non-citizens who are found to have credible fear are entitled to a full-fledged, defensive hearing before an IJ where they can then put forth asylum as a defense to removal.[20]

The second route is the "affirmative" process, whereby non-citizens already inside the territory, legally or otherwise, file asylum applications with the U.S. Citizenship and Immigration Service (USCIS), a branch of the Department of Homeland Security. USCIS schedules the applicant for an interview with an Asylum Officer, who may exercise discretion to grant asylum or refer the person for removal proceedings before an IJ.[21] If the person's case is referred to an IJ—essentially, if the Asylum Officer denies the application—the IJ then conducts an evidentiary hearing to examine the applicant's case *de novo*.[22]

Hearings before an IJ involve two opposing parties: the non-citizen and the Department of Homeland Security, represented by an assistant chief counsel from Immigration and Customs Enforcement (ICE).[23] The IJ makes two determinations. First, the IJ ascertains whether the noncitizen is removable under any inadmissibility or deportability grounds set in law.[24] Then, the IJ examines any affirmative applications for relief filed (e.g. an asylum application) and determines whether the non-citizen has met the relevant statutory requirements. However, a finding of statutory eligibility for asylum does not compel the IJ to grant such relief.[25] As a last step, the IJ

[19] USCIS, Questions & Answers: Credible Fear Screening, Last Reviewed/Updated: 07/15/2015, available at: https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening
[20] *Ibid.*
[21] In 2016, immigration courts received 1,445 affirmative asylum applications and 63,773 defensive applications.
[22] 8 C.F.R. § 208.14(c)(1) (assuming inadmissibility or deportability).
[23] 8 U.S.C. § 1229a(a)(1).
[24] 8 U.S.C. § 1182(a), § 1227(a).
[25] In U.S. law, there is an alternative remedy referred to as "withholding of removal" for applicants found to be fleeing persecution and entitled to *nonrefoulement*, yet not meriting asylum status in the IJs judgment. Unlike asylum, which is discretionary, "withholding of removal" merely protects persons from being returned to countries where their life or freedom would be threatened and does not afford them additional rights, such as the right to bring their family members along with them. 8 U.S.C. § 1231(b)(3).

exercises discretion to either grant or deny asylum.[26] The IJ issues a decision to that effect orally or in writing.[27]

Appeals of IJ decisions by either party are addressed to the BIA, which generally only conducts paper review of cases to determine whether IJs committed errors of law. However, the BIA may not reverse findings of fact, including credibility determinations, unless they are "clearly erroneous."[28] If the BIA finds an error of law, it remands the case to the IJ for a new determination. Otherwise, the non-citizen receives a "final order of removal" and is immediately deportable. In 2002, then-Attorney General John Ashcroft introduced reforms to replace the use of multimember panels with adjudications by single board members "in simple cases," as well as to tighten adjudication timelines.[29] Furthermore, since 2002, the BIA can issue many of its decisions without an opinion.[30] BIA decisions are binding on all IJs and, if published, are incorporated into a body of jurisprudence referred to as "BIA precedent" to be followed by IJs throughout the country.[31]

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[26] 8 U.S.C. § 1229a(c)(4)(A).
[27] 8 C.F.R. § 1240.13, § 1240.12(c). In 2016, IJs granted asylum in 17,018 of cases.
[28] 8 C.F.R. § 1003.1(d)(3).
[29] See, Department of Justice press release, "Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures," August 23, 2002. Codified by 8 C.F.R. § 1003.1(e) ("Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition."). Paragraph (e)(6) provides that "[c]ases may only be assigned for review by a three-member panel if the case presents one of these circumstances: (i) The need to settle inconsistencies among the rulings of different immigration judges; (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures; (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents; (iv) The need to resolve a case or controversy of major national import; (v) The need to review a clearly erroneous factual determination by an immigration judge; or (vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5)."
[30] 8 C.F.R. § 1003.1(e)(4)(i) ("The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.").
[31] Precedent decisions are published in bound volumes entitled "Administrative Decisions Under Immigration and Nationality Laws of the United States." *Precedent Decisions*, USCIS. Available at: https://www.uscis.gov/laws/precedent-decisions

Notably, the Attorney General may unilaterally and at any time decide to reverse, certify and rule on any case appealed to the BIA.[32]

Some BIA rulings, including all decisions on asylum,[33] are subject to review by Article III courts. However, appeals from BIA decisions (unlike those from IJ decisions) do not normally stay orders of removal, so non-citizens are still subject to deportation pending such review.[34] At the same time, in order to secure an appeal, deportable non-citizens are required to file a "petition for review" in the federal court of appeal for the circuit in which the removal hearing was held, usually without the help of legal counsel.[35] Given the practical hardships that this represents, the rate of appeals to Article III courts is relatively low, and the rate of reversals of BIA decisions is even lower.[36]

