RATIONING JUSTICE?: THE EFFECT OF CASELOAD PRESSURES ON THE U.S. COURTS OF APPEALS IN IMMIGRATION CASES

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Beginning in late 2003, the U.S. Courts of Appeals for the Second and Ninth Circuits experienced a deluge of immigration cases caused by changes in another part of the immigration bureaucracy. How did these two circuits, especially the Ninth circuit and its personnel, which handle more than 50% of all immigration appeals nationwide, respond to the "immigration surge" as it came to be called? Using interview data from 25% of the active judges on the court and some central staff, the article examines the series of internal experiments in case management that the Ninth Circuit was forced to undertake in the face of the immigration cases, and assesses the effect of the surge on the court itself as an institution, its personnel, and immigrant litigants. The addition of judgeships and other legislative-based solutions were not viable. The article concludes that the Ninth Circuit's incremental strategies for coping with its immigration caseload may have deleterious effects on political asylum applicants, and especially those who are pro se applicants, by altering the nature of judicial review and moving the Courts of Appeals toward the practices of a certiorari court.

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What happens to a Courts of Appeals' central staff, judges, and alien\(^1\) litigants when the circuit faces a caseload crisis, but legislative-based solutions that could provide more lasting relief are foreclosed? The word "triage" conjures images of a MASH unit and the sorting of the sick and injured, but this word has been used by the judges and central staff of the Ninth Circuit Court of Appeals to describe that court's attempt to keep pace with its recent deluge of immigration appeals. This circuit, along with the Second Circuit Court of Appeals, saw a huge jump in immigration appeals beginning in 2002. One insider noted, "It [the Second Circuit] has now received more than three times as many immigration appeals since 2002 [through 2006] as it received in the previous thirty years combined.\(^2\) Meanwhile the Ninth Circuit experienced a 570% increase in immigration appeals between 2002 and 2007.\(^3\) How does such a sudden and very sharp swell in one single category of appeals affect an institution of general jurisdiction like the U.S. Court of Appeals, and the way it decides cases? The institutional experiments and innovations that were necessitated by the sharp rise

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\(^1\) I am aware that the term “alien” can have derogatory connotations. I use the term in this study for the sake of consistency. Almost all U.S. government documents and federal legal opinions use the term to reference non-citizens. As stipulated by 8 U.S.C. 12 § 1108 (a)(3), “alien” is a legal term that refers to “any person not a citizen or national of the United States.”


\(^3\) Statistics provided by the Office of the Clerk of the Court, U.S. Courts of Appeals for the Ninth Circuit (3/29/07). Please note the percentages of the Ninth Circuit appeals reflect only the immigration appeals from the BIA and exclude the U.S. District Court /other filings that are also immigration related.
in immigration appeals required changes to these two courts' administrative procedures. Yet, the array of available solutions was severely limited.

Specifically, the possibility of adding extra judgeships to help with the increased workload was very unlikely. It turns out that after a series of experiments, the two courts adopted remarkably similar approaches. The convergence of strategies is testament to the structural constraints that limit any innovation and experimentation in the U.S. Courts of Appeals' attempts to manage its growing caseloads. Additionally, many legislative-based proposals were off the table. As a result, the choice of the Second and Ninth Circuits to adopt a triage procedure for the bulk of the immigration appeals as these courts' primary coping strategy ultimately changed the very nature of judicial review itself. The changes had the effect of moving these two Courts of Appeals away from their traditional error correction mission and toward the behavior of a certiorari court like the Supreme Court. This development has had serious consequences for the staff, judges, and alien appellants, especially those applying for political asylum.

Because others have already written about the responses of the Second Circuit to the immigration appeals surge, this article focuses primarily on the Ninth Circuit. Indeed, it is the Ninth Circuit more than any other Court of

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Appeals that play a pivotal role in immigration law because the circuit handles half of all immigration appeals filed nationwide. Its volume of immigration appeals led Judge C to state that for all intents and purposes, “The Ninth Circuit makes immigration and intellectual property law.” Any change to immigration law or policy will be strongly felt by this court.

Data and Methods

The primary data for this article consists of internal documents and statistics from the Ninth Circuit and interviews with the Ninth Circuit judges and central staff. The set of interviews consist of seven semi-structured, in-person interviews (and one phone interview) conducted by the author with a total of eight Ninth Circuit Court of Appeals judges, and in-person interviews with three central staff members of that court. The interviews were conducted in July and August of 2007 with a few subsequent follow up emails/phone calls. Because of the sensitive nature of judicial decision making, the judges and staff spoke only on condition of anonymity. Therefore, no further identifying information is revealed except the stipulation that seven of the judges are active status and one is senior status. The interview group includes 25% of all the active judges on the court. In revealing the bare minimum information of the judges, I follow the lead of


5 Throughout the article I refer to judges and staff using feminine pronouns for the sake of avoiding the cumbersome he/she and her/his. Therefore the sex of the pronoun used may not match the actual sex of the judges.
David Klein and Jonathan Cohen who provided very limited information about their Courts of Appeals interviewees and even declined to attribute specific comments to specific judges.\(^6\) Like Klein and Cohen, I have not identified the judges' ideology or party identification because the goal of this article is not to assess the effect of ideology on judicial decision making; rather it is to better understand and assess the effects of a sudden spike in caseload on a court's personnel and on the court as an institution itself.\(^7\)

This group of judges does not constitute a random sample of the Ninth Circuit, and such a sample is not desirable in this instance. The main goal of interviewing the judges and staff was to clarify and gain insight into the adjudicative procedures of the court and how the immigration surge affected the court its occupants. Through talking to the interviewees, I was able to piece together a broad account of the procedures that the Ninth Circuit as an institution uses to keep pace with its immigration appeals. They provided insider, first-hand accounts about court processes, what three judges referred to as "experiments" and especially assessments of their efficacy provided by the court's own personnel. At least four of the judges had participated in the court's experiments.

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\(^7\) For an empirical evaluation of the influence of ideology, see Anna Law and Margaret Williams, "Understanding Judicial Decision Making in Immigration Cases at the U.S. Courts of Appeals." A paper prepared for presentation at the 2009 meeting of the Midwest Political Science Association, April 2-5, 2009, Chicago, IL.
Information about these experiments and especially their results are neither
detailed in the Ninth Circuit’s operations manuals nor available from any other
source. Therefore, these interviews with key actors were crucial.

Causes of the Immigration Surge

The "immigration surge", as it came to be called, has had a
disproportionate impact on the Second and Ninth Circuit Courts of Appeals.\(^8\) The
reason for this particularized effect is due to immigration entry and settlement
patterns and its correspondence to the geographically defined boundaries of each
circuit jurisdiction. Although it is a policy area with national visibility,
immigration settlement remains a largely regional phenomenon. Both legal and
illegal aliens choose to enter and reside in the metro areas of six states:
California, Arizona, New York, Illinois, Texas, and New Jersey. Immigrants also
tend to concentrate in or near the gateway ports of entry in these states, including

\(^8\) The term “surge” was first used in the article “Immigration Appeals Surge in Courts,”
THE THIRD BRANCH (An e-newsletter produced by the Administrative Office of the
Subsequent articles and studies picked up the term and started using it as well. See
Palmer, Yale-Loehr and Cronin, Why Are So Many People Challenging Board of
Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent
Surge in Petition for Review. 20 Geo. Immigr. L.J. 1 (2005), 6. See also Cooper and
Bazar, Immigration Appeals Swamp Federal Courts, Sacramento Bee, Sept. 5, 2004, at
A1, Moore and Simmons, Immigrant Pleas Crushing Federal Appellate Courts: As
Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration
Appeals, L. A. Times, May 2, 2005, at 1, and Perotta, Immigration Appeals Surge in
Los Angeles, Tucson, Miami, and New York City. In deportation or removal proceedings in which an alien contests their right to remain in the U.S and not be expelled, an alien’s appeal originates in the federal court jurisdiction where they reside. The confluence of immigration settlement patterns and the geographically determined boundaries of the U.S. Court of Appeals system skewed the distribution of immigration appeals when their numbers increased dramatically in 2002. Moreover, the Supreme Court, due to its docket control mechanism, was insulated from the immigration surge.