Due to the way in which federal courts are arranged in the U.S., each circuit develops a different body of jurisprudence that effectively binds Immigration Courts located in that circuit but not other circuits in the country.[37] In addition, the development of precedent on the application of asylum law is further complicated by the doctrine of administrative deference, otherwise known as "Chevron deference," according to which federal courts will defer to agency interpretations of their own legal mandates and procedures as long as those interpretations are reasonable or "permissible."[38] When a federal circuit court rules on an appeal from a BIA decision, it may reverse

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[32] See 8 C.F.R. § 1003.1(h) (requiring the BIA to refer cases to the attorney general on demand).
[33] 8 U.S.C. § 1252(a)(2)(B)(ii).
[34] A stay of removal may be exceptionally granted. See, 8 U.S.C. § 1252(b)(3)(B).
[35] 8 U.S.C. § 1252(b)(2) (2006). The U.S. government does not provide free legal counsel to non-citizens at any stage in their petition for asylum. A study conducted in 2016 found that 37% of immigrants facing removal, and only 14% of those in detention, were represented by an attorney in cases decided on the merits. Ingrid V. Eagly & Steven Shafer, "A National Study of Access to Counsel in Immigration Court," *University of Pennsylvania Law Review*, Vol. 164, No. 1, p. 6 (2016).
[36] For e.g., from September through November 2017, federal circuit courts ruled on 461 appeals from the BIA and affirmed 90% of them. The rate of affirmances was also 90% for the equivalent period in 2016.
[37] See Koh, Steve Y. "Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals," *Yale Law & Policy Review*, Vol. 9, No. 2 (1991), p. 442-43.
[38] *INS v. Aguirre-Aguirre*, 526 U.S. 425, 424 (1999) (recognizing that the BIA's law-making decisions are entitled to *Chevron* deference). See also, Manning, Stephen W. "Judicial Deference in Immigration Cases," Immigrant Law

or vacate the Board's decision, holding that the Department of Justice's interpretation of asylum law was unreasonable.[39] However, the application of that particular circuit court's ruling on the agency's interpretation would remain subject to contention in other circuits, where federal courts of appeal might weigh differently on the matter. As such, there may be significant indeterminacy as to the validity of a particular interpretation of asylum law and its applicability in large swathes of the country unless and until the U.S. Supreme Court issues an authoritative ruling, which is an extremely rare occurrence.[40]

Crucially, this doctrine of administrative deference applies not only to rulings by BIA judges but also to cases decided unilaterally by the Attorney General, which raises a set of problematic features in the U.S. asylum adjudication framework. The first concerns the source and degree of hierarchical control over adjudicators. The INA grants the Attorney General, as head of the Department of Justice, exceptionally broad powers over immigration adjudicators. Under the law, the Attorney General is charged with directly appointing and supervising the director of the EOIR, the members of the BIA, and IJs.[41] The Attorney General's strong managerial powers are problematic not only because he exercises them exclusively but also because he is himself a political appointee, with direct accountability to the President of the United States, and also serves as chief law enforcement officer and prosecutor for the government.[42]

Group Practice Advisory, available at: http://www.ilgrp.com/wp-content/uploads/2012/07/Judicial-Deference-Article.pdf.

[39] See, *e.g.*, *Prudencio v. Holder*, 2012 U.S. App. LEXIS 1693 (Jan. 30, 2012); *Sanchez Fajardo v. U.S. Att'y Gen.*, 2011 U.S. App. LEXIS 20685 (11th Cir. Oct 12, 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009).

[40] See Koh, *supra*, p. 450-52. See also, Barr, Jeffery. "Intercircuit Conflicts: An Overview," in 2 Federal Courts Study Committee: Working Papers and Subcommittee Reports Part II(C), 5 (1990).

[41] See 8 U.S.C. § 1101(b)(4) (2006); 8 C.F.R. § 1001.1(l); 8 C.F.R. § 1003.0(a).

[42] There is no exact equivalent for this office in France. The closest institution might be the *procureur général*, which is the authority charged with defending the interests of society in the application of criminal law and adjudication of criminal cases. The *procureurs généraux,* of which there are several, do not have any role in asylum, or immigration, adjudications.

In addition, as mentioned before, the Attorney General can choose to certify or reverse any BIA decision unilaterally, effectively neutralizing whatever degree of independence or political insularity may be imputed to IJs and BIA judges. Although, historically, it has been rare for an Attorney General to interfere in the BIA's decision-making, the incumbent Attorney General has demonstrated a penchant for doing so. In a recent case,[43] Attorney General Jeffrey Sessions reversed settled BIA precedent recognizing certain victims of domestic violence and gang violence as members of "particular social groups" eligible for refugee status.[44] Following the Attorney General's ruling on June 11, 2018, USCIS released a policy memorandum interpreting the brand-new precedent and issuing direct instructions to asylum adjudicators accordingly.[45] The ability of one Attorney General to drastically revise the interpretation of asylum law through a single decision rendered unilaterally calls into question the significance of "judges" and "jurisprudence," as well as respect for fundamental fairness, in the immigration context.