In 2003 the Second and Ninth Circuits, which are courts of general jurisdiction, noticed a sudden and very sharp increase in immigration appeals flooding into their courts. The catalyst for this wave of immigration appeals was recent changes to the adjudicative procedures at the Board of Immigration Appeals (BIA). The BIA is the highest appellate body in the immigration administrative system and is often referred to as the "Supreme Court of immigration." The majority of immigration appeals pass through this body before heading into the federal court system. The BIA's purpose is to correct the mistakes of other immigration officials in the bureaucracy including Immigration Judges who may occasionally make errors "of law, of procedure, of the

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application of law to fact.”¹¹ Yet a series of changes mandated by then Attorney General John Ashcroft in 2002 severely compromised the BIA’s functions. Specifically, in August 2002, Ashcroft ordered the BIA to clear its backlog of over 56,000 cases by March of 2003.¹² The order resulted in what one study called, “a qualitative change in the BIA’s decision making.”¹³ To make headway on their backlog, the Board was ordered by Ashcroft to further streamline its procedure. Whereas previously panels of three Board members decided cases, now a single Board member could decide the majority of cases. This procedure remains current policy. Put differently, current practice at the BIA is that all cases are decided by a single member, except for the small classes of cases that are designated for review by a three-member panel.¹⁴

The move to single member adjudications raised a host of concerns in the immigration advocacy community and among many of the U.S. Courts of Appeals judges interviewed. As Stephen Legomsky wrote, “accuracy, consistency, efficiency, and public acceptance” should be four main goals of an application of law to fact.”¹¹ Yet a series of changes mandated by then Attorney General John Ashcroft in 2002 severely compromised the BIA’s functions. Specifically, in August 2002, Ashcroft ordered the BIA to clear its backlog of over 56,000 cases by March of 2003.¹² The order resulted in what one study called, “a qualitative change in the BIA’s decision making.”¹³ To make headway on their backlog, the Board was ordered by Ashcroft to further streamline its procedure. Whereas previously panels of three Board members decided cases, now a single Board member could decide the majority of cases. This procedure remains current policy. Put differently, current practice at the BIA is that all cases are decided by a single member, except for the small classes of cases that are designated for review by a three-member panel.¹⁴

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¹⁴ The move to single-member adjudications might be what prompted Judge C to tell me, “The BIA says that they have stopped streamlining, but they haven’t.” Interview with Judge C, 6/13/07.
administrative process. A primary concern was that a single Board member is far more likely to make a mistake than a panel of three judges and that the benefit of the deliberative nature of a panel discussion that could detect errors would be lost with the move to single member adjudications.

Exacerbating the worry that individual Board member adjudications would lead to more errors than a three-Member panel was the increase in summary affirmances of the Immigration Judge’s (“IJ”) decisions which went against the alien. Summary rulings are those with little more than a few lines and no elaboration of how the Board member reached the conclusion that she came to. The *Los Angeles Times* found that even before the streamlining was to officially commence, the Board’s summary rulings went up to 38% from the previous 9%.

The Dorsey Report, commissioned by the American Bar Association’s Commission on Immigration Policy, Practice and Pro Bono; also confirmed the qualitative change of BIA decisions. The report notes that by the end of 2001, “approximately 10% of BIA decisions were summary affirmances. By March 2002, more than half of the BIA’s decisions were summary affirmances.”

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Following the streamlining, aliens flowed in the U.S. Courts of Appeals in large numbers because they felt that they had not been heard after receiving a boilerplate summary affirmance. The changes at the BIA had altered the number and nature of the appeals flowing to the U.S. Courts of Appeals system.

Quantifying the Effects of the Immigration Surge

Due to the BIA streamlining, immigration appeals have added exponentially to the Second and Ninth Circuit’s caseload as evidenced by a variety of quantitative measures. Table 1 illustrates the surge in raw numbers and also shows the immigration appeals as a percentage of the two circuit’s dockets.

Table 1. Number of BIA Appeals Filed During 12 Month Periods 2001-2006 and as Percentage of Total Appeals Filed in Circuit

<table>
<thead>
<tr>
<th>Year Ending</th>
<th>National</th>
<th>2nd Circuit</th>
<th>9th Circuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/31/2001</td>
<td>1,642 (3%)</td>
<td>166 (4%)</td>
<td>913 (9%)</td>
</tr>
<tr>
<td>12/31/2002</td>
<td>6,465 (11%)</td>
<td>991 (19%)</td>
<td>3,672 (30%)</td>
</tr>
<tr>
<td>12/31/2003</td>
<td>8,750 (14%)</td>
<td>2,180 (33%)</td>
<td>4,035 (32%)</td>
</tr>
<tr>
<td>12/31/2004</td>
<td>11,366 (18%)</td>
<td>2,602 (38%)</td>
<td>5,964 (40%)</td>
</tr>
<tr>
<td>12/31/2005</td>
<td>12,873 (18%)</td>
<td>2,710 (37%)</td>
<td>6,625 (41%)</td>
</tr>
<tr>
<td>12/31/2006</td>
<td>10,750 (17%)</td>
<td>2,486 (37%)</td>
<td>5,166 (37%)</td>
</tr>
</tbody>
</table>

Source: All statistics provided to author by the Office of the Clerk of the Court, U.S. Courts of Appeals for the Ninth Circuit (3/29/07). Please note the percentages of the Ninth Circuit appeals reflect only the immigration appeals from the BIA and exclude the District Court /other filings that are also immigration related.

While she was Clerk of the Court, Catterson indicated in 2006 that the current “caseload challenges” at the Ninth Circuit were driven by “two words—‘immigration cases.’”

Although the Second Circuit was also severely affected, the Ninth Circuit receives the lion's share of the immigration appeals nationally. Table 2 shows a comparison of the numbers of immigration appeals filed nationally and of that number, the percentage of appeals that land in the Ninth Circuit. The staff further elaborated that among the immigration appeals flooding into the Ninth Circuit, approximately half of those were political asylum cases.

Table 2: Immigration Cases in the Ninth Circuit Courts of Appeals and Nationwide, 1994-2005 for 12-month Period Ending September 30, (as percentage of national immigration appeals)

<table>
<thead>
<tr>
<th>Year Ending</th>
<th>National</th>
<th>Ninth Circuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1994</td>
<td>983</td>
<td>431 (44%)</td>
</tr>
<tr>
<td>1995</td>
<td>1,180</td>
<td>624 (53%)</td>
</tr>
<tr>
<td>1996</td>
<td>1,062</td>
<td>579 (55%)</td>
</tr>
<tr>
<td>1997</td>
<td>1,921</td>
<td>1,018 (53%)</td>
</tr>
<tr>
<td>1998</td>
<td>1,936</td>
<td>1,102 (57%)</td>
</tr>
<tr>
<td>1999</td>
<td>1,731</td>
<td>938 (54%)</td>
</tr>
<tr>
<td>2000</td>
<td>1,723</td>
<td>910 (53%)</td>
</tr>
<tr>
<td>2001</td>
<td>1,760</td>
<td>954 (54%)</td>
</tr>
<tr>
<td>2002</td>
<td>4,449</td>
<td>2,670 (60%)</td>
</tr>
<tr>
<td>2003</td>
<td>8,833</td>
<td>4,206 (48%)</td>
</tr>
<tr>
<td>2004</td>
<td>10,812</td>
<td>5,368 (50%)</td>
</tr>
<tr>
<td>2005</td>
<td>11,741</td>
<td>6,390 (54%)</td>
</tr>
</tbody>
</table>

19 Catterson, Changes in the Appellate Caseload, Az. L. Rev. 287-299 at 294 (2006) In late 2007, Ms. Catterson was promoted to Circuit and Court of Appeals Executive and Molly Dwyer is now the Clerk of the Court.
Consider that the Ninth Circuit experienced from 2000-2002 a (+9%) increase in percentage of immigration cases; between 2001-2001 (+180%), 2002-2003 (+58%), between 2003-2004 (+28%), and between 2004 to 6/30/05 (+19%). Every year since 2002, the Ninth Circuit's immigration appeals kept mushrooming. Tables 1 and 2 show the concentrated impact of the immigration appeals on the Ninth Circuit. Table 2 also shows that it is the Ninth Circuit that makes the operative doctrine in immigration law, not the Supreme Court that adjudicated a total of 20 immigration cases between the years 1994 and 2005.

Aside from adding to the court's docket, the immigration appeals are slowing down all the business in the court. Judge E described it as a “tail wagging the dog” effect. She attributes the slowdown as the main effect of the immigration appeals on the Ninth Circuit as an institution. Judge E said, “When people complain about delays across the board, from the length of time of a filing to oral argument and the length of time to get a disposition…whether they know it or not, immigration cases are a systemic drag.” Catterson confirmed this assessment when she reported that appellate cases (of all kinds, not just immigration) recently used to take about six months to complete, but now they take nine months. As Judge E stated, “It’s not fair to the other litigants.” In the

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20 Moore and Simmons, *supra* note 5, at 1.
instance of the Ninth Circuit, immigration appeals do not just affect the manner in which judges and staff perform their duties; it has a spillover effect on the court's other litigants who have nothing whatsoever to do with immigration appeals. This realization led the court to brainstorm solutions and to try a series of experiments in judicial administration.

**Experiments, Innovations, and Incremental Changes**

What steps can Courts of Appeals take in the face of a tidal wave of immigration appeals? Any reforms are severely constrained by both the structure of the federal judicial hierarchy, the appointment process of federal judges stipulated in Article III of the Constitution, political realities, and basic logistical concerns. When asked about possible changes to help alleviate the Ninth Circuit's caseload pressures, Catterson pointed out that any innovations would have to fall “within the existing statutory structure” of the U.S. Courts of Appeals. She was referring to the fact that the Ninth Circuit was not likely to receive any additional judgeships soon. Nor was it likely that new courts, such as another layer of courts between the Supreme Court and U.S. Courts of Appeals would be created to help the U.S. Courts of Appeals with its caseload. Both these solutions would require legislative action and the imminent partisan fight that has come to characterize federal judicial appointments. Given the fact that federal judges, once appointed and confirmed, enjoy life tenure, members of congress would be hesitant to swell

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21 Catterson, *supra* note 10, at 298.
the federal bench or create a new intermediate level court for a caseload crisis of unknown duration. No one had any way of knowing if and when the immigration surge challenge would pass; yet the additional judges would be permanent. In equal measure, for practical and political reasons, the addition of new judgeships was unlikely.

Two other legislative-based proposals suffered from basic logistical problems. Although there have been perennial suggestions to split the Ninth Circuit or route immigration cases to the Federal Circuit, neither of these proposals would actually reduce the immigration caseload. The motivations for dividing the Ninth Circuit are diverse.\textsuperscript{22} The politics surrounding the split of the Ninth Circuit are complex and are not the focus of this article, but suffice it to say that the efforts to split the circuit are not driven by the immigration issue. Moreover, the various Ninth Circuit split proposals would not be able to alleviate the immigration appeals crunch for the reason that all these proposals simply divide up the states into different configurations. The plans do not divide up the state of California that contributes the bulk of immigration appeals to the Ninth Circuit. Both Senators Diane Feinstein (D-CA) and Barbra Boxer (D-CA) are on

record opposing the split of the state in any circuit splitting scheme.23 Ultimately, a Ninth Circuit split would do little to reduce the circuit's immigration caseload.

The other proposal to route all the immigration appeals from the 12 U.S. Courts of Appeals to the Federal Circuit located in Washington, DC originated with Senator Orrin Hatch (R-UT) in the 108th Congress. The provision was later reintroduced by Senator Arlen Specter (R-PA), and most recently resurrected by Senator Bill Frist (R-TN) in 2007.24 The Federal Circuit has nationwide jurisdiction to hear appeals on patent cases and cases appealed from Court of International Trade and the Court of Federal Claims. Speaking on behalf of the Ninth Circuit in 2007, then Chief Judge, Judge Mary Schroeder’s response to the proposal was that, “I don’t think this is very constructive…I think it will limit representation” because aliens themselves would have to travel to Washington, D.C. and also find lawyers that are willing to travel with them. Schroeder also pointed out that the judges of the Federal Circuit Court of Appeal, being mainly patent and trademark specialists, “have no background” in immigration cases.25 Similarly Judge F called the proposal “sort of a laugh” and “peculiar.” She

25 Cited in Egelko, id at A1. In late 2008, the Honorable Alex Kozinski became Chief Judge.
echoed her Ninth Circuit colleagues in pointing out that it “did not make a lot of geographical sense” for the alien litigants and their lawyers to have to travel to the opposite coast. One of the original reasons that the federal court districts were drawn to conform to a state's geographical lines was to make federal justice accessible to all citizens and this proposal flew in the face of that rationale.

For a variety of reasons, an array of legislative-based proposals was off the table. With the possibilities of increasing the number of judges, split the Ninth Circuit, or reroute the immigration appeals to one circuit having been ruled out, the Second and Ninth Circuits' responses to the immigration surge were limited to innovated case management techniques and the redeployment of existing personnel to maximize the use of the Article III judges' time. Both circuits tried a variety of strategies but ultimately they adopted a similar one for keeping pace with the immigration appeals; they began triaging the cases with some cases to receive more contact time from the Article III judges and others to receive less judicial attention.