Adjudication at the Cour nationale du droit d'asile

The Cour nationale du droit d'asile (CNDA) is a specialized tribunal with the exclusive mandate to adjudicate non-citizens' right to international protection in France.[46] Asylum seekers appear before judges at the CNDA after receiving an administrative rejection of their claims before the *Office de protection relative au droit d'asile* (OFPRA).[47] The CNDA exercises jurisdiction in

[43] *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).
[44] "Asylum Practice Advisory: Applying for Asylum After Matter of A-B-," National Immigrant Justice Center (2018). Available at: https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%206.21.18.pdf
[45] The memorandum instructs adjudicators to "be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may merit a grant of asylum or refugee status."
[46] *1952-2012: le juge français de l'asile. Un colloque organisé par la Cour nationale du droit d'asile et le Conseil d'Etat le 29 octobre 2012 au Palais du Luxembourg*, *supra*, p. 9-10.
[47] The mission and internal composition of the CNDA are established by the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

plein contentieux, meaning that its judges examine asylum applicants' claims to international protection *de novo*, both with regard to law and fact, without according special deference to OFPRA's prior findings.[48]

All asylum seekers appealing to the CNDA have a right to free legal counsel (*aide juridictionnelle*) provided by the State, and the deadlines for submitting appeals as well as requests for legal representation vary depending on whether a case follows the "normal procedure" (*procédure normale*)[49] or the "accelerated procedure" (*procédure accelerée*).[50] The decision of whether to channel a case into the accelerated procedure, which proves consequential for reasons that will be expounded on below, rests on a combination of legal and discretionary factors.[51]

The CNDA, like its predecessor, the *Commission des recours des réfugiés* established in 1952, is a centralized institution housed in one building in the outskirts of Paris. The building is organized into chambers, each one staffed by a combination of permanent and rotating personnel. On a typical day, a multiplicity of actors—judges, rapporteurs, asylum applicants and their legal counsel, research staff and members of the public—can be seen navigating its hallways and exchanging information about upcoming hearings.[52] In general, hearings are open-door, and any member of the public is free to attend.[53]

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[48] *1952-2012: le juge français de l'asile*, *supra*, p. 16. Although OFPRA is formally a party to the dispute, OFPRA counsel appear to defend the administration's position before the CNDA on an exceptional basis.
[49] 46.1% of total decisions rendered in 2017. CNDA annual report for 2017. Available at: http://www.cnda.fr/content/download/124660/1261477/version/2/file/RA%20CNDA%202017%20%2020180123.pdf
[50] 24.1% of total decisions rendered in 2017. *Ibid.*
[51] The initial decision of whether to channel a case into the accelerated procedure is made by the *préfecture* (municipal authorities) if the asylum seeker is applying from inside the territory. Subsequently, OFPRA protection officers can decide to reassign a case to the normal procedure. The law sets forth specific criteria for channeling a case into the accelerated procedure, including whether the asylum seeker's country of origin is considered a "safe country" (*pays d'origine sûr*) and whether the asylum seeker missed the deadline for lodging the asylum application. CESEDA Article L723-2.
[52] Laacher, p. 42.
[53] In certain sensitive cases, the presiding judge(s) can decide to hold a closed hearing (*huis clos*), either *sua sponte* or at the asylum seeker's request.

Cases channeled through the normal procedure are heard before three-judge panels (*formation collégiale*). The panel consists of a president-judge (*président de formation de jugement*) and two advisors (*assesseurs*). President-judges, who sit on a permanent or part-time basis, must be career magistrates but not necessarily from the administrative order.[54] Some president-judges also serve as "presidents of sections" (*présidents de section*), a role that involves monitoring the production of case law in three to four chambers and recommending certain decisions for publication.

The two advisors come from different (and opposing) quarters, although the law requires that both have a competence in geopolitics or a relevant legal field.[55] One advisor, designated by the Conseil d'État, represents the administrative corps and is typically a former ambassador, high-level bureaucrat or prefect.[56] The second advisor is chosen by the UN High Commissioner for Refugees (UNHCR) country office in France among its staff members, following an application and interview process.[57]

This tripartite appointment structure is not relevant to cases processed under the accelerated timeline and those decided without hearing (by *ordonnance*). In these two cases, claims are adjudicated by a president-judge sitting alone (*juge unique*). Rulings by *ordonnance* represent a sizeable proportion of decisions rendered at the CNDA.[58] A dedicated *service des ordonnances* refers cases to permanent president-judges for paper review when, for example, the applicant's file is "manifestly inadmissible" or unsupported by a colorable claim that could call into question the

[54] CESEDA Article L732-1.
[55] *Ibid.*
[56] "Bureaucrats" are members of the administrative order but not necessarily magistrates. A "prefect" (préfet) is the State's representative in a particular department or region.
[57] Interview with UNHCR judge on July 31. There is ongoing communication between UNHCR-appointed judges and the agency's "Chargé de liaison," especially with regard to rare or important cases and questions of law that arise in the course of adjudications.
[58] 29.8% of total decisions rendered in 2017. CNDA annual report for 2017, *supra*, p. 6.

rejection by OFPRA.[59] Following a paper review, a judge can either summarily reject the claim or refer it to public hearing before the *formation collégiale* or a single judge.[60]

In the latter context, the role of the *rapporteur* is particularly meaningful. Rapporteurs, who constitute a separate corps at the CNDA, are charged with preparing independent analyses of each case and delivering them orally at the beginning of each hearing.[61] Aside from providing a summary of the cases, the oral reports may raise gaps or inconsistencies in the applicants' narrative and suggest lines of questioning for the judges. During interviews conducted at the CNDA, several judges indicated they pay close attention to the rapporteurs' evaluation and suggestions.[62] Rapporteurs neither vote nor have a voice in the closed-door deliberations following each hearing. However, as they are in charge of drafting the judges' opinion, some rapporteurs mentioned they feel compelled to probe the judges for *reasons* in light of crucial facts or evidence presented. A separate corps of rapporteurs—which include those with the longest years of experience—is in charge of examining cases susceptible to rejections by ordinance. Such rapporteurs play an influential role in the reassignment of cases to the public hearing docket.[63]

Losing parties can appeal CNDA decisions to the Conseil d'État, but such appeals are discretionary and rarely granted.[64] The Conseil d'État, after certifying an appeal, only rules on the legal questions. While a Conseil d'État decision to quash a case compels the CNDA to re-

[59] CESEDA Article R. 733-4.
[60] CNDA annual report for 2017, *supra*, p. 12.
[61] Rapporteurs are usually entry-level or mid-career professionals with a background in international affairs, geopolitics, human rights, or law (i.e. not necessarily lawyers); they undergo an intensive five-month long training before being authorized to work on cases.
[62] These interviews are supported by certain written accounts. See, *e.g.*, Laacher, p. 31-35, 80.
[63] This is relevant only to cases that were deemed to lack a serious claim calling into question the rejection by OFPRA (recours "*qui ne présentent aucun élément sérieux susceptible de remettre en cause la décision de l'Office français de protection des réfugiés et apatrides*"). CESEDA Article R. 733-4, 5°. These types of cases accounted for 87% of ordinances in 2017. CNDA annual report for 2017, p. 13.
[64] Out of 1,052 CNDA judgments appealed and registered at the Conseil d'État in 2017, only 26 (2.5%) concluded in a decision (21 of them in favor of the asylum applicant).
[64] CESEDA Article 732-5.

adjudicate the matter, the ruling does not bind CNDA judges according to the norm of *stare decisis*, as would in a common law system. In practice, however, Conseil d'État decisions are regarded as authoritative and feature prominently in publications by the *Centre de recherche et de documentation* (CEREDOC).[65]

CEREDOC, the CNDA's in-house think-tank, plays an important role in shaping the CNDA's evolving case law. Judges and rapporteurs interviewed for this paper remarked that they derived most if not all of the information relevant to their adjudication from CEREDOC's weekly newsletters, monthly informational bulletins, country and mission reports, compilation of reference decisions, and bi-annual *notes de jurisprudence* disseminated internally.[66] In addition, CEREDOC provides tailored information to judges and rapporteurs, at their request, on countries of origin or specific legal issues.[67]

Overseeing the entire CNDA structure is the President of the Court. Appointed by the vice-President of the Conseil d'État among high-ranking magistrates of the administrative order, CNDA Presidents have tenure protection and are not accountable to the ministries.[68] There are three principal, albeit indirect, ways through which the CNDA President influences the jurisprudence and general ideological orientation of the court. First, the CNDA President manages the appointment of president-judges, which includes both new permanent judges and sitting part-time judges who have reached the end of their three-year term.[69] Second, the CNDA President acts as president-judge in highly contentious cases adjudicated in *grande formation* (before nine judges),

[65] Interviews with judges and rapporteurs on July 16 and 17, 2018 at the CNDA.
[66] CNDA annual report for 2017, p. 20-21.
[67] *Ibid.*
[68] Article L731-1. Historically, CNDA presidents have been nominated from their posts as presidents of other administrative tribunals with five or more chambers. Interview with CNDA judge on August 6, 2018. By contrast, OFPRA Directors General, who are nominated at the recommendation of the Minister of the Interior and Minister of Foreign Affairs, are usually high-level members of the administration such as prefects or diplomats, but not magistrates. Interview with OFPRA lawyer on August 7, 2018.
[69] Reportedly, it is rare for a CNDA President not to renew a part-time judge's term.

which usually result in *décisions classées* incorporated into the CNDA's jurisprudence.[70] Finally, the CNDA President exerts an informal harmonizing influence by organizing thematic workshops in which judges discuss certain questions of law among each other and with outside experts. That is the extent, in law and in practice, of the CNDA President's role as manager of the court.[71]