The Second Circuit's Main Responses

The Second Circuit responded to the immigration surge in a number of ways including a heavier reliance on its mediation system, hiring more part time attorneys, initiating a non-argument calendar in October of 2005, and adding additional panels to process immigration cases, among other strategies. The numerous changes adopted by this circuit are detailed elsewhere so I highlight
two of the circuit's main strategies here.\textsuperscript{26} From the beginning of the surge at the end of 2002 to August of 2005, the circuit made an initial attempt to manage the immigration appeals via a mandatory mediation program also known as a conferencing system. The Second Circuit's mediation program that was created in 1974 is one of the oldest Alternative Dispute Resolution programs in the Courts of Appeals. Until the Ninth Circuit also began sending immigration cases to mediation recently, the Second Circuit's program was the only one that regularly included immigration appeals.\textsuperscript{27} (The Ninth Circuit's central staff reported that the court sends about 100 cases per year through its mediation program, a very tiny percentage of its immigration appeals.) The conferencing system in the Second Circuit was applied to 80\% of the BIA appeals in which the petitioner was represented by counsel.\textsuperscript{28} Of the conferenced appeals, some 60\% of the BIA appeals were resolved at this staff attorney level and required no further attention from the court.\textsuperscript{29} The mediation program worked well in helping the circuit move the cases off the docket, but in August 2005, "in anticipation of a rapid filing of thousands of administrative records, the court abandoned regulation in the asylum

\begin{footnotes}
\footnotetext[26]{supra notes 1 and 3.}
\footnotetext[27]{Catterson, supra note 10, at 972 and interviews with Ninth Circuit central staff.}
\footnotetext[28]{For a more detailed description of this program, see The Committee on Federal Courts, supra note 3, at 251-252.}
\footnotetext[29]{Id at 252.}
\end{footnotes}
mediations altogether" and mediation would now occur only if requested by one of the parties.  

With the limited success of the mediation program behind them, the Second Circuit's main strategy for coping with the immigration cases is one that was also adopted as the primary strategy for the Ninth Circuit. John Palmer, a former associate supervisory staff attorney for the Second Circuit, writes that the "most significant change adopted by the Second Circuit" in response to the immigration surge was the creation on October 3, 2005 of the "non-argument calendar" where "appeals relating to asylum claims can be decided without oral argument."  

Thus the main effect of the immigration appeals in the Second Circuit was not to slow all the courts’ business down like in the Ninth Circuit, but the appeals forced the Second Circuit to abandon its long cherished commitment to provide oral argument in all cases. The mechanics of the Second Circuit's non-argument calendar are very similar to the Ninth Circuit's screening system that is described below, including the option that any judge on reviewing a non-argument case could transfer the case back onto the oral argument track.  

The difference is that while the Ninth Circuit sends many other types of cases to

30 Catterson, supra note 10, at 973.  
31 id at 974.  
32 Palmer, supra note 1, at 967 and 975, and The Committee on Federal Courts, supra note 3, at 251, and Rivero, supra note 3, at 1512.
screening panels besides immigration ones, the Second Circuit's non-argument calendar is primarily reserved for asylum cases.\(^{33}\)

*The Ninth Circuit's Responses: Building on Previous Reforms Under Browning*

The Ninth Circuit under the tenure of Chief Judge James R. Browning from 1976 to 1988 had already undertaken a number of reforms in order to better handle the large circuit's even larger caseload. Beginning in 1978, notable reforms included the Ninth Circuit's moved to an en banc procedure that allowed a number of judges smaller than the full court to hear a case, the court's creation of three administrative units located in different cities in the circuit's jurisdiction, and the establishment of a large and structured staff attorneys' office.\(^{34}\) The office of the staff attorneys is responsible for a "case-inventory" system that was designed to sort cases by difficulty. This system's purpose is to help the judges balance their workload and maintain consistency in the adjudication of cases.\(^{35}\) This sorting system commences as soon as a case arrives at the court. The staff first checks that the Ninth Circuit actually has jurisdiction over the case. Then the cases are coded by the legal issues represented, which the staff must then keep track of for the purposes of assigning the cases to panels later. Finally, the staff

\(^{33}\) *Id.* at 1512 and see also Interim Local Rules Section 0.29 and 0.18(8). (Available at http://www.nycourts.gov/pub/legalnotices/Non-Argument_Calendar.pdf.) Accessed on 9/16/08).

\(^{34}\) See generally *supra* note 14, especially Arthur Hellman's chapter: "The Crisis in the Circuits and the Innovations of the Browning Years.", 7.

\(^{35}\) *Id.*
assigns a numerical "weight" to the case of S, 3, 5, 7, or 10. The higher the number, the more complex and difficult the legal issues involved in the case.

This weighting system also dictates how the cases are calendared and whether the cases are placed on an oral argument track or on a screening track. The former, which may not necessarily entail literal oral argument of counsel before the judges, nevertheless tracks the appeal to receive more attention from Article III judges. The latter routes an appeal to receive less judicial scrutiny and is characterized by heavy staff involvement. The oral argument track is intended for cases with more complex and difficult legal issues. The screening track (known as the non-argument track in the Second Circuit) is meant for appeals that are regarded as straightforward and therefore easy, or appeals that are perceived as frivolous or hopeless. The screening system began in January of 1982. The case weight "S" was first introduced in the spring of 1988 toward the end of Browning's term. A case with an S designation is automatically scheduled for a screening panel. The higher weighted cases are eligible to be placed on the oral argument track although not all of them will wind up there.

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37 Id.
38 Id at 110-111. The "S" weight designation simply replaced the previous 1 and 3L classifications that designated low weighted cases.
The Ninth Circuit has used various permutations of screening since the Browning era. In its earliest form, screening at the Ninth Circuit consisted of judges reading case files either simultaneously (or in "parallel" fashion) with the other two judges on the panel, or in "serial" fashion whereby the first judge passes along the file to the second judge on the panel. Beginning in early 1989, the Ninth Circuit began combining face-to-face conferencing (and therefore parallel adjudications) with oral staff presentations. This practice is now standard at the court where a staff memorandum accompanies every case submitting to a screening panel and where conferencing takes place either in person or by videoconferencing to cut down on travel.\footnote{Oakley, John B. \textit{The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties}, 1991 BYU L. Rev. 859 (1991), at 876, 907.}

Regardless of the incarnation of screening that takes place on the court, the important point is that the designation of a case for oral argument or screening track determines the degree of scrutiny by Article III judges. In an appeal that is set for oral argument, the judges review the case file in depth. In contrast, the screening panel procedures involve a three-judge panel sitting through staff presentations of summaries of the case file, and often the judges will not have read the file themselves.\footnote{Pether, \textit{Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law}, 39 Ariz. St. L. J. 1 (2007), at 15.} Judge Kozinski’s assessment of the judicial time put into screening cases was that there was "an average of five to ten minutes devoted to each case" and during the two or three days each month that a judge sat on a
screening panel, the panel "may issue 100 to 150 such rulings." On a screening panel, a decision must be unanimous. If the screening panel cannot reach consensus, a single judge who does not agree to sign on to the opinion for whatever reason can “kick” the case back to the argument track.

Given the 1978 creation of the Ninth Circuit's staff attorneys' office and their elaborate case inventory system, the institutional infrastructure to process a large volume of cases was already in place before the sharp spike in immigration appeals that began in 2002. As Judge C and the central staff reported, the court did not require “new procedures for immigration appeals” because the court simply “tweaked the old process” to accommodate the post-BIA streamlining flood of appeals.