Between management and control

The French and American asylum adjudication systems clearly differ in numerous respects, but an overarching contrast is discernible: the American system, with its strong accountability and subservience to the executive branch, follows a logic of *control*, whereas the French system, with its multiplicity of actors exerting concurrent and often indirect influence, functions according to a logic of diversified *management* and informal *harmonization*. Put differently, the U.S. system is heavily vertical in its orientation, while the French model builds in a more prominent horizontal dimension. These characteristics manifest themselves in the following pertinent ways:

The appointment and management of personnel

In the American system, the Attorney General directly appoints IJs as well as key figures in the EOIR's leadership, and the law does not provide robust tenure protections. The INA does contain general language prohibiting politically motivated hiring and firing of adjudicators,[72] but those provisions have historically gone unenforced despite evidence of ideological employment practices by certain administrations.[73] As a result, asylum adjudicators are susceptible to political

[70] Article 732-5 of CESEDA.
[71] Interviews with CNDA judges on July 17 and August 6, 2018.
[72] 8 U.S.C. § 1101(b)(4) (2006) (immigration judges); 8 C.F.R. § 1001.1(l) (immigration judges); id. § 1003.1(a)(1) (BIA members).
[73] Legomsky, Stephen H., "Restructuring Immigration Adjudication," 59 Duke Law Journal 1635-1721 (2010), p. 1668-69 (elaborating on the decision by the Attorney General to excise the BIA corps from 23 to 11 members and to demote judges with highest percentages of rulings in favor of non-citizens). See also, Lichtblau, Eric, "Report Faults Aides in Hiring at Justice Dept," New York Times, July 29, 2008. Available at:

pressure—a vulnerability that, by some accounts, is bearing out in practice.[74] It is worth noting that the Attorney General himself is a presidential appointee removable by the U.S. President at will,[75] which accentuates the subservience of the entire immigration adjudication system to the policy preferences of the executive branch.

In France, due to the heterogeneity of actors involved at almost every stage of the decision-making process, the possibilities for hierarchical supervision and control of asylum adjudications are more limited.[76] The CNDA President, who is herself a magistrate with tenure protection, has the power to appoint new permanent judges, but once appointed those judges are irremovable.[77] An internalized culture of respect for the independence of magistrates prevents the President of the court from otherwise attempting to alter the composition of chambers.[78] Furthermore, two out of three judges in the *formation collégiale* owe their appointments and tenure to entities outside of the CNDA, which diversifies the lines of accountability and managerial influence.[79] Finally, the CNDA as an institution benefits from the general political insularity that characterizes the administrative system as a whole.[80]

The development and authority of case law

https://www.nytimes.com/2008/07/29/washington/29justice.html. See also, Office of Professional Responsibility and Office of the Inspector General, U.S. Department of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (2008). Available at http://www.usdoj.gov/oig/special/s0807/final.pdf.

[74] See, e.g. "Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence," July 30, 2018.

[75] *Myers v. United States*, 272 U.S. 52 (1926).

[76] See Laacher, p. 42-43, 75-76.

[77] Judges have life-tenure, which in France translates into mandatory retirement at age 69.

[78] For example, by refusing to renew the appointment of sitting part-time judges following the end of their three-year tenure. Interview with judges on July 16-August 6.

[79] CESEDA Article L732-1.

[80] Chenot, Bernard, "Le ministre, chef d'une administration," *Pouvoirs*, Vol. 36 (1986), p. 79.

U.S. doctrine on asylum develops according to the common law principle of *stare decisis*. Legal authorities are arranged hierarchically, and once a legal authority has decided an issue or question of law, adjudicators subject to that authority are bound to apply it in all similar cases going forward. Within the administrative system, the highest legal authority on immigration is the Attorney General, and he can create precedent binding on IJs and BIA adjudicators any time that he decides to certify and rule on a case. The recent case of *Matter of A-B-,* and its implications for future adjudication of asylum claims involving persecution in the form of domestic and gang violence, is illustrative of the Attorney General's power in this regard.[81]

Normally, the doctrine of *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[82] However, in the case of asylum adjudication, *stare decisis* may not have the intended effects for at least two reasons. First, when affirming an IJ decision, the BIA need not issue an opinion explaining the reasons for its decision.[83] Such "affirmances without opinion" (or AWOs) introduce gaps and ambiguities in the case law, as they fail to establish clear precedent for other IJs adjudicating similar cases. Second, the circuit-specific generation of case law by the federal courts of appeal contributes to a widening divergence of jurisprudence applicable to IJs located in different circuits across the country. The ad hoc and unsettled doctrine of agency deference further complicates matters for asylum adjudicators trying to determine what is the "binding precedent" that they are compelled to apply.[84] In effect, an IJ may receive conflicting signals from BIA rulings and earlier circuit court precedent, and may not

[81] See, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). See also, "Asylum Practice Advisory: Applying for Asylum After Matter of A-B-," *supra*.
[82] *Payne v. Tennessee,* 501 U.S. 808, 827–828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).
[83] 8 C.F.R. § 1003.1(e)(4)(i)
[84] See Koh, *supra*, p. 450-52. See also, Barr, Jeffery. "Intercircuit Conflicts: An Overview," in 2 Federal Courts Study Committee: Working Papers and Subcommittee Reports Part II(C), 5 (1990).

know which doctrine to apply until the circuit court explicitly rules on the matter and decides whether the agency's interpretation stands.

Asylum adjudication in France operates according to a somewhat looser conception of jurisprudence. The lack of strictly binding precedent in the French administrative system[85] means that asylum adjudicators always retain a degree of decisional independence vis-à-vis higher legal authorities, including the Conseil d'État. At the same time, such independence is tempered by the concurrent operation of vertical and horizontal mechanisms of influence. On the vertical axis, highly persuasive authorities within the CNDA include "reference decisions" rendered in *grande formation*, as well as those recommended for publication by presidents of sections. Outside of the CNDA, the most important legal authorities are Conseil d'État decisions on matters of law as well as case law of the European Court of Human Rights (ECHR) and European Court of Justice.[86]

These multiple and varied sources of jurisprudence apply with reasonable consistency across adjudications due to the pervasiveness of horizontal, or peer-to-peer, lines of influence. Adjudicators in the administrative system are accustomed to making decisions in collegiality, and judges at the CNDA are no exception.[87] In addition to the formal discussions and negotiations taking place inside chambers—among adjudicators in the collegial formation as well as between rapporteurs and adjudicators—judges at the CNDA engage in regular informal conversations about

[85] Interview with CNDA judges on July 31 and August 6, 2018. See also, Cohen-Tanugi, Laurent. "Case Law in a Legal System Without Binding Precedent: The French Example," Stanford Law School, China Guiding Cases Project, Commentary No. 17. Available at: https://cgc.law.stanford.edu/commentaries/17-laurent-cohen-tanugi/

[86] ECHR rulings can be considered binding or mandatory in the sense that failure by national authorities to follow the Court's imposition of remedies can result in substantial fines or, in cases of chronic noncompliance, expulsion from the Council of Europe. However, with respect to parties not involved in the particular cases or controversies, the Court's rulings are more accurately described as "highly authoritative precedent," applied by judges of both the ECHR and national courts in similar cases with more flexibility than under the rule of *stare decisis*. See, *e.g.*, Guillaume, Gilbert, "The Use of Precedent by International Judges and Arbitrators," Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), p. 13.

[87] See, e.g., Massot, *supra*, p. 2; Gonod, Pascale, "Le Vice-Président du Conseil d'État, Ministre de la Juridiction Administrative?" *Le Seuil*, Vol. 123 No. 4 (2007), p. 119.

the evolving case law. Finally, CEREDOC plays an instrumental role in supporting, complementing and facilitating the assimilation of a harmonized body of law.

The fairness and consistency of decisions[88]

These vertical and horizontal dynamics have implications for the quality of process to which asylum seekers are subjected. An adjudication system, in order to be perceived as fair and legitimate, must strive for accuracy and consistency of outcomes.[89] As H.L.A. Hart, a towering figure in 20th century legal philosophy, famously proclaimed, "one essential element of the concept of justice is the principle of treating like cases alike."[90] The French model, compared to the American system, is more likely to achieve these goals for several reasons. First, it effectively isolates adjudicators from politics and more squarely places them in the realm of law.[91] Individual adjudicators in the U.S. may strive to render fair and impartial judgments, but they are ultimately at the mercy of the managerial control and precedential authority of the Attorney General.[92]

In general, the assignment of strong managerial powers to the head of a hierarchy, coupled with the operation of *stare decisis*, may be assumed to lead to greater consistency in the development of case law across jurisdictions and over time. Nevertheless, there is little evidence that concentrating power in the Attorney General has resulted in greater uniformity across asylum adjudications. On the contrary, there is a wealth of literature documenting the extraordinary dispersion of asylum grants across immigration courts and even among individual adjudicators

[88] In the U.S., the term "procedural due process" is taken to imply standards of fairness and impartiality in judicial proceedings. See, *e.g.*, U.S. Supreme Court's elaborations in *Lisenba v. California*, 314 U.S. 219 (1943) (referring to due process as "that fundamental fairness essential to the very concept of justice"). See also, *Palko v. Connecticut*, 302 U.S. 319 (1937) and Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[89] Legomsky, p. 1645-46.
[90] Hart, H.L.A., "Positivism and the Separation of Law and Morals," *Harvard Law Review*, Vol. 71, No. 4 (1958), p. 623-24.
[91] See Massot, *supra*.
[92] See, *e.g.*, 8 U.S.C. § 1101(b)(4) (2006); 8 C.F.R. § 1001.1(l); 8 C.F.R. § 1003.0(a).

located in a single courthouse.[93] To these disparities can be added the fact that federal courts of appeal have produced starkly divergent case law on immigration.[94] The increasingly circuit-specific precedent on asylum, and its uncertain applicability given the doctrine of administrative deference alluded to before, have contributed to inconsistent application of the law. For example, circuit courts have accorded variable deference to the BIA's post-2008 requirements for finding a "particular social group," one of the protected grounds for asylum.[95] Following the BIA's rulings, the Seventh and Third Circuits declined to apply at least one of the BIA's requirements (the "social visibility" requirement),[96] whereas the Ninth Circuit endorsed and further clarified the new test. As such, until and unless the Supreme Court decides to weigh in on the "particular social group" test, immigration judges located in these different circuits will be bound by different case law, leading to disparate consequences for asylum seekers whose "like cases" will not be treated alike.[97] The presence of strong vertical control in the U.S. immigration system has therefore failed to ensure the uniform application of asylum law.