Even so, the Ninth Circuit had to become creative and undertake a number of additional experiments in judicial administration with the onset of the surge. The flood of cases that deluged the Ninth Circuit also brought about extensive discussions among the judges themselves and then a series of experiments followed. In April 2004, the subject of how to deal with the immigration appeals was the main topic of the judges’ annual symposium and retreat where the judges and staff get together to discuss the court’s administrative business in an informal manner. Judge F reported that while there were no formal policy decisions made or votes, a lot of informal discussion and brainstorming about how to keep up

\footnote{41} Cited in \textit{Id.} at 11.
with the immigration cases too place. Then Chief Judge Mary Schroeder had asked an ad hoc committee of four judges to “brainstorm” about the court’s backlog of immigration cases and to "list a variety of proposals for the court’s consideration at the upcoming symposium.” That effort resulted in an April 2004 memo by the ad hoc committee that laid out a number of options.42

Several of the judges and the central staff referred in the interviews to these tests as "experiments", not in the sense that it was a scientific test, but that they were simply going to try something new and see what happened. The existing screening procedures that were built upon with these options were not new per se. What was new about the proposed options was that they attempted to alter the construction of the panels in terms of the mix of cases it heard, the frequency of which the screen panels would occur, the number of these panels a judge would have to sit on per year, the staffing of these panels (whether by judges or visiting judges), and the amount of judge contact time with the case files on these panels. Judge C had said that the Ninth Circuit was already "geared for volume."

These experiments sought to prioritize cases, redeploy existing personnel, add visiting judges borrowed from other federal courts, maximize the use of

42 Internal memo to Ninth Circuit Judges from ad hoc committee on immigration case processing, April 9, 2004; henceforth cited as, “Ad hoc immigration appeals committee memo.” (Memo is on file with author. I am grateful to Professor Stephen Wasby who passed along the memo after he obtained it through the course of his own research.) In late 2007, Alex Kozinski replaced Mary Schroeder as the Chief Judge of the Ninth Circuit.
existing personnel’s time, or some combination of these. Except for the “visiting option,” the proposed options assumed that panels would be “made up of active judges and senior-judge volunteers, but not visiting judges except otherwise stated.” Only one proposal would make use of borrowed personnel. This option would add "new" judges, new in the sense that the Courts of Appeals sometimes have District Court or other federal court judges, including retired Supreme Court justices, who are visiting judges and who sit by designation. The “visitor proposal” would establish eight more argument panels in the next year “using visiting judges but reshuffling existing calendars so that our own active judges and senior-judge volunteers will participate in each argument panel. These would be ordinary calendars with the usual mix of cases, only some of which would be immigration cases.” This proposal would decide about 240 more cases.

Other options would not borrow personnel, but would simply increase the frequency of both the oral argument and screening panels to process more cases. Option A, or the “one-week option,” for example, entailed a “one-week intensive immigration-case non-argument calendar [screening cases] would occur in San Francisco and Pasadena…Assuming that 24 judges participate (8 panels) and that they decide about 10 cases per day, then about 400 additional cases would be

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43 Id. at 2.  
44 Id. at 4.
decided.” A similar option, the “alternating calendars option,” would for six months have half the scheduled argument panels hear the usual mix of Ninth Circuit cases, except immigration cases, and the other half of the argument panels would hear relatively straightforward or low weighted immigration cases only. The immigration only panels would be expected to decide 10 cases per day for a total of 50 cases per week, “because these cases can be ‘batched,’ sorted by country and/or issue, and given central staff memos to provide an overview.” The net result of this option would be to decide an extra 360 cases.

The internal memo presented a final option called the “screening proposal” that sought to maximize the use of existing resources by requiring each judge to take on two more days of screening within the next year in addition to the usual 2-3 days each month. The court’s “screening proposal” experiment would increase the number of screening panels. However, “These days would not be tacked on to existing screening panels (to avoid burnout), and judges would donate the help of their elbow clerks to the effort of carefully reviewing the records, drafting proposed dispositions, and making presentations to the panel [that would summarize each case].” Again, the goal was to process more immigration appeals to draw down the number of accumulated cases.

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45 Id. at 2-3.
46 Id.
47 Internal memo. supra note 32, at 4.
To minimize the impact of the increased number of panels that judges would be required to sit on and to further the consistency of adjudications, the central staff began grouping like cases not only by similar weights, which had begun back in the Browning era, but by other criterion as well. Because of the character of the immigration appeals arriving at the Ninth Circuit in which half of the cases were political asylum cases, the central staff was able to “batch” or bundle the cases for oral argument and screening panels based on the nationality of the alien. An alien claiming political asylum does so by presenting evidence that she cannot return to her home country based on a well-founded fear of persecution. To adjudicate these cases, the judges must know something about the country conditions and political conditions in Guatemala, in addition to sorting out the facts specific to that one case. Therefore it makes sense to collect cases from a single nationality. For example, panels may be constructed to hear a group of asylum claims from applicants from Guatemala or asylum applications from a series of Chinese applicants claiming persecution because they had run afoul of China’s one child policy. The central staff also bundles cases and constructs panels around a common legal issue. A panel for instance might be constructed around "212c" cases. (If an alien is found deportable, she can apply for a number of waivers that would save her from deportation. 212c was such a

48 Oakley, supra note 37, at 877 "Case weights were the linchpins of the court's calendaring system during the study period. They were used to balance the workload of the argument panels, with each day's calendar of argued cases being bundled into a set of case weights equaling eighteen."
waiver that was available before changes to the immigration law in 1996 eliminated this form of relief). The assumption was that a larger number of cases could be processed more quickly and consistently in this manner because bundling the cases would lower the mental transaction cost for the judges and help them increase consistency by allowing them to compare like cases.

**Ninth Circuit Personnel's Assessments of the Experiments**

Although both the Second and Ninth circuits tried other strategies first, the sending of the majority of immigration appeals to screening has been the primary means by which both the Second and Ninth Circuits have processed their immigration appeals. According to the interviews with the central staff, the Ninth Circuit, which already had a screening system in place, began routing the majority of its immigration appeals (60%) to screening panels, including all pro se appeals. This percentage is higher than the "approximately half" of the court's overall appeals that are sent to such panels. Screening has become the dominant means for deciding immigration appeals on the Ninth Circuit. Moreover, immigration appeals are sent to screening at a higher rate than other types of appeals.

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49 The central staff noted that the majority of immigration appeals at the Ninth Circuit are counseled. However, a prominent study noted the precipitous decline from 33% in 2001 (pre-surge) to a 5% success rate in 2005 in the asylum grant rates of pro se applicants from 2002-2005. Ramji-Nogales et al, *supra* note 15, at 360.

Judge F noted that there were no "formal decision" or change in policy about how to handle the onslaught of immigration cases and in fact the memo that had laid out all the experimental options, was a part of the informal discussion of at the Ninth Circuit's spring 2004 retreat. In fact, she noted that none of the experiments were adopted because of a "lack of consensus" across the court and general "unhappiness with all the options" that were presented in the memo.

Instead, she said the court took an "incremental approach" to the immigration case surge by "picking up the output in expedited methods" of adjudicating cases, including more of them to formal screening (tied to the inventory and weighting system), and informal screening which happened when the staff attorneys weeded out hopeless and straightforward cases to be placed on the motions calendar instead of the argument calendar. Judge F noted that about 5 years ago, all judges would spend 4 to 5 days a year serving on screening panels. In order to accommodate the Ninth Circuit's ever growing docket, and not directly in response to the immigration cases per se, now all the judges were required to spend an additional day serving on screening or motion panels, with 3 days of screening each year and 3 days on motion panels, a total of 6 days a year. Senior judges participated in screening panels at their discretion. Therefore, the court never made a formal policy decision to give special treatment to the immigration cases like in the Second Circuit did.
The judges and the staff assessed the experiments differently given their dissimilar vantage points. All the judges who had participated in one experiment or another uniformly agreed that these experiments were not satisfactory because these efforts were neither saving energy nor time. Judge F had characterized the general consensus across the court among the judges as “roundly unpopular” because “you have to compromise and cut corners because the number of judges is not getting larger.” Judge F stated that, “it was too hard to cope with twelve cases a day” because “judges wanted to read all the stuff [in the case files] and it was getting overwhelming. Many judges wanted to read to go through the full record…The benefits it was achieving wasn’t worth the strain it was causing.”