By contrast, the French model is characterized by the prevalence of horizontal checks. At the CNDA, several stakeholders—including fellow judges, rapporteurs, section presidents, pro

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[93] See, e.g., "Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Location and Nationality" (2007), http://trac.syr.edu/ immigration/reports/183/; U.S. Gov't Accountability Office, No. GAO-08-940, U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges (2008), available at http://www.gao.gov/new.items/d08940. pdf; see also Ramji-Nogales et al., supra note 7, at 296 ("[I]n one regional asylum office . . . some officers grant[ed] asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases. Similarly, Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building."). For one explanation of this variation, see Koh, Steve Y. "Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals," *supra*.

[94] Ramji-Nogales, Jaya, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York University Press (2009), p. 79-86.

[95] In two precedential decisions from 2008, *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008), the BIA added two requirements to the test for establishing a "particular social group:" social visibility and particularity.

[96] *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (finding that the BIA's "social visibility" requirement "makes no sense" and is inconsistent with prior decisions by the Board); *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011) (holding that the BIA's requirements that "particular social group" must possess elements of "social visibility" and "particularity" in order for member of group to be "refugee" eligible for asylum was not entitled to Chevron deference.).

[97] See Koh, *supra*, p. 450-52.

bono as well as private lawyers, CEREDOC staff—have roles to play in ensuring that judgments rendered are defensible and supported by reasons rather than ideological predispositions.[98] By some accounts, this institutional design, which embeds a multi-participatory dynamic within a centralized institution, ensures a significant degree of harmonization without the need for strong vertical control.[99]

Contemporary relevance and stakes

At the time of writing, new administrations in the U.S. and France are stridently pushing for reforms in their immigration and asylum systems. In the U.S., the Trump administration has announced plans to expand "expedited removal,"[100] raised the standard of proof for asylum seekers expressing "credible fear," tightened the legal definition of persecution[101] and, most recently, proposed new regulations to allow the indefinite detention of immigrant children in contravention of the 1997 Flores settlement agreement.[102]

In France, the Macron administration has succeeded in passing an amendment to the law on asylum and immigration through the National Assembly that, among other changes, abolishes the suspensive effect of appeals from OFPRA rejections for cases in the "accelerated procedure."[103] At the same time, the new bill endows permanent president-judges with fixed tenure, a protection that did not formerly exist, thus arguably enhancing their independence.[104]

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[98] See Laacher, p. 33-37, 42-43.
[99] Ibid., p. 35-37, 42-43, 75-80, 126-27. Assertions also supported by interviews with judges and asylum attorneys at the CNDA in June 2018.
[100] Hauslohner, Abigail and David Nakamura, "In memo, Trump administration weighs expanding the expedited deportation powers of DHS," Washington Post, July 14, 2017.
[101] "Asylum Practice Advisory: Applying for Asylum After Matter of A-B-," *supra*.
[102] See, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," A Proposed Rule by the Homeland Security Department and the Health and Human Services Department on 09/07/2018, available at: https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children
[103] Comité inter mouvements auprès des evacuees (CIMADE), "Décryptage du Projet de Loi Asile et Immigration," July 30, 2018. Available at: https://www.lacimade.org/decryptage-projet-de-loi-asile-immigration/
[104] Interview with CNDA judge on August 6, 2018.

As they undertake such initiatives, both administrations may wish to consider their implications for the integrity of the adjudication system from a comparative perspective. Admittedly, there are certain aspects of each system that are not easily transferrable, and it would be absurd to suggest that the U.S. legal system should abandon the principle of *stare decisis* or abolish its circuit court system. Nevertheless, lawmakers in the U.S. may still look to the French model for ideas on how to enhance the legitimacy of asylum adjudications, such as by amending the Immigration and Nationality Act to temper the power of the Attorney General over the immigration court system and consolidating the practice of using three-judge panels to adjudicate appeals from denials of asylum at the BIA. Meanwhile, policy-makers in France may look upon the U.S. as a cautionary example of what happens when the readiness to infuse public policy objectives into the process and outcomes of adjudications leads to system-wide politicization and erosion of the system's trappings of justice.

Bibliography

1952-2012: le juge français de l'asile. Un colloque organisé par la Cour nationale du droit d'asile et le Conseil d'Etat le 29 octobre 2012 au Palais du Luxembourg. Conseil d'Etat, Droits et Débats (2014).

"Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," A Proposed Rule by the Homeland Security Department and the Health and Human Services Department on 09/07/2018, available at: https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children

"Asylum Practice Advisory: Applying for Asylum After Matter of A-B-," National Immigrant Justice Center (2018).
Bell, John. *Judiciaries within Europe: A Comparative Review*. Cambridge University Press: 2006.

Barr, Jeffery. "Intercircuit Conflicts: An Overview," in 2 Federal Courts Study Committee: Working Papers and Subcommittee Reports Part II(C), 5 (1990).

Chenot, Bernard, "Le ministre, chef d'une administration," *Pouvoirs*, Vol. 36 (1986).

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837.

CNDA annual report for 2017.

Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).

Cohen-Tanugi, Laurent. "Case Law in a Legal System Without Binding Precedent: The French Example," Stanford Law School, China Guiding Cases Project, Commentary No. 17.

Comité inter mouvements auprès des evacuees (CIMADE), "Décryptage du Projet de Loi Asile et Immigration," July 30, 2018.

Damaška, Mirjan R. (1986). *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven: Yale University Press.

Department of Justice press release, "Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures."

Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

Givati, Yehonatan and Matthew C. Stephenson. "Judicial Deference to Inconsistent Agency Statutory Interpretations," *The Journal of Legal Studies*, Vol. 40, No. 1 (January 2011).

Gonod, Pascale, "Le Vice-Président du Conseil d'État, Ministre de la Juridiction Administrative?" *Le Seuil*, Vol. 123 No. 4 (2007).

Guillaume, Gilbert, "The Use of Precedent by International Judges and Arbitrators," Journal of International Dispute Settlement, Vol. 2, No. 1 (2011).

Hart, H.L.A., "Positivism and the Separation of Law and Morals," *Harvard Law Review*, Vol. 71, No. 4 (1958)
Hauslohner, Abigail and David Nakamura, "In memo, Trump administration weighs expanding the expedited deportation powers of DHS," Washington Post, July 14, 2017.

Immigration and Nationality Act, USCIS.

INS v. Aguirre-Aguirre, 526 U.S. 425, 424 (1999).

Koh, Steve Y. "Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals," *Yale Law & Policy Review*, Vol. 9, No. 2 (1991).

Kozel, Randy J. and Jeffrey A. Pojanowski. "Administrative Change," *UCLA Law Review*, Vol. 59, No. 1 (2011).

Massot, Jean. "The Powers and Duties of the French Administrative Judge," April 1, 2016, Yale Law School. Adapted from "Les pouvoirs et les devoirs du juge administratif dans l'examen des requêtes," lecture delivered in Split, Croatia, at the *Troisièmes journées juridiques et administratives franco-croates*, October 26-27, 2009.

Lisenba v. California, 314 U.S. 219 (1943).

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008).

Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

Manning, Stephen W. "Judicial Deference in Immigration Cases," Immigrant Law Group Practice Advisory, available at: http://www.ilgrp.com/wp-content/uploads/2012/07/Judicial-Deference-Article.pdf

Myers v. United States, 272 U.S. 52 (1926).

Laacher, Smaïn, *Croire à l'incroyable. Un sociologue à la Cour nationale du droit d'asile*. Galimard: 2018.

Legomsky, Stephen H., "Restructuring Immigration Adjudication," 59 Duke Law Journal 1635-1721 (2010).

Precedent Decisions, USCIS.

Payne v. Tennessee, 501 U.S. 808, 827–828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

Ramji-Nogales, Jaya, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York University Press (2009).

"Retired Immigration Judges and Former Members of the Board of Immigration Appeals Statement in Response to Latest Attack on Judicial Independence," July 30, 2018.

Rescan, Manon, "La loi asile et immigration définitivement adoptée à l'Assemblée," *Le Monde*, August 1, 2018. Available at: https://www.lemonde.fr/politique/article/2018/08/01/la-loi-asile-et-immigration-definitivement-adoptee-a-l-assemblee_5338430_823448.html

"The Layout of the French Legal System," Georgetown Law Library Guide, available at: https://guides.ll.georgetown.edu/c.php?g=362135&p=2446075

Title 8, Code of Federal Regulations.

Title 8, U.S. Code.

"Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Location and Nationality" (2007).

Troper, M. and Grzegorczyk, C. (1997). "Precedent in France" in D. MacCormick and R. Summers (eds.) *Interpreting precedents: A comparative study*. Dartmouth, MA: Dartmouth Publishing Co.

"Trump threatens government shutdown if Democrats don't back immigration reform," CNBC, July, 29, 2018.

USCIS, Aliens and Nationality; Homeland Security; Reorganization of Regulations; Final Rule [68 FR 9824] [FR 19-03], February 28, 2003, available at: https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-88492/0-0-0-91881/0-0-0-91963.html

USCIS, Questions & Answers: Credible Fear Screening, Last Reviewed/Updated: 07/15/2015, available at: https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening

Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011).