With regard to her participation on an experimental screening panel, Judge E concluded, “If you are one of the judges that’s more careful, you’re holding up the screening panel. For those judges [the ones who wish to give more careful review] you’re still spending that much time. There is no time savings.” Judge E also pointed out that, “three-weight cases took up as much time as seven or ten-weight cases.” So there really was no benefit to sorting and bundling the case by weights to balance the judges’ workload. However, Judges A and G agreed that the bundling by legal issue or nationality of the alien was "helpful rather than boring" because they believed it helps increase their consistency in rulings. These comments suggested that while all the judges wanted to be able to move quickly
and efficiently through the cases, the experiments failed because they ended up frustrating the judges who wished to provide deeper scrutiny of the cases.

Indeed the fact that innovation was limited to tweaking procedures and processes in lieu of a more thorough overhaul may have doomed the experiments to failure because these procedures either did not make appreciable changes to the court’s procedures, or they deviated too much from the way judges were accustomed to adjudicating cases. The experiments seemed to work against institutional arrangements that were already in place before the surge. Judge F offered such a structurally based reason for why the experiments were unpopular. Her estimation was that the Ninth Circuit pre-surge had set up a division of labor among the judges and staff attorneys and law clerks or what she described as an “assembly line” and a “certain set way of doing things.” Judge F further explained that, “staff attorneys process cases a different way from judges.” Judges are, “inserted into the process at different points depending on whether the case is routed to a screening or oral argument track.” Judge F emphasized that the difference between judges and staff and how they look at the cases is that “judges are set up to look at each case individually, like hand tailoring,” whereas the staff are set up to deal with volume. Simply put Judge F concluded, “Judges are set up to do a more thorough review of the cases.” The division of labor in the court administration was that judges, by institutional design, are supposed to do a more thorough review of the cases than staff attorneys. The judges' perception that they
are doing more thorough review of the cases than the staff may derive from the very logic of their triaging procedures. The staff must sort through large numbers of cases to root out those with nettlesome legal issues to save for the judges. Therefore, the judges feel that they must necessarily provide more thorough review for these more complex cases. In this sense, the various experiments failed because in trying to increase the speed in processing cases, the experiments were working against the judges’ preferred level of scrutiny of the cases and as a result, they felt rushed. Judge F’s comments also go right to the heart of the difference between a judge’s reviews of a case versus a staff attorney’s review—it is a question of the degree of scrutiny of the record. Whether by structural design or reinforced by personal preference, judges understood they were supposed to provide more in depth scrutiny of the cases than staff.

From their vantage point, the staff had a different assessment of the experiments and the immigration surge from the judges. The increased reliance on the screening system had placed added pressure on the staff given their key role in the inventory and calendaring/scheduling processes. The interviews revealed that it was the staff that bore the brunt of the difficulties created by the burgeoning caseload. Judge A noted that because the staff handles a larger percentage of immigration appeals "up front", the caseload crunch does not affect the judges as much as it would the staff. She surmised that “morale issues are at the staff level” rather than at the judges’ level. The central staff themselves spoke
of the great pressures placed on them with the increased reliance on their role in case management. During the Browning era, the court administration had developed very precise and careful tracking of cases including which judge gets what kinds of appeals and motions. Now a much heavier burden on staff to keep track of which legal issues are sent to which panels so that no two panels are deciding the same legal issue. The goal of preventing cases with the same legal issue from being sent to more than one panel is to avoid not only duplication of effort, but also to avoid the creation of precedent pointing in opposite directions. The staff is also responsible for collecting and holding back appeals with similar legal issues until an oral argument panel can render a lead decision whose precedents would then be applied to the held cases.

Once the cases are inventoried and coded, they must be placed on the calendar and here the staff played an important role as well. They stated that in scheduling cases for the hearings calendar, they intentionally minimize the percentage of immigration cases to 30% of the oral argument calendar in order to limit what they referred to as the "mental fatigue" of the judges. The staff told me that without the attentiveness to the types of cases comprising the calendar, “it [the immigration appeals] would be 50% of the calendared cases.” In fact this capping of the number of cases on the calendar was the only formal decision made in regard to the specific treatment of immigration cases Judge F stated.
Although the staff and judges experienced the immigration surge and the consequences of reforms in different ways, there was also a common effect that both groups brought up. They explained some of the other negative effects wrought by recent congressional changes to the immigration laws and how these effects were further exacerbated by the immigration surge. Specifically, the Anti-Terrorism and Effective Death Penalty Act and Illegal Immigration Reform and Responsibility Act had changed the nature of the cases flowing to the courts by increasing the overall difficulty because of the more tedious, technical procedural review necessary in these cases, as opposed to just concentrating on questions of law. As Seventh Circuit Judge Richard Posner has noted, one’s caseload is not the same as one’s workload.\(^{51}\) A heavy caseload does not necessarily mean a heavier workload just as a lighter caseload does not always mean a lighter workload, and the two are not correlated. Especially after the 1996 legislative changes to the Immigration and Nationality Act, instead of deciding legal questions, jurisdictional and procedural issues now largely consume much of the staff attorneys’ time. One staff attorney attributed her frustration to a feeling of a lack of efficacy. She said she initially joined the court because of her desire to “help people”, but now the vast amount of the cases she handles are dealing exclusively with technical issues that are non-legal in nature. Because of the

central staff’s primary role in initially screening arriving appeals for jurisdiction, one can see how the changes to the immigration law would significantly change the nature of their job.

The 1996 legislative changes have had unintended consequences for all the personnel on the Ninth Circuit. Although the goal of these laws was to strip large classes of cases from federal court jurisdiction, presumably to lighten the courts’ caseload and to clamp down on aliens abusing the legal system to delay their inevitable deportation/removal, the consequence has been to create more work. One unintended result of the court stripping in immigration appeals is to give rise to an array of jurisdictional issues. Currently, instead of just deciding the merits of the case, staff as well as judges must first wade through the diverse requirements of when federal courts retain jurisdiction over the case. These determinations are often quite complex and can turn for example on the reading of the federal statute, the meaning of a “conviction” under various state’s criminal laws, when an alien was convicted, or on the effective date of the statutes. The central staff as well as many of the judges noted that instead of alleviating the court’s caseload crunch and lightening their individual workload, the recent changes in immigration laws has consumed even more of the staff and judges’

52 The Real ID Act of 2003 stripped the district courts of jurisdiction to hear habeas cases, sending these cases directly to the U.S. Courts of Appeals. This move however had a minor effect on the Courts of Appeals' caseload and workload given the small number of such cases. (Author's email communication with Professor Stephen Legomsky, a leading immigration law expert, 4/14/08.)
time. Rather than decreasing the circuit’s workload by removing the cases from their jurisdiction, the legislative changes have added to it by now requiring a painstaking sorting through jurisdictional issues first. Even when judges end up finding that the court has no jurisdiction to review in the case, they had already sunk significant amounts of time and staff resources into the case. Judge G was of the opinion that it would have been easier if the Congress had left the law as it was because now, instead of going “straight to the merits of the cases,” the judges spend at least half their time wading through and “figuring out procedural issues” like jurisdiction before they can even get to the merits of the case. Thus, the Ninth Circuit and its personnel were hit with a double whammy beginning in the late 1990s with an increase in caseload and workload.

As the judges themselves pointed out, there are not many good options for keeping pace with the immigration appeals except two pragmatic but dispassionate possibilities. Many accepted sending more and more cases to screening as a necessary evil to keep up with the immigration caseload because they found these two alternatives even less palatable. One choice is to simply adopt a deferential attitude toward the administrative adjudicators and affirm their decisions. Judge G said, “then we wouldn’t have to take a hard look at these cases; we’d just process them.” This was an approach Judge G strongly disagreed with and she criticized some of her colleagues for taking this line of attack. She stated, “There are no more important cases [than immigration cases] unless they
are capital cases. To send someone out of the country and break up their family…Yet so many judges think these [cases] are a nuisance.” Even as Judge G expressed discomfort with the screening system, she acknowledged that it would be worse to simply “not care how long the cases sit on the docket.” The screening process disturbed many judges, but they were resigned to it after the failure of the various experiments and the lack of support for automatic deference to the administrative decision makers or leaving the cases to sit on the docket indefinitely.

When asked about what could be done to help the U.S. Courts of Appeals with its immigration appeals, many judges pointed to a solution that lay outside of the Courts of Appeals system. By the winter of 2007, Judge B thought that BIA streamlining had "abated." Judge E had said in July of 2007 that "the BIA says they have stopped streamlining. But they haven't." Judge F stated that due to the lag time of the appeals process, she was still seeing streamlined cases as of the summer of 2008. Several of the judges stated that the best solution to the U.S. Courts of Appeals immigration caseload would be to bolster the staffing and resources at the BIA—not to create a specialized immigration court or to try exotic plans like routing the immigration appeals to the Federal Circuit. Judge B urged, “Reinvigorate the BIA.” Judge D said, “Make the BIA do its job and give them the resources to do its job.” Judge E suggested that “Congress and the Department of Justice put the resources in to hire and train qualified IJs and roll
back streamlining.” and Judge G noted that the best thing that could happen would be that the cases reaching the Courts of Appeals “were properly decided by the IJs and BIA...If the DOJ acted properly, we wouldn’t get many cases.” After attempts at a variety of experiments on the court, the judges came to conclusion that the best solution to the court's immigration caseload lies outside of the federal court system. On May 30, 2008, Attorney General Mukasey announced the addition of 5 new BIA members. Whether the expansion of the BIA will alter its actual adjudications process, which was the root of the problem, remains to be seen.

Ramifications of the Reforms

The decision of the Second and Ninth Circuits to send more and more immigration appeals to screening panels as their primary survival strategy has a number of consequences for all involved. It raises the risk of missing routine looking cases that may have complex legal issues buried, taxes the cognitive functions of the judges because of the repetitive nature of the bundled cases, and can skew the eventual outcome of the cases by limiting the level of judicial scrutiny an appeal receives.

One objection some of the judges had to the screening process was that it was largely staff driven. Judge D flatly stated, “Pro-alien judges are disturbed by

screening. This is essentially a staff decision.” The point of Judge D’s comment was not to denigrate the staff as less competent than the judges. On the contrary all the judges spoke highly of the central staff’s competence, but she was simply echoing Judge F’s observation that in the Ninth Circuit’s division of labor, the judges are institutionally designed to provide more thorough review of cases than staff. On this point there was disagreement between the staff and judges and even among the judges interviewed. Some staff was of the opinion that Article III judges are not necessary to handle routine matters like motions, but Judge D stated that although she thought the staff was extremely competent, staff processing of the cases is “different” from an Article III judge doing so. For example, Judges D and G opined that it is often difficult for staff attorneys to pick up the issues while doing the case inventory and that often it takes more thorough review to uncover issues. It may be particularly difficult to unearth latent legal issues in the briefs of pro se applicants who would be not be trained or adept in bringing salient legal issues to the fore. Again it came down to the degree of scrutiny. Judge D concluded that the screening panels “fundamentally altered the nature and degree of judicial review” and had the effect of “weakened” judicial review not so much because of whom (judges or staff) were conducting the reviews, but because of the difference in the level of scrutiny the appeals were receiving.
Another cost of moving 60% of the immigration appeals through screening panels and "bundling" the cases is that while the method is effective in speeding the processing, the judges may suffer mental fatigue from the monotony. After sitting through staff presentations of up to 100 to 150 cases in a two or three-day period, the judges on these screening panels must make a decision based on those oral descriptions. Judge D complained that screening is "too mechanistic and it doesn't give you time to think about it." In reference to the screening system in general but not immigration appeals in particular, Judge Kozinski has written, "After you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible." Conversely, Judge Posner of the Seventh Circuit has written that one of the benefits of oral argument is that, "It also provides a period of focused an active judicial consideration of the cases. During the argument, the judge, unless peculiarly given to woolgathering, is thinking about the case and nothing else." While there are studies noting the higher pro-alien grant rate in published versus unpublished cases, the more salient issue is the degree of scrutiny involved in these cases based on their routing to screening or oral argument, a decision which precedes the decision to publish or

54 Peter, supra note 30, at 7
not publish an opinion. Increasing the number of screening panels may indeed speed up the number of cases that can be processed, and the judges seemed to find the bundling of cases to be helpful because they believed it raised their level of consistency in adjudicating similar cases. But the bundling process combined with the increase of screening panels holds the danger of eroding the judges' concentration and perhaps lowering their threshold of belief in the applicants' credibility when they hear the same story over and over again.

In turn, the degree of concentration and scrutiny a judge is able to bring to an appeal can affect the final disposition of the case. Issues of mental weariness aside, the interviews indicated that a judge’s level of sympathy for aliens seemed to correlate with how much time the judge is willing to spend with these cases, which in turn may skew the outcome toward a particular disposition. Judge F confirmed this notion when she explained, “You get into a case far enough and you start second-guessing the fact finder.” She noted that the deeper one digs into the case and scrutinize the record, the more likely one will find grounds for reversal. In fact, the panel’s review of a case is not limited to only the legal issues presented in the briefs. Yet a major determinant of the level of scrutiny a judge

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57 Interview with Judge F. For an example of the “getting into a case far enough” resulting in the second guessing the fact finder see Suntharalinkam v Gonzales, 458 F.3d 1034 (9th cir. 2007) where the panel majority contested eight different points pertaining to the credibility determination that the IJ reached.
can bring to an appeal is whether the case goes the screening or oral argument route.

With the realization that the degree of scrutiny can determine the outcome, the more frequent use of screening panels also invites increased exercises of specific kinds of strategic behavior. Recall that on a screening panel, a decision must be unanimous. If the panel of three judges cannot reach consensus, a single judge who does not agree to sign on to the opinion, for whatever reason can “kick” the case back to the argument track. Approximately 10% to 15% of all the court's cases get “kicked.” However, Judge E estimated that the percentage of kicked cases to be in the range of 30% among all the cases, not just immigration ones, and that the percentage varied by panel. She also had recently sat on an admittedly anomalous panel that kicked 80% of their cases. Because of the rule that any one judge can kick a case, several judges indicated the composition of the screening panel matters greatly and one judge can act strategically to slow a case down. Judge E noted that “some judges don’t care; they will just rubber stamp the administrative agency.” Judge G noted that even though they are pressed for time on a screening panel that is designed to move cases along more quickly than on the oral argument track, “some judges pay attention anyway and kick the case or [otherwise] slow down the screening.” She added disapprovingly,

58 Follow up email communication with author from Judge B and Judge F, 12/19/07.
59 Follow up email communication with author from Judge E, 1/8/08.
judges are willing to let several hundred go through [with little scrutiny], but they would also do this even for oral argument cases.” Judge E added that she knew of another judge who “would automatically kick any cases involving U.S. citizen children” because of her belief that the deportation of an alien parent is the de facto deportation of the citizen children.  

The degree of scrutiny for immigration appeals by an Article III judge, particularly in asylum appeals, can influence the outcome of the case because when judges are able to take a much closer look at the appeals, they can exercise their discretion. The concept of discretion is not clearly understood, and perhaps due to its lack of definition, it plays an important role in immigration cases. Daniel Kanstroom has noted that, “Due to the harshness and rigidity of our current deportation laws and the powerful historical role placed by discretion in immigration law—often the last repository of mercy in an otherwise merciless system—the issue of discretion is crucially important.” It is not surprising that discretion in immigration appeals has become a flashpoint in the Ninth Circuit. As Judge F indicated, there is a remarkable level of agreement rather than disagreement, among the Ninth Circuit and the other Courts of Appeals on immigration matters. As evidence, she pointed out that the pro-alien grant rates

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60 She refers to immigration cases where a “mixed status” family is affected. These families have members of dissimilar immigration statuses. One parent could be a lawful permanent resident (“greencard” holder), another could be an illegal alien, and they could have U.S. citizen children.

for immigration appeals was “about the same” across the 12 circuits. However, she noted that in the Ninth Circuit in particular, the fight over immigration appeals is regard to “the level of deference” exercises in immigration cases. She stated that, “In concept, we’re not following Congress; we show substantial disrespect to IJs. We are far more prone to second guess IJs,” even though the statutory and legal standard requires substantial deference to IJs. Judge F attributed the second-guessing of IJs to the psychological effect on the Courts of Appeals judges of seeing too many “bad decisions getting through the system” which in turn “makes it hard to trust the system.” She added that the level of confidence the Ninth Circuit judges in the decisions of other administrative law judges such as those in social security, tax, and veterans cases is much higher than toward the administrative fact-finders in the immigration system which suffers from well documented flaws at each stage of the process.62

The fact is that the judges' review of a case is not limited to reviewing the legal issues laid out in the briefs. Several judges interviewed stated that the fact that Congress had tried to statutorily instruct the U.S. Courts of Appeals to defer to the Attorney General’s discretion did not mean that the hands of the Courts of Appeals judges were completely tied. Judge H relayed that, in her view, if a Courts of Appeals judge agrees with the previous decision making body’s

conclusion, she can just simply state that the Attorney General has exercised her discretion and that the case is no longer within the jurisdiction of the federal courts. Conversely, Judge E explained that despite the statutory directive that federal courts should not second-guess the Attorney General or her designated entities, "Egregious cases get sent back to the BIA regardless of discretion.” But an exercise of discretion requires a fairly thorough review or "digging” into a case, especially asylum cases, which are often, require intensive review of the factual record. On screening panels, judge will not have much time to thoroughly review the record.

Conclusion

The recent onslaught of immigration appeals into the U.S. Courts of Appeals only affected some circuits while leaving other circuits and the Supreme Court unaffected. Experiments and brainstorming ensued in the two most affected circuits. Even though the Ninth Circuit did not end up adopting any of the informal proposals after trying a number of experiments, the fact that the court was engaging in a series of institutional coping mechanisms pointed to the seriousness of the strain caused by the immigration cases. This single category of appeals was the driving force behind much testing, innovation, and incremental institutional evolution in the Second and Ninth Circuits. After trying various
methods of managing its immigration caseloads and overall docket, the Second Circuit decided to move the asylum cases through a non-argument calendar while the Ninth Circuit de facto settled on a very similar strategy of sending the majority of the immigration appeals to screening panels. The coming together of the two circuits on the same strategy may have to do with the fact that the two courts' central staffs were in constant communication during the surge to brainstorm and share ideas. More likely it was due to the constraints of the institutional structures and arrangements of the U.S. Courts of Appeals system did not leave open many other options, and the fact the legislative-based proposals were not viable. Regardless of the multiple and varied reasons behind each court adopting a non-argument calendar or screening strategy to process the immigration appeals, there were real consequences in this choice for all involved.

The upshot of the move of the majority of immigration appeals to the screening and non-argument calendar is that the nature of judicial review on the Second and Ninth Circuits at least for aliens in immigration proceedings has been altered. A triaging procedure like the ones adopted by these two circuits may be among the few options these courts have to cope with their caseloads, and the procedures may even be efficacious in maximizing the use of the institutions’ resources. The problem is that such procedures may not, in the view of the litigants, be living up to the promise of our justice system to provide "equal

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Interview with Ninth Circuit central staff members.
justice under law." Their caseload pressures, most recently driven by immigration appeals, have forced these two Courts of Appeals to move away from their traditional error correction functions to mimic the behavior of a certiorari court. Caseload pressures have contributed to a slow mission drift in the Courts of Appeals. Judge D suggested that when the Supreme Court denies a case certiorari, they have given the case cursory review and “They haven’t had time to read the case.” She likened the certiorari procedures of the Supreme Court to that of her circuit routing cases to screening or oral argument track and observed that, “Screening is their [the Ninth Circuit’s] way of granting certiorari.” The effect of the immigration appeals on the two circuits has been to create a stratified system concentrated in the courts’ immigration cases in which some appeals receive higher levels of judicial scrutiny than others, much like the Supreme Court’s certiorari system. It is understood that the Supreme Court, through its certiorari function, cannot and will not hear all cases. The U.S. Courts of Appeals have no such statutorily defined authority to pick and choose its cases. Yet these courts have had to, out of sheer necessity, adopt certiorari-like procedures.

The heavier reliance on the screening system may also affect alien litigants in a number of ways. A serious problem from the alien litigants’ perspective, especially for pro se aliens in political asylum cases is the less strict scrutiny given to screened cases. So often, political asylum cases involve detailed review of facts and country conditions, both of which go toward the legal
determination of whether the alien has met the legal standard of a well-founded fear of persecution. Yet pro se litigants' briefs often are not well developed and serious legal issues remain buried. Only more thorough review of such appeals would uncover these issues. The screening system, with its more cursory scrutiny of the record, may very well predetermine the disposition of the case.

In the long run, the courts also risk questions of legitimacy. Studies suggest the litigants whose appeals are not granted oral argument feel like the court has given their concerns short shrift. If this is true, then the triaging of appeals may alleviate the courts' caseload crunch, but it has not improved the litigants' perceptions of the legitimacy of the system and procedural fairness. Recall that many alien litigants flooded into the Courts of Appeals in the first place because they felt the after the BIA streamlining procedures, they had not received their day in court and had not been heard.

Although the Second and Ninth circuits have had to, rely more heavily on the screening system to cope with their immigration caseload, the courts' actions could be construed as an act of kicking the can further down the road. The screening system may temporarily suffice for the purposes of the courts' efficacy, but it defers addressing the more nettlesome and systemic questions of what level of review should immigration appeals receive and which institution (the

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Immigration Judges, the BIA, the federal courts) is best suited to provide that review. Yet what choice do these Courts of Appeals have at the moment but to proceed as best they can with their limited range of resources and options?